

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

CR No. 6061 of 2015 (O&M)

Date of decision: 30.03.2016

Raj Kumar

... Petitioner

versus

Mewa Devi and others

.... Respondents

CORAM: HON'BLE MR. JUSTICE K. KANNAN

Present: Mr. C.B. Goel, Advocate for the petitioner.

Mr. Nitin Jain, Advocate with

Mr. Gajraj Naharwal, Advocate for respondent Nos. 1 to 7.

K.Kannan, J. (ORAL)

The revision petition is against the order rejecting an objection taken by the defendant about the frame of the suit and contended that the suit was barred under Order 7 Rule 11 CPC. The objection was taken in the context of an earlier suit filed by the same plaintiff for declaration of joint possession and injunction. The defendant had raised similar objection about the maintainability of the suit under Order 7 Rule 11 CPC and for rejection of the plaint. The plaintiff did not allow for an adjudication of the application on merits but had sought for withdrawal of the plaint with liberty to file a fresh suit. The Court allowed the withdrawal and on the very next date the instant suit came to be filed. The objection taken was that the Court had not allowed for liberty to file a fresh suit and therefore, the suit filed was incompetent.

The plaintiffs are claimants under one Dhan Singh as heirs at law. The defendant-petitioner had filed the suit against the brothers of the plaintiffs who are the sons of Dhan Singh and have obtained a

decree at the Appellate Court against the judgment in Civil Suit No. 382 of 1992. The second appeal filed by the plaintiffs brothers appear to have been dismissed and the SLP was also dismissed.

The suit filed by the sisters were on a plea that they were not bound by the decree obtained against the brothers and it is fraudulent. If in such a suit the plaintiffs had originally asked for a relief of injunction when they were not actually in possession but they were seeking themselves to be in joint possession, the plaintiffs have sought for permission to file a fresh suit and the Court has allowed the withdrawal. The nature of order passed by the Court on 21.05.2013 allowing the case to be withdrawn is not satisfactory and that has given rise to the scope for objection in the manner raised by the petitioners.

If a petition for withdrawal with liberty is sought, the Court has power either to dismiss an application or it has also the power to grant the withdrawal with liberty if it finds that the prayer satisfied any of the requirements under Order 3 Rule 1. It has no power to pass an order midway to allow for only the withdrawal. There is no scope for such an order, for, a mere withdrawal constitutes abandonment of action. If the plaintiff has himself not sought for abandonment and fetter himself from instituting a suit, the Court cannot allow for relief what was not sought. This not a lesser prayer which the Court can grant. It is much more serious and more than what a party has sought for. I will under such a circumstance construe the order passed as an order passed in the manner sought for by the plaintiffs. The order merely ordering withdrawal in the context in which it was made namely, by constituting a prayer on the plaintiff that they were seeking for a liberty to file a fresh suit, the withdrawal must be taken as allowing for such liberty as well.

The counsel for the petitioner argued that the Court may dismiss the suit but allow for consideration of the application for rejection of the plaint filed earlier and which was not argued and before

which the petition for application for withdrawal with liberty was sought. The counsel for the petitioner argued that the earlier suit in which an application for rejection was made and which was not prosecuted but sought to be withdrawn may be revived and the Court may consider that application. According to him, the permission for withdrawal with liberty could be granted if there was a formal defect which can render invalid the maintainability of the suit and such a formal defect was not disclosed. We do not need to travel for too long before we really encounter what the problem is. Here is a case where the daughters of Dhan Singh were trying to seek for their own right in the property as heirs to Dhan Singh and they were seeking to find fend off a claim by the defendant from defeating the rights by reference to a decree obtained against their brothers. The plaintiffs are seeking for joint possession and for injunction which the plaintiff could not have effectively secured especially in the face of the findings recorded in the appeal and is still further second appeal against the decision in Civil Suit No. 382 of 1992. In the said case, the defendant was found to be in possession of the property. The plaintiffs, therefore, require appropriate reliefs to secure recovery from the defendant if they establish the title as heirs at law of Dhan Singh and if Dhan Singh had a right against the defendant which right could be canvassed by the plaintiffs. If such a prayer was not there, it might become necessary to allow for amendment of the plaint to further prosecute the suit. It could only delay further proceedings. The narration in present suit is compatible with the correct state of affairs of an admission of the defendant as being in possession and claiming the right as heirs to Dhan Singh.

There are two options open, one to allow for withdrawal of the earlier suit filed by the plaintiff and permit the plaintiff also to amend the plaint to secure appropriate reliefs. The second option could be to allow for prosecution of the second suit where appropriate reliefs have already been given. I will allow the second option to be exercised

in order that the trial of the suit is not further delayed.

The order already passed is sustained and the revision petition is dismissed.

(K.KANNAN)
JUDGE

30.03.2016

kv