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IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CR No.6684 of 2016

Date of Decision : 10.11.2017

KISHAN CHAND AND OTHERS

....PETITIONERS

VERSUS

RAKESH KUMAR AND OTHERS

....RESPONDENTS

CORAM : HON'BLE MR. JUSTICE B.S. WALIA

Present: Mr. Sandeep Singal, Advocate for the petitioners.
Mr. Sanjeev Kumar Aggarwal, Advocate for the respondents.

B.S. WALIA, JUDGE (ORAL)

[1] Prayer in the revision petition is for setting aside order dated 08.08.2016 i.e. Annexure P-5, whereby application of the plaintiffs-petitioners for withdrawal of the suit as well as appeal with liberty to file fresh suit was dismissed.

[2] Brief facts of the case leading to the filing of the instant petition are that the plaintiffs-petitioners filed a suit on 17.07.2009, for a declaration with consequential of separate possession by way of partition. Defendant-respondent No.1 took up the stand in the written statement that prior to his death, father of the plaintiffs-petitioners had given the residential house in question to the father of defendant-respondent No.1 on the basis of oral partition of property. Suit filed by the plaintiffs-petitioners was dismissed vide judgment and decree Annexure P-2 dated 16.08.2014 by the learned Civil Judge (Sr.Divn.) Rohtak.

[3] Aggrieved, the plaintiffs-petitioners filed an appeal against the dismissal of the civil suit along with an application under Order 23 Rule 1

CPC on the ground that the suit had been dismissed on account of formal defects, consequently liberty be granted to withdraw the appeal as well as original suit to file fresh suit on the same cause of action. In response thereto, defendant-respondent No.1 took up the stand that appeal/suit could not be allowed to be withdrawn with liberty to file a fresh suit since the same did not suffer from any formal defects.

[4] Learned counsel for the defendant-respondent by relying upon paragraph No.17 of the judgment of the learned trial Court contended that a perusal thereof revealed that the plaintiffs-petitioners in their cross-examination had admitted that their father had made a oral settlement of the house and in view thereof, it was not open to them to challenge the settlement as on settlement, ownership had changed hands, consequentially, there was nothing for the legal heirs to receive on the death of Parkash Chand, i.e. father of the plaintiffs-petitioners.

[5] Learned counsel for the defendant-respondents also contended that cause of action had arisen on the oral settlement qua the property and the father of the plaintiffs-petitioners having died prior to 1974, institution of the suit on 17.07.2009 had rightly been held in paragraph No.21 of the judgment of the learned trial Court to be hopelessly time barred.

[6] Learned counsel for the respondents also referred to paragraph No.18 of the decision of the Hon'ble Supreme Court in 'R. Rathinavel Chettiar versus V. Sivaraman', 1994(4) SCC 89 to contend that where a decree passed by the learned trial Court is challenged in appeal, it would not be open to the plaintiff at the appellate stage to withdraw the suit, so as to destroy the decree and the rights which vest in the parties to the suit under the decree unless very strong reasons were shown that the withdrawal would not affect or prejudice

anybody's vested rights. Relevant extract of the of the decision of the Hon'ble Supreme Court in **R. Rathinavel Chettiar's** case (Supra) reads as under:-

“18. In view of the above discussion, it comes out that where a decree passed by the trial court is challenged in appeal, it would not be open to the plaintiff, at that stage, to withdraw the suit so as to destroy that decree. The rights which have come to be vested in parties to the suit under the decree cannot be taken away by withdrawal of suit at that stage unless very strong reasons are shown that the withdrawal would not affect or prejudice anybody's vested rights. The impugned judgment of the High Court in which a contrary view has been expressed cannot be sustained.”

[7] The suit was filed on 17.07.2009 in respect of cause of action which had accrued in the year 1970 i.e. at the time when the oral partition took place and the property in dispute i.e. residential house vested in respondent-defendant No.1. The father of the plaintiffs-petitioners died around about the year 1970 itself whereas the suit was filed on 17.07.2009 and was dismissed on 16.08.2014. Thereafter, an appeal was filed by the petitioners-plaintiffs. It is in the appeal that application was moved under Order 23 Rule 1 CPC for permission to withdraw the suit, with liberty to file a fresh suit on the same cause of action primarily on account of partial partition of the joint properties as also non joinder of necessary parties, i.e. daughters Chanderkala and Kailasho and son Hari Chand.

[8] Learned counsel for the respondents contended that Hari Chand was unmarried and left the house around 40 years ago. His whereabouts were unknown, accordingly he was presumed to be dead according to law.

[9] Learned counsel for the respondents contended that the suit having been filed much beyond the period of limitation and having been held to be hopelessly time barred, valuable rights had accrued to respondent No.1-defendant, therefore the plea of the petitioner-plaintiff under Order 23 Rule 1

of the CPC could not be allowed so as to nullify the admissions made by the petitioner-plaintiff with regard to oral partition having taken place way back in 1970 and of giving of the properties to one of the co sharer. Moreover, a finding had also been given regarding the civil death of Hari Chand and in case the plaintiffs-petitioners were allowed to withdraw the suit with liberty to file a fresh suit then the aforesaid finding would be erased and the respondent would be burdened with a second round of litigation to secure the same finding. Besides, the suit was hopelessly beyond limitation. Learned counsel for the respondents also contended that it was not a case where the petitioners-plaintiffs were unaware of the other properties sought to be partitioned by withdrawing the suit with liberty to file a fresh suit, therefore, in the circumstances, no case was made out for granting the liberty prayed for and that in the circumstances, the learned lower Appellate Court had rightly rejected the application.

10. The learned lower appellate court vide order dated 08.08.2016 while taking into account the decision of the Hon'ble Supreme Court in '**Avenue Supermarts Pvt. Ltd. versus Mrs. Nischint Bhalla and others**', 2015(4) R.C.R. (Civil) 782 held that since a finding had been given in favour of respondent-defendant No.1 in the judgment regarding partition, the application in hand could not be allowed and applicant i.e. petitioner-plaintiff could not be allowed to withdraw the suit with liberty to file a fresh suit on the same cause of action. Relevant extract of the decision of the learned lower Appellate Court is reproduced as under:-

*"6. In the case titled **Avenue Supermarts Pvt. Ltd. versus Mrs. Nischint Bhalla & Ors., 2015 (4) RCR (Civil) 782** it has been held by Hon'ble Apex Court that after the suit is decided in favour of a party, some right accrues in his favour and suit cannot be allowed to be withdraw at appellant stage. Thus, in case any findings has been given in favour of a person making that findings a part of the decree then the other party cannot seek the withdrawal of that suit*

and by withdrawal erasing such a findings. In the instant case, a perusal of para No.20 of the judgment clearly reveals that the applicant-appellant has admitted the oral partition many years ago and giving of the properties to one of the co share. Moreover, a findings has been given regarding civil death of Hari Chand and in case the applicant is allowed to withdraw the suit then with a permission to file fresh suit then the aforesaid finding would be erased and the respondent would be burdened with second round of litigation to secure the same finding.”

[11] I have considered the submissions made by learned counsel for the parties and am of the view that as a finding of fact has been recorded in paragraphs No.17 and 21 of the judgment of the learned trial Court dated 16.08.2014 of not only oral partition having been admitted by the petitioners-plaintiffs as also of the suit filed by the petitioners-plaintiffs on 17.07.2009 being hopelessly time barred, therefore in view of the decision of the Hon'ble Supreme Court in 'Avenue Supermarts Pvt. Ltd. versus Nischint Bhalla and others', 2015(4) R.C.R. (Civil) 782 as well as in 'R. Rathinavel Chettiar versus V. Sivaraman', 1994(4) SCC 89, rights which have vested in the respondent-defendant No.1 by virtue of the judgment of the learned trial Court cannot be allowed to be taken away by withdrawal of the suit at the appellate stage. Moreover, no compelling reason has been shown as to why the suit and appeal should be allowed to be withdrawn particularly in the light of the finding of the trial Court of the suit being hopelessly time barred as also of the petitioners-plaintiffs having admitted the oral settlement by virtue of which the property in question fell to the share of respondents-defendant No.1. Accordingly finding no merit in the revision petition, the same is dismissed with no order as to costs.

(B.S. WALIA)
JUDGE

November 10, 2017

rajneesh

Whether speaking/reasoned:
Whether reportable:

Yes/No
Yes/No