

In the High Court of Punjab and Haryana at Chandigarh

**Civil Revision No. 1264 of 2012 (O&M)
Date of Decision: 23.3.2015.**

Ram Sarup Sood

.....Petitioner

Versus

Arunesh Kumar Sood and others

.....Respondents

CORAM: HON'BLE MRS. JUSTICE SABINA

Present: Mr. Anuj Raura, Advocate
for the petitioner.

Mr. S.K.Gupta, Advocate for
Mr. S.S.Rana, Advocate
for the respondents.

SABINA, J.

Petitioner has filed this petition under Article 227 of the Constitution of India challenging the order dated 22.11.2011.

I have heard the learned counsel for the parties and have gone through the record available on the file carefully.

Impugned order dated 22.11.2011 reads as under:-

“Heard on the application for permission to withdraw the case on technical ground filed by the applicants-plaintiffs.

In the application, it has been submitted that there is technical defect in the present case and the suit may fail on this ground only. It has been further submitted that plaintiffs want to file a fresh suit after removing the technical defect of non-pleading of necessary parties. It

has been prayed that the plaintiffs may be allowed to withdraw the present suit with permission to file a fresh.

In reply to the application filed by the respondents-defendants, preliminary objections with regard to maintainability, barred by act and conduct and limitation have been taken. It has been submitted that no ground is made out for grant of permission to the plaintiff to withdraw the present suit with liberty to file the fresh as there is no formal defect in the present suit rather the suit of the plaintiffs must fail on merits, which is clear from the facts and evidence. It has been further submitted that the plaintiffs are bound by their admissions made at different stages of the present suit. It has been prayed that the application of the applicants-plaintiffs be dismissed.

The present suit has been filed by the plaintiff for possession by way of partition. It has been contended by Ld. Counsel for the plaintiffs that some persons/co-owners were not impleaded as party to the suit though they are necessary parties for the partition of the suit property. It is settled law that partition of the joint land can be effected only after impleadment of all the co-owners of the same. Thus, suit of the plaintiff must fail on this ground as in the absence some co-owners, partition of the suit property cannot be granted. Order XXIII Rule 1 of the Code of Civil Procedure provides as under:-

'Withdrawal of the 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 a subject matter of a suit or part of a claim,*

It may be 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 authorize 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.'

There is a formal defect in the suit of the plaintiffs as they have not impleaded all the co-sharers of the joint property in the present suit. Thus, the suit of the plaintiffs must fail on the ground of non-joinder of necessary parties, which is a formal defect. In this view of the matter that the suit of the plaintiffs must fail due to the formal defect, the plaintiffs are allowed to withdraw the present suit with liberty to file a fresh suit on the same cause of action as provided under law. Hence, application of the plaintiffs stands allowed and present suit of the plaintiff stands dismissed as withdrawn with liberty to file a fresh

suit on the same cause of action as per law subject to payment of costs Rs. 2500/-. File be consigned to the record room.”

In the present case, plaintiffs had filed suit for possession by way of partition. Defendant took up the plea that the suit was bad for non-joinder of necessary parties. Although, the parties had led their evidence and at that stage, plaintiffs moved the application for permission to withdraw the suit to enable them to file a fresh one by impleading all the co-sharers but the fact remains that the suit was liable to fail as all the co-sharers had not been impleaded. Since the defect was formal in nature, the learned Trial Court had rightly permitted the plaintiffs to withdraw the suit to enable them to file a fresh one by impleading all the co-sharers.

No ground for interference by this Court is made out.

Dismissed.

**(SABINA)
JUDGE**

March 23, 2015
Gurpreet