

**For Orders**

**ORDERS ON I.A.NO.III**

*The learned counsel for plaintiff filed an I.A. No.III under Order XXIII Rule 1 (3) R/w Sec.151 of CPC seeking permission to withdraw the suit with liberty to file fresh suit on the same cause of action in the interest of justice and equity.*

*2. In the annexed affidavit the GPA Holder of the plaintiff averred that now recently GPA holder of the plaintiff came to know that the defendant No.2 died and he has filed an application for bringing the legal heirs of the deceased defendant No.2. The legal heirs of the deceased defendant No.2 is appeared before this Court and he got the death extract of the deceased defendant No.2 and on perusal of the death extract of the deceased defendant No.2 he came to know that the defendant had died long back on 31.03.2013. It is further averred that the defendant No.2 died prior to filing the above said suit and also prior to issue the notice for termination of the tenancy. So, at this stage the suit filed against the deceased defendant No.2 prior to his death is defective one. So, the plaintiff want to withdraw the above said*

*suit with liberty to file the fresh suit against the defendant No.1 and 3 and the legal heirs of the deceased defendant No.2 on the same cause of action by issuing the fresh termination notice to the above said defendants.*

*3. On the other hand, the counsel for the defendant No.1 and 3 filed objections and contended that the contents of the application and the affidavit are all false, frivolous, vexatious and not maintainable. The defendant No.2 was expired long back on 31.03.2013. Admittedly, the suit is filed against the dead person, that to by issuing termination of tenancy notice against the dead person. Since the question of tenancy is involved in the suit and basically the law mandates the compliance of termination of tenancy etc., and on which the plaintiff cannot now rely upon the notice issued to the dead person. As such the plaintiff is not entitled for the withdrawal of suit with liberty to file fresh suit on the same cause of action. As such certainly the plaintiff if intends to file a fresh suit requires a new cause of action, hence, the application needs to be dismissed and in consequence*

*the suit also deserves to be dismissed with costs.*

*4. Heard arguments.*

*5. The points for consideration are:*

*1. Whether the relief sought by the plaintiff under the application, can be granted ?*

*2. What order ?*

*6. The above point No.1 is answered in the Affirmative, and point No.2 as per final order, for the following:*

### **REASONS**

*7. **Point No.1:** This is the suit filed by the plaintiff against the defendants for the relief of eviction and arrears of the rent of the suit property. When the matter has been set down for hearing on I.A. No.I, the counsel for plaintiff filed present application seeking permission to withdraw the suit with liberty to file fresh suit on the same cause of action.*

*8. So far as legal position is concerned*

*Under Order XXIII Rule 1(3) CPC, permission to withdraw a suit with liberty to institute a fresh suit can be granted only when:*

*The suit must fail by reason of some formal defect, or*

*There are sufficient grounds for allowing the plaintiff to institute a fresh suit.*

*The power is discretionary and cannot be exercised merely because the plaintiff desires to avoid an adverse result in the pending suit.*

*In the present case, the suit was instituted in the year 2024 against defendant Nos.1 to 3. Subsequently, it was reported by the Process Nazir that defendant No.2 had already died on 31.03.2013, much prior to the institution of the suit.*

*It is settled law that a suit instituted against a dead person is a nullity insofar as such defendant is concerned. However, the question is whether the entire suit becomes non-maintainable or whether the suit can proceed against the surviving defendants depending upon the nature of the relief and the status of parties.*

*The plaintiff contends that due to the death of defendant No.2 prior to institution of the suit and due to defects relating to termination notice, the present suit suffers*

*from formal defects and therefore permission may be granted to withdraw the suit with liberty to institute a fresh suit.*

*In a suit for ejectment/eviction and recovery of possession, where one of the alleged tenants are necessary parties had already died prior to institution and his legal representatives were not brought on record at the inception, such defect goes to the root of the maintainability of the proceedings against that deceased person. Any decree passed in the absence of necessary legal representatives may become vulnerable to challenge and may ultimately result in failure of the suit.*

*Therefore, the institution of the suit against a person who had died long prior to filing of the suit constitutes a defect which cannot be effectively cured in the present proceedings. The defect is not attributable to any adjudication on merits but is procedural in nature and likely to result in failure of the suit.*

*Accordingly, the Court may treat the same as a sufficient ground falling within the ambit of Order XXIII Rule 1(3) CPC.*

*The objection of defendant Nos.1 and 3 that a fresh suit requires a fresh cause of*

*action is not acceptable. Grant of liberty under Order XXIII Rule 1(3) itself contemplates institution of a fresh suit on the same cause of action, subject to law of limitation and other legal defences available to the defendants. Hence, I answer point No.1 in the Affirmative.*

*9. **Point No.2:-** In view of the above said reasons, I proceed to pass the following:*

**ORDER**

*I.A.No.III filed by the learned counsel for the plaintiff under Order 23 Rule 1 (3) R/w Section 151 of CPC is hereby allowed with cost of Rs.1,000/-.*

*The records disclose that defendant No.2 had expired on 31.03.2013, much prior to the institution of the present suit. A suit instituted against a dead person is a nullity insofar as such defendant is concerned.*

*In the facts and circumstances of the case, the defect relating to institution of the suit against a deceased person is a defect which is likely to result in failure of the suit and*

*constitutes sufficient ground within the meaning of Order XXIII Rule 1(3) CPC.*

*Therefore, the plaintiff is permitted to withdraw the present suit with liberty to institute a fresh suit on the same cause of action against the proper and necessary parties, if so advised and subject to the law of limitation and other legal objections available to the defendants.*

*Accordingly, the suit is dismissed as withdrawn with liberty as stated above.*

*sd/-*

*I Addl. Senior Civil Judge and JMFC.,  
Hubballi.*