

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CR No.1643 of 2016(O&M)
Date of Decision: 26.10.2018

Raj Kumar

.....Petitioner

Versus

Asha Rani and others

.....Respondents

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. Inderjit Sharma, Advocate
for the petitioner.

Mr. Vikram Bali, Advocate
for the respondents.

RAJ MOHAN SINGH, J.

[1]. This revision petition has been preferred by the petitioner against the order dated 07.12.2015 passed by Additional District Judge, Gurdaspur, whereby application under Order 23 Rule 1 CPC filed by the plaintiffs for withdrawal of the appeal as well as the main suit with a liberty to file fresh suit on the same cause of action was allowed subject to payment of costs of Rs.2500/-.

[2]. Perusal of the record would show that initially Satpal Bhogal filed Civil Suit No.171 dated 03.03.1997 titled Satpal

Bhogal Vs. Raj Kumar and others for permanent injunction, restraining the defendants from interfering in the peaceful possession of the plaintiff over the room marked as 'FGHI' which is part of house marked as 'ABCDEF' as was shown in the site plan. The said suit was dismissed by the trial Court vide judgment and decree dated 31.01.2006. An appeal was filed by Satpal Bhogal against the aforesaid judgment and decree. During pendency of the said appeal, Satpal Bhogal died on 30.12.2006 leaving behind petitioner, Asha Rani and others as his legal heirs. Respondents had withdrawn the said appeal on the basis of statement dated 31.10.2008. The appeal was allowed to be withdrawn by the Lower Appellate Court vide order dated 20.12.2008.

[3]. Respondents Asha Rani and others had filed another Civil Suit No.309 dated 20.10.2008 titled Asha Rani and others Vs. Raj Kumar for declaration to the effect that the plaintiffs are in possession to the extent of 6/7th share in the house marked as 'ABCD' in the site plan which is constructed in an area of 334 sq. yards in Plot No.27, Ward No.11, Dina Nagar, Tehsil and District Gurdaspur.

[4]. Petitioner/defendant contested the suit.

[5]. Trial Court after due adjudication of the controversy dismissed the suit vide judgment and decree dated 09.01.2014.

Feeling aggrieved against the aforesaid judgment and decree, the respondents filed an appeal before the Additional District Judge. During pendency of the appeal, respondents filed an application under Order 23 Rule 1 CPC for permission to withdraw the appeal as well as the main suit with a liberty to file fresh one with the same cause of action.

[6]. The said application was allowed by the Lower Appellate Court vide impugned order dated 07.12.2015.

[7]. Learned counsel for the petitioner submitted that the parties have been litigating a protected litigation since 1997. A suit for permanent injunction was dismissed by the trial Court and the same was withdrawn at the stage of first appeal before the Lower Appellate Court. The second suit for declaration filed by the respondents was also dismissed by the trial Court and in appeal before the Lower Appellate Court, the same has been allowed to be withdrawn along with suit itself with a permission to file a fresh suit on same cause of action. Virtually, the rigour of judgment and decree of the trial Court has been taken away without there being any adjudication of the *lis* on merits. Such a course is not permissible as the respondents could not prove the ingredients of Order 23 Rule 1 CPC to show that the suit was having any such formal defect so as to grant permission for withdrawal of the same at appellate stage.

[8]. Learned counsel relied upon **R. Rathinavel Chettiar Vs. V. Sivaraman, 1999(2) RCR (Civil) 447, K.S. Bhoopathy Vs. Kokila, 2000(3) RCR (Civil) 195, Executive Officer, Arthanareswarar Temple Vs. R. Sathyamoorthy, 1999(2) RCR (Civil) 193** and **Jai Narain Vs. Haryana Urban Development Authority (HUDA) Hisar, 2010(15) RCR (Civil) 166** and contended that once a decree is passed by the trial Court and is challenged in appeal, it would not be open to the plaintiffs to withdraw the suit so as to destroy the decree and rights which have accrued and vested in the defendant unless very strong reasons are shown that it would not affect or prejudice the rights of the defendant in any manner. The grant of permission to withdraw the appeal as well as the main suit at appellate stage would definitely frustrate the decree and rights of the defendant without there being any adjudication of the *lis* on merits by the trial Court. Learned counsel further submitted that the permission to withdraw the suit can be granted. If there was no question of any adjudication on merits in favour of the defendant by the trial Court being nullified by such withdrawal if any such findings by the trial Court in favour of the defendant would get nullified, such permission for withdrawal of the suit cannot be granted. A new cause of action for filing a fresh suit is claimed to have accrued to the respondents from a Will which

was found from a trunk after the demise of Satpal Bhogal. Date of knowledge of said Will has not been pleaded in the application. The Court must record its satisfaction that proper grounds and reasons exist for granting permission to withdraw the suit with leave to file fresh suit and the conditions of statutory mandate must be complied with. The withdrawal of the suit at the appellate stage has to be viewed in the context of prejudice to be caused to the successful party before the trial Court. If a decree is passed by the trial Court in favour of the defendant by dismissing the suit of the plaintiffs, then it would not be open to the plaintiffs at the appellate stage to withdraw the suit so as to destroy the decree. A valuable right has accrued in favour of the defendant and the said right cannot be lightly taken away by way of withdrawing the suit as the same would have the affect of destroying the decree already passed in favour of the defendant without any proper adjudication by the Lower Appellate Court.

[9]. On the other hand, learned counsel for the respondents submitted that appeal is the continuation of suit and the Appellate Court is competent to grant permission to withdraw the suit. Learned counsel relied upon **Suseelakutty Amma Vs. Sankunny Pillai, 2014(1) RCR (Civil) 333** and **CRP (NPD) No.1 of 2011** titled **Mohammed Hanifa (died) and others Vs.**

Sankaranarayanan decided on 17.08.2017 by the Madras High Court and contended that in case, a strong case is made out, Appellate Court can grant permission to withdraw the suit. In **Mohammed Hanifa (died) and others case (supra)**, permission was declined. There is no bar to decline the permission to withdraw the suit at appellate stage, but such power should be used very cautiously and only when a strong case is made out in terms of Order 23 Rule 1(3) (b) CPC.

[10]. I have considered the submissions made by learned counsel for the parties.

[11]. In my considered opinion, no such inherent defect has been projected on record by the plaintiffs so as to attract Order 23 Rule 1 CPC at the appellate stage. The provisions in terms of Order 23 Rules 1(3) CPC cannot be allowed to be utilized by the plaintiffs in the background of the present case when earlier suit for permanent injunction was dismissed by the trial Court and in the appeal before the Lower Appellate Court, the same was withdrawn. Plaintiffs were negligent during the trial. The discovery of Will in terms of knowledge and date is conspicuously missing in the application for withdrawal of the suit and the appeal before the Lower Appellate Court. The application was duly contested by the defendant. The object of Order 23 Rule 1(3) CPC is to permit the plaintiffs to have fair

trial on merits in cases where defects are mere of technical form and can be rectified only by a *de novo* trial, but in the cases where plaintiffs want to avoid their previous negligent conduct and the defect has occurred due to plaintiffs' own fault, in such eventuality, the Court would be acting illegally in its exercise, if the plaintiffs are permitted to withdraw the suit at appellate stage with a liberty to file fresh one on the same cause of action. In the absence of pleading knowledge of existence of Will, it has to be presumed that the plaintiffs were aware of the defect and still proceeded to fight out the case before the trial Court, therefore, plaintiffs cannot be allowed to take benefit of Order 23 Rules 1 and 2 CPC. Reference can be made to **Piar Ram and another Vs. Ganesh Dass and others, AIR 1967, Punjab and Haryana 237** in addition to the precedents cited by learned counsel for the petitioner.

[12]. For the reasons recorded hereinabove, I deem it appropriate to set aside the impugned order dated 07.12.2015 passed by Additional District Judge, Gurdaspur. Consequently, this revision petition is allowed. At the time of notice of motion on 03.03.2016, interim stay of further proceedings was granted by the Co-ordinate Bench, therefore, as a result of acceptance of the present revision petition, proceedings in the appeal before the Lower Appellate Court would be revived and the Lower

Appellate Court would proceed to decide the appeal on merits.

Both the parties are directed to appear before the Lower Appellate Court on 22.11.2018.

October 26, 2018	(RAJ MOHAN SINGH)
Prince	JUDGE
Whether reasoned/speaking	Yes/No
Whether reportable	Yes/No