

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

C.R. No. 2382 of 2017 (O&M)

Date of decision : 23.11.2021

Yogender Sharma

...

.....Petitioner

vs.

Birbal Agarwal and others

.....Respondents

Coram: Hon'ble Mr. Justice H. S. Madaan

Present: Mr. Abhimanyu Singh, Advocate for the petitioner.

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H. S. Madaan, J.

Case taken up through video conferencing.

1. This revision petition is directed against order dated 27.2.2017, passed by the Court of Civil Judge (Junior division), Bhiwani, vide which an application for withdrawing the main suit and to file a fresh suit on the same cause of action, moved on behalf of plaintiff Birbal Agarwal had been allowed. Defendant – Yogender Sharma, who is revisionist before this Court prays that the revision petition be accepted and such impugned order be set aside.

2. Briefly stated, facts of the case are that, plaintiff Birbal Agarwal, aged 75 years, original resident of Bhiwani, presently living in Orissa, through his Attorney Shri Hari Ram, had brought a suit against Municipal Council, Bhiwani, Krishan Kumar, as well as Smt. Kamlesh Sharma, her husband – Yogender Sharma and their son

Jitender Kumar, seeking a decree for mandatory injunction, directing defendants No. 3 to 5 to restore the shop Municipal Unit No. F-505 situated at Halu Bazar Chowk, Old Grain Market, Bhiwani, in its original position, since the defendants had demolished the premises in dispute without any right or authority under the garb of sale deed No. 1359 dated 17.6.1999. In that suit, the plaintiff craved for grant of relief of permanent injunction also, so as to restrain defendants No. 3 to 5 from raising any construction over the shop in dispute, in order to merge the property of the plaintiff therewith and further not to alienate the property till final decision of the suit.

3. Notice of the suit was given to the defendants, who put in appearance. During the pendency of the suit, plaintiff Birbal Agarwal, moved an application to withdraw the suit and to file a fresh suit on the same cause of action contending that plaintiff had filed suit for mandatory injunction directing the defendants No. 3 to 5 for restoring the shop; that although the plaintiff had claimed that he had been owner in possession of the shop in dispute, but he failed to pray for declaration to that effect and on account of technical and formal defect in the suit, the plaintiff wanted to withdraw the suit seeking permission to file a fresh one on the same cause of action. That application was resisted by defendant No.4, contending that the application in question had been filed to delay the trial and to cover the period of limitation and that sale deed dated 17.6.1999, bearing 1359 was already in knowledge of the plaintiff when the suit was filed by him and he should have prayed for declaration if he wanted

to do so. The trial court had allowed the application vide impugned order dated 27.2.2017. The operative part of the said order contained in paras No. 4 and 5 are reproduced for ready reference :-

“4. I have heard learned counsel for the applicant/plaintiff as well as the learned counsel for the respondents/defendants and have also gone through the case file very carefully.

5. The plaint reveals that in para no.2 the plaintiff mentioned that he was the owner in possession of the shop in dispute by way of inheritance. However, in the prayer clause, the plaintiff has not prayed for any declaration whatsoever. Now the plaintiff wants to withdraw the suit to file a fresh suit on the same cause of action. The main argument of the defendant No.4 is that the plaintiff wants to cover the period of the limitation by seeking liberty to file fresh suit on the same cause of action. However, this contention is now well founded as limitation is a different matter in the suit for declaration and even if the permission on the same cause of action is granted, the same does not stop the period of limitation

from running as far as the question of declaration of ownership goes. Whether the suit, which is sought to be filed by the plaintiff, would be under the period of limitation or not, will only be seen when the subsequent suit was filed by the plaintiff. In *Dalbir Kaur vs. Jagir Kaur, AIR 2003, NOC 40*, the Hon'ble Punjab and Haryana High Court observed that, failure to claim proper relief can also be considered a formal defect. Same is the matter here. The applicant/plaintiff had sought injunction through this suit but now he wants to file for declaration of ownership. As I think, if amendment in the plaintiff is allowed at this stage, even that would result in a de-novo trial. Also there would be no prejudice whatsoever, if the permission is given to the applicants to file fresh suit on the same cause of action. Hence the application is allowed. The suit is hereby dismissed as withdrawn. The plaintiff is at liberty to file fresh suit subject to the law of limitation.”

4. This order had left defendant No.4 – Yogender Sharma aggrieved and he has filed the present revision petition, notice of

which was given to respondent No.4 who had put in appearance through counsel.

5. I have heard learned counsel for the petitioner, besides going through the record.

6. The impugned order passed by the trial Court is quite detailed and well reasoned. The same does not suffer from any illegality or infirmity, much less apparent on the face of it. This order is certainly not perverse or arbitrary in violation of settled legal position.

7. Under Order 23 Rule 3 CPC (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, then such court 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.

8. The impugned order has been passed in light of such requirements. I do not see any reason to interfere with the said order by exercising the revisional jurisdiction by this Court.

9. The revision petition is absolutely without any merit and is dismissed accordingly.

23.11.2021
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(H.S. Madaan)
Judge

Whether speaking / reasoned
Whether reportable

Yes / No
Yes / No