

(2018) 01 SHI CK 0076
In the High Court Of Himachal Pradesh
Case No : Civil Revision No. 188 Of 2017

Basanti

APPELLANT

Vs

Dhian Singh and Ors

RESPONDENT

Date of Decision : 05-01-2018

Acts Referred:

Code Of Civil Procedure, 1908 — Section 151, Order 1 Rule 10, Order 23 Rule 1

Citation : AIR 2018 (HP) 36 : (2018) 1 ShimLC 430 : (2018) 2 CivCC 737

Hon'ble Judges : Sandeep Sharma, J

Bench : Single Bench

Advocate : Vikas Rathore

Final Decision : Dismissed

Judgement

Sandeep Sharma, J

1. Being aggrieved and dissatisfied with order dated 13.6.2017, passed by the learned Civil Judge (Sr. Division), Chamba, in CMA No. 239 of 2017, whereby application having been filed by the present petitioner (herein after referred to as "the plaintiff") under Order 23 Rule 1 read with Section 151 CPC, seeking therein permission to withdraw the suit, came to be rejected, plaintiff (petitioner) has approached this Court by way of instant revision petition.

2. Briefly stated facts necessary for the adjudication of the present case are that plaintiff filed suit for declaration, injunction and in alternative, for possession, in the Court of learned Civil Judge (Sr. Division), Chamba. It also emerge from the bare reading of the impugned order passed by the Civil Judge that both the parties have already led their evidence in support of their respective claims and matter is pending for final arguments. Before final pronouncement could be made by the learned court below, plaintiff filed an application under Order 23 Rule 1CPC, seeking therein permission to withdraw the suit having been filed by him. Allegedly, respondents (herein after referred to as the defendants No. 1 to 7) had filed partition proceedings before A.C. Ist Grade, Churah, District

Chamba, against one Shri Thakur Dass, predecessor-in-interest of the plaintiff. During the pendency of the partition proceedings, aforesaid person namely Thakur Dass expired leaving behind plaintiff as his LR to succeed to the estate left by him.

3. Mr. Vikas Rathore, Advocate, representing the plaintiff (petitioner herein) contended that since LRs of deceased Thakur Dass were not brought on record by defendants No. 1 to 7 and as such, order of partition passed by the A.C. Ist Grade, Churah, is a nullity being passed against a dead person. Appeal(s) having been preferred by the plaintiff against the aforesaid order passed by the A.C. Ist Grade, Churah, in the Court of SDO (C), Churah and thereafter, before the Divisional Commissioner, came to be dismissed on the ground that no appeal, if any, could be filed by the plaintiff as he was not party to the partition proceedings. Learned counsel further contended that since factum with regard to the passing of partition order, was not in the knowledge of the plaintiff, he could not lay any challenge to the partition orders passed by the AC Ist Grade, Churah. Omission on the part of the defendants to bring the LRs of deceased Thakur Dass on record in the proceedings of partition, which ultimately came to be decided by the AC Ist Grade, has caused great prejudice to the plaintiff and in case, he is not allowed to withdraw his suit, great prejudice shall be caused to him as he would be debarred from laying challenge to the partition order passed by the AC Ist Grade, Churaha.

4. Since despite service, none has put in appearance on behalf of the defendants, this Court has no option but to decide the present case on the basis of material available on record.

5. I have heard the learned counsel for the plaintiff (petitioner) and carefully gone through the record.

6. After having carefully perused impugned order passed by the learned Civil Judge, there appears to be no illegality and infirmity in the same, rather same appears to be based upon the proper appreciation of provision contained under Order 23 Rule 1 CPC. Perusal of application filed under Order 23 Rule 1 CPC (Annexure-P1) clearly suggests that plaintiff being aggrieved and dis-satisfied with order of partition passed by AC Ist Grade, Churah, filed an appeal before SDO (C) Churah and as such, plaintiff cannot be allowed to state that factum with regard to the passing of order of partition against deceased Thakur Dass i.e. predecessor-in-interest of the plaintiff, was not in his knowledge. Rather, impugned order reveals that plaintiff himself moved an application under Order 1 Rule 10 alleging therein that LRs of deceased Thakur Dass were not brought on record in the partition proceedings before the AC Ist Grade, Churah, but same was dismissed on 16.11.2015. Though, it is an admitted case of the defendants that predecessor-in-interest of the plaintiff passed away during the pendency of the proceedings but it also stands proved on record that after the death of Thakur Dass i.e. predecessor in interest of the plaintiff, plaintiff alongwith her mother, Smt. Dilu, appeared before AC Ist Grade, Churah and contested the

partition proceedings. Learned court below has categorically recorded that perusal of order Ext.PE clearly suggests that Smt. Dillu, widow of Thakur Dass was present before the Assistant Collector, Ist Grade, Churah on various dates. It also emerges from the various orders passed by the Divisional Commissioner in the appeal having been preferred by the plaintiff and her grandmother i.e. widow of Thakur Dass that plaintiff as well as widow of Thakur Dass, appeared before the Divisional Commissioner and order dated 15.12.2005 passed by the AC Ist Grade, was well in their knowledge. It also emerges from the impugned order that in the suit at hand, plaintiff while deposing before the court below categorically admitted in her cross-examination that on 19.3.2011, she had filed written statement before AC Ist Grade, meaning thereby, LRs of deceased Thakur Dass were brought on record and they appeared and contested the partition proceedings.

7. True, it is that in terms of order 23 Rule 1 CPC, plaintiff can, at any time, after the institution of a suit, against all or any of the defendants abandon the suit or abandon a part of his claim but that is subject to satisfaction of the Court that a suit must fail by reason of some formal defect, or 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.

8. In the case at hand, as has been discussed in detail above, factum qua passing of partition order by AC Ist Grade, Churah in partition proceedings preferred on behalf of defendants, was very much in the knowledge of the plaintiff, rather said proceedings were contested by the plaintiff and his grandmother i.e widow of Thakur Dass and as such, there appears to be no force in the argument of Mr. Vikas Rathore, learned counsel representing the plaintiff/petitioner that defendants concealed material fact with regard to the non-impleadment of LRs of Thakur Dass in the partition proceedings.

9. Moreover, as has been taken not above, suit is complete in all respects and ready for pronouncement of judgment and as such, learned court below rightly held that allowing of application at this stage, would amount to filling up of lacuna or defect occurred in the suit.

10. Consequently, in view of the above, this Court sees no reason to interfere in the order passed by the court below, which otherwise appears to be based upon proper appreciation of material available on record and accordingly, same is upheld. The revision petition is dismissed being devoid of any merit. However, it is made clear that observation made in the present case shall not have any bearing on the main case and shall remain confined to the disposal of the present petition only.