

CR No.3811 of 2016

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

**CR No.3811 of 2016
Date of decision: 25.09.2024**

SHIV MANDIR RAKSHA COMMITTEE ATELI MANDIPetitioner

Versus

**MURTI MANDIR THAKUR JI MAHARAJ ATELI MANDI AND ORS
.....Respondents**

CORAM: HON'BLE MR. JUSTICE PANKAJ JAIN

Present : Mr. Ashwani Bhardwaj, Advocate
for the petitioner.

Mr. Akash Vashisth, Advocate for
Mr. Ranvijay Singh, Advocate
for respondent No.1.

Mr. Jagdish Marwaha, Advocate with
Mr. Kanwal Marwaha, Advocate
for respondents No.2 and 3.

PANKAJ JAIN, J. (ORAL)

Challenge is to the order dated 25th of March, 2016 whereby the application filed by the plaintiff under Order XXIII Rule 1 read with Section 151 CPC praying for withdrawal of the suit on account of technical defect with liberty to file a fresh suit on the same cause of action, has been allowed.

2. For convenience, the parties hereinafter are referred to by their original position in the suit i.e. the petitioner as defendant No.4 and the respondents as the plaintiffs.



3. Counsel for the petitioner/defendant No.4 submits that the application has been allowed being without the plaintiffs' disclosing formal defect. So much so, even the Trial Court has not opined as to the nature of the formal defect on the basis of which the application was allowed. He has drawn attention of this Court to the application filed under Order XXIII Rule 1 read with Section 151 CPC which shows that the dispute is w.r.t. compensation received on account of acquisition of the property. Plaintiffs as well as defendant No.4 are at issue w.r.t. entitlement to the said compensation. Plaintiffs filed suit claiming that defendant No.3, in collusion with defendant No.4 on the basis of false affidavit and false documents, released the compensation amount to defendant No.4 which was deposited with defendant No.5-Bank and sought restrain against defendant No.4 from withdrawing the same. The fact w.r.t. deposit of the amount was admitted by defendants No.4 and 5 in their written statement. The plaintiffs in application under Order XXIII Rule 1 r/w Section 151 CPC have pleaded as under:

“2. That the plaintiffs have filed the present suit for permanent injunction to restrain the, defendant no. 4 & 6 from withdrawing the amount of compensation of suit property measuring 1 Kanal comprised in Khewat No. 349 Khatoni No. 463 Khasra No. 36//8 (16 Kanal) situated in Ateli Mandi (Nangal) from defendant no. 5 bank. As the plaintiff temple is owner in possession of the above said suit property measuring 1 Kanal which was part of total land measuring 16 Kanal. Earlier Ramanand was mohatmim of temple and at present both Rishi Kumar and Ramasaran are mohatmim of the temple and are managing the affairs of the property of temple.



Defendant no. 4 has no concern with the suit property in any manner. Suit property was acquired by defendant no. 1 to 3 by DFCC of India Limited and notice in this regard was issued to the plaintiff for receiving the compensation amount. The plaintiffs put their appearance before the concerned authority but defendant no. 3 was in collusion with defendant no. 4, as a result on the basis of false affidavit dated 07-06-2011 and other false document the defendant no. 1 to 3 released the compensation amount to defendant no. 4 of which he had no right, without deciding the objection filed by the plaintiff and neither the matter was referred to tribunal.

3. The defendant no. 4 and 5 stated in their written statement that the amount has been released to defendant no. 4 through cheques and defendant no. 4 has deposited the same with the defendant no. 5.”

4. He submits that there is no formal defect warranting the Court to allow the application filed under Order XXIII Rule 1 CPC and thus passing of the order that too at the stage wherein the suit was fixed for the rebuttal evidence, cannot be sustained.

5. Per contra, Mr. Vashisth submits that the compensation was released by way of two cheques. The same were deposited by defendant No.4 with defendant No.5 and during the pendency of the suit, the same was withdrawn. In view of the subsequent events, the prayer made in the suit for permanent injunction has been rendered otiose. The same being the formal defect, application was moved and the Trial Court has rightly allowed the same. He further submits that subsequent to the passing of the above-said order, fresh suit has been filed in which the petitioner/defendant No.4



participated by way of filing written statement and even evidence has been led. Thus, the present revision petition has been rendered infructuous. He is being supported by Mr. Marwaha counsel representing respondents No.2 and 3 who contends that once fresh *lis* has been allowed to proceed and the petitioner does not raise any objection before the Trial Court, allowing the present revision petition at this stage would render the fresh suit redundant.

6. I have heard counsel for the parties and have gone through records of the case.

7. The plaintiffs filed application under Order XXIII Rule 1 CPC.

The bare provision reads as under:

“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

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(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of 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 precluded 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 plaintiff.]"

8. Thus, in order to invoke provision as contained under Order XXIII Rule 1 CPC, formal defect is a *sine qua non*. In the absence of there being any formal defect, the plaintiffs cannot invoke the provision. In the present case, the only ground for invoking the provision is that the amount has been withdrawn by defendant No.4 and thus, the prayer cannot be allowed.

9. In the considered opinion of this Court, the defect so spelled out in the application does not fall within the ambit of expression 'formal defect'.



10. The term ‘formal defect’ as mentioned in Order XXIII Rule (1) (3)(a) generally refers to a defect in form or procedure that does not impact the merits of the case, such as the absence of statutory notice under Section 80 of the CPC, misjoinder of parties, etc. Trite it is that the ‘formal defect’ does not relate to the merits of the case but only connotes defect, related to the procedure. So far as the plea w.r.t. filing of the fresh suit is concerned, from the records, it is discernible that the impugned order is dated 25th of March, 2016, present revision petition was filed on 16th of May, 2016. Merely on the ground that the present revision petition remained pending before this Court for 8 years, the illegality cannot be allowed to perpetuate.

10. In view of above, the instant revision petition is allowed. Impugned order is hereby set aside. Suit is ordered to be restored to its original number. Parties are directed to appear before the Trial Court on **28th of October, 2024.**

September 25, 2024				(Pankaj Jain)
Dpr				Judge
	Whether speaking/reasoned	:		Yes/No
	Whether reportable	:		Yes/No