

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

**Civil Revision No.3501 of 2014 (O&M)
Date of Decision: 21.11.2017**

Sadhu Singh

.....Petitioner

Vs

Prem Kumar Sharma and others

....Respondents

CORAM: *HON'BLE MR. JUSTICE RAJ MOHAN SINGH*

Present: Mr. Arun Takhi, Advocate
for the petitioner.

Mr. Kanwaljot Singh, Advocate
for respondent No.3.

RAJ MOHAN SINGH, J.

[1]. Petitioner has challenged the order order 18.04.2014 passed by the Additional District Judge (Adhoc) Fast Track Court, Hoshiarpur whereby the application filed by the petitioner under Order 23 Rule 1 CPC for permission to withdraw the suit was dismissed.

[2]. Brief facts are that plaintiff/petitioner filed a suit for mandatory injunction directing the defendants to remove wall/super structure/construction from the *rasta* measuring 3 *karams* as shown by the configurations attached in the plaint

and the site plan. Consequent relief of permanent injunction restraining the defendants from raising any sort of construction on the *rasta* shown in the site plan was also sought.

[3]. The trial Court after full-fledged trial dismissed the suit vide judgment and decree dated 26.05.2010. The plaintiff/petitioner preferred an appeal before the lower Appellate Court and thereafter moved the application under Order 23 Rule 1 CPC for permission to withdraw the suit itself at the appellate stage. It was stated in the application that earlier a civil suit for mandatory injunction was filed against Vidya Dhar. The defendants being legal representatives of Vidya Dhar were bound by the decree. The filing of the suit against the present defendants, who were the legal heirs of Vidya Dhar were on account of advice of the counsel. In fact, the execution should have been filed in decree earlier passed and, therefore, there was a technical defect.

[4]. The application was opposed by the defendants/respondents and lower Appellate Court dismissed the application on the ground that once the trial Court has recorded the findings against the plaintiff and at the appellate state, if the suit itself was allowed to be withdrawn, it would amount to negate the findings recorded by the trial Court before whom the matter was processed since the year 2002. Since the

trial Court had recorded positive findings, therefore, a valuable right was accrued to the defendants. The lower Appellate Court declined to grant permission for withdrawal of the suit.

[5]. Learned counsel for the petitioner by relying upon **Hazara Singh and others vs. Lal Singh, 2012(1) PLR 258** contended that the suit can be allowed to be withdrawn at the appellate stage. Since no prejudice would be caused to the defendants as the plaintiff has sought to abandon his action, therefore, the permission to withdraw the suit should have been granted by the lower Appellate Court.

[6]. Learned counsel for the respondents contended that the plaintiff filed a suit in the trial Court on the basis of dimensions mentioned in the plaint along with site plan. The suit remained pending before the trial Court since the year 2002 and the plaintiff never thought of the earlier decree dated 17.08.1993 during the period from 2002 to 2010 and thereafter even after filing the appeal before the lower Appellate Court on 14.06.2010, the present application came to be filed only on 07.02.2014 i.e. after about 3 years 8 months of filing of the appeal. The suit remained pending in the trial Court for about 8 years and the appeal remained pending before the lower Appellate Court for about 3 years 8 months when the application in question came to be filed. In nutshell, the application has

been preferred after about 12 years from the date of filing of the suit. In the suit for mandatory injunction, the plaintiff sought that the defendants be directed to remove the wall/super structure/construction from the *rasta* and sought permanent injunction restraining the defendants from raising any construction over the said *rasta*. The factum of decree dated 17.08.1993 passed by the trial Court was also taken consideration by the Court as well as in the judgment and decree dated 18.03.1996 passed by the lower Appellate Court and the order passed by the High Court in Regular Second Appeal. After due consideration of the said decree passed by the trial Court, judgment and decree passed by the lower Appellate Court and the decision rendered by the High Court in Regular Second Appeal, the trial Court dismissed the suit. Learned counsel relied upon **Pardhan and others vs. Mohar Singh and others, 2012(13) R.C.R. (Civil) 137.**

[7]. I have heard learned counsel for the parties.

[8]. In my considered opinion once the ground on which the suit itself was sought to be withdrawn at appellate stage was rejected by the Court while dismissing the application, the withdrawal at the appellate stage would create material prejudice to the defendants as the execution of the decree, if any, filed on the basis of earlier civil Court decree dated

17.08.1993 would be subject to the findings recorded by the trial Court on such decree in the subsequent suit filed by the plaintiff which was dismissed vide judgment and decree dated 26.05.2010 by the trial Court.

[9]. The factum of earlier decree was discussed in the fresh suit which was dismissed. The findings recorded by the trial Court after due consideration of earlier decree would be a fact which would bring out the case from the ambit of the reasons given by the Court in **Hazara Singh and others'** case (supra). The consideration of earlier decree in the judgment and decree passed by the trial Court would make this case distinct and the differentia is only a valuable right granted in favour of the defendants when the factum of earlier decree dated 17.08.1993 was duly considered while dismissing the suit by the trial Court on 26.05.2010.

[10]. In view of aforesaid while relying upon the ratio of **Pardhan and others's** (supra) I hold that the present case is distinguishable from the facts of **Hazara Singh and others'** case (supra). In view of judgment and decree passed by the trial Court while recording findings in favour of the defendants, the plaintiff cannot seek to wipe away the same by withdrawing the suit as it would create substantial prejudice to the defendants incase withdrawal of the suit is permitted at the appellate stage.

It is a case where the rights of the defendants were dealt with in the judgment and decree of the trial Court with reference to earlier decree dated 17.08.1993 which was upheld by the lower Appellate Court on 18.03.1996 and even upto the High Court. Therefore, the present case is at different parameters than the facts of **Hazara Singh and others'** case (supra).

[11]. For the reasons mentioned hereinabove, I find that there is no substance in this revision petition. The same is found to be devoid of merits and is accordingly dismissed.

November 21, 2017

Atik

**(RAJ MOHAN SINGH)
JUDGE**

Whether speaking/reasoned

Yes/No

Whether reportable

Yes/No