



CR No.1137 of 2018 1

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CR-1137-2018

Date of Decision: 26.03.2025

Sunita Devi @ Sunita and another ...Petitioners

Vs

Sher Singh and others ...Respondents

CORAM : HON'BLE MR. JUSTICE VIKRAM AGGARWAL

Present: Mr. Vijay Sharma, Advocate
for the petitioners.

Mr. Anoop Kumar Yadav, Advocate
for respondent No.1.

VIKRAM AGGARWAL, J (ORAL)

The present revision petition is directed against the order dated 06.01.2018, passed by the Court of learned Civil Judge (Junior Division), Narnaul vide which the application filed by respondent No.1-plaintiff (hereinafter referred to as 'respondent No.1-plaintiff') for permission to withdraw the suit with liberty to file a fresh suit on the same cause of action was allowed.

2. A suit for declaration (Annexure P-1) that respondent No.1-plaintiff was the owner in possession of land measuring 20 kanals 08 marlas (fully described in the plaint), situated at Village Bocharia, Tehsil Narnaul, District Mahendergarh vide sale deed dated 22.04.1988 was filed. A further declaration was sought that sale deed dated 12.02.2008 secretly executed by one Amar Singh in favour of defendants No.1 and 2-petitioners (Sunita Devi @ Sunita and Neelam) (hereinafter referred to as 'the petitioners-defendants



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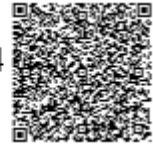
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No.1 and 2) was null and void. Consequential relief of permanent injunction was also sought.

3. The suit was opposed by way of written statement (Annexure P-2). Issues were framed on 31.03.2015. Evidence of the plaintiff was closed by order on 26.08.2016. Thereafter the defendants led their evidence and the evidence was closed whereafter the matter was fixed for rebuttal evidence and arguments. Rebuttal evidence was also closed by order on 25.09.2017. After that, an application for leading additional evidence was filed by respondent No.1-plaintiff which was dismissed vide order dated 21.11.2017. Thereafter, an application dated 28.11.2017 (Annexure P-3) was moved by respondent No.1-plaintiff seeking permission to withdraw the suit with liberty to file a fresh suit on the same cause of action. The said application was opposed by way of a reply (Annexure P-4). However, the application was allowed by the trial Court vide order dated 06.01.2018, leading to the filing of the present revision petition.

4. I have heard learned counsel for the parties.

5. Learned counsel for the petitioners has strenuously urged that the impugned order is not sustainable. Reference has been made to the provisions of Order XXIII Rule 1(3) of the Code of Civil Procedure, 1908 (for short 'CPC') and it has been submitted that no permission to file a fresh suit on the same cause of action could have been granted once the trial almost stood concluded. Learned counsel has referred to the interlocutory orders which have been reproduced in the revision petition. Reference has further been made to the contents of the written statement, application moved by respondent No.1-plaintiff for withdrawal, the reply thereto and

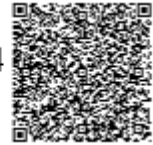


the impugned order and has submitted that the impugned order deserves to be set aside. In support of his contentions, learned counsel has placed reliance upon the judgments of Coordinate Benches of this Court in ***Bhag Mal s/o Moti Ram versus Master Khem Chand s/o Ram Kishan and others 1961 AIR (Punjab) 421*** Law Finder Doc Id # 85461, ***Municipal Committee versus Bala Nand 1993 CivCC 270*** Law Finder Doc Id # 121962, ***Chander versus Mohinder and others 2013 (2) R.C.R. (Civil) 577*** Law Finder Doc Id # 410585 and ***Vinod Kumar versus Gurdev Singh & others 2016 (2) PLJ 347*** Law Finder Doc Id # 763801.

6. Per contra, learned counsel representing respondent No.1-plaintiff has submitted that there is no illegality or infirmity in the impugned order. He submits that on account of a technical defect, the prayer to withdraw the suit had been made with liberty to file a fresh suit on the same cause of action which was rightly allowed by the trial Court.

7. I have considered the submissions made by learned counsel for the parties.

8. The suit was filed on 01.09.2014. Written statement was filed on 23.12.2014 and issues were framed on 31.03.2015. The matter remained pending for evidence of respondent No.1-plaintiff during which few witnesses were examined. However, ultimately, the evidence of respondent No.1-plaintiff was closed by order of the Court on 26.08.2016. Thereafter, the defendants led their evidence and examined five witnesses. The matter then remained pending for rebuttal evidence. Since no rebuttal evidence was led, the same was also closed by Court order on 14.09.2017.



Respondent No.1-plaintiff then filed an application for leading additional evidence which was dismissed on 18.11.2017.

9. It was after this that the application for permission to withdraw the suit with liberty to file a fresh suit on the same cause of action was filed on 28.11.2017. The application also makes an interesting reading. Paragraph No.2 and the prayer clause of the application read as under:-

“paragraph No.2

That in the present suit sale deed No.1925 dated 12.02.2008 and mutation entered on the basis of the same has been challenged on the ground that the subject matter of aforesaid sale deed had already been transferred vide sale deed No.118 dated 22-04-1988. However, after leading of evidence by all the parties to the suit, recently the plaintiff has come to know that the aforesaid sale deed No.1925 had come into existence by playing fraud and misrepresentation upon the vendor of suit property. This ground also needs to be incorporated in the present suit.

Prayer clause

7. It is, therefore, respectfully prayed that the plaintiff may kindly be allowed to file a fresh suit on the same cause of action by withdrawing the present suit and in the alternative, if any reason whatsoever, the Hon’ble Court does not find it fit to allow the present application, then the plaintiff may kindly be allowed to amend the present plaint by filing an application for amendment. It may be very kind of this Hon’ble Court. An affidavit is attached herewith.”

10. A perusal of the averments shows that essentially respondent No.1-plaintiff wanted to add the plea of fraud and misrepresentation.



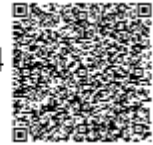
11. The trial Court vide order dated 06.01.2018 allowed the application holding as under:-

“It stands well established that every suit should be decided on merits so as to end all the controversies between the parties rather than on mere technicalities. Be that as it may, it must be noted that the present civil suit was instituted by the plaintiff on 01.09.2014 and has been strongly contested by the defendants. The defendants have spent a considerable amount of money in contesting the present suit. Though, the plaintiff should be allowed to remove the technical defects in his plaint yet the interests of defendants should be protected as well. In view of afore-mentioned discussion the plaintiff is permitted to withdraw the present suit and is granted the liberty to institute a fresh suit on the same cause of action with the specific condition that the plaintiff shall pay a sum of Rs.3,000/- to each of the defendants of the present case at the time of institution of the fresh suit. The application stands disposed off accordingly. File be consigned to the record-room.”

12. In the considered opinion of this Court, the trial Court did not examine the matter from the correct perspective. Merely awarding costs is not the solution. The trial Court also did not consider that there was an alternative prayer also and if at all, the trial Court felt that the plea needed to be incorporated, it could have allowed the application for amendment, though after considering the facts and the law on the subject. Order XXIII CPC provides for withdrawal and adjustment of suits. Order XXIII Rule 1(3) CPC lays down as under:-

“(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 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.”

13. In the considered opinion of this Court, the trial Court did not record any satisfaction that the suit would fail on account of some formal defect or that there were sufficient grounds for allowing the plaintiff to institute a fresh suit. It has to be borne in mind that such permissions are to be granted after considering the matter in its entirety and also keeping in mind the facts of the case and ramifications of such an order. No party can be permitted to derive undue advantage of its own wrongs.

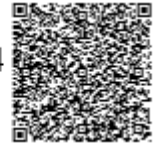
14. In the present case, the entire evidence of both sides had been concluded. Even an application for leading additional evidence had been dismissed. At that stage, to permit withdrawal of the suit with liberty to file a fresh suit on the same cause of action meant permitting the plaintiff to fill up the lacunae in the case. It is settled law that such permissions are not to be granted when a party knows that its suit is bound to be dismissed for want of proper evidence. In any case, no formal defect was pointed out in the suit nor was any satisfaction recorded by the trial Court while granting the permission. Infact, no such satisfaction could have been recorded. In this view of mine, I am supported by a number of judgments of this Court starting from *Bhag Mal s/o Moti Ram versus Master Khem Chand s/o Ram Kishan and others, Municipal Committee versus Bala Nand,*



Chander versus Mohinder and others and *Vinod Kumar versus Gurdev Singh & others* (*supra*). In the case of *Sardul Singh vs. Bhanvar Lal and others 2017 (4) RSJ 328*; Law Finder Doc Id 1453597 also, a Coordinate Bench took a similar view;

17. In the instant case, defect in the plaint is sought to be projected by way of application under Order 23, Rule 1 CPC. After objections having been raised by the defendants in the written statement and reiteration of the pleadings of the plaint made by the plaintiffs in the replication. Thereafter the plaintiffs sought to rectify that defect by means of application under Order 1, Rule 10 CPC and having failed to get their required result, the application under Order 23, Rule 1 CPC came to be filed. In such circumstances, when the defect was pointed out and the plaintiffs still decided to fight it out, then the benefit of Order 23 Rules 1 and 2 CPC cannot be granted. Precisely on the controversy of like nature reference can be made to Baru Ram v. Baldeva, 1994 PLJ 144.

18. The provisions of Order 23 Rules 1(3) of the Code cannot be allowed to be utilized by the plaintiffs, who were negligent in the conduct of the suit from the very beginning. Due objection was taken in the written statement with regard to locus standi of the plaintiffs to file the suit, but even in the replication filed by the plaintiffs they persisted in their stand on the strength of pleadings made in the plaint, therefore, plaintiffs were fully aware with regard to the objections taken by the defendants, but nevertheless chose to proceed with the suit as framed and with such permission the plaintiffs want to avoid their previous negligent conduct, therefore, they cannot be allowed to seek withdrawal of the suit with a liberty to file fresh one on the same cause of action. The object of Order 23, Rule 1(3) CPC is to permit the plaintiff to have a fair trial on merits in cases where defects are mere of



technical form and can be rectified only by a de novo trial, but in the cases where plaintiffs want to avoid their previous negligent conduct and the defect has occurred due to plaintiffs' own fault and in such eventuality the Court would be acting illegally in its exercise, if the plaintiffs are permitted to withdraw the suit with a liberty to file fresh one. It has to be presumed that the plaintiffs were aware of the defect and still have proceeded to fight it out. In such circumstances plaintiffs cannot take benefit of Order 23 Rules 1 and 2 CPC. Reference can be made to Piar Ram and anr. v. Ganesh Dass and ors., AIR 1967, Punjab and Haryana 237.

19. Having considered the submission I am of the view that owing to the conduct of the plaintiffs in the light of pleadings on record, they are not entitled to withdraw the suit under Order 23, Rule 1 CPC with liberty to file fresh suit on the same cause of action. Consequently, the impugned order dated 04.11.2015 passed by the Civil Judge (Jr. Divn.) Abohar is set aside and the revision petition is allowed dismissing the application under Order 23, Rule 1 CPC.

15. Upon a consideration of the entire facts and circumstances as have been referred to above and the law on the subject, this Court is of the firm opinion that respondent No.1-plaintiff was unable to make out a case within the four corners of Order XXIII Rule 1(3) CPC and, therefore, there was no occasion for the learned trial Court to allow the said application.

In view of the above, the present revision petition is allowed. The order dated 06.01.2018, passed by the Court of learned Civil Judge (Junior Division), Narnaul is set aside and the application filed by respondent No.1-plaintiff for withdrawal of the suit with liberty to file a

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fresh suit on the same cause of action stands dismissed. As a consequence, the suit shall stand restored. The alternate prayer for amendment shall remain alive and the Court concerned may decide the same in accordance with law.

Pending application(s) if any, stand(s) disposed of accordingly.

26.03.2025

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**(VIKRAM AGGARWAL)
JUDGE**

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No