

: ORDER ON I.A No. III :

This is the application filed by plaintiffs U/o 6 Rule 17 R/w Sec.151 of CPC, seeking permission to amend the plaint as per the proposed amendment slip annexed alongwith this application. This application is filed when the case is posted for plaintiff evidence.

2. In support of this application, plaintiff No.1 has sworn to an affidavit stating that, he is swearing to this affidavit on behalf of himself and on behalf of plaintiff No.2. They have filed this suit for declaration and consequential relief of injunction and mandatory injunction against the defendant. It is submitted that, they are the owners of property bearing TMC Ward No.6, property No. 2776/B/3489/B and 3491 situated in Kallatti Galli of Terdal and the property bearing Terdal TMC No.2775/3488 is standing in the name of defendant. The defendant started a new construction over her property as shown by letters 'CDEF'. It is submitted that, they had filed I.A.No.1 seeking to restrain defendant from opening any door in the southern wall of her premises bearing TMC 3488. By the order dated : 28.02.2017, this court had granted temporary injunction in favour of plaintiffs and the same is extended from time to time which is in force even till the date of filing this application. The defendant had filed her objection on 10.07.2017 and had produced two photographs contending that, there were windows and door in the southern wall long before filing the present suit and she has not made any changes in the southern wall and her premises. It is submitted that, they have taken the photographs of the property of defendant wherein it is visible that, there is no windows and doors in the southern wall. The defendant has constructed over the property without obtaining any permission from TMC, Terdal and has opened the door and windows in her southern wall. By taking advantage of the plaintiffs residing in their garden land, the said act is done by the defendant in violation of the

temporary injunction order passed by this court. They have filed an application U/o 39 Rule 2A of CPC for breach of injunction by the defendant and the same is numbered as Civil Misc. No.5/2021 and the same is pending for adjudication. Due to the developments taken place during the pendency of this suit, it has become necessity for the plaintiffs to get the plaint amended as per the proposed amendment slip. The proposed amendment will not change the nature of suit and the cause of action the same is bonafide. Hence, on these grounds prayed to allow the application.

3. On the other hand, defendant has filed objection contending that, the application filed by plaintiffs is not maintainable at this stage. There were windows and door in the southern wall of her premises prior to filing this suit. After filing this suit, she has not made any changes or construction over her property. Moreover, the plaintiffs have to prove their contentions before filing this application. A separate Civil Misc. bearing No.5/2021 is pending for adjudication and thereafter, after the decision is passed in the said case, the plaintiffs are at liberty to file this application and the same is filed at a premature stage with an evil intention. On these grounds, prayed to reject the application.
4. Heard both sides and perused the materials on record.
5. The points that would arise for my consideration are as under:
 - (1) Whether the plaintiffs have made out grounds to allow the application?
 - (2) What order?
6. My answers to the above said points are as under:

Point No.1 : In the Affirmative.

Point No.2 : As per final order,
for the following:

: REASONS :

7. **Point No.1:** The plaintiffs have filed this suit for declaration seeking to declare themselves as the exclusive owners of 5 feet bole road situated towards the eastern side of their suit property and for consequential relief of injunction seeking to restrain defendant from opening any door in 'CF' wall and for issuance of mandatory injunction against defendant directing her to divert the roof rain water towards north. It is the specific case of plaintiffs that, defendant is reconstructing her property and is trying to open new door in 'CF' wall and thereby, is intending to create a new easementary right over the property of plaintiffs situated towards the south.
8. On the other hand, defendant has filed the written statement denying the entire case of plaintiffs and has also contended that, she has not demolished her old house at any point of time and has not put up a new construction. But, she has removed the door and has re-fixed the same. Further, prior to filing this suit, there was a door and windows in the southern side of her property at 'CF' wall, and hence, the question of not leaving door and windows does not arise for consideration.
9. On perusal of entire order sheet, it is observed that, plaintiffs had filed I.A.No.1 seeking an order temporary injunction restraining the defendant from opening door in the southern wall. This court had passed ex parte ad-interim temporary injunction in favour of plaintiffs. Thereafter, defendant appeared through her counsel and filed objection to the said I.A.No.1. Subsequently, the plaintiffs had filed I.A.No.2 U/o 39 Rule 2A of CPC for breach of injunction order by the defendant. The said application is ordered to be registered as separate Misc. by the order dated : 20.04.2021. The same is pending for adjudication. Subsequently, the plaintiffs have filed the present application on the basis of

improvements or development taken place after filing this suit seeking for an amendment to plaint.

10. By filing this application, plaintiffs are seeking permission to carry out amendment to the plaint by adding para No.5(a) wherein, they are intending to carry out amendment as follows:

Para No.5(a) : “ The defendant after filing of the present suit has made construction over the property and has opened a new door in the southern wall of CDEF portion of property. The act of the defendant is high handed and illegal. The said act is during the pendency of the present suit and as such the plaintiff is entitled for relief of mandatory injunction to close the said illegal door made in violation of the temporary injunction order granted by this Hon'ble Court. The said act is totally illegal and the plaintiff is entitled to get it amended.”

Further, seeking to add para No.9(a) regarding the valuation for the relief of mandatory injunction and in the prayer column i.e., in para No.10 of the plaint, they are intending to add one relief by adding a para as b(1) which reads as follows :

Para No.10(b)(1) : “ that the Hon'ble Court may be kind enough to direct and issue a Mandatory injunction order against defendants for closer of the door opened in southern wall portion of CDEF of the property.”

11. On perusal of the entire materials on record, it is true that, plaintiffs have to prove their case on merits. It is for the plaintiffs to prove that, there was no any door and windows at the time of filing this suit and the defendant has subsequently put up the said door and windows in 'CF' wall during subsistence of the temporary injunction order passed by this court.

However, it is true that, whether the defendant has violated any injunction order, will be decided in the said Civil Misc case. However, the plaintiffs have stated that, they are seeking permission to amend the plaint based on the subsequent development occurred during the pendency of this suit. Hence, it is necessary for this court to give an opportunity to the plaintiffs to prove their case and the defendant will have every opportunity to disprove the contentions alleged by the plaintiffs. On perusal of the proposed amendment slip, it is clear that, proposed amendment will not change the nature of suit and hence, there is no impediment to allow the application filed by plaintiffs. The contention of defendant that, plaintiffs have to prove the violation of temporary injunction order passed by this court does not hold water at this stage because, it is for the plaintiffs to prove their case independently. If an opportunity to prove their case is not granted, it would amount to miscarriage of justice. Learned counsel for plaintiffs has relied on a decision in **2022 (4) KCCR 3230** between **Parappa Vs. Town Municipal Council, Terdal, Bagalkot** wherein, the Hon'ble High Court of Karnataka, Dharwad Bench has observed that, in a suit for permanent injunction, during the pendency of the said suit, if any construction is put up and the plaintiff is seeking to bring this development on record and mandatory injunction for restoration of construction, rejection of the application for amendment of plaint is not justified. Hence, it is clear that, whether the defendant has put up construction during the pendency of this suit and during the subsistence of temporary injunction order or not is a question for adjudication which has to be decided after full fledged trial. Moreover, the plaintiff evidence is yet to be commenced. The defendant is at every liberty to cross examine the plaintiff witnesses. Hence, in view of my findings, I proceed to answer point No.1 in the Affirmative.

12. **Point No.2:** For the forgoing reasons, I proceed to pass the following:

: O R D E R :

I.A. No.3 filed by plaintiffs U/o 6 Rule 17 R/w sec. 151 of CPC is hereby allowed.

Plaintiffs are permitted to carry out necessary amendment as per the proposed amendment slip and furnish amended plaint.

For amendment and amended plaint.

Call on :15-12-2022

Sd/-

Civil Judge & J.M.F.C., Banahatti.