

RSA No.1640 of 1999 (O&M)

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

**RSA No.1640 of 1999 (O&M)
Date of Decision: 10.08.2018**

Surat Singh and others

... Appellants

Versus

Madan Lal and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Sudeep Mahajan, Advocate and
Ms. Manjit Saini, Advocate
for the appellants.

Mr. Baldev Raj Mahajan, Senior Advocate with
Mr. Prateek Mahajan, Advocate and
Ms. Manpreet Ghuman, Advocate
for respondent Nos.1 to 11.

AMIT RAWAL, J.

The appellants-plaintiffs are in present regular second appeal against the concurrent findings of fact, whereby the suit claiming declaration to the effect claiming ownership in possession of the land measuring 26 kanals comprised in khata 107 khatuauni 221-222-223, Rect. No.29, Killa 4.7.14, Rect. 17 Killa 10/2 as entered in the jamabandi for the year 1981-82 and situated in village Attari, Had Bast No.151, Tehsil Gurdaspur, has been dismissed by the trial Court and affirmed by the lower Appellate Court.

The appellants-plaintiffs instituted the, aforementioned suit, on the premise that plaintiff Nos.1 to3, 4 to 7 and 8 to 13 are owner in

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possession of the land to the extent of $1/3^{\text{rd}}$ shares, out of total property measuring 26 kanals situated in Village Attari, Tehsil Gurdaspur. One Santi Devi widow of Nand Lal was owner of land measuring 40 kanals 4 marals, which was sold to one Behari Lal son of Dhanpat Rai, vide sale deed dated 03.04.1945. Possession thereof was also delivered to the vendees. Surain Singh, father of the plaintiff Nos.1 to 3, instituted a suit for possession by way of pre-emption against Behari Lal, which was decreed on 24.07.1946. Decree was conditional on deposit of ₹2500/-, which was deposited, thus, Surain Singh became the owner of the land. Since Karnail Singh and Kartar Singh had also contributed, therefore, Surian Singh along with Karnail Singh and Kartar Singh became the owners. Surain Singh died in 1961 and was succeeded by plaintiff Nos.1 to 3. Kartar Singh died in 1963 and was succeeded by his daughters Ambo and Bhira and widow Joginder Kaur and on their demise, plaintiff Nos.8 to 13 succeeded. Karnail Singh died in the year 1966 and plaintiff Nos.4 to 7 succeeded and in this process, all the plaintiffs, aforementioned, became owner to the extent of $1/3^{\text{rd}}$ share. Dalip Singh and Harbans Singh residents of Village Maur were incorrectly entered in the revenue record as mortgagees. Defendant Nos.15 to 24 being legal heirs had no right, title and interest, whereas defendant Nos.12 to 14 were tenants of the plaintiffs and had been impleaded as proforma defendants. However, Santi incorrectly and illegally continued to be recorded as owner in the disputed land. Defendant Nos.1 to 11 asserted themselves to be legal heirs of Santi and threatened to dispossess the plaintiffs and therefore, cause of action arose to file the suit.

Defendant Nos.12 to 14 were proceeded ex parte and all other remaining defendants were served by way of publication, but failed to put

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appearance, whereas defendant Nos.1 to 11 contested the suit and admitted that Santi was owner in possession of land measuring 40 kanals 3 marals, but denied that the suit filed by Surain Singh was decreed. The factum of death of Kartar Singh, Surain Singh and Karnail Singh was not denied, but the factum of plaintiff Nos.1 to 3 being legal heirs was emphatically denied. It was averred that Santi died intestate and mutation of her land was rightly sanctioned in favour of Niranjan Dass and Gian Chand and on their demise, in favour of defendant Nos.1 to 11 being their legal heirs.

Since the parties were at variance, the trial Court framed the following issues:-

1. *Whether Smt. Shanti sold land mentioned in para No.1 of the plaint in favour of Bihari Lal vide sale deed dated 3.4.1945? OPP*
2. *Whether Surain Singh father of plaintiffs No.1 to 3 pre-emption the sale and obtained decree? OPD*
3. *Whether Surain Singh deposited the pre-emption money and became owner of the land? OPP*
4. *Whether the land in suit was allotted in lieu of land sold by Smt. Shanti in favour of Bihar Lal? OPP*
5. *Whether Niranjan Dass and Gian Chand predecessor-in-interest of defendant Nos.1 to 11 inherited the land in suit from Smt. Shanti? OPD*
6. *Whether the suit is bad for non-joinder of necessary parties? OPD*
7. *Whether the suit is not within time? OPD*
8. *Whether the plaintiffs are entitled to declaration prayed for? OPP*
- 8-A *Whether the suit is barred u/o 23 rule 1 CPC ? OPD*
9. *Relief.*

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Both the parties led evidence in support of their case, as noticed by the trial Court in para No.6 of the judgment and therefore, is not required to be referred to, in order to avoid repetition.

The trial Court on the basis of the evidence brought on record rendered findings on issues Nos.1 to 8 in favour of the plaintiffs, but returned finding against them under issue No.8-A holding that the suit was barred by Order 23 Rule 1 of the Code of Civil Code as identical suit bearing No.76 of 1986 was filed on 07.03.1986 which was withdrawn on 31.07.1987, but before its withdrawal, the present suit was filed on 30.07.1987. As noticed above, the lower Appellate Court affirmed the findings of the trial Court. It is, under these circumstances, the present regular second appeal has been filed.

Mr. Sudeep Mahajan, learned counsel appearing on behalf of the appellants submitted that both the Courts below have abdicated and committed perversity in returning the findings against plaintiffs on issue No.8-A, for, a plain and simple reading of the provisions of Order 23 Rule 1 CPC leaves no manner of doubt that they were not applicable to the fact of the case as the present suit was filed on 30.07.1987 and the previous suit of 1986 was withdrawn i.e. post filing on 31.07.1987. This fact has been proved on record. In support of his contentions, reliance has been laid to the judgment rendered by Hon'ble the Supreme Court in **"Vimlesh Kumari Kulshrestha V/s Sambhajirao and another" 2008 (5) SCC 58.**

With lot of vehemence and eloquence, he further submitted that sub-rule (b) of Rule 3 of Order 23 envisages a situation that the suit can be withdrawn where there are sufficient grounds and to institute fresh suit or part of the claim in respect of subject matter of the suit or such part of the

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claim, even if, no permission was granted, for, second suit was already pending adjudication. This fact was brought to the notice of the Courts below.

Dehors of the fact that the previous counsel in the previous suit and present suit, are the same, plaintiff cannot be made to suffer on such trivial point nor legal objection of the opposite side could be accepted by the Court below, for, no cross-appeal/objection had been availed of, even if, the decree is in their favour. In support of the aforementioned contentions, reliance has been laid to the judgment rendered by Hon'ble the Supreme Court in "**Hardevinder Singh V/s Paramjit Singh and others**" 2013 (1) Civil Court Cases 833 (SC), thus, urges this Court for setting aside the concurrent findings, under challenge.

Mr. B.R. Mahajan, learned Senior Counsel assisted by Mr. Prateek Mahajan, learned counsels appearing on behalf of the respondent Nos.1 to 11, submitted that there was no occasion for the defendants to assail the findings on issue No.1 to 8 rendered against the defendants, once decree was in their favour. The net result of the suit was that it stood dismissed, as it was found to be barred under Order 23 Rule 1 of the Code of Civil Procedure. Counsel, who made a statement in the previous suit and the present suit, was the same, thus, the plaintiffs cannot be permitted to take shelter of ignorance of law. It could be understood that the second suit was filed by some different counsel, therefore, there was no occasion for the defendants in raising objection viz-a-viz withdrawal of the civil suit No.76 of 1986. In support of his submissions, reliance has been laid to the judgment rendered by Hon'ble the Supreme Court in "**M/s Virgo Industires (Eng.) P. Ltd. V/s M/s Venturetech Solutions P. Ltd.**" 2012 (4) RCR

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(Civil) 372.

I have heard learned counsel for the parties, appraised the paper book as well as records of the Courts below.

From the submissions of the counsel made hereinabove, the only question to be determined by this Court whether the finding rendered by the trial Court and affirmed by the lower Appellate Court on issue No.8-A, suffers from illegality and perversity. For the sake of brevity, issue No.8-A reads thus:-

" 8-A Whether the suit is barred u/o 23 rule 1 CPC ? OPD"

Concededly, the appellants instituted the suit bearing No.76 of 1986 claiming identical relief. The aforementioned suit in the presence of counsel for the defendants was withdrawn on 31.07.1987. This fact has not been disputed by either of the side, much less, filing of the present suit on 30.07.1987, in other words, the present suit had already been filed during pendency of the previous suit as the previous suit was withdrawn a day later i.e. 31.07.1986.

It would be apt to reproduce the provisions of Order 23 Rule 1 CPC, which read as under:-

"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 1 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

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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 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 plaintiff.]

On plain and simple reading of the aforementioned provisions, there is no provision whether the plaintiff can be permitted to file fresh suit during pendency of the previous suit, even, sub-rule 4 of Order 23 Rule 1, can be pressed into service which provides that person is precluded from instituting a fresh suit in respect of subject matter.

Hon'ble Supreme Court in Vimlesh Kumari Kulshrestha's case (supra), on similar circumstances, where the second suit was filed in 1987

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viz-a-viz the pendency of the previous suit of 1986 and before the suit of 1986 could be withdrawn, the suit of 1987 was filed, held that the provisions of Order 23 Rule 1 CPC would not apply. For the sake of brevity, para 7 to 11 of the same read as under:-

"7. It is not in dispute that O.S. No. 13A of 1987 was filed during pendency of O.S. No. 228A of 1986.

Order 23 Rule 1 of the CPC stricto sensu therefore, was not applicable, the relevant provision whereof reads thus:

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 :

(2)

(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.

Admittedly, the second suit was filed before filing the application of withdrawal of the first suit. The first suit was withdrawn as an objection had been taken by the appellant in regard to payment of proper court fee. We, therefore, are of opinion that Order 23 Rule 1 of the Code was not applicable to the facts and circumstances of the present case.

8. A somewhat similar question came up for consideration in *Mangi Lal Vs. Radha Mohan* [1930 Lahore 599(2), wherein it was held;

"Order 23, Rule 1, refers to permission to withdraw a suit with liberty to institute a fresh suit after the first one has

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been withdrawn. Order 23, Rule 1, cannot be read so as to bar a suit which has already been instituted before the other suit has been abandoned or dismissed. The rule is clear and can only be applied to suits instituted after the withdrawal or abandonment of previous suits".

9. The said view was followed by the Karnataka High Court in P.A. Muhammed Vs. The Canara Bank and Another [AIR (1992) Kar. 85].

10. An identical view was also taken in Girdhari Lal Bansal Vs. The Chairman, Bhakra Beas Management Board, Chandigarh and Others [AIR 1985 Punj and Har 219] wherein it was held;

"4. .. The earlier application was filed on 6th Oct, 1982 and the present application was fixed on 26th Oct., 1982 and the first application was withdrawn vide order dt. 18-11-1982. The learned counsel for the Board could not show if aforesaid two decisions were ever dissented from or overruled. The aforesaid two Lahore decisions clearly say that if second suit is filed before the first suit is withdrawn then Order 23, C.P.C. is not attracted and the second suit cannot be dismissed under Order 23, Rule 1(4) of the Civil Procedure Code. Accordingly, I reverse the decision of the trial Court and hold that the present petition was not barred under Order 23, C.P.C."

We agree with said views of the High Court.

11. The application filed for withdrawal of the suit categorically stated about the pendency of the earlier suit. Respondent, therefore was aware thereof. They objected to the withdrawal of the suit only on the ground that legal costs therefor should be paid. The said objection was accepted by the learned Trial Court. Respondent even accepted the costs as directed by the Court, granting permission to withdraw the suit. In a situation of this nature, we are of the opinion that an inference in regard to grant of permission can also be drawn from the conduct of the parties as also the Order passed by the

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Court. It is trite that even a presumption of implied grant can be drawn.

On plain and simple reading of findings, aforementioned, I am of the view that the point of law as of the present case are identical to one, therefore, the Courts below ought not to have rendered the finding on issue No.8-A against the appellants-plaintiffs. As indicated above, the defendants had not chosen to assail findings on issue No.1 to 8, which could have been, in view of findings in para 18 of the judgment rendered in Hardevinder Singh's case (supra), which reads as under:-

"18. After the 1976 amendment of Order 41 Rule 22, the insertion made in sub-rule (1) makes it permissible to file a cross-objection against a finding. The difference is basically that a respondent may defend himself without taking recourse to file a cross-objection to the extent the decree stands in his favour, but if he intends to assail any part of the decree, it is obligatory on his part to file the cross- objection. In Banarsi and Others v. Ram Phal (supra), it has been observed that the amendment inserted in 1976 is clarificatory and three situations have been adverted to therein. Category No. 1 deals with the impugned decree which is partly in favour of the appellant and partly in favour of the respondent. Dealing with such a situation, the Bench observed that in such a case, it is necessary for the respondent to file an appeal or take cross-objection against that part of the decree which is against him if he seeks to get rid of the same though he is entitled to support that part of the decree which is in his favour without taking any cross-objection. In respect of two other categories which deal with a decree entirely in favour of the respondent though an issue had been decided against him or a decree entirely in favour of the respondent where all the issues had been answered in his favour but there is a finding in the judgment

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which goes against him, in the pre-amendment stage, he could not take any cross-objection as he was not a person aggrieved by the decree. But post-amendment, read in the light of explanation to sub-rule (1), though it is still not necessary for the respondent to take any cross- objection laying challenge to any finding adverse to him as the decree is entirely in his favour, yet he may support the decree without cross- objection. It gives him the right to take cross-objection to a finding recorded against him either while answering an issue or while dealing with an issue. It is apt to note that after the amendment in the Code, if the appeal stands withdrawn or dismissed for default, the cross-objection taken to a finding by the respondent would still be adjudicated upon on merits which remedy was not available to the respondent under the unamended Code. "

Keeping in view the aforementioned facts, I am of the view that both the Courts below have committed illegality and perversity in dismissing the suit on technical ground. Engaging of same counsel cannot be fatal for arriving at just and equitable findings.

No doubt, this Court, on earlier occasions had been framing the substantial questions of law while deciding the appeals but in view of the *ratio decidendi* culled out by five learned Judges of the Hon'ble Supreme Court in **“Pankajakshi (dead) through LRs and others V/s. Chandrika and others AIR 2016 SC 1213”**, wherein the proposition arose as to whether in view of the provisions of Section 97(1) CPC, provisions of Section 41 of the Punjab Courts Act, 1918 would apply or the appeal i.e. RSA would be filed under Section 100 of Code of Civil Procedure and decision thereof could be without framing substantial questions of law. The Constitutional Bench of Hon'ble Supreme Court held that the decision in **“Kulwant Kaur and others**

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V/s. Gurdial Singh Mann (dead) by LRs and others” 2001(4) SCC 262, on applicability of Section 97(1) of CPC is not a correct law, in essence, the provisions of Section 41 of the Punjab Courts Act, 1918 had been restored back.

For the sake of brevity, the relevant portion of the judgment of five learned Judges of the Hon'ble Supreme Court in “Pankajakshi 's case (supra) reads thus:-

“Since Section 41 of the Punjab Act is expressly in conflict with the amending law, viz., Section 100 as amended, it would be deemed to have been repealed. Thus we have no hesitation to hold that the law declared by the Full Bench of the High Court in the case of Ganpat [AIR 1978 P&H 137 : 80 Punj LR 1 (FB)] cannot be sustained and is thus overruled.” [at paras 27 - 29] ”

27. Even the reference to Article 254 of the Constitution was not correctly made by this Court in the said decision. Section 41 of the Punjab Courts Act is of 1918 vintage. Obviously, therefore, it is not a law made by the Legislature of a State after the Constitution of India has come into force. It is a law made by a Provincial Legislature under Section 80A of the Government of India Act, 1915, which law was continued, being a law in force in British India, immediately before the commencement of the Government of India Act, 1935, by Section 292 thereof. In turn, after the Constitution of India came into force and, by Article 395, repealed the Government of India Act, 1935, the Punjab Courts Act was continued being a law in force in the territory of India immediately before the commencement of the Constitution of India by virtue of Article 372(1) of the Constitution of India. This being the case, Article 254 of the Constitution of India would have no application to such a law for the simple reason that it is not a law made by the

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Legislature of a State but is an existing law continued by virtue of Article 372 of the Constitution of India. If at all, it is Article 372(1) alone that would apply to such law which is to continue in force until altered or repealed or amended by a competent Legislature or other competent authority. We have already found that since Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976 has no application to Section 41 of the Punjab Courts Act, it would necessarily continue as a law in force.”

Therefore, I do not intend to frame the substantial questions of law while deciding the appeal, aforementioned.

As an upshot of my observations, hereinabove, the findings of the Courts below on issue No.8-A are hereby set aside. Suit of the plaintiffs is decreed in toto. Decree sheet is ordered to be prepared.

Resultantly, the present regular second appeal is allowed.

10.08.2018
Yogesh Sharma

(AMIT RAWAL)
JUDGE

✓

Whether speaking/reasoned **Yes/ No**

✓

Whether Reportable **Yes/ No**