

(2024) 07 MP CK 0035

In the Madhya Pradesh High Court

Case No : Civil Revision No. 259 of 2023

Dwarka Prasad And Others

APPELLANT

Vs

The State Of Madhya Pradesh And Others

RESPONDENT

Date of Decision : 26-07-2024

Acts Referred:

Code of Civil Procedure 1908 — Order 23 Rule 1, Order 1 Rule 10, Order 23, Rule 1(3)

Citation : (2024) 07 MP CK 0035

Hon'ble Judges : Hirdesh, J

Bench : Single Bench

Advocate : Akhil Godha, Kunjan Mittal, Anand Bhatt

Final Decision : Allowed

Judgement

Hirdesh, J

Petitioners/plaintiffs have filed this civil revision against the order dated 13.03.2023 passed by 2nd Civil Judge, Junior Division, Sarangpur, district Rajgarh in civil suit no.67A/2014 whereby the application filed by the petitioners under Order 23 Rule 1 CPC has been dismissed.

2. The brief facts of the case are that petitioner/plaintiff filed a suit for declaration and permanent injunction against the respondent/State with regard to the land bearing survey no.269/1/1 Rakba 0.140 hectares situated at Kasba Pachore, Tehsil Pachore, district Rajgarh (hereinafter referred to as 'the suit property'). The respondent no.1/State filed a written statement denying all the averments made in the plaint and alleged that the petitioners are not the owners of the suit property and in the year 1948 the suit property was not allotted to the father of the petitioner for establishment of ginning factory.

3. The trial court framed issues, recorded evidence and dismissed the suit filed by the petitioners. The petitioners/plaintiffs being aggrieved by the said judgment passed by the trial court preferred a first appeal before the first appellate court. During the pendency of the first appeal, Bhagwatibai and

Lalitabai, daughters of late Mangilal filed an application under Order 1 Rule 10 CPC stating that they are the daughters of Mangilal, therefore, they are also having share in the suit property and the petitioner without informing them has filed a suit which was not maintainable due to non joinder of necessary parties. The first appellate court has allowed the said application and partly allowed the appeal filed by the plaintiff and set aside the issues, judgment and decree passed by the trial Court and remanded the matter back to the trial court with a direction to join necessary parties in the suit and after giving them opportunity of hearing decide the suit on merit in accordance with law.

4. During the pendency of the suit the petitioner filed an application under Order 23 Rule 1 CPC for withdrawal of the suit with liberty to file a fresh suit stating that appellate court has remanded the matter and directed to add the necessary parties in the present case, therefore, the petitioner has to amend the suit and because of the said amendment the nature of the suit will be changed and certain discrepancy will also arise. However, on 13.03.2023 the trial court has rejected the application filed by the petitioner under Order 23 Rule 1 CPC holding that non-joinder or mis-joinder of parties is not a formal defect. Being aggrieved by the said order, the petitioners/plaintiffs have filed this civil revision before this Court.

5. Learned counsel for the petitioner submits that the order of the trial court is arbitrary and without jurisdiction. He further submits that the impugned order passed by the trial court is contrary to the record. The trial court has erred in holding that as per the order of the appellate court newly added party has already been added and there appears no reason for the apprehension that because of the amendment the nature of the suit will change without. The said finding is without considering the content of the application filed by the newly added party under order I Rule 10 CPC, so prayed for setting aside the impugned order.

6. On the other hand, learned counsel for the respondent no.1 has supported the impugned order and prayed for rejecting this revision petition.

7. In support of the contentions, learned counsel for the petitioner has placed reliance in para-3 & 5 of the decision in the case of Kunwar Bai wd/o Ram Prasad Keer and others vs. Gangram s/o Baliram Keer and another - 2013 (2) MPLJ 173 which are reproduced below:

3. By placing heavy reliance upon the single Bench decision of this Court Mst. Chhabili Dullaiya vs. Lallu in Second Appeal No. 218/1961 decided on 8-12-1964 which has been digested in 1965 MPLJ Note 99 it has been put forth by learned counsel for the applicants that a suit can be permitted to be withdrawn if it suffers from formal defect. Learned counsel submits that this decision was also in respect to partition suit and because some of the necessary parties could not be joined no effective decree of partition can be passed and therefore, this Court allowed the prayer to withdraw the suit with liberty to file fresh suit. The

contention of learned counsel is that the aforesaid decision is squarely applicable in the present case because in the instant suit also the sons of first defendant were not joined as parties to the suit and therefore, it amounts to a formal defect and hence, learned trial Court by rejecting the application under Order XXIII, Rule 1(3), Civil Procedure Code has acted illegally with material irregularity in exercise of its jurisdiction. Hence, it has been prayed that by allowing this revision application the application under Order XXIII, Rule 1(3), Civil Procedure Code be allowed.

5. I have heard learned counsel for the parties. According to me, the provision envisaged under Order XXIII, Rule 1(3), Civil Procedure Code can be set in motion and the permission to withdraw the suit with liberty to file fresh suit can be granted only when the defect pointed out is formal one and not substantial one. I may further add that the object of this provision is not to permit the plaintiff to file a fresh suit if he has failed to conduct the suit with care and diligence, but, to prevent technical defect in rendering the justice. The expression 'formal defect' connotes defects of various kinds not affecting the merits of the case, which according to me, would mean a defect in the nature prescribed by rules of procedure. If the procedural rules under Order I, Civil Procedure Code are seen, this Court finds that the Order I, Civil Procedure Code pertains to the impleadment of the parties to the suit and Rule 3 prescribes that all the persons may be joined in one suit as defendants where any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist against such persons, whether jointly, severally or in the alternative and further if separate suits were brought against such persons, any common question of law and fact would arise. At that same time, while considering the said application the Court should see that the object to allow this application as to whether with care and diligence without impleading some of the coparceners in the suit was filed for which the withdrawal is sought with liberty to file fresh suit.

8. In the present case, petitioner/plaintiff has filed an application before the trial court for withdrawal of the civil suit with liberty to file fresh suit to avoid complication after the amendment and since the suit has not been finally adjudicated, no right has been accrued upon the daughters of Mangilal. Therefore, to avoid complications and ambiguity the application which was filed by the petitioner under Order 23 Rule 1 CPC would come under the ambit of and sweep of formal defect.

9. This Court in the case of Kunwar Bai (supra) has held in para-9 as under:

9. In absence of any indication of categorization or classification of the suit to which Order XXIII, Rule 1(3), Civil Procedure Code is to be made applicable, this provision is also applicable to the partition suit. The cause of action for seeking partition of joint Hindu family property is a recurring cause of action and even if one suit is dismissed as withdrawn second suit for partition of the property is not barred because in a partition suit the defendant who is entitled to a particular

share is also in the position of plaintiff. I have called the disposed of file of S.A. No. 218/1961, Mst. Chhabili Dullaiya vs. Lallu and another from the record room and according to me, decision passed in Mst. Chhabili Dullaiya (supra) is squarely applicable in the present case because that suit was also for partition and the plaintiff of that suit prayed to withdraw his suit with liberty to bring a fresh suit for partition of joint Hindu family property belonging to joint family for the same cause of action. This Court in the said decision held that the expression 'formal defect' must be given a wide liberal meaning and it was further held that the mis-joinder or non-joinder of the parties is a formal defect within the meaning of Order XXIII, sub-rule (3) of Rule 1, Civil Procedure Code. For better understanding it would be relevant to quote the aforesaid judgment in its entirety, which reads thus :—

"This is a second appeal arising out of a suit for partition filed by respondent No. 1 Lallu against the widow and daughter of one Ajuddhi Jadiya, who, is alleged, was his father's cousin. Hiralal, who was his cousin (once removed) was also joined as a party defendant. It appears from the genealogy filed with the plaint that one Udho has three sons: Pragi, Mathura and Patami. Hiralal is one of the grandsons of Pragi, the other two being: Punnu and Ramprasad. Lallu belongs to the branch of Mathura. But there is another son of Mathura, named Nandi, and this Nandi has also a son, named Dipchand. Similarly, the branch Patami is represented by his son Ajuddhi, whose wife and daughter have been joined as party defendants to the suit. There is no explanation on record, even though a specific objection in this behalf was taken, why the other members of the family, who are alive, have not been joined as party defendants to this partition suit. As belonging to the branch of Udho, they all would have an interest in joint family property.

2. During the course of argument, it transpires that the suit must fail by reason of the non-joinder of necessary parties to this suit for partition. The learned counsel for the respondent-plaintiff then prayed leave to withdraw his suit with liberty to bring a fresh on the same cause of action, namely, for a partition of the joint family property belonging to the joint family of which Lallu, Hiralal and Ajuddhi, amongst others, are members.

3. Under sub-rule (2) of Rule 1 of Order 23 of the Code of Civil Procedure, where the Court is satisfied that a suit must fail by reason of some formal defect, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit with liberty to institute a fresh suit in respect of the subject-matter of such suit. The expression 'formal defect' must be given a wide and liberal meaning: See Ramrao Bhagwantrao vs. Babu Appanna, I.L.R. 1940 Bom. 299 (F.B.); and it is settled law that a mis-joinder or a non-joinder of parties is a formal defect within the meaning of this rule, if by reason of such mis-joinder or non-joinder, the suit must fail: see R. Watson and Co. vs. Collector of Zillah Rajshahye, 13 Moo Ind App 160(170) and Asian Assurance Co. vs. Madholal, AIR 1950 Bom.378. In the instant case, this being a suit for partition of joint family

property, all persons interested in that property were necessary parties to the suit and in their absence the suit was bound to fail. Consequently, their non-joinder was a formal defect by reason of which the suit was bound to fail.

4. In the result, in my opinion, this is a fit case in which the plaintiff can be allowed to withdraw the suit with liberty to institute a fresh suit in respect of the subject-matter covered by it.

5. Necessary permission is, therefore, granted to the plaintiff. There shall be no order as to costs."

10. In view of the above, in the considered opinion of this Court, trial court has committed error in rejecting the application filed by the petitioner. So this petition is allowed and the application filed by the petitioner under Order 23 Rule 1 CPC before the trial court is allowed and the petitioner is permitted to withdraw the suit with liberty to file a fresh suit in respect of the subject matter covered by it.