

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

CR No.5821 of 2017 (O&M)

Date of Decision:28.03.2018

Karan Singh and another

...Petitioners

Versus

Braham Parkash Lathwal

...Respondent

CORAM:- HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr.C.B.Goel, Advocate for the petitioners.
Mr.Amit Jain, Advocate for the respondent.

ANIL KSHETARPAL, J.

Defendants-petitioners are in the revision petition against the order passed by the learned trial court, declining leave to defend in a suit filed for recovery under Order 37 of the Code of Civil Procedure ('CPC' for short).

At the outset, learned counsel for the respondent has pointed out that the suit has been decreed vide judgment dated 5.7.2017 that is on the same day. He points out that the present revision petition is not maintainable. Pursuant to the judgment, a decree has also been framed. Learned counsel for the respondent has pointed out that as per Section 96 CPC, only an appeal can be filed and appellant would also be entitled to challenge the order, refusing leave to defend in the aforesaid appeal under Order 43 Rule 1-A of the Code of Civil Procedure.

Learned counsel for the petitioners has submitted that the order passed declining the leave to defend is the main order and the judgment and

decree is only a dependent/consequence order. He has further submitted that unless the order under challenge declining the leave to defend is set aside, the defendants-petitioners cannot argue the appeal.

It is not disputed that the suit filed for recovery of the amount has been finally decreed. The decree is appealable before the first appellate court. All non-appealable orders can be challenged by filing appeal against the main decree. Order 43 Rule 1-A CPC specifically makes a provision enabling challenge to the non appealable orders in the appeal against the decree. Order 43 Rule 1-A CPC is extracted as under:-

“Order 43 Rule 1-A-Right to challenge non-appealable orders in appeal against decrees.- (1) Where any order is made under this Code against a party and thereupon any judgment is pronounced against such party and a decree is drawn up, such party may, in art appeal against the decree, contend that such order should not have been made and the judgment should not have been pronounced.”

Further, the issue has been examined by the Hon’ble Supreme Court in ***Ajay Bansal Vs. Anup Mehta and others, 2007(2) SCC 275*** and held as under:-

“12. Ordinarily, an application under Article 227 of the Constitution of India would not be maintainable where an appeal lies. An appeal lay from the decree under Section 96 of the Code. When an appeal could be filed, ordinarily, an application under Article 227 of the Constitution of India would not be entertained.

13. A decree passed subsequent to the refusal of leave to defend could either be under Order 37 Rule 3(6) of the Code or it could be based on the affidavit evidence on the side of the

plaintiff and the documents produced or even based on oral evidence formally proving, say, the execution of a promissory note by the defendant. It may not be proper or necessary to apply the theory of "dependent order" in such circumstances. For one, the theory may not apply. Even if this Court were to set aside the order of the court below and give the defendant leave to defend the suit, the decree that is passed may not go automatically. It may have to be set aside. Secondly, the defendant can always go to the court which passed the decree and move under Rule 4 Order 37 of the Code to reopen the decree.

14. *The theory of "dependent order" may not apply in a case of this nature because even if this Court were to set aside the order refusing leave to defend, the decree subsequently passed may not fall by itself. It has still to be set aside either by resort to Order 37 Rule 4 or by way of an appeal, or by some other mode known to law. In a given case like the present one as it may not be proper to interfere with the decree merely because in an appeal against an order refusing leave to defend, this Court is inclined to take a different view.*

This issue was further examined by Delhi High Court in ***V.S.Saini and another Vs. D.C.M.Ltd., 2004 AIR (Delhi) 219*** and same view was reiterated.

In view of the above, this revision petition is found to be non maintainable. This Court has chosen to express no opinion on merits lest it may prejudice any of the party.

The revision petition is dismissed as not maintainable, with liberty to the petitioners, to file an appeal against the judgment and decree passed by the court, wherein petitioners would be at liberty to challenge the

order, declining leave to appeal. Pending applications, if any, shall also stand disposed of.

The Revision Petition is dismissed as not maintainable.

28.03.2018
mks

(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned: Yes/No
Whether Reportable: Yes/No