

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

**CR No.7191 of 2013
Date of Decision: 30.04.2018**

Mohinder Singh

.....Petitioner

Vs.

Santokh Singh and others

.....Respondents

CORAM: HON'BLE MS. JUSTICE RITU BAHRI

Present: Mr. Harkesh Manuja, Advocate,
for the petitioner.

Mr. Lalit Pathak, Advocate,
for the respondent No.1.

RITU BAHRI, J. (ORAL)

Challenge in this petition is to the order dated 23.10.2013 (Annexure P-2) passed by the Civil Judge (Junior Division), Phillaur, whereby application filed by plaintiff-petitioner under Order 23 Rule 1 read with Section 151 CPC for withdrawal of the suit with liberty to file fresh one, has been declined.

Initially, plaintiff-petitioner filed a suit (Annexure P-1) against his brothers & sisters (defendant-respondents herein) for possession by way of partition of property/house left by his father-Pakhar Singh. Defendant-respondents, in their written statement, had raised an objection that suit for partial partition was not maintainable as there was another property owned by Pakhar Singh which was *Gair Mumkin Abadi*, measuring 28 marlas.

Subsequently, plaintiff-petitioner filed an application for amendment of

plaint, which was dismissed vide order dated 16.09.2013. Thereafter, he filed an application under Order 23 Rule 1 read with Section 151 CPC seeking withdrawal of the suit with permission to file fresh one. The said application has been dismissed vide order dated 23.10.2013 (Annexure P-2). Hence, this petition.

Learned counsel for the petitioner argued that application filed by plaintiff-petitioner under Order 23 Rule 1 CPC has been wrongly declined by the trial Court. There was sufficient ground to allow the same, as plaintiff intends to file a fresh suit by including the other property left behind by his father.

Learned counsel for defendant-respondent No.1, *inter alia*, contended that once an application to amend the suit/plaint was dismissed, the petitioner cannot be permitted to file a fresh suit for partition by including complete details of the properties. He further submitted that the present suit was filed in the year 2003 and objection regarding partial partition was taken by the defendants in their written statement on 19.10.2005. Plaintiff-petitioner remained silent for such a long period. Thereafter, he filed an application for amendment of plaint on 06.09.2013, which was dismissed by the trial Court vide order dated 16.09.2013. Thereafter, he had filed the present application on the same grounds. He could have removed this defect at the initial stage of the trial itself. In support of his contentions, learned counsel has referred to the judgments passed by this Court in **Parsin Kaur and others vs. Harjinder Singh and others**, 2014 (36) RCR (Civil) 938; **M/s Glass Palace vs. IndusInd Bank Limited and another**, 2009 (25) RCR (Civil) 668 and **Baljit Singh vs. Jot Ram**, 1994 (3) PLR 261.

For reference, Order 23 of the CPC is reproduced as under:-

“ ORDER XXIII

Withdrawal and Adjustment of Suits

1. Withdrawal of suit or abandonment of apart of claim.- (1) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants abandon his suit or abandon a part of his claim:

Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(2) An application for leave under the proviso to sub rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of a pleader to the effect that the abandonment proposed is, in his opinion, of the benefit of the minor or such other person.

(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) Where the plaintiff –

(a) abandons any suit or part of claim under subrule

(1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter of such part of the claim.

(5) Nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part

of a claim, without the consent of the other plaintiffs.”

After hearing learned counsel for the parties, present petition deserves to be allowed. Reference, at this stage, can be made to the judgment passed by a Co-ordinate Bench of this Court in **Vinod Kumar Vs. Gurmail Singh and another**, 2012 (1) RCR (Civil) 539 whereby, plaintiff had filed a suit for declaration without seeking the relief of possession. An application under Order 6 Rule 17 CPC for amendment of plaint by incorporating the relief of possession, was rejected. Thereafter, application filed by the plaintiff under Order 23 Rule 1 CPC to withdraw the suit with liberty to file fresh one on the same cause of action, was accepted. In paragraph 10 of the said judgment it has been observed as under:-

“A bare perusal of above-said provision shows that court can allow the plaintiff to withdraw the suit when such suit is likely to fail by reason of some formal defect. In the present case, admittedly petitioner plaintiff is not in possession of the property in dispute. He filed suit seeking relief of mere declaration without seeking relief of possession. Hence, the suit is not maintainable as no declaratory decree can be passed without claiming relief of possession if the same is available to the plaintiff on the date of filing of the suit. Merely on the ground that petitioner-plaintiff was negligent in not claiming relief of possession initially and in view of the fact that present application has been filed after dismissal of the application filed by the petitioner-plaintiff for amendment of the plaint under Order 6 Rule 17 CPC, it cannot be said that his prayer under Order 23 Rule 1 CPC to withdraw the present suit with liberty to file another one on the same cause of action is to be declined. Rather the other party can be compensated by way of cost in view of the gross negligent conduct on behalf of the petitioner plaintiff in not claiming the relief of possession initially.

Hence, in my view, learned trial Court has committed illegality in

declining the request of petitioner plaintiff to withdraw the suit with liberty to file another suit on the same cause of action.

This question came up for consideration before this Court in **Amar Singh vs. Kashmiri Lal**, 2009 (2) RCR (Civil) 173, where initially, a suit was filed for mandatory injunction directing the defendant to appear before the Sub Registrar, Guhla for attestation and registration of mortgage deed dated 14.05.1985. Subsequently, an application under Order 23 Rule 1 CPC for withdrawal of the suit with liberty to file fresh suit for specific performance of mortgage deed was made. Said application was allowed, as there was sufficient ground for allowing the plaintiff to institute a fresh suit. In the absence of prayer for specific performance, suit for mandatory injunction was likely to be dismissed.

At the same time, judgments referred to by learned counsel for respondent No.1 are not applicable to the facts of the present case. In **Parsin Kaur's** case (supra), initially a suit for mandatory injunction was filed against the defendants directing them to restore the motor connections. The plaintiffs were required to first prove their ownership over the land in dispute and hence, permission to withdraw the suit was held to be rightly declined, as under Order 23 Rule 1 CPC, application can be allowed only, if there are sufficient grounds to file a fresh suit. Since, in the initial suit itself, the plaintiffs were required to lead evidence with regard to ownership and their ownership had been denied by the defendants, they could not be granted permission to file fresh suit. Similarly, other judgments passed in **M/s Glass Palace** and **Baljit Singh's** cases (supra), are not applicable to the facts of the present case.

In the facts of the present case, suit for partition was filed by plaintiff-petitioner against the defendants. Defendant-respondents, in their

written statement, raised objection that there was another property owned by Pakhar Singh, which had not been mentioned in the plaint. Moreover, an application for amendment of the plaint was dismissed by the trial Court vide order dated 16.09.2013. Since there was another property, which could be subject matter of partition, the application under Order 23 Rule 1 CPC should have been allowed, as in a suit for partition, details of all the properties were necessary. Plaintiff-petitioner was required to give details of all the properties, which would have been the subject matter of partition. In the absence of complete details of the properties, no decree for partition could be passed on the basis of initial plaint itself. Hence, application under Order 23 Rule 1 CPC filed by petitioner-plaintiff should have been allowed.

In the light of the above discussion, present petition is allowed and impugned order dated 23.10.2013 (Annexure P-2) is set aside subject to costs of Rs.10,000/- to be paid by plaintiff-petitioner to defendant-respondents.

(RITU BAHRI)
JUDGE

30.04.2018
anil/ajp

<i>Whether speaking/reasoned</i>	<i>Yes/No</i>
<i>Whether reportable</i>	<i>Yes/No</i>