

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Miscellaneous Appeal (Civil) No. 875 of 2014

1. Smt. Guruwarin Bai W/o Late Horilal Sahu, aged about 32 years, R/o Village Pahand, P.O. Urga, District Korba (C.G.)
 2. Shankar Lal S/o Late Horilal Sahu, aged about 5 years
 3. Suresh Kumar S/o Late Horilal Sahu, aged about 2 years
- No.2 and 3 are minor through their natural guardian mother No. 1 Smt. Guruwarin Bai, W/o Late Horilal Sahu, aged about 32 years, R/o Village Pahand, P.O. Urga, District Korba (C.G.)

----Appellants/Claimants

Versus

- 1 A- Lakhan Lal, Aged about 48 years, R/o Gokul Ganj Sitamani, Korba, District Korba (C.G.)
- 1 B- Smt. Badrika Bai W/o Late Ramesh Kumar, aged about 23 years, D/o Shri Nanka Yadav, At present R/o Bokrel, P.O. and Tehsil Kharasiya, District Raigarh (C.G.)
- 2 Ramkrishna Sahu S/o P.R. Sahu, R/o Qr.No. LIG73, Sharda Vihar Korba, Tehsil and District Korba (C.G.)
- 3 The Oriental Insurance Company Limited, Divisional Office- Gitanjali Bhawan, Purana Bus Stand, Korba (C.G.)

---- Respondents

For Appellants	:	Shri Sanjay Patel, Advocate
For Respondent 1A & 1B	:	None
For Respondent No. 2	:	Ms. Uma Sahi, Advocate
For Respondent No. 3	:	Shri Arvind Shrivastava, Advocate

Hon'ble Shri Justice Gautam Chourdiya, J

Judgment on Board

26.02.2019

1. Being aggrieved by the award dated 03.05.2014 passed in Claim Case No. 31 of 2013 by the Additional Motor Accident Claims Tribunal (FTC), Korba (C.G.), the Appellants/Claimants, unfortunate wife and children of deceased- Horilal Sahu, have preferred this appeal under Section 173 of the Motor Vehicles Act, 1988.
2. Learned counsel for the Appellants/Claimants submits that on advice of counsel, the Claimants had filed application under Section 166 of the Motor

Vehicles Act, 1988 (hereinafter referred to as the 'Act') before the Tribunal, but now they want to file application under Section 163A of the Act before the Tribunal. Therefore, the Claimants/Appellants want to withdraw the application filed under 166 of the Act before the Tribunal and want to file afresh application under Section 163A Act before the Tribunal which is benevolent provisions for the survivors of the deceased.

3. It is not disputed by learned counsel for the Respondents that if the Appellants/Claimants want to withdraw the application filed under Section 166 of Act before the Tribunal at appellate stage, according to the law, they have own choice to withdraw application. Previously the Claimants had ample opportunity before the Tribunal, but they failed to prove their case, therefore, in these circumstances appropriate order should be passed.

4. Heard the learned counsel for the parties and perused the material available on record.

5. In ***K.S. Bhoopathy and others Vs. Kokila and others, AIR 2000 SC 2132***, the Hon'ble Supreme Court in para-9 has interpreted Order XXIII, Rule 1 CPC which makes provisions for withdrawal of suit or abandonment of part of claim. Relevant portions of the provisions are extracted hereunder:

“Order XXIII

Withdrawal and Adjustment of Suits

(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 or Order XXIII extend, neither the suit nor any part of the claim shall be abandoned without the leave of this Court.

(3) Where the Court is satisfied.-

(a) that a suit must fall 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.”

(Emphasis supplied)

6. Further, in ***Narain s/o Chokh Ram Vs. Rewati s/o Chokh Ram and Others, AIR 2004 Punjab and Haryana 275***, the Hon'ble Supreme Court has observed in para-5 as under:-

5. After hearing learned counsel for the parties and perusing the impugned order as well as the other material on record, I am of the considered opinion that this petition deserves to be allowed because the name of the father of the plaintiff-petitioner as well defendant-respondents is the same, namely, Chokh Ram and on account of either some error or deliberate attempt on the part of defendant-respondents, the dispute has arisen with regard to the suit property. In the suit filed by the plaintiff-petitioner such a plea could not be set up and the Civil Judge has failed to exercise jurisdiction vested in him by considering the plea under Cl. (b) of sub-rule (3) of R.1 of O.23 of the Code. This aspect has been considered by the Supreme Court in K.S. Bhoopathy's case (AIR 2000 SC 2132) (supra) where two alternatives as contemplated by sub-rule (3) of R.1 or O. 23 of the Code have been discussed. It has been emphasized that the Court must be satisfied about the sufficiency of the grounds for allowing the plaintiff to institute a fresh suit for the same claim or part of the claim on the same cause of action. Their Lordships have interpreted O. 23, R. 1 of the Code by observing as under:-

“The provisions in O. 23, R. 1, C.P.C. is an exception to the common law principle of non-suit. Therefore, on principle an application by a plaintiff under sub-rule (3) cannot be treated on par with an application by him in exercise of the absolute liberty given to him under sub-rule (1). In the former it is actually a prayer for concession from the Court after satisfying the Court regarding existence of the circumstances justifying the grant of such concession. No doubt, the grant of leave envisaged in sub-rule (3) of R. 1 is at the discretion of the Court but such discretion is to be exercised by the Court with caution and circumspection. The legislative policy in the matter of exercise of discretion is clear from the provisions of sub-rule (3) in which two alternatives are provided; one where the Court is satisfied that a suit must fall by reason of some formal defect, and the other where the Court is satisfied 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. Clause (b) of sub-rule (3) contains the mandate to the Court that it must be satisfied about the sufficiency of the grounds for allowing the plaintiff to institute a fresh suit for the same claim or part of the claim on the same cause of action. The Court is to discharge the duty mandated under the provision of the Code on taking into consideration all relevant aspects of the matter including the desirability of permitting the party to start a fresh round of litigation on the same cause of action. This becomes all the more important in a case where the application under O. 23, R. 1 is filed by the plaintiff at the stage of appeal. Grant of leave in such a case would result in the

unsuccessful plaintiff to avoid the decree or decrees against him and seek a fresh adjudication of the controversy on a clean slate. It may also result in the contesting defendants losing the advantage of adjudication of the dispute by the Court or Courts below. Grant of permission for withdrawal of a suit with leave to file a fresh suit may also result in annulment of a right vested to the defendant or even a third party. The appellate/second appellate Court should apply its mind to the case with a view to ensure strict compliance with the conditions prescribed in O. 23, R. 1 (3), C.P.C. for exercise of the discretionary power in permitting withdrawal of suit with leave to file a fresh suit on the same cause of action. Yet another reason in support of this view is that withdrawal of a suit at the appellate/second appellate stage results in wastage of public time of Courts which is of considerable importance in the present time in view of large accumulation of cases in lower Courts and inordinate delay in disposal of the cases.”

7. It is not disputed that death of Horilal Sahu arises in the motor vehicular accident. Looking to the age of minor children ie. 5 and 3 years and widow of deceased – Horilal Sahu and the technicalities in this case, the Appellants/Claimants have a right to file afresh application under Section 163A of the Motor Vehicles Act before the appropriate forum under the Motor Vehicles Act.

8. In view of the above cited judgments and the provisions under Order XXIII Rule 1 of the Code of Civil Procedure, the present appeal is disposed of. The claim petition filed under Section 166 of the Motor Vehicles Act, 1988 before the Tribunal by the Claimants/Appellants is permitted to be withdrawn with liberty to file fresh application under Section 163A of the Motor Vehicles Act on the same cause of action.

Sd/-
(Gautam Chourdiya)
Judge