

ORDERS ON I.A. NO.XI.

These are the I.A.No.XI filed by the applicant/defendant No.4 under Order 9 Rule 8 of C.P.C, seeking dismissal of the suit.

2. In the I.A.No.XI, it is stated for the reasons mentioned in the accompanying affidavits that, the plaintiff has filed the above suit against him for the relief of permanent injunction. The plaintiff examined as P.W-1 on 05.01.2017 and got marked Ex.P-1 to 18 and the above case has been posted to Cross of P.W-1. Thereafter, he has filed an application for stay the proceedings of the above case. But he has filed the Memo for withdraw the said stay application, willing to proceed the above case only on merit. This court is allowed the said memo on 05.12.2019 and case has been posted to cross P.W-1 to 07.01.2020. But the plaintiff or his counsel are not appeared before this court till 06.02.2020 and the P.W-1 is not tender for cross examination. On that day the Hon'ble court has taken cross examination of P.W-1 as nil and case has been posted to defendant evidence.

3. Further stated that, the plaintiff or his counsel were not appeared before this court till 17.11.2020. On this day the Hon'ble court has adjourned the above case to defendant evidence finally on the request of his counsel. But, even the plaintiff was examined as P.W-1, when he was not tender for cross examination and evidence given in affidavit was not tested by cross examination, no meaning and no sanctity of his evidence in the eye of Law. The defendants were not admitted the plaintiff's case and not claimed any counter claim against plaintiff. In these circumstances the evidence of defendants is not required. The provision invoked in the

application is acting and as per these provisions, the case is required to be dismissed. if the accompanied application is considered, no hardship would be caused to other side. On the other hand I will be put to great hardship and inconvenience. Accordingly, prayed to allow the I.A.No.XI.

4. On the other hand, the learned counsel for the plaintiff has objected to the I.A.No.XI stating that, the application is not maintainable either in law or on facts of the case. From 24.01.2017 to 14.07.2017 the defendants are simply took the adjournments without cross examining the plaintiff and defendant No.4 has filed the application for stay of the present proceedings before this court. The said application was withdrawn by the defendant No.4 himself on 07.01.2020. The defendant No.4 has filed the instant application after lapse of so many months and himself does not entered in to the witness box to disprove the claim of the plaintiff, on the contrary he came up with this false and baseless application before this court.

5. Further contended that, the plaintiff had went to United States to perform his daughter marriage and he left the country on 20.10.2020 and he was returned to India on 31.12.2021. He is the senior citizen and suffering from old age ailments. Further on the said period the Hon'ble High court of Karnataka has issued a S O P for appearance of the parties before this court. The defendant No.4 has suppressed the real and material facts before the court and he has filed this false application. The plaintiff has sought declaratory relief against the defendant No.1 and 3 and very recently defendant No.4 had impleaded to the suit. Hence, prays to dismiss the application with costs.

6. Heard both sides and perused the materials available on record.

7. Now the points that will arise for my consideration are:-

1. Whether the applicant/plaintiff has made out sufficient grounds to allow the I.A.No.IX?

2. What order?

8. My answers to the above points are:-

Point No.1: In the **Negative**.

Point No.2: As per my final order below for the following:-

REASONS

9. **Point No.1:-** The suit is filed for the relief of declaration and possession. Now the case is posted for defendant evidence. At this stage applicant/defendant No.4 has filed the above application for seeking to dismiss the suit.

10. In this case, I have completely gone through the entire suit file. This is the suit filed by the plaintiff for the relief of declaration and permanent injunction. Now this case has been posted for evidence of the defendant. The applicant/defendant No.4 has come up with these I.A.No.XI with a prayer to dismiss the suit on the ground of non appearance of plaintiff.

11. After careful perusal of the entire case file and also after hearing the both sides on these I.As., I have also

perused the specific provision of Rule 8 of Order IX of C.P.C. which states that, *“where the defendant appears and plaintiff does not appear when the suit is called on hearing, the court shall make an order that the suit be dismissed”*. As per the above provision, the Court shall dismiss the suit when the plaintiff failed to appear before the suit. However, it is the discretionary power of the Court. On the other hand the plaintiff has contended that, he had went to foreign to perform his daughter marriage. Moreover earlier my learned predecessor in office has not dismissed the suit as per provision of rule 8, order 9 of C.P.C rather than closed the cross-examination of P.W.1 and posted the matter for defendant evidence with an intention to provide more opportunity to the parties. Moreover after filing of the above application the plaintiff has present before the court and filed objections to the above application. Hence at this statge this court cannot dismiss the suit as per provision of rule 8, order 9 of C.P.C. Further the plaintiff has filed the above suit for declaration and injunction. Hence it is necessary to provide one more opportunity to the plaintiff to prove his case. Hence, it is necessary to give an opportunity to contest the matter on merits. Therefore, I am of the opinion that, the burden is on the plaintiff to prove his case. Hence per provision of rule 8, order 9 of C.P.C. this court cannot dismiss the suit, when the plaintiff appeared before the court and contest the application. Hence the applicant/defendant No.4 has not made out sufficient grounds to allow the application. Further, the sufficient opportunities are to be given to the plaintiff to prove the case. Thus, in the ends of justice and equity and also for the proper adjudication of the case and also in order to avoid the multiplicity of proceedings, if this I.A. is rejected, no hardship will be caused to the opponent/defendant No.4. In these circumstances, this Court has no other option except

rejecting the I.A.No.XI. **Accordingly, Point No.1 is answered in the Negative.**

12. **Point No.2:-** In view of my findings on Point No.1, I proceed to pass the following:-

:: O R D E R ::

The I.A.No.XI filed by the applicant/defendant No.4 U/O.9 Rule 8 R/w. Sec.151 of C.P.C is hereby **rejected**.

**Addl. Civil Judge & J.M.F.C.,
T.Narasipura.**

ORDERS ON I.A. NO.XII AND XIII.

These are the I.A.No.XII and XIII filed by the applicant/plaintiff under Section 151 of C.P.C and under Order 18 Rule 17 read with Section 151 of C.P.C respectively, seeking to re-open the case and re-call the P.W-1 in order tender him to cross-examination.

2. In the I.A.No.XII and XIII, it is stated for the reasons mentioned in the accompanying affidavits that, on the last date of hearing his advocate verified the file & found that, on 06.02.2020 this court has discarded the plaintiff's evidence, on that day he could not able to appear before this court for the purpose of cross-examination. Further stated that, From October 2020 to till February 2021 he had not in the country, he had went to United States of America to perform his daughter marriage. Hence, he could not tender himself for

cross-examination. If the above applications are allowed no prejudice will be caused to the defendants, on the other hand if not allowed he will be put to untold hardship and inconvenience. Accordingly, prayed to allow the I.A.No.XII and XIII.

3. On the other hand, the learned counsel for the defendant No.4 has objected to the I.A.No.XII and XIII stating that, the application is not maintainable either in law or on facts of the case. The contention taken by the plaintiff is false and except he had not in the country there is no other reasons for delay and in support of his contention he has not produced any document. He had been continuously absent before the court from 07.01.2020 to 16.11.2021. Further in the said hearing dates the counsel for the plaintiff also absent before the court. Further contended that, the plaintiff has not filed objection to the application filed under order 9 Rule 8 of C.P.C. On the basis of the said application this court has issued the notice to the plaintiff, but he has not appeared before this court. Hence, the plaintiff has not made out grounds to allow the applications. The plaintiff has come up with this application just to drag on the proceedings. Hence, prays to dismiss the application with costs.

4. Heard both sides and perused the materials available on record.

5. In this case, I have completely gone through the entire suit file. This is the suit filed by the plaintiff for the relief of declaration and permanent injunction. Now this case has been posted for defendant evidence. The applicant/plaintiff has come up with these I.A.No.XII and XIII with a prayer to re-open the case and re-call the P.W-1 for the purpose of

cross-examination. This shows that counsel for the plaintiff has intentionally filed the above applications to drag the proceedings. Hence, he has filed the above frivolous applications.

6. After careful perusal of the entire case file and also after hearing the both sides on these I.As., I have also perused the specific provision of Rule 17 of Order XVIII of C.P.C. which states that, "*the Court may at any stage of the suit recall any witness who has been examined*". As per the above provision, the Court may permit the party to recall his witness for further examination at any stage of the suit that includes even at the stage of argument. However, it is the discretionary power of the Court. The applicant/plaintiff intends to tender himself for cross-examination. Hence, it is necessary to give an opportunity to contest the matter on merits. Therefore, I am of the opinion that, the burden is on the plaintiff to prove his case. Hence, the sufficient opportunities are to be given to the plaintiff to prove the case. Thus, in the ends of justice and equity and also for the proper adjudication of the case and also in order to avoid the multiplicity of proceedings, if these I.As. are allowed on cost, no hardship will be caused to the opponent/plaintiff. Hence, I proceed to pass the following:-

:: O R D E R ::

The I.A.No.XII and XIII filed by the applicant/plaintiff U/Sec.151 of C.P.C. and U/O.18 Rule 17 R/w. Sec.151 of C.P.C respectively, are hereby **allowed** on cost of Rs.200/- each.

The case is re-opened and P.W-1 is re-called.

The applicant/plaintiff is hereby permitted to tender himself for cross-examination.

For cross of P.W-1.

Call on- 26.07.2022.

**Addl. Civil Judge & J.M.F.C.,
T.Narasipura.**