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IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CR-5483-2014 (O&M)

Date of decision : 23.05.2016

Darshan Singh Gill

... Petitioner

Versus

Amandeep Singh and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Akshay Kumar Goel, Advocate
for the petitioner.

Mr. I.S. Brar, Advocate
for respondent Nos.1 & 2.

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the reporters or not?
3. Whether the judgment should be reported in the digest?

AMIT RAWAL, J. (ORAL)

The petitioner-plaintiff is aggrieved of the impugned order dated 09.05.2014, whereby the application filed under Order 23 Rule 1 (3) of the Code of Civil Procedure (hereinafter called 'CPC') seeking withdrawing of the suit with permission to file fresh one, has been dismissed.

Mr. Akshay Kumar Goel, learned counsel appearing on behalf of the petitioner-plaintiff submits that the relief sought in the plaint was only with regard to the declaration, but however, possession could not be claimed and other certain facts i.e. regarding the death of the Chand Singh, he being in possession till his life, inheritance of his share after his death,

in paragraph 2 of the application could not be pleaded. Even the factum of the death of wife of Chand Singh could not be mentioned. The factum of land being leased out by the plaintiff during his life time and the collection of the lease amount, also could not be incorporated, whereas the claim has been confined in the suit for declaration that the plaintiff and defendant Nos.6 to 8 and defendant Nos.3 to 5 are jointly owner of the land measuring 38 kanals 8 marals in equal share and challenge of the sale deed dated 18.10.2006. All these factors are essential and necessary to be incorporated. In support of his contentions, he relies upon the judgment of this Court rendered in CR No.4247 of 2010 titled as “Vinod Kumar V/s Gurmail Singh and another”, 2012(1) RCR (Civil) 539.

Mr. I.S. Brar, learned counsel appearing on behalf of respondent Nos.1 and 2 submits that the challenge to the sale deed now would be barred by law of limitation, in case, the permission is granted, it will amount to *de novo* trial and filling up the lacuna in the evidence, which is not permissible in law. At the best, the plaintiff could have moved an application for amendment. He submits that the suit had reached at the stage of petitioner-plaintiff's evidence. He further submits that an application under Order 39 Rules 1 and 2 CPC was dismissed on 16.05.2013, having failed to get interim relief for injunction, the plaintiff moved an application to withdraw the suit with liberty to file fresh one, rightly so, has been dismissed having not falling into “expression”.

I have heard the learned counsel for the parties and appraised the paper book and of the view that in case, the injunction sought in an application under Order 39 Rules 1 and 2 CPC challenging to the sale deed

the suit, in case, ingredients of Order 23 are complied with. The factum of the death of Chand Singh, wife, having right in the property to lease out and the realization of the lease amount, in my view, are the essential facts for the adjudication of the suit and no harm and prejudice would be caused to the respondent as so far, no valuable right had accrued as the plaintiff had not examined any witness. The present case squarely falls within the parameters of the ratio decidendi culled out in the judgment rendered by this Court in **“Vinod Kumar's case”** (supra), wherein it has been held that Court can allow the plaintiff to withdraw the suit, when such suit is likely to fail by reason of some formal defect and continuous of the trial, would be a farcical exercise.

For the foregoing reasons, the impugned order declining the application under Order 23 Rule 1(3) CPC is hereby set aside and the application is allowed. The petitioner is permitted to file the fresh suit by incorporating the certain facts as noticed above.

However, since time and machinery of Court and engagement of the counsel by the defendants are required to be looked into. Accordingly, the application is ordered to be allowed subject to the payment of cost of Rs. 10,000/- which shall be paid to the learned counsel for the respondents-defendants in the High Court.

Resultantly, the revision petition stands allowed.

23.05.2016
yogesh

(AMIT RAWAL)
JUDGE