

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

**CR-6299-2016 (O&M)
Date of decision: 24.04.2023**

Jaswinder Singh and another

...Petitioners

VS

Pirithi Singh and others

...Respondents

CORAM: HON'BLE MR. JUSTICE ARUN MONGA

Present: Mr. Vikas Singh, Advocate,
For the petitioners.

Ms. Sonia G. Singh, Advocate,
For respondents No.1 and 2.

None for respondents No.3 (i) to (iv), despite service.

ARUN MONGA, J. (ORAL)

Present revision petition is to set aside impugned order dated 09.05.2016 (Annexure P-10) passed by learned Civil Judge (Junior Division), Patiala, whereby suit filed by the plaintiff/respondents was allowed to be dismissed as withdrawn with liberty to file a fresh suit.

2. Learned counsel for petitioners submits that inspite of the fact that plaintiffs have failed up to the Apex Court and were unable to get the Will executed but they could not succeed and subsequently, when the suit was at its final stage, an application under Order 23 Rule 1 of the CPC was moved, which was allowed by learned trial Court vide impugned order dated 09.05.2016 (Annexure P-10). The said order is against the legal proposition of law as well as letter and spirit of Order 23 Rule 1(3) of the CPC.

3. Given the nature of order being passed, there is no necessity to issue notice to respondent No.3 (v), who has remained unserved, as no serious prejudice would be caused to him. Notice to respondent No.3(v) is thus dispensed with.

4. Heard learned counsel for parties.

5. Section 34 of the Specific Relief Act, 1963 (for brevity, ‘Act of 1963’) reads thus:

“34. Discretion of court as to declaration of status or right.—Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief: Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so. Explanation.—A trustee of property is a “person interested to deny” a title adverse to the title of some one who is not in existence, and whom, if in existence, he would be a trustee.”

6. The Section 34, *ibid*, which mandates that in the case of seeking declaration *qua* the title rights of the immovable property, suit for declaration has to be necessarily accompanied with relief of seeking possession, if petitioner is able to seek such relief.

7. As regards objection of learned counsel for petitioners that suit is not maintainable under Order 2 Rule 2 being hit by principle of *res judicata*, the same, needless to say, shall have to be adjudicated in case respondents choose to file a fresh suit.

8. Learned counsel for petitioners, on the other hand, contends that it is not a suit simplicitor of curing the defect, as has been made out by respondents and learned trial Court was misled into permitting to withdraw the suit under Order 23 Rule 1 of CPC by ignoring that there has been an earlier cantankerous multiple round of litigation arising out of the same suit proceedings, more particularly *qua* grievance of plaintiffs to allow them to adduce additional evidence after their evidence stood closed vide order dated 02.08.2014 by learned trial Court, against which revision petition was preferred, which too stood dismissed.

9. That apart, learned counsel for petitioners points out that plaintiffs had also filed an application for recalling of the witnesses since in the earlier round, they had failed to prove the Will propounded by plaintiffs. Even said application was dismissed and dismissal order was affirmed by this Court in CR No.407 of 2015. SLP No.3820 of 2015 against the same was also dismissed. He submits that effect of withdrawal of the suit would amount to rendering all the earlier proceedings a nullity.

10. Learned counsel for respondents No.1 and 2 has also relied upon Apex Court's judgment rendered in case titled "*V. Rajendran and another Vs. Annasamy Pandian (D) through LRs. Karthyayani Natchiar*" reported in *2017 (1)R.C.R. (Civil) 887* stating that plaintiffs can be given opportunity to withdraw the suit at any stage, regardless that both the parties have concluded their evidence and at the stage of trial as long as it stands established that there was either a formal defect in the plaint or there was sufficient ground for withdrawal of the same.

11. While I am in agreement with the proposition of law as canvassed by learned counsel for the respondents, I am afraid that facts of the case are entirely different and said judgment is not applicable in view of the earlier conduct of plaintiffs in having resorted to unsuccessful attempts to recall witnesses as well as adducing additional evidence, which orders against them had attained finality as they failed to get any relief right upto the Supreme Court. Same course cannot be re-opened to them by way of allowing withdrawal of the suit and to re-summon the same very witness and/or adduce additional evidence on the issues, which are not related to curing defect for which a fresh suit is sought to be filed.

12. Having heard the rival contentions, I am of the view that in order to balance the equities, on one hand plaintiffs are entitled to cure the defect of not having sought relief of possession, whereas on the other hand, they cannot be allowed to get away from what already stands concluded.

12.1. In the totality of the circumstances instead of withdrawing the suit and re-filing the same, plaintiffs are permitted to file an application for amendment under Order 6 Rule 17 CPC to amend the plaint for curing its defect which will be decided by the learned trial Court in accordance with law. If such application is moved and allowed then the plaintiffs will be given further opportunity to adduce additional evidence only *qua* amendment due opportunity shall also be given to the defendants to refute the same. Evidence already adduced shall of course be also read by learned trial Court while deciding issues already framed.

13. In the premise, impugned order is set aside and the proceedings before learned trial Court are revived with liberty to plaintiff/respondents to file an application under Order 6 Rule 17 CPC.

14. It is made clear that in case plaintiffs are allowed to amend the plaint and any further issue is required to be framed *qua* the amendment, learned trial Court shall do the needful and permit the plaintiff-respondents to adduce additional evidence only *qua* that amendment.

15. Disposed of in above terms.

(ARUN MONGA)
JUDGE

24.04.2023
vandana

Whether speaking/reasoned:
Whether reportable:

Yes/No
Yes/No