

indraj Singh and ors. Vs. Satdev Singh

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Court : Delhi

Decided On : Feb-05-1997

Reported in : 1997IIAD(Delhi)939; 67(1997)DLT385

Judge : S.N. Kapoor, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 23, Rule 1(4)

Appeal No. : Civil Revision Appeal No. 113 of 1997

Appellant : indraj Singh and ors.

Respondent : Satdev Singh

Advocate for Pet/Ap. : J.K. Jain, Adv

Judgement :

S.N. Kapoor, J.

(1) The petitioner/defendant challenges an order dated 10th January, 1997 allowing amendment of the plaint to claim relief of possession in an Injunction Suit No. 245/88.

(2) Brief facts giving rising to the present petition are as under :

(3) The plaintiff/respondent filed a suit for injunction on 27th October, 1988 for restraining the father of the defendant/petitioner Shri Mange Ram from raising any

construction over the land in dispute. But the deceased defendant forcibly dispossessed the plaintiff on 28th July, 1988. It appears that a contempt application was also filed. But the deceased Mange Ram expired. The plaintiff filed a suit for possession on 4th October, 1995 which was entrusted to the Court of Shri Ravi Kumar. That Suit No. 193/95 in S.D. Singh v. Inder Raj & Ors., was dismissed as withdrawn unconditionally without giving any permission to file afresh. In view of these changed circumstances, due to death of Mange Ram, the Contemnor in the earlier suit and withdrawal of the Second Suit No. 193/95 on account of technical objections, an application for amendment was moved claiming the relief of possession in respect of the area constructed by the deceased defendant.

(4) This application was contested by the petitioner/defendant on the ground that suit is barred by Section 11, Cpc, Order 2 Rule 2 and Order 23(l)(4), Civil Procedure Code

(5) The learned Civil Judge by impugned order feeling that the period of limitation for recovery of possession being 12 years, has not expired held that the question of limitation would not arise. The amendment sought in the suit was not barred by Order 2 Rule 2, Civil Procedure Code for this was the first suit in which the amendment was being sought and not the subsequent suit. This Order 2 Rule 2 would have certainly applied in the subsequent suit which was filed and withdrawn.

(6) Learned Counsel for the petitioner contended that simply by moving an application for contempt, it was not established that the possession was forcibly taken by raising construction. There may be some substance in his submission if it is established that the defendant/petitioner - were in possession as the leaned Counsel claimed. The question of possession is a question which cannot be considered and decided at this stage. It is a matter of trial, it is not a matter of pleading; it is not a case of withdrawal of admission. It is not clear cut case of bar of Order 2 Rule 2, CPC also which could be decided without recording any evidence. If without recording any evidence, the matter cannot be decided, we have to uphold the view that by the learned Civil Judge and still further, the reason given by the learned Trial Court are also not without substance and cannot be

lightly brushed aside. Inasmuch as bar under Order 23 Rule 1(4) is concerned, it reads as under :

RULE1. Withdrawal of suit or abandonment of part of claim.- (4) Where the plaintiff- (a) abandons any suit or part of claim under Sub-rule (1), or (b) withdraws from a suit or part of a claim without the permission referred to in Sub-rule (3), shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(7) A bare reading makes it crystal clear that the plaintiff 'shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim'. It does not debar amendment of plaint in a suit which is already pending since before the institution of the suit, which is withdrawn.

(8) So far as the question of taking technical pleas is concerned, the defendant/ petitioner could certainly take those very pleas on which he is seeking quashing of the order in his amended written statement.

(9) For the foregoing reasons, I was not inclined to interfere in the impugned order dated 10.1.97. Now the petitioner has also filed an affidavit withdrawing the petition. Revision petition is accordingly dismissed in limine.

(10) A copy of this order be sent to the learned Trial Court concerned through learned District Judge for information and to proceed in accordance with law.

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