

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH.

101

CR No.4471 of 2013 (O&M)

Date of decision:28.3.2019

Kulwant Singh and another

... Petitioners

versus

Rajinder Kaur and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH.

Present: Mr.B.S.Guliani, Advocate,
for the petitioners
Mr.Karan Vir Nanda, Advocate,
for respondent no.1.
Mr.Kirti Sharma, Advocate, for
Mr.Sandeep Suri, Advocate,
for respondent no.4.
Ms.Eklavya Gupta, Advocate, for
Mr.Ashok Gupta, Advocate,
for respondent no.6.
Mr.Sunder Singh, Advocate,
for respondent no.7
...

AMOL RATTAN SINGH, J. (Oral)

1. By this petition, the petitioners challenge the order passed by the Civil Judge (Junior Division), Chandigarh, dated 21.5.2013 (copy Annexure P-1), by which the application of respondent no.1 herein, i.e. Rajinder Kaur, seeking to withdraw the petition pending before that Court under Section 372 of the Indian Succession Act, 1925, was allowed and while allowing her to withdraw the said petition, liberty was granted to her to file a 'fresh suit'. That part of the impugned order reads as follows:-

“The issue regarding devolution of property of deceased needs to be determined. Therefore, in view of the above, the present application stands allowed and the applicant is permitted to

withdraw the present petition with liberty to file the fresh suit.

It is made clear that the permission is granted to the petitioner only to secure the limitation period of fresh suit but not for any other reasons. File be consigned to the record room after due compliance.”

2. As already noticed in the order dated 7.3.2019, Mr.Guliani, learned counsel appearing for the petitioners, had brought attention of this Court to Rule 2 of Order 23 of the Code of Civil Procedure, 1908, to submit that the liberty granted by the trial Court overriding any limitation that may arise in filing a fresh suit, has been wholly erroneously granted by that Court by simply referring to Rule 1 of the said Order, wholly ignoring Rule 2.

Both the Rules contained in Order 23 are reproduced hereinunder:-

“1 . Withdrawal of suit or abandonment of part 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 the pleader to the effect that the abandonment proposed is, in his opinion, for 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 sub-rule (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 preclude from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(5) Nothing in this rule shall be deemed to authorise 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.

2 . Limitation law not affected by first suit.- In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted.”

3. Mr.Guliani, as also learned counsel for respondent no.1, submit that pursuant to the impugned order having been passed, respondent no.1 has in fact instituted a fresh suit seeking that she be declared to be the legally wedded wife of deceased Joga Singh.

Mr.Guliani had further submitted on the last date of hearing that in fact the said respondent has been specifically held not to be the wife of Joga Singh in proceedings under, both, the Motor Vehicles Act, 1988, in a claim petition filed, such proceedings being in the form of a judgment passed by a coordinate Bench of this Court in FAO No.2478 of 2009 (arising out of MACT case no.122 of 2003), as also on account of a judgment dated 31.7.2014 passed in Civil Suit no.238 of 25.8.2004.

The said suit is stated to have been instituted by the present petitioners against respondent no.1 herein as also the Chandigarh Housing Board, seeking a decree of mandatory injunction directing the Housing Board to transfer the ownership of a particular flat in favour of the petitioners herein (plaintiffs in that suit) on the basis of a will stated to have been executed by Joga Singh, who was the original allottee of the said flat.

That judgment (copy Annexure P-9 herewith) is stated to have become final with the appeal filed against it by respondent no.1 having been dismissed.

Upon query to learned counsel appearing for respondent no.1, he submits that he has no instructions as to whether any second appeal has been filed in that *lis* or not.

The SLP filed by respondent no.1 against the judgment of this Court in FAO no.2475 of 2009, was also dismissed vide an order dated 12.5.2011 (passed in SLP (Civil) nos.13267-13268 of 2011).

3-A Upon query to learned counsel for respondent no.1 as to how the impugned order is sustainable in any manner, he refers to Rule 1 of Order 23 of the CPC (as reproduced hereinabove), to submit that since the said respondent had availed a wrong remedy by way of filing a petition under Section 372 of the Indian Succession Act, 1925, the trial Court has not erred in giving her liberty to file a fresh suit, further observing that she should not be barred on account limitation to file such suit.

4. It is first to be noticed here that at the time when notice of motion was issued in this petition on 29.7.2013, interim stay “of all further proceedings”, had been ordered by this Court (with learned counsel appearing today for the parties being *ad idem* that the said order was in the context of the suit filed by respondent no.1 after the impugned order was passed).

5. After considering the matter, in the opinion of this Court, this petition needs to succeed simply on the touch stone of Rule 2 of Order 23 of the CPC, in which, it is specifically stipulated that any liberty available in terms of Rule 1 of the said Order, would not affect the law of limitation and if a fresh suit is filed in terms of the earlier rule, the plaintiff in the fresh suit would still be bound by the law of limitation as if the first suit had not been

instituted.

Therefore, the impugned order is obviously wholly erroneous in the face of the statutory provision itself.

6. Consequently, the petition is allowed, with the impugned order set aside as regards the observation made therein on the issue of limitation in any fresh suit instituted by respondent no.1 after she withdrew the petition filed by her under Section 372 of the Indian Succession Act, 1925.

Parties to the suit pending would now appear before the trial Court on 6.4.2019. If however, that suit already stands adjourned to any particular date, they would appear on that date, with the suit to proceed forward keeping in mind what has been observed hereinabove.

Any application filed under Section 14 of the Limitation Act, and any issue raised on the applicability of the principle of *res judicata*, would naturally be considered appropriately by the trial court.

28.3.2019
pk/vcgarg

(AMOL RATTAN SINGH)
JUDGE

Whether speaking/reasoned
Whether Reportable

Yes/No
Yes/No