

**IN THE COURT OF THE ADDL. CIVIL JUDGE & JUDICIAL  
MAGISTRATE FIRST CLASS AT HOSADURGA.**

**PRESENT: SRI GANGADHAR BADIGER,  
B.A.,LL.B.(Spl).  
Addl. Civil Judge & JMFC., Hosadurga.**

**THIS 15<sup>th</sup> DAY OF APRIL 2021**

**ORIGINAL SUIT NO. 104/2013**

**PLAINTIFFS :- S.Thimmappa @ Thimmanna,**

**-V/S-**

**DEFENDANTS :- Govindappa Dead by LR's & another.**

**PARTIES TO I.A.No.IX**

**APPLICANTS/PLAINTIFFS : S.Thimmappa @ Thimmanna,**

**And**

**OPPONENTS/DEFENDANTS: Govindappa Dead by LR's & another.**

**ORDER ON I.A.NO.IX**

The plaintiff No.1 has filed the I.A.No.IX U/o 23 rule 1(a) and (b) of CPC, and thereby sought permission of this court to withdraw the suit with liberty to file fresh suit on the same cause of action, in the interest of justice and equity.

**2.** Accompanying the I.A, the plaintiff No.1 has sworn in an affidavit, wherein, he stated that the reliefs sought and documents produced in the present case are not consistent with the pleadings and prayer. Even, it is not possible to cure the defects by making the amendment to the plaint. In order to

avoid multiplicity of proceedings, it is necessary to withdraw the present suit, with a liberty to file fresh suit on the same cause of action. If the I.A. is not allowed, he will be put to great hardship and injustice will be caused. Hence, he prayed to allow the I.A.No.IX, in the interest of justice and equity.

**3.** The defendant No.4(a) to (e) have filed the objections to the I.A., and thereby contended that already issues have been framed and plaintiffs have taken sufficient time to lead the evidence. After taking several adjournments, the plaintiff No.1 has come up with the present application. The suit schedule properties have been acquired by defendant NO.4 through registered partition deed and will, and as such the plaintiffs have no right, interest in and over the suit schedule properties and plaintiffs have no cause of action to file fresh suit. The application as well as affidavit filed by the plaintiff NO.1 is silent about the defect in the plaint to withdraw the suit. Hence, they prayed to dismiss the I.A.No.IX, in the interest of justice and equity.

**4.** Meanwhile, the counsel for plaintiffs has filed memo, along-with affidavit of plaintiff NO.2 stating that the plaintiff NO.2 has no objections for withdrawal of suit by the plaintiff NO.1.

**5.** This court after hearing the matter, has allowed the I.A.No.IX and thereby permitted the plaintiffs to withdraw the suit and file fresh suit on the same cause of action.

**6.** Being aggrieved by the order of this court on I.A.No.IX, the defendant No.4(a) to (e) have filed revision petition before the

Hon'ble High Court of Karnataka in C.R.P.No.2017/2015 (IO). The Hon'ble High Court of Karnataka has set aside the order of this court on I.A.IX and remanded the matter for fresh disposal after hearing plaintiffs and defendants by order dated: 24/11/2020.

**7.** After remanding the matter, this court has heard the arguments of learned counsels for plaintiffs and defendant No.4(a) to (e). The learned counsel for defendants No.4 (a) to (e) has relied upon the following decisions:

1. AIR 1973 SC 643

2. 1980(2) KLJ 391

This court has gone through above decisions and it's ratio laid down therein and applied.

**8.** Perused the I.A, objections and records placed before this Court.

**9.** The following points arise for consideration of this court:

**1. Whether the plaintiffs have made out grounds to allow the I.A.IX filed under order 23 rule 1(a) and (b) of CPC?**

**2. What order?**

**10.** The findings of this Court to the above points are as under;

**Point No.1 :- In the Affirmative.**  
**Point No.2: As per the final order for the following:**

## **REASONS**

**11. Point No.1:-** The plaintiffs have filed the present suit for declaration and mandatory injunction with respect to suit schedule properties. It is the case of the plaintiffs that the suit schedule properties are the joint family properties of plaintiffs and defendant NO.4. The suit schedule properties were acquired by the plaintiffs and defendant NO.4, when they were in joint family. However, the plaintiffs now have contended that the suit schedule properties are not the joint family properties of the plaintiffs and defendant NO.4, but they are self acquired properties of themselves and deceased defendant No.4. Therefore, the pleadings and also the documents are not consistent with each other and it cannot be cured by the way of amendment and as such the plaintiff NO.1 filed the present I.A.IX to withdraw the suit and to file fresh suit on the same cause of action.

**12.** Before discussing anything, it is incumbent upon this court to refer the relevant provision, which is extracted as under:

Order XXIII, Rule 1: "Withdrawal of suit or abandonment of part of claim -

(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim;

Provided that where the plaintiff is a minor or other person to whom the provisions contained in Rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

2. An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

3. Where the Court is satisfied,-

(a) that a suit must fail by reason of some formal defect,  
or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

(4) Where the plaintiff-

(a) abandons any suit or part of claim under sub-rule (1),  
or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs."

**13.** On perusal of the above provision, it reveals that at any stage of the proceedings, the plaintiff can make an application to withdraw the suit with the liberty to file fresh suit. However the sub-rule(3) of Rule-1 of order XXIII of CPC requires the court to record satisfaction that the suit will fail by reason of some formal defect or that there are sufficient grounds for allowing the plaintiff to institute fresh suit on the subject matter of a suit or part of the claim on such terms as it thinks fit. In this regard in the decision reported in AIR 2017 KARNATAKA 71 in the case of Chikkamadaiah v. Smt. Ningamma and Ors, is relevant and head note is extracted as under:

“ Civil P.C. (5 of 1908), O.23 R.1(3)(a) - Withdrawal of suit - Formal defects in filing suit - Application for withdrawal can be filed at any stage of suit - In case of formal defect, plaintiff cannot be asked to cure defects by seeking amendment of plaint - Plaintiff permitted to withdraw suit with liberty to file fresh suit subject to payment of costs of Rs. 2000/-. AIR 1982 SC 789, Relied on.”

In this regard in the decision reported in AIR 2017 SC 685 in the case of V. Rajendran and Anr. v. Annasamy Pandian (D) Thr. LRs. Karthyayani Natchiar, is relevant and head note is extracted as under:

Civil P.C. (5 of 1908), O.23 R.1(3)(a) - Withdrawal of suit - Defect in survey number of suit property - Constitute 'formal defect' within meaning of O.23, R.1(3)(a) - Withdrawal, allowed. 2015 (2) Mad LW 360, Reversed. Interpretation of Statutes - Word 'Sufficient ground' in O.23, R.1(3)(b) of Civil P. C. - Interpretation of.

**14.** In the present case on hand, the plaintiffs averred the in the plaint at para NO.3 that when the plaintiff NO.1 was in joint

family has purchased land bearing Sy.NO.39/P total measuring 3 acres 10 guntas through registered sale deed dated:15/09/1978. Similarly, the defendant No.4 has purchased the Sy.NO.39/P 3 acres 31 guntas through registered sale deed dated: 15/09/1978 and the plaintiffs and defendant NO.4 divided the said properties as North-South strips and have been enjoying the same from 1978 to till 2012.

**15.** Though, the plaintiffs have contended that they and defendant NO.4 have divided the properties, which they purchased in Sy.No.39/P of Shivanakatte village through registered sale deeds and are enjoying the same from 1978 to till 2012. However, the prayer of the plaintiffs is to declare the suit schedule properties are the joint family properties of plaintiffs and that of the defendant NO.4. The prayer of the plaintiffs is itself contrary to their pleadings. When the plaintiffs themselves have contended that the defendant NO.4 and they have divided the properties and enjoying the same since from 1978, then question of declaring the suit schedule properties as joint family properties does not arise at all.

**16.** Apart from this, even the description of the properties are not in consonance with the documents produced by the plaintiffs. The prayer sought by the plaintiffs seeking mandatory injunction against the defendant NO.4 at prayer (b) at para NO.10 of the plaint is appears to be without there being any documents. Moreover, this court cannot direct the defendants to execute the registered partition deed, since it is not a suit for specific performance of contract, as there is no

agreement is forth-coming from the documents produced by the plaintiffs. The decisions relied upon by the counsel for defendants is not applicable to the case on hand.

**17.** Over all looking into the pleadings of the plaintiffs with the documents produced by the plaintiffs by keeping into the dictum of the decisions stated supra and there is consistency in the pleadings and the facts and if the plaintiffs continue with the suit the suit would fail by the reason of defect in the pleadings and materials produced by the plaintiffs. Therefore, there are sufficient grounds for allowing the plaintiffs to withdraw the present suit with the liberty to file fresh suit on the sub matter of suit or part of the claim. In view of the delay in the filing of the I.A.No.IX and thereby the defendant No.4(a) to (e) have borne the litigation expenses and as such the plaintiffs are liable to pay the cost to the defendants as litigation expenses. **Accordingly, this court answers point No.1 in the Affirmative.**

**18. Point No.2:-** In view of the above said discussion, reasonings and finding to the point No.1, this Court proceed to pass the following:-

### **ORDER**

***The I.A.No.IX filed by the plaintiffs U/o 23 rule 1(a) and (b) of CPC, is hereby allowed.***

***The plaintiffs are permitted to withdraw the present suit with liberty to file fresh suit on the same cause of action in accordance with law.***

***The plaintiffs are hereby directed to pay cost of Rs.5,000/- to the defendant No.4(a) to (e).***

*(Dictated to the Stenographer, typed by her on computer and corrected by me, then pronounced in the open Court on this 15<sup>th</sup> day of APRIL 2021)*

(GANGADHAR BADIGER)  
Addl.Civil Judge and JMFC.,  
Hosadurga.

