

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

RSA-5184 of 2017 (O&M)
Date of decision: 21.11.2017

Chhaju Ram (deceased) through LR

.... Appellant

Versus

Dakshin Haryana Bijli Vitran Nigam Ltd. and others

..... Respondents

CORAM: HON'BLE MR. JUSTICE AVNEESH JHINGAN

Present : Mr.Parmod Kumar, Advocate
for the appellant.

Avneesh Jhingan, J.

The present regular second appeal is at the behest of plaintiff being aggrieved of concurrent dismissal of suit for declaration with consequential relief of injunction.

For the sake of convenience, the parties are being referred to as per their original position in the plaint.

The plaintiff filed a suit for declaration and consequential relief of injunction. The facts averred in the plaint are that the plaintiff was a resident of village Bhurjat, Tehsil and District Mahendergarh. He took one electric connection in handicapped quota from the electricity department bearing connection No.NBT42 AP and its new number is BS53-2125. It was averred that the plaintiff was regularly paying the electricity bill and enjoying continuous electric supply. The notice number 1178 dated 07.06.2002 was served upon the plaintiff asking him to pay a sum of Rs.97,000/-. It was alleged that the said notice was served under Section D80, which was not

applicable to the handicapped quota.

It was further averred that the Civil Suit No.79 of 2002 titled as “Chhaju Ram vs. DHVPNL” was filed seeking mandatory injunction against the defendant. One LDC Maman Ram of Electricity Department appeared as witness from the plaintiff's side and admitted that plaintiff was only liable to pay Rs.2200/-. The civil suit was dismissed as withdrawn vide order dated 01.02.2010. It was stated that after the settlement of the amount, again a recovery notice No.2541 dated 02.05.2010 had been issued for recovery of Rs.97,000/-. A prayer was made for setting aside the recovery notice and restraining the defendants from disconnecting the electricity supply.

On notice, defendants filed written statement.

The learned trial Court framed the following issues:-

1. Whether plaintiff is entitled for injunction as prayed for? OPP
2. Whether the suit of the plaintiff is not maintainable? OPD
3. Whether the plaintiff has no locus standi to file the suit? OPD
4. Whether the suit is time barred? OPD
5. Whether the plaintiff be estopped from filing the suit by his own act and conduct? OPD
6. Whether the plaintiff has not come before the Court with clean hands? OPD
7. Whether the defendants are entitled for special cost under Section 35A of CPC? OPD
8. Relief.

The plaintiff, in order to support his suit, examined two witnesses i.e. PW1 Bir Singh, who was the power of attorney holder of the plaintiff and

PW2 Sanjay. He has placed reliance upon certain documents i.e copy of order of the civil suit, evidence recorded in that civil suit, copy of bills and power of attorney were exhibited as Ex.P1 to P4 and PW1/B respectively.

The defendants have failed to adduce any evidence.

Learned trial Court decided issue No.1 against the plaintiff holding that the plaintiff has failed to prove any ground for setting aside the recovery notice. Issue Nos. 2 to 7 were not pressed and were decided against the defendants. The net result was that the suit was dismissed vide judgment and decree dated 16.07.2015.

Aggrieved of the said judgment, the first appeal was filed, and the learned District Judge, Narnaul, vide judgment and decree dated 17.04.2017 dismissed the same.

Hence the present regular second appeal.

The contention raised by learned counsel for the plaintiff is that the learned courts below have erred in dismissing the suit. No amount was due from the plaintiff. He further contented that LDC of the department had deposed in the earlier suit that only Rs.2200/-were due from the plaintiff. There was no occasion with the defendants to issue the recovery notice. In the appeal, five substantial questions of law have been framed but while arguing the matter instead of addressing on the questions of law, only the above contention was raised.

The contentions raised by learned counsel for the plaintiff cannot be accepted. There was an earlier suit admittedly filed by the plaintiff. In the earlier suit, Maman Ram appeared as witness and deposed that Rs.2200/- is outstanding against the plaintiff. After his statement recorded, the suit was

withdrawn. It is pertinent to note that neither any compromise had been arrived at in that suit nor there was any adjudication by the Court. The suit was simplicitor withdrawn without any permission or liberty. The net result was that the amount of Rs.97,000/-to be recovered from the plaintiff remained as it is.

If the contention of the learned counsel is accepted, the net result would be that the suit would be filed and one of the witness is examined who will depose in favour of the plaintiff and thereafter the suit will be withdrawn taking a stand that as per the deposition of the witness, the defendants are bound and they cannot make any recovery. This is not permitted in law.

Order XXIII of the CPC is reproduced as under :-

“1. Withdrawal of suit or abandonment of part of claim.-*(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim.*

Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the court.

(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate

of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

(3) Where the court is satisfied,—

a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of the claim.

(4) Where the plaintiff,—

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule

(3), he shall be liable for such costs as the court may award and shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim.

(5) Nothing in this rule shall be deemed to authorise

the court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs.

Order XXIII of the CPC deals with withdrawal of the suit or abandonment of part of claim. Rule 3 of Order 23 CPC says that if Court is satisfied that there is sufficient ground for allowing the plaintiff to institute a fresh suit for the same subject matter, the court can permit withdrawal with liberty to institute a fresh suit.

Rule 4 provides that if a suit is withdrawn without permission, the plaintiff shall be precluded from instituting any fresh suit in respect of such subject matter.

The present case is fully covered within the ambit of order XXIII CPC. The earlier suit was not withdrawn with liberty to file fresh. Therefore, the Courts below have rightly held that the present suit is not maintainable on the same subject matter.

The faint attempt was made during the proceedings to state that no amount is due as no amount can be recovered because the electric connection was under handicapped quota. No such pleadings were made and nothing was produced to establish that the said amount of Rs.97,000/- cannot be recovered from the plaintiff or that the plaintiff is entitled to any relief as electricity connection was obtained under handicapped quota.

During the course of hearing, learned counsel for the appellant could not point out any illegality or perversity in the impugned judgments passed by the Courts below. He could not refer to any question of law much

less substantial question of law which is sine qua non for this court to exercise its appellate power under Section 100 of the CPC.

The cogent findings recorded by the learned civil court as well as the first appellate court have been found factually correct and legally justified. Thus, no fault can be found in the impugned judgments and decrees passed by the courts below and the same deserve to be upheld.

No other argument was raised.

Considering the facts and circumstances of the case noted above, coupled with the reasons aforementioned, this Court is of the considered view that the present appeal is bereft of merit and without any substance, thus it must fail.

Resultantly, the instant Regular Second Appeal is dismissed, however, with no order as to costs.

(AVNEESH JHINGAN)
JUDGE

21.11.2017
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Note:

1. Whether the order is speaking/reasoned: Yes
2. Whether the order is reportable : Yes