***Before Ramendra Jain, J.***

**RAJ KUMAR**—*Petitioner*

*versus*

**RANI AND OTHERS**—*Respondents*

**C. R. No. 3549 of 2014**

May 25 2018

***Constitution of India, 1950—Art. 227—Code of Civil Procedure, 1908—O.23 Rl. 1(3)—Trial Court committed a grave error by allowing the suit to be filed afresh under Order 23 Rule 1(3) CPC application—Petitioner is made to suffer and litigate for 17 years—Trial Court did not record any finding in the impugned order—Thus, the order is not maintainable in law—Revision allowed—Impugned order set aside only to the extent of grant any permission to file suit afresh—Dismissal of suit is upheld—No right/cause to the respondent plaintiff to move any application for amendment of their plaint—Suit be treated dismissed as withdrawn.***

*Held,* that the trial Court committed a grave error in granting permission to file a fresh suit without recording any finding in the impugned order.

(Para 15)

*Further held,* that in view of the above discussion, revision petition is allowed. Impugned order is set aside only to the extent of granting permission to the contesting respondent-plaintiff to file suit afresh.

(Para 16)

*Further held,* that it is clarified that any observation hereinabove in this order shall not give any right/cause of action to the respondent/plaintiff to move any fresh application for amendment of their plaint. For all purposes, their suit shall be treated to have been dismissed as withdrawn.

(Para 17)

Vikas Mohan Gupta,Advocate, *for the petitioner.*

Anish Setia, Advocate, for respondents No.4, 5 & 8 to 14.

**RAMENDRA JAIN, J. (ORAL)**

(1) Through this revision petition under Article 227 of the

Constitution of India, challenge has been laid to order dated 12.02.2014 (Annexure P-1) of the trial Court, permitting the respondents-plaintiff to withdraw their suit with permission to file fresh one, allowing their application under Order 23 Rule 1(3) CPC.

(2) Briefly stated, ancestors of respondents No.1 to 14, namely, Hans Raj and Kidar Nath, filed a suit on 19.11.1997 against the petitioner and his brother Jiwan Lal for declaration and permanent injunction to the effect that they were owner in possession of 2/3rd share in shop bearing No.2959/3, situated in Ban Bazar, Patiala, shown in red colour, which was on rent with respondent No.7. The petitioner and his brother be restrained from dispossessing them from the suit property. Upon notice, petitioner and his brother filed written statement on 02.09.1998. When the plaintiffs failed to file their replication despite availing sufficient opportunities, their right to file the same was rejected vide order dated 20.09.1999. Thereafter, suit was dismissed in default vide order dated 21.08.2003, which upon application of the ancestors of the contesting respondents, was restored on 30.08.2013. Issues were re-framed on 31.01.2014. Immediately thereafter, contesting respondents-plaintiff moved application under Order 23 Rule 1(3) CPC for withdrawal of their suit with permission to file fresh one. Despite strong contest by the petitioner, the said application of the respondents-plaintiff was allowed by the trial Court vide impugned order permitting the contesting respondents-plaintiff to withdraw their suit with liberty to file fresh one.

(3) Learned counsel for the petitioner *inter alia* contends that great prejudice has been caused to the petitioner on account of the impugned order, granting liberty to the contesting respondents-plaintiff to file fresh suit in view of the fact that petitioner was made to suffer and litigate for around 17 years for a frivolous suit of the contesting respondents-plaintiff. The trial Court failed to appreciate that earlier suit of the contesting respondents-plaintiff was dismissed for non-prosecution and even after its restoration and recasting of issues, the contesting respondents-plaintiff, instead of leading any evidence to prove their case, moved application under Order 23 Rule 1(3) CPC for withdrawal of their suit with *mala fide* intentions on the false and frivolous ground of wrong mentioning of genealogy of the parties in para 1 of the plaint. The trial Court also failed to appreciate that the ground, on which contesting respondents-plaintiff prayed for withdrawal of suit, was not specifically mentioned in their application under Order 23 Rule 1(3) CPC. Therefore, the trial Court ought not to

have permitted the contesting respondents-plaintiff to withdraw their suit with permission to file fresh one. In support of his argument, he has placed reliance upon the judgments in ***Chander and others*** *versus* ***Gulzari Lal and others***[1] and ***Baljit Singh*** *versus* ***Jot Ram***[2].

(4) On the other hand, learned counsel for the contesting-respondents-plaintiff, vehemently opposing the above submissions of learned counsel for the petitioner and pleading the legality and validity of the impugned order, contends that relationship in between the parties was wrongly described in para 1 of the plaint, which had material bearing on the merit of the case. The above mistake falls under the definition of "formal defect" under Order 23 Rule 1(3) CPC. Therefore, the trial Court rightly allowing their application under the said provision has validly permitted them to file fresh suit. In support of his arguments, learned counsel for the contesting respondents placing reliance on the judgments of Andhra Pradesh High Court in ***Lakshmanna*** *versus* ***Chinna Govindappagari***[3] and Gujarat High Court in ***Arvindkumar Ratiall Punatar*** *versus* ***Yogeshkumar Harilal Shah***[4] further contends that delay, if any, during trial was on behalf of the petitioner-defendant and not on account of any negligence of the contesting respondents-plaintiff.

(5) Having given considerable thought to the submissions made by learned counsel for both the sides, I find force in the submissions made by learned counsel for the petitioner for the reasons to follow.

(6) One Charan Dass had purchased the suit property vide registered sale deed dated 11.05.1939 from the father of the contesting-respondents- plaintiff. Thereafter, some portion of the suit property was given to the contesting respondents-plaintiff on rent. To counter the eviction petition, ancestors of the contesting respondents-plaintiff, namely, Hans Raj and Kidar Nath filed a suit for declaration and permanent injunction claiming themselves to be owner in possession of the suit property to the extent of 2/3$^{rd}$ share on the basis of some family settlement in the year 1950, which was dismissed in default on 21.08.2003 and was restored upon application of the contesting respondents-plaintiff on 30.08.2013, after approximately ten years. The stand of learned counsel for contesting respondents-plaintiff that delay

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[1] 1979 PLJ 584 (P&H)

[2] 1994 PLJ 570 (P&H)

[3] 1998(3) ALD 110

[4] 1999 AIHC 3464

of ten years in restoration of the suit was on account of the conduct of the petitioner as he did not file reply to their application for restoration of the suit for such a long period.

(7) To counter the above stand of learned counsel for the respondents-plaintiff, learned counsel for the petitioner has submitted that respondents-plaintiff intentionally and deliberately impleaded their numerous real brothers as proforma defendants, having hand in glove with each other. Therefore, a long period of ten years had consumed in service of the proforma defendants. Consequently, delay, if any, in disposal of the application of the contesting respondents-plaintiff was not on account of any fault of the petitioner, rather is on account of intentional and deliberate evading of service by the performa defendants.

(8) Admittedly, written statement was filed on 02.09.1998, within ten months of filing of the suit and receipt of notice without any delay. In the written statement, the petitioner categorically pointed out that relationship shown by the contesting respondents-plaintiff in para 1 of the plaint was incorrect. Despite having come to know about this fact, contesting respondents-plaintiff did not choose to amend their plaint for mentioning correct relationship in between the persons shown in para 1 of the plaint, rather got dismissed the suit in default. Contesting respondents-plaintiff did not make any effort to correct the said mistake, even by filing replication or moving application for amendment of the plaint or at the time of recasting of issues upon their application in the year 2013. Therefore, their application for withdrawal of the suit, in the considered opinion of this Court, has illegally and wrongly been accepted by the trial Court, inasmuch as mentioning of wrong relationship in para 1 of the plaint at the most can be termed as a typographical or clerical mistake and not as a 'formal defect'.

(9) The best course available to the contesting respondents-plaintiff was to amend their plaint instead of maintaining silence for 17 years for which period, the petitioner has unnecessarily been made to suffer a great hardship. Instead of amending their plaint to correct the typographical mistake in mentioning relationship of the parties, contesting respondents-plaintiff went on avoiding the same. Therefore, for their own fault, they should not have been unfairly rewarded by the trial Court, allowing their application to withdraw their suit with permission to file fresh one.

(10) Finding of the trial Court, while accepting the application of the contesting respondents-plaintiff that no prejudice would be caused to the petitioner, in case, contesting respondents-plaintiff are permitted to withdraw their suit with liberty to file fresh one, is completely illegal, inasmuch as the trial Court did not appreciate that petitioner had already been made to suffer for a long period of 17 years to fight for his legal right. The trial Court ought to have considered this aspect of the matter also while passing the impugned order. It could permit the contesting respondents- plaintiff only to withdraw their suit without granting permission to file fresh one.

(11) Since mentioning of wrong relationship in para 1 of the plaint has been held to be a typographical mistake, therefore, no benefit of the authority relied upon by learned counsel for the respondents having distinguishable facts, can be given to them.

(12) A Division Bench judgment of this Court in ***Chander and others*** (*supra*) has held that it is for the trial Court to specify as to what was the 'formal defect' in the suit of the contesting respondents-plaintiff on account of which the same was likely to fail. In the instant case, the trial Court while passing the impugned order has not specified as to what was the 'formal defect', what to talk of giving any cogent and convincing reasoning for permitting the contesting respondents-plaintiff to withdraw their suit with liberty to file fresh one. Therefore, impugned order is completely illegal.

(13) It is also not disputed by learned counsel for contesting respondents-plaintiff that in their application under Order 23 Rule 1(3) CPC for withdrawal of their suit, they had not specified the 'formal defect' on account of which their suit would fail. Therefore, this Court is not able to find out from the impugned order as to what weighed in the mind of the trial Court, while allowing their application aforesaid or as to what was the formal defect in the suit. It was incumbent upon the trial Court to record its satisfaction as to what was the formal defect in the suit, which may have resulted into dismissal of the same before passing the impugned order. Since the impugned order is silent in this respect, the same is not liable to be sustained from any angle. Reference can be made to the judgment of this Court in ***Bansi Tal Clarence*** *versus* ***United Church of Northern India Trust Asse. Regs Office, Bombay***[5].

[5] 1995 (1) PLR 139

(14) In ***Baljit Singh's*** *case (supra),* this Court has held that the trial Court, while granting permission to file a fresh suit, was required to give specific finding that there was a 'formal defect' in the plaint on account of which the suit is likely to fail. Thus, the order impugned in the revision suffers from material irregularity and is not sustainable in law.

(15) In the present case, the trial Court committed a grave error in granting permission to file a fresh suit without recording any finding in the impugned order. Therefore, the judgment relied upon by learned counsel for the petitioner is fully applicable to the facts of the case in hand.

(16) In view of the above discussion, revision petition is allowed. Impugned order is set aside only to the extent of granting permission to the contesting respondents-plaintiff to file suit afresh. The impugned order qua dismissal of suit is upheld.

(17) It is clarified that any observation hereinabove in this order shall not give any right/cause of action to the respondents-plaintiff to move any fresh application for amendment of their plaint. For all purposes, their suit shall be treated to have been dismissed as withdrawn.

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*Amit Aggarwal*