

459.

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

Civil Revision No.2190 of 2005 (O&M)

Date of decision:14.01.2016

Town Improvement Trust, Pathankot, through its Chairman.

... Petitioner

versus

Mulakh Raj and others

.... Respondents

CORAM: HON'BLE MR. JUSTICE K. KANNAN

Present: Mr. S.C. Pathela, Advocate,
for the petitioner.

Mr. Rai Singh Chauhan, Advocate,
for the respondents.

1. Whether reporters of local papers may be allowed to see the judgment ? **Yes.**
2. To be referred to the reporters or not ? **Yes.**
3. Whether the judgment should be reported in the digest ? **Yes.**

K.Kannan, J. (Oral)

1. The revision is by the defendant who is aggrieved that a suit for injunction filed by the respondents was dismissed on a contest that in the trial court, a plea in defence had been that the plaintiff was an unauthorized occupant and the claim by him that he was a tenant was not true. In the appeal against the decree of dismissal, he had moved an application for withdrawal of the appeal and the suit and the court has allowed for both the suits and the appeal to be withdrawn. The defendant is in revision to point out

that while the plaintiff may abandon the suit by resort to Order 23 Rule 1 CPC without any fetter bring the trial stage, such a privilege does not extend in the appellate court to abandonment of the suit. He may choose to abandon the appeal but he cannot have an order allowing for the suit to be also dismissed as withdrawn. This would mean effacing adverse findings that have been recorded all together. Such an order ought not to be passed. The counsel would refer me to the decision of the Supreme Court in **R. Rathinavel Chettiar Versus V. Sivaraman-1999(4) SCC 89** that held that once a decree is passed by the trial court and it is challenged in appeal, it would not be open for the plaintiff to withdraw the suit so as to destroy the decree and the rights which have come to be vested in the parties unless very strong reasons are shown that it would not cause prejudice to anybody's vested rights. The point has been also considered in the judgment of this court in **Gian Chand Verus Pavitar Singh-1993 PLJ 360** and yet another judgment in **Raj Rani Versus Ram Lal-1999(2) PLJ 105**.

2. The counsel for the respondents has two alternative arguments to make: one, the court may direct the applications already filed for withdrawal to be disposed of with a direction for fresh consideration on merits by the appellate court; or retain the order itself as passed, for, no prejudice could be caused to the Improvement Trust, for, after all, only his suit has been dismissed

and the Improvement Trust has not an executable decree which could be effaced by withdrawal of the suit. I reject both these contentions of the respondents and allow the civil revision for the following reasons.

3. Withdrawal of a suit and withdrawal of appeal have different legal consequences. A withdrawal of an appeal at the appellate court will mean abandonment of appeal and confirmation of the judgment already given. There is no fetter for any person to have the appeal withdrawn, for, the law takes this course that a party, who was abandoned an important forum of adjudication for prosecution of the case, will be barred from agitating the same right at the same forum. To that extent the respondent in appeal cannot be prejudiced if an appeal is withdrawn. If ever a suit is also withdrawn, it will be wrong to assume because the defendant-respondent did not have an executable decree, no prejudice could be caused. If, in this case, the suit had been filed for injunction on a plea that he was a tenant and the defendant was contending that the defendant was not a tenant and that he was an unauthorized occupant and the court renders an adjudication on merits and holds the plaintiff to be an unauthorized occupant and dismisses the suit, the decision will become final if the appeal alone is withdrawn. If the suit is also permitted to be withdrawn, it means that in a future action by the defendant against the same plaintiff characterizing him

as an unauthorized occupant, the plaintiff can have an objection taken again that he is not an unauthorized occupant and vex a repetition of the same proceedings and seek for adjudication also that he was only a lessee. That cannot be permitted to be done. The prejudice is serious, for, it may impair the defendant to work out any rights which have accrued through the dismissal of the plaintiff's suit.

4. It is wrong to assume that only the plaintiff has a right to espouse in a suit. A dismissal of the suit is another way of recognition of right of the defendant which cannot be taken away by the plaintiff's assertion. There may be instances where only the plaintiff asserts a right and the defendant has no right in the property, but in situation where the defendant pleads for certain rights and the court on examination of respondent's contention held that the plaintiff was not even proving any better right than the defendant, the dismissal of the suit results in recognition of the particular right of the defendant. That right cannot be right to be effaced by withdrawal of the suit.

5. The counsel has also an argument to make that he should be permitted to withdraw the application which had already filed and allow the prosecution of appeal. An abandonment once done voluntarily cannot be withdrawn. What cannot be withdrawn voluntarily is only that withdrawal which affects the other party. A

self-infliction of withdrawal of appeal is a matter of discretion by the appellant but a withdrawal of suit is not a matter of discretion. It has to be examined on the touchstone of whether it causes prejudice to the defendant-respondent or not. I have already explained that withdrawal of suit at the appellate stage is bound to constitute a prejudice and, therefore, the withdrawal of appeal must be restricted as such and cannot operate to create a withdrawal of suit as well. There is no question therefore of allowing the withdrawal of the application filed before the appellate court for addressing the arguments on merits before the appellate court. The permission pleaded before me by the respondents is declined.

6. The revision petition is allowed which will have the effect of withdrawal of appeal and declining permission to withdrawal of suit.

(K.KANNAN)
JUDGE

14.01.2016
sanjeev