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**(1999) 12 P&H CK 0022**  
**In the Punjab And Haryana At Chandigarh**  
**Case No : S.A.O. No. 33 of 1988**

Harbans Kaur

APPELLANT

Vs

Jagir Singh and Others

RESPONDENT

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**Date of Decision :** 09-12-1999

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 23 Rule 1

**Citation :** (2000) 3 CivCC 22 : (2000) 125 PLR 626 : (2000) 2 RCR(Civil) 77

**Hon'ble Judges :** R.L. Anand, J

**Bench :** Single Bench

**Advocate :** Arun Jain, for the Appellant; R.C. Setia and Rohit Pathak, for the Respondent

**Final Decision :** Dismissed

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## Judgement

R.L. Anand, J.—This is a second appeal against the order dated 27.5.1988 passed by Additional District Judge, Ludhiana, who allowed the appeal of the plaintiff-respondents Jagir Singh and others and gave them the direction to pay the costs within two months from the date of the passing of the impugned order and the parties were directed to appear before the trial Court, which was directed to proceed with the case in accordance with law.

2. Some facts can be noticed in the following manner:-

Earlier the plaintiff-respondents filed a suit for declaration against the defendants which was dismissed by the Court of Shri B.C. Gupta, Sub Judge, Ludhiana on 23.9.1981. The plaintiffs filed an appeal against the judgment and decree dated 23.9.1981 in the Court of Additional District Judge, Ludhiana and in the appeal the suit was allowed to be withdrawn with permission to the plaintiffs to file a fresh suit on the same cause of action subject to payment of Rs.300/- as costs. This order was passed by first appellate court on 8.4.1983 and the said order was never challenged by the defendant.

Later on the plaintiffs filed the present suit for declaration that they and

defendant No. 1 are the joint owners of the land fully described in the head note of the plaint situated in village Pakhowal, Tehsil and District Ludhiana in equal shares and the plaintiffs are entitled to separate their 3/4 the share from the suit land from defendant No. 1 ignoring the gift-deed dated 1.1.1981 pertaining to the land measuring 28 kanals 1 marla alleged to have been executed by Amar Singh in favour of defendant No.2 as the same is illegal, void and inoperative. The present suit was instituted on 15.6.1983. But the plaintiffs did not deposit the cost of Rs.300/- either in the Court or in the treasury before filing the suit. The suit continued. Finally in April 1988, an application was filed by the plaintiffs that they may be allowed to deposit the costs. The trial Court dismissed that application and consequent to that the plaint was also rejected. Aggrieved by the order of the trial Court passed on the application, the plaintiffs came in appeal before the Court of Additional District Judge, Ludhiana, who allowed the appeal and directed the plaintiffs to pay the costs within 2 months from the date of the passing of the impugned order dated 27.5.1988 and directed the parties to appear before the trial Court which was directed to proceed with the case in accordance with law. The grounds for allowing the appeal by the Additional District Judge, Ludhiana are contained in paras No.5 to 8 of the order, which read as under:-

"5. Mr. Jhanji, the learned counsel for the appellants has vehemently argued that the suit is still pending and he should have been allowed to pay the costs and plaint should have not been rejected. in support of his contention, the learned counsel has relied upon Konkan Trading Company Vs. Suresh Govind Kamat Tarkar and Others, Mast Ram Ram Charan and Others Vs. Deputy Commissioner Bahraich and Another, . 6. On the other hand, the learned counsel for the respondents" has relied upon Konkan Trading Company Vs. Suresh Govind Kamat Tarkar and Others,

I have gone through the authorities cited above. It is an admitted fact that earlier suit was allowed to be withdrawn, with permission to file fresh suit on the same cause of action with conditional costs of Rs.300/- Hon"ble Supreme court in the cited authority supra M/s Konkan Trading Company has stated in so many words that the payments should be accepted at any stage within reasonable time as it does not militate against any express provisions of law, but on the other hand, it advances the cause of justice. This view is also in accordance with the spirit behind Section 148 of the C.P.C. Justice should not be lip-aim of Court, instead it should be their life-aim. The Courts should not dismiss the suit only on a very trifle matter; rather justice should be done, after giving an opportunity to both the parties and it should seem to have been done. It the present case no time was fixed by the Court to make the payment. The plaint should not have been rejected, if during the pendency of fresh suit the payment is made and it has been so held by Hon"ble Mysore High Court, cited supra in Chikkanuma's case. So far as the authorities cited by the learned counsel for the respondents are concerned, they are not applicable to the facts of the case in hand. Even if there is any such authority, the same have been overruled by Hon"ble Supreme

Court.

7. The learned counsel for the respondents then argued that the appeal in this case is not competent. According to him, application u/s 151 and no appeal for rejection of the application u/s 151 C.P.C. is applicable.

This contention of the learned counsel for the respondents, also does not find favour with me, because it was not application that was rejected but even plaint was rejected in this case. Rejection of plaint amounts to decree u/s 2(2) C.P.C. and appeal is competent by virtue of section 96 of the C.P.C. and it has been so held by Hon''ble High Court reported as (1978 P.L.J. 17) Kashmiri Devi v. Aziz-u-Din.

In view of the above discussion, I allow this appeal. The plaintiffs are directed to pay the cost within two months, from today. Parties through their counsel, are directed to appear before the trial Sub Judge, who is directed to proceed with the case in accordance with law. File be sent there for 13.6.1988."

3. I have heard Mr. Arun Jain, Advocate on behalf of the appellant Mr. R.C. Setia, Senior Advocate, on behalf of the respondents and with their assistance I have gone through the records of this case.

4. The learned counsel appearing on behalf of the appellant submitted that the suit of the plaintiff-respondents could not proceed and it could not be instituted by them till they deposited Rs.300/- as costs. He also submitted that the Appellate Court could not give the permission to the plaintiffs to withdraw the suit with the permission to file fresh one on the same cause of action vide order dated 8.4.1983.

5. I have considered the submissions raised by the learned counsel for the appellant and in the view of this Court these are totally devoid of merit. The order dated 8.4.1983 was never challenged by the defendant-appellant and that order had already attained the finality. In this view of the matter, it is not open to the defendant-appellant to say that the Appellate Court could not pass the order dated 8.3.1983 allowing the plaintiffs to withdraw the suit and file a fresh one on the same cause of action. .It has not been shown on the record that it was ordered by the Appellate court vide order dated 8.4.1983 that the costs were condition precedent before filing the present suit which was instituted on 15.6.1983. In this view of the matter, the remedy, if any, lied with the defendant to recover the amount of Rs.300/-. Moreover, when the application was moved by the plaintiffs to deposit the amount of Rs.300/- in the trial Court the suit was still pending. Thus, the first Appellate Court rightly allowed the plaintiffs to deposit the costs even at a belated stage.

6. It was then submitted by the learned counsel for the appellant that the suit was instituted on 15.6.1983, but the application for the deposit of costs was not made within a reasonable time. The same was moved somewhere in April, 1988 when the plaintiffs realised that their suit was likely to fail due to non-deposit of

costs and such a lapse could not and should not have been cured by the Court of Additional District Judge, Ludhiana vide order dated 27.5.1988. This argument is not again acceptable to this Court. Rather this argument can be taken as detrimental to the present appellant because they remained silent right from 15.6.1983 upto April, 1988 and never agitated the issue before the trial Court that the suit of the plaintiffs was liable to be dismissed as they had not deposited the costs as required vide order dated 8.4.1983. The defendant-appellant is guilty of de-lay and latches and at the belated stage it was not proper on her part to raise the plea that the application of the plaintiff-respondents should be dismissed when they simply prayed for the deposit of the costs. It has been rightly observed by the first Appellate Court that the courts should not dismiss the suit on very trifling matter, rather we should try to promote justice between the parties.

7. It was also submitted by the learned counsel for the appellant that the appeal of the plaintiff-respondents was not legally maintainable before the Court of Additional District Judge. This argument is again devoid of merit, because in this case the plaint had been rejected by the trial Court which order amounts to decree for the purpose of Section 2(2) C.P.C. The appeal in such a situation was legally maintainable.

8. Resultantly, I do not see any merit in this appeal and dismiss the same with no order as to cost.

Copy of this order be sent to District Judge, Ludhiana for information.