

**Orders on application under Order 23 Rule 1 of
CPC**

The advocate for plaintiff has filed application to withdraw the suit with liberty to file fresh suit.

The original plaintiff Thimmaiah has filed the affidavit accompanying the application and the reasons stated are that because of his old age and ill health he could not give proper information with regard to joint family of suit properties and the manner of its

acquisition and further with regard to Pw1 having acquired item No.1 suit property by way of Will. Further reasons is that the legal representatives of Nagamma and Gangamamma was the sisters of Ganganna are not parties to the suit and therefore in order overcome the said technicalities, has sought to withdraw the suit with liberty to file fresh suit.

Advocate for defendants files objections submitting that the original plaintiff has given GPA to Pw1 and there is no material with regard to revocation of said GPA and therefore the application filed by the original plaintiff is not maintainable. Secondly, the grounds urged are available to the plaintiff to bring him by way of amendment. The earlier amendment application that was dismissed was because the plaintiff has sought for deletion of item No.1 suit properties. Thirdly, in the written statement specific has been taken with regard to item No.1 and item No.4 that it is ancestral properties. Fourthly, the Pw1 in her evidence has not stated of she having acquired item No.1 by way of Will. The said grounds urged by plaintiff are not material to allow the withdrawal application. The stage set out is for cross examination of Dw1 and admissions with regard to the acquisitions of the properties being elicited, by its withdrawal hardship would be caused to the defendants. Further, it is contended that in a suit for partition the defendants are also the plaintiff who could continue with the suit. With the above submissions it is prayed to dismiss the application with exemplary cost.

Heard respective advocates. The contentions raised in the applications are argued.

The application firstly is not maintainable of the ground that there is no material of original plaintiff having revoked the GPA given to Pw1. Therefore, the original plaintiff cannot filed the affidavit when GPA is in force. Therefore, the contentions so raised by original

plaintiff to withdraw cannot be accepted on any of the grounds.

Even otherwise the contentions for withdrawal raised can be corrected by way of amendment. It is submitted that earlier amendment application was dismissed, but it was on the ground that the item No.1 was sought for deletion and therefore said application was dismissed on merits. Such amendment do not come in the way to give a ground for the plaintiff to file the application for withdrawal. Moreover, no document of any probate and even no averments earlier made by Pw1 herself who is the alleged beneficiary under the alleged Will. Further there has been cross examination of Pw1 and also admissions with regard to nature of the suit properties. If the plaintiff is permitted to withdraw hardship would be caused to the defendants. The grounds urged for withdrawal do not come under the scope of Order 23 Rule 1 of CPC and therefore this is the frivols application made at the stage of cross examination of Dw1.

Decision have been quoted by advocate for plaintiff in the decision of Hon'ble Supreme Court in **2018 (1) KCCR SN 22(SC)**. In the said decision no liberty was sought and therefore it was held that such suit to be allowed to be withdrawn. However in this case liberty has been sought and therefore the said decision was not applicable. Another decision of Hon'ble High Court of Karnataka between **Narayan and others V/s Narasingh reported in 2022 (4) KCCR 3146** has been relied upon to hold that withdrawal of suit was permitted in a suit for bare injunction alleging encroachment and that there was no details of such encroachment. Each case have to be adjudicated differently on the facts of the case. Under such circumstances, in the present case there is no ground for withdrawal made and such grounds can be included by way of amendment and by filing

impleading application. The non-joinder of the necessary parties and not describing the mode of acquisition of the suit properties can be brought by way of amendment, subject to limitation of law and hence for the above reasons even the said decision is not applicable. Moreover, the stage is for cross of Dw1 and the amendment to any pleadings will also be subject to the admissions made by Pw1. Hence for the above reasons no grounds made in this court proceed to pass the following:

Order

The application filed under Order
23 Rule 1 of CPC is hereby dismissed.

Sd/-

Prl. Civil Judge and JMFC.,
C.N.Halli.

For cross of Dw1.
Call on 10.01.2025.

Sd/-

Prl. Civil Judge and JMFC.,
C.N.Halli.