

IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

CR No.4238 of 2016
Date of decision:25.05.2018

Sanjay Kapoor

... Petitioner

Vs.

Annu Sachdeva and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Sachin Mittal, Advocate
for the petitioner.

Mr. K.S.Rekhi, Advocate
for respondent No.2.

Mr. Davinder Lubana, Advocate
for respondent No.3.

AMIT RAWAL J.

Petitioner-defendant No.1 has approached this Court laying challenge to the order dated 09.05.2016 (Annexure P-6), vide which an application of the petitioner-defendant No.1 filed under Order 23 Rule 1A read with Order 1 Rule 10(2) CPC for his transposition as plaintiff No.2, was dismissed.

Succinctly, the facts which emanate from the pleadings are that plaintiff/respondent No.2 -Sunil Kumar (retd.) being Wing Commander instituted the suit for partition and consequential relief of injunction claiming 1/3rd share in all moveable and immovable properties, bank accounts and cash of late mother-Sarojini Kapoor with permanent injunction

restraining the defendants from entering into premises till the pendency of the suit.

The suit was contested by petitioner/defendant No.1 by raising all possible pleas. The factum of death of mother on 13.08.2012 was not denied. However, defendant no.2 filed a separate written statement, much less set up a counter claim and taken a stand that there was family settlement dated 20.1.2012 and as well as Will dated 23.6.2012.

However, during the pendency of suit, petitioner-defendant No.1 filed an application (Annexure P-4) on the premise that defendant no.1 did not have any dispute with the plaintiff, for, it was defendant no.2, sister, who had set up a family settlement and Will but the plaintiff was not pursuing the suit in proper and diligent manner and even failed to produce the evidence and in these circumstances, sought the indulgence of the Court for transposition as plaintiff No.2.

The application was contested by defendant no.2/counter claimant on the premise that defendant no.1 had rebutted the claim of the plaintiff, rather prayed for dismissal of the suit, therefore, interest was not common. The trial Court, vide impugned order dated 09.05.2016, dismissed the application.

Mr. Sachin Mittal, learned counsel for the petitioner/defendant No.1 submitted that the Court below has not appreciated the fact that plaintiff despite granted several opportunities did not lead the evidence and therefore, an attempt had been made by petitioner-defendant no.1 to fill up the lacunae and in this context, he submitted that basic interest of the

petitioner-defendant No.1 and plaintiff in the suit property is the same, for, stand of plaintiff and defendant No.1 to the fact that mother Sarojini Kapoor having died intestate, is same. It is the only defendant no.2, who set up the family settlement and Will but somehow the plaintiff has not lead any evidence and in the absence of same, suit may not proceed in different dimension.

Despite service, there is no representation on behalf of respondent-defendant No.2.

On the other hand, Mr. K.S.Rekhi and Mr. Davinder Lubana, learned counsel appearing on behalf of respondents No.2 and 3, respectively opposed the aforementioned application on the ground that neither the provisions of Order 1 Rule 10 CPC nor Order 23 Rule 1-A CPC are applicable. It is an attempt to fill up the lacunae, for, plaintiff has failed to lead evidence, much less to overcome the laxity on behalf of the plaintiff for the purpose of leading evidence which the plaintiff was required. The factum of filing counter claim by defendant No.2 had not been denied. Even evidence of the plaintiff had also been closed on 08.12.2015, whereas, application in hand was submitted on 14.01.2016 and urged this Court for affirming the impugned order.

I have heard the learned counsel for the parties and appraised the paper book. For the same of brevity, provisions of Order 23 Rule 1A CPC read thus:-

1A. When transposition of defendants as plaintiffs may be permitted.- Where a Suit is with drawn or abandoned by a

plaintiff under rule 1, and a defendant applies to be transposed as a plaintiff under rule 10 of Order I, the court shall, in considering such application, have due regard to the question whether the applicant has a substantial question to be decided as against any of the other defendants.”

On perusal of the aforementioned provisions, it is evident that in case where the plaintiff does not lead evidence or withdraws the independent suit, defendants having no adverse inference with the plaintiff can always seek transposition. In a suit for partition, all the co-sharers have equal share until and unless one of the parties sets up an independent right or title on the basis of testamentary documents or family settlement which had been taken by defendant no.2. Thus, clash of interest is amongst the plaintiff, defendant no.1 on one side and defendant no.2 on the other side. In such circumstances, in my view, no rights of the plaintiff would be effected, for, defendant no.1 would be able to prove the per pleaded case of the partition by leading the evidence and belying the Will and family settlement propounded by defendant No.2 In my view, trial Court has not appreciated the aforementioned factual aspect.

As an upshot of my findings, order under challenge is not sustainable in the eyes of law as it suffers from infirmity, illegality and perversity, much less without jurisdiction and the same is hereby set aside. The application (Annexure P-4), is allowed. The petitioner-defendant No.1 is transposed as plaintiff No.2. The parties are permitted to lead evidence in accordance with law.

Revision petition stands allowed.

(AMIT RAWAL)
JUDGE

May 25, 2018

savita

Whether Speaking/Reasoned

Yes/No

Whether Reportable

Yes/No