

IN THE HIGH COURT OF PUNJAB AND HARYANA HIGH COURT
AT CHANDIGARH

CR No. 2143 of 2014 (O&M)

Date of decision: 27.1.2015

Baldev Krishan

....Petitioner

Versus

Buddhi and others

...Respondents

CORAM: Hon'ble Mr. Justice Rakesh Kumar Jain

Present: Mr. Adarsh Jain, Advocate for the petitioner.

Mr. Vijay Kumar, Advocate for the respondents.

Rakesh Kumar Jain, J. (Oral)

This petition is against the order dated 28.1.2014 by which respondents No.1 and 2 have been permitted to withdraw their Objections to file it afresh.

In short, the petitioner filed a suit for possession by way of redemption of land measuring 2 Kanal 17 marlas situated in village Missa, Tehsil and District Palwal which was mortgaged with respondents No.3 to 12/Judgment Debtors. Suit was decreed on 12.6.2008. The petitioner filed execution petition on 7.8.2008 in order to recover possession. Respondents No.1 and 2 filed Objections on 18.11.2008 on the ground that they were inducted as tenants by the mortgagees.

On the pleadings of the parties issues were framed on 16.4.2009. The evidence was closed by both the parties on 19.5.2011 and

the case was fixed for arguments. On 28.1.2014 learned counsel appearing on behalf of the Objectors made the following statement :

“Statement of Sh.B.D.Jakhar, Advocate for Objectors/W.O.

Stated that I do not want to proceed further with suit dated 18.11.2008 filed under Order 21 Rule 97, 100 and 101 CPC, on account of technical defects, the same be permitted to be withdrawn and consigned to record and permission be granted to file a fresh.

ROAC
B.D.Jakhar

Sd/-
C.J.(S.D.) Palwal 28.1.2014”

On this statement, the impugned order was passed on 28.1.2014 which is reproduced as under:

“In view of the statement of learned counsel for Objector Counsel, Objections are hereby dismissed with liberty to file a fresh. In view of the statement of DH counsel, execution petition is hereby dismissed being fully satisfied. File be consigned to the records after due compliance.”

Counsel for the petitioner has argued that the Executing Court has erred in allowing the Objector to withdraw his Objections even at the stage of arguments without assigning any reason much less the formal defect. In this regard, he has referred to Order 23 Rule 1 sub rule (3) CPC and has relied upon a judgment of the Supreme Court in the case of ***K.S.Bhoopathy and others Vs. Kokila and others (2000) 5 SCC 458***. He has also submitted that if the Objectors/respondents No.1 and 2 are claiming themselves to be tenant, they have no right to retain possession of the disputed property once order has also been passed against the mortgagees.

He has also relied upon a recent judgment of the Supreme Court in the case of ***Thakar Singh (D) by LRs and another Vs. Sh.Mula Singh (D) through***

LR and others 2014(4) RCR (Civil) 825.

On the other hand, counsel for the respondent has argued that the Executing Court has rightly passed the order in his favour as it has the jurisdiction to allow to withdraw the Objections to file it afresh in terms of Order 23 Rule 1 sub rule 3 CPC. He has also relied upon a judgment of the Supreme Court in the case of ***Ram Chand Vs. Randhir Singh 1995 AIR (SC) 130*** to contend that if tenant is inducted on agricultural land by the mortgagee by virtue of his right under Section 76(a) of Transfer of Property Act, the tenant gets all tenancy rights as if he was inducted by the owner/mortgagor and can pre-empt any sale made by the owner/mortgagor as a whole. As a matter of fact, counsel for the respondent wanted to argue that once he is a tenant on the mortgaged property, he would become automatically a tenant of the mortgagor even if the property is redeemed by the mortgagor from the mortgagee and would get only the symbolic possession in terms of Order 21 Rule 36 CPC.

After hearing learned counsel for the parties and examining the record, I am of the opinion that the present revision petition deserves to be allowed. Reason for allowing the revision petition is that Order 23 Rule 1 CPC though provides jurisdiction to the Civil Court to allow the party to withdraw its suit to file it afresh if there is a formal defect but the Court has to look into the application and find out that whether there exists formal defect or not. In this regard, it would be relevant to refer to Order 23 Rule 1 sub rule 3 CPC which reads as under:

- (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.”

The Supreme Court in the case of *K.S.Bhoopathy and others* (*supra*) has made the following observations:

“The provision in Order XXIII Rule 1 CPC is an exception to the common law principle of non suit. Therefore, on principle an application by a plaintiff under sub rule (3) cannot be treated on a par with an application by him in exercise of the absolute liberty given to him under sub rule (1). In the former it is actually a prayer for concession from the court after satisfying the court regarding existence of the circumstances justifying the grant of such concession. No doubt, the grant of leave envisaged in sub rule (3) of Rule 1 is at the discretion of the court but such discretion is to be exercised by the court with caution and circumspection. The legislative policy in the matter of exercise of discretion is clear from the provisions of sub rule (3) in which two alternatives are provided; first where the court is satisfied that a suit must fail by reason of some formal defect, and the other where the court is satisfied 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. Clause (b) of sub rule (3) contains the mandate to the court that it must be satisfied about the sufficiency of the grounds for allowing the plaintiff to institute a fresh suit for the same claim or part of the claim on the same cause of action. The court is to discharge the duty mandated under the provision of the code on taking into consideration all relevant aspects of the matter including the desirability of permitting the party to start a fresh round of litigation on the same cause of action. This becomes all the more important in a

case where the application under Order XXIII Rule 1 is filed by the plaintiff at the stage of appeal. Grant of leave in such a case would result in the unsuccessful plaintiff to avoid the decree or decrees against him and seek a fresh adjudication of the controversy on a clean slate. It may also result in the contesting defendant losing the advantage of adjudication of the dispute by the court or courts below. Grant of permission for withdrawal of a suit with leave to file a fresh suit may also result in annulment of a right vested in the defendant or even a third party. The appellate/second appellate court should apply its mind to the case with a view to ensure strict compliance with the conditions prescribed in Order XXIII Rule 1(3) CPC for exercise of the discretionary power in permitting the withdrawal of the suit with leave to file a fresh suit on the same cause of action. Yet another reason in support of this view is that withdrawal of a suit at the appellate/second appellate stage results in wastage of public time of courts is of considerable importance in the present time in view of large accumulation of cases in lower courts and inordinate delay in disposal of the cases.”

Even otherwise in the recent judgment of Supreme Court in the case of ***Thakar Singh (supra)*** it has been held that even if mortgagor has authorised the mortgagee to induct tenants but after redemption, tenants of the mortgagee do not become tenants of mortgagor even though mortgagor has been receiving rent from tenants.

The judgment which has been relied upon by counsel for the respondent in the case of ***Ram Chand (supra)*** is not applicable to the facts and circumstances of this case.

It is also pertinent to mention that I have pointedly asked learned counsel for the respondent as to what is the formal defect but he could not give satisfactory answer except for saying that he has a right to

continue as a tenant of the mortgagee in view of the judgment in ***Ram Chand (supra)***. It is not a formal defect to withdraw the Objection and file afresh in order to start *denovo* trial.

In view thereof, the present revision petition is allowed and the impugned order is hereby set aside.

27.1.2015
Meenu

(Rakesh Kumar Jain)
Judge