

CR-6164-2009

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**RA-CR-183-CII-2013 (O & M) in/and
CR-6164-2009**

Date of Decision: 27.01.2015

Kuldeep Singh

... Petitioner(s)

Versus

Virender Singh and another

... Respondent(s)

CORAM: HON'BLE MR. JUSTICE PARAMJEET SINGH

- 1) Whether Reporters of the local papers may be allowed to see the judgment ?.
- 2) To be referred to the Reporters or not ?.
- 3) Whether the judgment should be reported in the Digest ?

Present: Mr. Kanwaljit Singh, Sr. Advocate with
Ms. Gurdeep Kaur, Advocate,
for the applicant-respondent no.1.

Mr. K.S.Cheema, Advocate,
for non-applicant/petitioner.

Paramjeet Singh, J.

CM-23709-CII-2013

Having heard learned counsel for the parties and in view of grounds mentioned in application, delay of one day in filing review application is condoned.

Disposed of.

CM-23708-CII-2013

Allowed, as prayed for. Annexures A-1 to A-3 are taken on record.

RA-CR-183-CII-2013

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Instant review application has been filed under Order 47 Rule 1 read with Section 114 CPC for recalling the order dated 19.09.2013 passed by this Court in Civil Revision No.6164-2009.

I have heard learned counsel for the parties and perused the record.

Unfortunately, this is a family dispute raised by the petitioner against his son-respondent no.1 and brother-respondent no.2. The petitioner and son-respondent no.1 are practicing advocates. Since I am dealing with the review application, therefore, I need not narrate other details here.

The review has been sought on the ground that the applicant-respondent no.1 had engaged Sh. Rameshwar Singh Malik as an advocate. The civil revision was admitted and remained pending. Learned counsel earlier representing the applicant has been elevated as a Judge of this Court, as such the applicant could not become aware of hearing of the case. These facts have not been disputed by learned counsel for petitioner.

I must make it crystal clear, right at the outset, that *audi alterem partem* is a basic value of our judicial system. Hearing the party affected is too deeply embedded in the consciousness of our constitutional order. The right to be heard is of the essence but hearing means fair opportunity to present one's point on a dispute. It would be apposite to reproduce a relevant extract of the decision rendered in

P.N.Eswara Iyer and others vs. Registrar, Supreme Court of India

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(1980) 4 Supreme Court Cases 680:

“5. The substantive power of review and the procedure for its exercise are essential for any judicial system if unwitting injustice is to be obviated to the extent pragmatically possible, without being blinded by any claim to impervious infallibility in the first judgment. Even Judges, more than other mortals, to (sic are to) correct injustice if the error is discovered within working limits. Thus, the root principle of judicial review is profound. Judge Learned Hand commended to the Judges the great rule of humility contained in the oft-repeated words of Cromwell: “I beseech ye in the bowels of Christ, think that ye may be mistaken” said Oliver Cromwell just before the battle of Dunbar. These words Judge Hand said he would like to have written “over the portals of every church, every court-house and at every crossroad in the nation”. (emphasis added) Such is the high-minded tolerance with which this Court re-examines its own orders to eliminate the happenstance of injustice unhampered by judicial hubris.”

Since learned counsel for the non-applicant/petitioner agrees that order dated 19.09.2013 may be recalled and civil revision be heard on merit, I need not deliberate any further.

With the consent of learned counsel for the parties and keeping in view the fact that the matter is already pending before the civil court, the order dated 19.09.2013 is recalled, civil revision No.6164-2009 is restored to its original number and taken up on board for hearing on merit.

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Instant revision petition has been filed under Article 227 of the Constitution of India for setting aside the order dated 03.10.2009 (Annexure P/3) passed by learned Civil Judge (Junior Division) Charkhi Dadri, whereby application moved by the petitioner for recalling order dated 02.09.2005 has been dismissed.

Brief facts relevant for disposal of this revision petition as averred in the petition are that the petitioner-plaintiff filed a suit for declaration and possession against the respondents-defendants. It was a family dispute. Due to the intervention of the relatives and friends, the defendants allegedly agreed and assured the plaintiff that they will retransfer the suit property in his name. There was an oral compromise between the parties in the presence of relatives and friends. Believing the assurance of the defendants and relatives, the plaintiff withdrew the aforesaid suit without liberty to file fresh suit on the same cause of action, after 15 days of its filing and even before effecting service upon the defendants. The defendants did not abide by the oral compromise and assurance and resiled from the same. Thereafter, the petitioner moved an application dated 21.08.2006 for recalling order dated 02.09.2005 and for restoration of the aforesaid suit for decision on merit. The said application was dismissed vide impugned order dated 03.10.2009 (Annexure P/3). Hence, this revision petition.

I have heard learned counsel for the parties and perused the record.

Learned counsel for the petitioner contended that the suit was

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dismissed as withdrawn in view of oral compromise between the parties to the suit, even the service was not effected upon the respondents-defendants. Admittedly, the suit was withdrawn without seeking permission to file a fresh suit on the same cause of action. Although, the petitioner moved an application after about one year, but no prejudice would be caused to any of the party if suit is restored; rather if the suit is not restored to its original number, injustice would be caused to the petitioner. The Court has inherent power to restore the suit under Section 151 CPC. Learned counsel for the petitioner has relied upon a judgment of Hon'ble Supreme Court in *Jet Ply Wood Private Limited and another vs. Madhukar Nowlakha and others, 2006(2) RCR (Civil) 593*.

Per contra, learned senior counsel for respondent no.1 contended that provisions of Order 23 Rule 3 CPC will apply in the present case. The plaintiff has abandoned his claim and suit cannot be restored. Learned senior counsel has tried to distinguish the law laid down in *Jet Ply Wood Private Ltd. (supra)* and submitted that the same will not be applicable in the matter in hand. In support of his contentions, learned senior counsel relied upon *Amteshwar Anand vs. Virender Mohan Singh and others* 2005 (4) R.C.R.(Civil) 485.

I have considered the rival contentions of learned counsel for the parties.

Admittedly, the petitioner-plaintiff had filed a suit against his son and brother, so the suit is between the family members. Even no service was effected upon the respondents-defendants as suit was

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withdrawn within 15 days of its filing. The Hon'ble Supreme Court in the case of ***Jet Ply Wood Private Ltd. (supra)*** has held that the Court has inherent power to recall its order and restore the suit. The Hon'ble Supreme Court in the aforesaid judgment has held as under:-

*“25. The aforesaid position was reiterated by the learned Single Judge of the High Court in his order dated 4th February, 2005, though the language used by him is not entirely convincing. However, the position was clarified by the learned Judge in his subsequent order dated 14th March, 2005, in which reference has been made to a bench decision of the Calcutta High Court in the case of **Rameswar Sarkar (supra)** which, in our view, correctly explains the law with regard to the inherent powers of the Court to do justice between the parties. There is no doubt in our minds that in the absence of a specific provision in the Code of Civil Procedure providing for the filing of an application for recalling of an order permitting withdrawal of a suit, the provisions of Section 151 of the Civil Procedure Code can be resorted to in the interest of justice. The principle is well established that when the Code of Civil Procedure is silent regarding a procedural aspect, the inherent power of the court can come to its aid to act ex debito justitiae for doing real and substantial justice between the parties. This Court had occasion to observe in the case of **Manohar Lal Chopra vs. Rai Bahadur Rao Raja Seth Hiralal, AIR 1962 SC 527**, as follows:*

'It is well settled that the provisions of the Code are not exhaustive, for the simple reason that the Legislature is incapable of contemplating

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all the possible circumstances which may arise in future litigation and consequently for providing the procedure for them."

26. Based on the aforesaid principle, the Division Bench of the Calcutta High Court, in almost identical circumstances in Rameswar Sarkar's case, allowed the application for withdrawal of the suit in exercise of inherent powers under Section 151 of the Code of Civil Procedure, upon holding that when through mistake the plaintiff had withdrawn the suit, the Court would not be powerless to set aside the order permitting withdrawal of the suit."

In view of the law laid down cited above, the Court has inherent power to restore a suit withdrawn without permission to file afresh on the same cause of action. Admittedly in the present case, the suit was got dismissed as withdrawn by the petitioner-plaintiff on account of oral compromise effected between the parties in hope that the respondents-defendants will restore back the property to him. The case was withdrawn at the initial stage and even before effecting service upon the respondents-defendants. The suit was withdrawn without seeking permission to file afresh on the same cause of action. The withdrawal of suit without permission to file on the same cause of action may be by mistake or the wrong advice. When the situation is such, then the Court is not powerless to order restoration specifically when no prejudice would be caused to anyone specially the defendants as the *lis* would be decided on merit in accordance with law. In such circumstances, the Court has inherent powers to recall the order and restore the suit. The

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Code of Civil Procedure is silent regarding the procedural aspect in such cases, therefore, the inherent power of the court can come to its aid to act *ex debito justitiae* for doing real and substantial justice between the parties. The case law *Amteshwar Anand (supra)* cited by learned senior counsel for respondent no.1 is not applicable to the facts and circumstances of the present case. In *Amteshwar Anand (supra)*, the dispute between the parties was with regard to written agreement on which some persons had not signed and there was no issue with regard to withdrawal of suit with or without permission to file fresh suit.

In view of this, present revision petition is allowed. Order dated 03.10.2009 (Annexure P/3) is set aside and the application dated 21.08.2006 filed by the petitioner for restoration of civil suit is allowed. Earlier too, vide order dated 19.09.2013, which has now been recalled, the suit was ordered to be restored to its original number and trial Court was directed to proceed in accordance with law. Since there has been no stay against order dated 19.09.2013 passed by this Court, the suit has proceeded in pursuance thereto after completion of pleadings and now is at the evidence stage, therefore, it is directed that proceedings in the suit will continue further from the stage at which they are.

No order as to costs.

27.01.2015

parveen kumar

**(Paramjeet Singh)
Judge**