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

CR No.2331 of 2014

Date of decision: April 27, 2015

Naseem Hushain and another

.....Petitioners

Versus

Smt. Mahender Kaur and others

.....Respondents

CORAM: HON'BLE MRS. JUSTICE SABINA

Present: Mr. Rajesh Bansal, Advocate
for the petitioners.

Mr. Gaurav Khurana, Advocate
for the respondent Nos.1 to 6.

Mr. M.S. Bedi, Advocate
for the respondent No.7.

Mr. Munish Bansal, DAG Haryana.

SABINA, J

Petitioners have filed this petition challenging the order dated 17.02.2014, whereby application moved by the petitioners for permission to withdraw the suit with liberty to file fresh one on the same cause of action, was dismissed.

Learned counsel for the petitioners has submitted that the petitioners had filed suit for declaration with consequential relief of permanent injunction. Petitioners had impleaded defendant No.1, although, he was already dead at the time of filing of the suit. Thus, there was a formal defect in the suit, which necessitated that the petitioners should withdraw the suit and file a fresh one by impleading correct/necessary parties. In support of his arguments, learned

counsel for the petitioners has placed reliance on **Indiana International Ltd. versus Santana Miguel Fernandes**, 2007

(5) BCR 804, wherein it was held as under:-

“3. The petitioner had sought permission to withdraw the suit against the defendants Smt. Santana Miguel Fernandes and Mis Apolonia Miguel Fernandes i.e. Respondents No.1 and 2 here, on the ground that they were dead when the suit was filed. It appears that the Bailiff report on the summons issued to the defendants also shows that the defendants have expired. In these circumstances, the plaintiff expressed his intention to withdraw the suit with permission to file a fresh suit on the same cause of action. This request has been rejected on the ground that a suit against a dead person is a nullity and his legal heirs cannot be brought on record. According to the learned trial Court to filing of a suit against a dead person being a nullity cannot be said to be a formal defect under Order 23, Rule 1(3) of C.P.C.

Order 23 Rule 1(32) reads as follows:-

“(1) Withdrawal of suit or abandonment of part of claim.-- (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 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.”

4. The learned trial Court has made a correct observation that the legal heirs of a sole defendant who is dead, cannot be brought on record, since the suit against a dead person itself is a nullity. In fact, it appears that to prevent this, that

the plaintiff sought to withdraw the suit itself, which has been denied on the ground that the suit is a nullity.

5. *Undisputedly, such a suit must be held to be a nullity and therefore not instituted at all. However, it does not follow that the fact that a suit has been filed upon payment of Court fees must be ignored. In such a case, the withdrawal that is sought by the plaintiff must be viewed as a request for withdrawal of the filing of the suit which is the physical aspect of the suit. For this purpose therefore, filing of the suit against a dead person must be treated to be a formal defect within the meaning of order 23 Rule 1(3) since the defect is in the nature of misjoinder and non-joinder.*

6. *In this regard the decision in the case of **Ramrao Bhagwantrao Inamdar and Anr. v. Babu Appanna Samage and Ors. reported in A.I.R. 1940 Bombay 121** relied upon by the learned Counsel for the petitioner of this Court may be considered applicable. The Full Bench has observed that the expression "formal defect" must be given a wide and liberal meaning, and must be deemed to connote every kind of defect which does not affect the merits of the case, whether that defect be fatal to the suit or not, relying on a decision of the Privy Council in the case of **Robert Watson & Co. v. Collector of Zillah Rajshahye (1869) 13 M IA 160** in which the Privy Council cites an instance of mis-joinder of parties as a formal defect."*

Learned counsel for the respondents, on the other hand have opposed the petition and have submitted that, in fact, Virsa Singh-defendant No.1 was not the necessary party and the fact that he was already dead at the time of filing of the suit, had no bearing on the merits of the case.

In the present case, petitioners while filing the suit had impleaded Virsa Singh as defendant No.1. However,

defendant No.1 had already died on 22.12.1999, whereas, the suit was filed in the year 2008. The said fact was highlighted by defendant No.1 at the time of filing of the written statement. Thereafter, petitioner No.1 moved an application for bringing on record the legal representatives of deceased-Virsa Singh. However, the said application was dismissed. Since the defendant No.1 was already dead at the time of filing of the suit, the trial Court should have permitted the petitioners to withdraw the suit with permission to file a fresh one on the same cause of action as per law.

Accordingly, this petition is allowed. Impugned order dated 17.02.2014 is set aside. The application moved by the petitioners for permission to withdraw the suit for permission to file a fresh one, is allowed. Consequently, the suit is dismissed as withdrawn with liberty to the petitioners to file a fresh one on the same cause of action as per law.

**(SABINA)
JUDGE**

April 27, 2015
m.singh