

In the High Court of Punjab and Haryana, at Chandigarh

Civil Revision No. 2492 of 2022

Date of Decision: 28.10.2022

Chamkaur Singh (Now Deceased) through his Legal Representative

... Petitioner(s)

Versus

Atma Singh and Others

... Respondent(s)

CORAM: Hon'ble Mr. Justice Anil Kshetarpal.

Present: Mr. Arihant Jain, Advocate
for the petitioner(s).

Anil Kshetarpal, J.

1. Questioning the correctness of the order passed by the First Appellate Court, defendant No.10 has filed the present revision petition.
2. The First Appellate Court has permitted the plaintiff to withdraw his suit with permission to file a fresh one after impleading all the co-sharers as party to the suit.
3. Some facts are required to be noticed. The plaintiff claims to be the Auction Purchaser of a plot measuring 3 biswas out of the joint land. He filed a suit for possession by way of partition, which was initially decreed on 12.12.2014. However, in the appeal filed by the defendants, the First Appellate Court held that the interest of various other co-owners/parties interested in the property has not been mentioned. Thus, the First Appellate Court remitted the matter back to the trial Court. In the second round, the suit filed by the plaintiff was dismissed by the trial Court on the ground that

all the co-sharers including seven co-sharers named in the judgment have not been impleaded as parties in the suit. In the first appeal, the plaintiff initially filed an application under Order I Rule 10 of the Code of Civil Procedure, 1908 (hereinafter referred to as “CPC”) for impleading 19 co-owners as parties, which was opposed by the defendants. At that stage, the plaintiff has filed an application under Order XXIII Rule 1(3) CPC for permission to withdraw the suit with liberty to file a fresh one on the same cause of action.

4. Challenging the correctness of the order, the learned counsel representing the petitioner contends that the First Appellate Court could not have allowed the application during the pendency of the first appeal. He submits that the First Appellate Court has no jurisdiction to pass such an order particularly when there is a decree in favour of the defendants. He further contends that once an application under Order I Rule 10 CPC has been dismissed as withdrawn, the plaintiff could not maintain an application under Order XXIII Rule 1 CPC. He further submits that the plaintiff has failed to take steps in accordance with the judgment passed by the Additional District Judge while deciding the appeal on 23.03.2017 in the first round.

5. This Court has considered the submissions of the learned counsel representing the petitioner and perused the paper-book.

6. At the outset, it is necessary to observe that even in the absence of permission to file a fresh suit, a co-owner has a right to file a suit for partition even if his first suit has been dismissed on the ground that he did not implead all the co-owners as parties to the suit. The dismissal of the first

suit on the ground of non-impleadment of the necessary parties is not a decision on merits of the case. In such circumstances, the permission granted is superfluous/unnecessary.

6. Order XXIII Rule 1 CPC enables the Court to permit the party to withdraw his suit with liberty to file a fresh one on the same cause of action. Sub Rule 3 of Rule 1 of Order XXIII CPC envisages two different reasons for permitting the plaintiff to file a fresh suit. Under clause (a), the Court can grant permission if it is satisfied that a suit must fail by reason or some formal defects. Under clause (b), permission can be granted if the Court comes to a conclusion that there are sufficient grounds for allowing the plaintiff to institute a fresh suit based upon the subject matter of the original suit or part of the claim. Such power can be exercised any time after the institution of the suit. There is no provision that such application is only maintainable before the trial Court. The First Appellate Court is a Court of fact and is empowered to decide such an application, if filed. Undoubtedly, the Appellate Court should be slow in granting such permission and the same should be granted only when the Court is satisfied that the plaintiff fulfills either of the two conditions laid down in Sub Rule 3 of Rule 1 of Order XXIII CPC. Hence, the first argument of the learned counsel that the First Appellate Court has no power to decide an application under Order XXIII Rule 1 CPC cannot be accepted.

7. As regards the second argument, it would be noticed that the plaintiff did file an application under Order I Rule 10 CPC, but it was opposed by the defendants. In such a situation, the plaintiff has considered it appropriate to file an application, for withdrawal of suit with liberty, which

has been allowed.

8. The last argument of the learned counsel is with regard to the observations made by the First Appellate Court in the order dated 23.03.2017. The learned Appellate Court has observed as under:-

“19. So, the analytical appraisal of the entire material and evidence on record itself leads towards the inescapable interference that the learned trial Court has not passed the preliminary decree in the light of the provisions of Order 20 Rule 18 CPC, as the interests of the other co-sharers/parties interest in the property have not been mentioned. After weighing the entire evidence on record in the scale of judicial scrutiny, I find that the findings given by the learned trial Court call for interference by this Court”.

9. The plaintiff, being an undisputed co-owner, is entitled to his share on partition of the property. Being a co-sharer, the plaintiff is entitled to enjoy the fruits of the property he has purchased. Hence, partition of the joint land is required to be ordered.

10. Keeping in view the aforesaid facts, no ground is made out to interfere. Hence, the present revision petition is dismissed.

(Anil Kshetarpal)
Judge

October 28, 2022
“DK”

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No