

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

**Civil Revision No.3962 of 2016
Date of Decision: 21.11.2017**

Sardul Singh

.....Petitioner

Vs

Bhanwar Lal and others

....Respondents

CORAM: *HON'BLE MR. JUSTICE RAJ MOHAN SINGH*

Present: Mr. Vikas Chatrath, Advocate with
Ms. Mandeep Kaur, Advocate
for the petitioner.

Mr. Snehdip Oberoy, Advocate for
Mr. Peeush Gagneja, Advocate
for respondents No.1 and 2.

RAJ MOHAN SINGH, J.

[1]. Petitioner has challenged the order dated 04.11.2015 passed by the Civil Judge (Jr. Divn.) Abohar whereby application under Order 23 Rule 1 read with Section 151 CPC for withdrawal of the suit with liberty to file fresh suit on the same cause of action was allowed.

[2]. Brief facts are that the plaintiffs Bhanwar Lal and Sanjeev Kumar filed a suit for declaration to the effect that notwithstanding any thing contained to the contrary in the revenue

record, they were the owners/co-sharers of land measuring 8 Kanals 4 Marlas i.e. 328/1508th share in the total land. Mandatory injunction was also sought, directing the defendants to remove the wall and relief for possession of the said property shown with red colour in the site plan and relief for permanent injunction restraining the defendants from changing the nature of the property were also sought.

[3]. The suit was contested by defendant No.2-Satish Sharma. Besides the other grounds, grounds of misjoinder, non-joinder of all the necessary parties and misjoinder of causes of action were taken in the written statement.

[4]. In replication, the plaintiffs denied the contents of para no.8 of the preliminary objection as well as the written statement. Factum of suit being bad for misjoinder, non-joinder of all the necessary parties and misjoinder of causes of action were denied, rather the defendants were claimed to be proper and necessary parties for the suit.

[5]. It would be appropriate to reproduce the prayer clause of the plaint, preliminary objection No.8 of the written statement filed by defendant No.2 and para no.8 of the replication to preliminary objection filed by the plaintiffs. The same are as follows:-

“Prayer clause

It is, therefore, prayed that a decree for declaration to the effect that notwithstanding any thing to the contrary in the revenue record that the plaintiffs are the owners/co-sharer of land measuring 8 Kanals 4 Marlas comprised in Khasra No.709(37-14) comprised in Khewat No.1275 Khatoni No.1401 vide Jamabandi for the year 2009-2010 situated in the area of Alamgarh, Tehsil Abohar H.B. No.109 i.e. 328/1508 share of the abovesaid total area/land and the same is bounded by the boundaries as under: East: 49' Property of Tara Estate West: 48'6” property of Kabal Singh South: 916.10” Property of other share holder North 924' property of Tara Estate, which shown with red colour in the attached site plan and a Suit for Mandatory injunction by way of issuance of direction to defendants to remove the Wall Mark A to Mark B as shown in the attached site plan and Suit for Possession of the above said property shown with red colour in the attached site plan and Suit for Permanent Injunction restraining the defendants from changing the existing nature of the property or raising any type of construction over the above said property in any manner may be passed in favour of plaintiffs and against the defendants and any other relief to which the plaintiffs is found to be entitled be also awarded in favour of plaintiffs and against the defendants with costs.

Preliminary objection No.8 of the written statement

8. *That the suit is bad for misjoinder of parties*

and non joinder of all necessary parties and misjoinder of cause of action as well, So the suit is liable to be dismissed.

Para no.8 of the replication to preliminary objection filed by the plaintiffs.

8. *That the contents of para no.8 of preliminary objection of written statement are wrong. It is wrong that the suit is bad for mis-joinder of parties and non joinder of all necessary parties and misjoinder of causes of action. Rather the defendants are proper and necessary parties in the present suit and suit of the plaintiffs deserves to be decreed.”*

[6]. An effort to get a Local Commissioner appointed was negated by the Civil Judge (Jr. Divn.) Abohar vide order dated 09.12.2013. Thereafter an application under Order 39 Rules 1 and 2 read with Section 151 CPC was also dismissed by the Civil Judge (Jr. Divn.) Abohar vide order dated 11.11.2014. Again an application under Order 1 Rule 10 CPC for impleading the other co-sharers of the suit property namely Siri Ram, Duli Chand and Banwari Lal sons of Sh. Kanshi Ram being necessary parties was filed. It was averred in the said application that during evidence of plaintiffs, the plaintiffs came to know that there are some other persons, who were recorded to be co-shares in the suit land and, therefore, it was necessary to implead them. The trial Court noticed the fact that the suit was filed by the plaintiffs in the year 2011. Issues were framed

on 11.11.2014. The plaintiffs did not lead evidence on 01.12.2014, 11.12.2014 and 17.12.2014. Names of other co-sharers were mentioned in the *jamabandi* for the year 2009-10 which was available at the time of filing of the suit in the year 2011. Therefore, the story propounded by the plaintiffs for impleading other co-sharers as party defendants was negated and the application was dismissed vide order dated 22.01.2015 by the Civil Judge (Jr. Divn.) Abohar. Thereafter the present application under Order 23 Rule 1 CPC came to the filed on 06.04.2015 for permission to withdraw the suit with a liberty to file fresh one on the same cause of action.

[7]. Para No.3 of the aforesaid application is to the following effect:-

“3. That as the Tartima of suit land has been carved out so it has become to implead all the co-owners as per latest revenue record.”

[8]. The application was contested by the defendants on the ground that the defendants themselves projected the defect in the suit by way of filing written statement in preliminary objection No.8 and the said objection was not taken care of, rather the plaintiffs reiterated their pleadings in the replication to the preliminary objection No.8. The plaintiffs remained unsuccessful in the application for appointment of Local

Commissioner, application under Order 39 Rules 1 and 2 CPC and in the application under Order 1 Rule 10 CPC. Thereafter the present application came to be filed.

[9]. Learned counsel for the petitioner submitted that the order dated 22.01.2015 passed in the application under Order 1 Rule 10 CPC was never assailed by the plaintiffs. The ground on which the suit was sought to be dismissed as withdrawn with a liberty to file fresh suit on the same cause of action was akin to the prayer made in the application under Order 1 Rule 10 CPC. Non-joinder of the necessary parties was the ground on which the application in question was filed. The prayer for impleading those parties as party defendants was declined by the trial Court on 22.01.2015. The said order was never assailed by the plaintiffs. The formal defect, if any, was duly brought to the notice of the plaintiffs in preliminary objection No.8 of the written statement filed by the defendants. The said objection was not adhered to, rather in replication the pleadings of the plaint were reiterated.

[10]. Learned counsel further submitted that the suit was filed on 16.11.2011 and withdrawal of the suit with a liberty to file fresh suit on the same cause of action was sought on 06.04.2015, particularly after dismissal of the application for appoint of Local Commissioner, application under Order 39

Rules 1 and 2 CPC and application under Order 1 Rule 10 CPC for impleading other co-sharers as party defendants. No technical defect was ever shown by the plaintiffs on earlier occasion, rather on pointing out the said defect, the plaintiffs reiterated their stand in the replication. The prayer in terms of Order 1 Rule 10 CPC has already been declined. In these circumstances, if permission for withdrawal of the suit is granted with liberty to file fresh suit on the same cause of action, the same would cause very serious prejudice to the defendants/petitioner.

[11]. Learned counsel by relying upon order dated 22.07.2015 passed in CR No.6662 of 2014 by the Co-ordinate Bench of this Court contended that after passing of more than substantial period, no such technical defect can be projected for withdrawal of the suit, particularly when the said defect was pointed out in the written statement and was not rectified by the plaintiffs thereafter, rather they reiterated their original stand in the replication.

[12]. On the other hand, learned counsel for the respondents submitted that dismissal of application under Order 1 Rule 10 CPC for impleading other co-sharers would not bring the suit to an end, therefore, the plaintiffs were justified in moving the subsequent application under Order 23 Rule 1 CPC.

[13]. Learned counsel by relying upon order dated 23.03.2015 passed by the Co-ordinate Bench of this Court in CR No.1264 of 2012 titled 'Ram Sarup Sood vs. Arunesh Kumar Sood and others' contended that even if, plea of non-joinder was taken by the defendants in the written statement, the plaintiffs can be permitted to withdraw the suit as non-impleadment of all the necessary co-sharers would show the technical defect in the suit.

[14]. Learned counsel also by relying upon **Kousalya Educational Trust rep. By its Chairman, Kumaran K. Pandiya vs. K. Vijayakumari and others, 2003(4) R.C.R. (Civil) 736 Madras** contended that the decision of the application under Order 1 Rule 10 CPC cannot be considered to be the proceedings as no revision was maintainable against such interlocutory order and the order passed on such application would not bring the suit to an end. Learned counsel also relied upon **M/s Manohar Cold Storage and Ice Factory vs. Baldev Singh, 2010(30) R.C.R. (Civil) 388.**

[15]. I have heard the submissions made by learned counsel for the parties.

[16]. In case of **Ram Sarup Sood** (supra) the suit was for possession by way of partition. In case of partition suit, every

plaintiff is defendant and every defendant is plaintiff because each one is to get his share. No impleadment of all the co-sharers would be a formal defect. In that case no such defect was pointed out by the defendant and there was no such reiteration by the plaintiff in the replication. In **M/s Manohar Cold Storage and Ice Factory's** case (supra), the case involving withdrawal of the suit at the appellate stage was in view of facts and circumstances of that case only.

[17]. In the instant case, defect in the plaint is sought to be projected by way of application under Order 23 Rule 1 CPC. After objections having been raised by the defendants in the written statement and reiteration of the pleadings of the plaint made by the plaintiffs in the replication. Thereafter the plaintiffs sought to rectify that defect by means of application under Order 1 Rule 10 CPC and having failed to get their required result, the application under Order 23 Rule 1 CPC came to be filed. In such circumstances, when the defect was pointed out and the plaintiffs still decided to fight it out, then the benefit of Order 23 Rules 1 and 2 CPC cannot be granted. Precisely on the controversy of like nature reference can be made to **Baru Ram vs. Baldeva, 1994 PLJ 144.**

[18]. The provisions of Order 23 Rules 1(3) of the Code cannot be allowed to be utilized by the plaintiffs, who were

negligent in the conduct of the suit from the very beginning. Due objection was taken in the written statement with regard to *locus standi* of the plaintiffs to file the suit, but even in the replication filed by the plaintiffs they persisted in their stand on the strength of pleadings made in the plaint, therefore, plaintiffs were fully aware with regard to the objections taken by the defendants, but nevertheless chose to proceed with the suit as framed and with such permission the plaintiffs want to avoid their previous negligent conduct, therefore, they cannot be allowed to seek withdrawal of the suit with a liberty to file fresh one on the same cause of action. The object of Order 23 Rule 1(3) CPC is to permit the plaintiff to have a fair trial on merits in cases where defects are mere of technical form and can be rectified only by a *de novo* trial, but in the cases where plaintiffs want to avoid their previous negligent conduct and the defect has occurred due to plaintiffs' own fault and in such eventuality the Court would be acting illegally in its exercise, if the plaintiffs are permitted to withdraw the suit with a liberty to file fresh one. It has to be presumed that the plaintiffs were aware of the defect and still have proceeded to fight it out. In such circumstances plaintiffs cannot take benefit of Order 23 Rules 1 and 2 CPC. Reference can be made to **Piar Ram and anr. vs. Ganesh Dass and ors., AIR 1967, Punjab and Haryana 237.**

[19]. Having considered the submission I am of the view that owing to the conduct of the plaintiffs in the light of pleadings on record, they are not entitled to withdraw the suit under Order 23 Rule 1 CPC with liberty to file fresh suit on the same cause of action. Consequently, the impugned order dated 04.11.2015 passed by the Civil Judge (Jr. Divn.) Abohar is set aside and the revision petition is allowed dismissing the application under Order 23 Rule 1 CPC.

November 21, 2017

(RAJ MOHAN SINGH)
JUDGE

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Whether speaking/reasoned

Yes/No

Whether reportable

Yes/No