

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CR No. 5188 of 2011 (O&M)
Date of Decision:- 19.02.2016

Ude Paul

....Petitioner

Versus

Subhash and others

....Respondents

CORAM: HON'BLE MR. JUSTICE SHEKHER DHAWAN

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

Present:- Mr. K.K.Chaudhary, Advocate,
for petitioner.

Mr. Ajay Jain, Advocate,
for respondents No.8, 9, 13 & 14.

SHEKHER DHAWAN, J.

Present revision petition under Article 227 of the Constitution of India for setting aside the impugned order dated 17.03.2011 passed by Additional District Judge, Sirsa whereby the application for withdrawal of appeal was allowed but liberty was not granted to file a fresh suit for declaration on new legal grounds as well as grounds already taken.

2. Relevant facts of the case; petitioner had earlier filed a suit for declaration on the ground that he is the owner in possession of the suit land and the entries in the revenue record relating to the said suit land are incorrect. Plea was taken by the petitioner that originally predecessor of the parties had an estate namely Patti Raju Nehrana, Tehsil and District Sirsa.

Land owners of Patti Raju Nehrana, Tehsil and District Sirsa used this land

for mutual benefits of the land owners and the same was never used for common purpose of the village. Petitioner had been cultivating the suit land since 05.11.1985 and the possession of the plaintiff over the suit land was continuous, peaceful and without payment of rent etc. qua other land owners of Patti. That way, the rights of possession ripened into ownership rights on the basis of adverse possession.

3. Respondent contested the suit. However, the Court below dismissed the said suit. Appeal was preferred before the first Appellate Court. During the pendency of the appeal an application was also filed for additional evidence under Order 41 Rule 27 CPC and subsequently present petition moved.

4. An application for allowing the petitioner to withdraw the appeal as well as application under Order 41 Rule 27 CPC was filed. Permission was sought to withdraw the civil suit. However, the Court below accepted the prayer of applicant-petitioner to the extent that he was allowed to withdraw the present appeal as well as application for additional evidence but the prayer for permission to withdraw the civil suit and to file fresh civil suit with fresh grounds as well as old grounds was declined and petitioner has challenged the said part of the order dated 17.03.2011.

5. Learned counsel for petitioner submitted that application was filed by the petitioner as there was a formal defect in the suit and earlier the suit was dismissed by the Court below on the ground that suit was not maintainable. The Court below had declined the prayer to withdraw the suit with liberty to file the fresh suit on new legal grounds as well as old grounds without any reason and the said order is liable to be set aside.

Learned counsel for petitioner also submitted that such a permission can be

granted by the appellate Court while deciding the application under Order 23 Rule 1 CPC. Such a permission can be granted by appellate Court during the second appeal also. On this point reliance was placed upon the judgment of co-ordinate Bench of this Court in case **Veer Bhan and another Vs. Madan Gopal** 1991(1)PLR 199 wherein such a view was taken by this Court. Reliance was also placed on another judgment of co-ordinate bench of this Court in case **Phool Chand Vs. Shyam Sunder and another** 2013(2) RCR (Civil) 469 wherein this Court had taken identical view that while deciding an application under Order 23 Rule 1 CPC trial Court ought to have declined prayer for withdrawal of the suit after declining him leave to file the fresh suit. An application under Order 23 Rule 1 of CPC could not have been bifurcated so as to dismiss the suit as having been withdrawn without granting him any leave to file a fresh suit. So the present petition be accepted and petitioner be allowed to withdraw the suit with liberty to file fresh suit on the same cause of action as well as fresh grounds.

6. Learned counsel for respondent while opposing the contention of learned counsel for the petitioner submitted that the Court below has rightly taken a view that such a permission cannot be granted after decision having been rendered by the trial Court after appreciating the entire evidence and as such present petition is liable to be dismissed.

7. Having considered the submissions made by learned counsel for the parties, this Court is of the considered view that on an application under Order 23 Rule 1 CPC, the Court below passed the order for withdrawal of application for additional evidence as well as to withdraw the appeal, but declined the prayer to withdraw the suit with liberty to file fresh

one on the ground already taken by the petitioner. In fact, the Court below has justified the grounds for declining that part of the prayer in the application. First of all, present petitioner has not given any detailed reasoning in the application as to why petitioner was withdrawing the present suit and seeking permission to file fresh suit on the same cause of action and on the fresh grounds. In the application, simple plea has been taken that there is a formal defect. Needless to mention that when such a prayer is being made after recording of findings by the Court below after completing trial, then such an application for permission to file fresh suit can be granted only in exceptional cases. It is not disputed that permission can be granted to withdraw the suit by First Appellate Court and even by the Second Appellate Court, but there must be some justifiable grounds for that. In the present case there appears to be no ground for allowing such a prayer. Specially when the findings had already been recorded by the trial Court and after decision of the civil suit.

8. Similar matter was before Hon'ble Supreme Court in case **Executive Officer, Arthanareswarar Temple Vs. R. Sathyamoorthy** 1999(2) RCR (Civil) 193 wherein it was held that on an application under Order 23 Rule 1 CPC, if an appeal was preferred by unsuccessful plaintiff against the judgment of the trial Court dismissing the suit and if the plaintiff-appellant wanted to withdraw not only appeal but also the suit unconditionally, then such permission so far as the withdrawal of the suit was concerned, can be granted if there was no question of any adjudication on merits in favour of the defendants by the trial Court being nullified by such withdrawal. In fact, that is the determining point for decision of such a prayer because if the trial Court has already adjudicated the matter, grant of

such permission shall result into nullifying the trial which is not warranted by law. Hon'ble Supreme Court observed that if such finding by the trial Court in favour of the defendant would get nullified, such permission for withdrawal of the suit should not be granted. There are identical facts of the case in hand and the Court below has rightly declined the prayer of the petitioner to withdraw the present suit and to file fresh one on the same cause of action and also by taking fresh grounds. This Court does not find any illegality in the order under challenge.

9. In view of the above, present petition being devoid of any merit, stands dismissed.

February 19, 2016

mohan

(SHEKHER DHAWAN)
JUDGE