

In the High Court of Punjab and Haryana at Chandigarh

223

CR No. 8921 of 2017

Date of decision: 19.11.2019

Bharat Bhushan

.....petitioner

Versus

Kamal Singh

.....respondent

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr.Sanjiv Gupta, Advocate,
for the petitioner.

Mr.Manish Mehta, Advocate
for the respondent.

RAJ MOHAN SINGH, J.(oral)

Petitioner has challenged the order dated 12.10.2017 passed by the Additional District Judge, Narnaul, vide which application for withdrawal of the suit at appellate stage was allowed.

Plaintiff-respondent No.1 filed a suit for permanent injunction against the petitioner and Naresh Chand before the trial Court. The suit was dismissed vide judgment and decree dated 26.11.2014. Against the aforesaid judgment and decree, appeal was preferred before the Additional District Judge, Narnaul. During pendency of the appeal, an application was

filed without mentioning any provision of law for withdrawal of suit and appeal with permission to file a fresh suit on the same cause of action. Vide the impugned order the permission was accorded by the lower Appellate Court, allowing the plaintiff to withdraw the suit with liberty to file a fresh suit on the same cause of action.

Perusal of record would show that the permission has been given and the said permission in a way has taken away the rigour of judgment and decree passed by the trial Court on merits. No inherent defect was projected before the Appellate Court in terms of Order 23 Rule 1 CPC.

In **Baru Ram Vs. Baldeva, 1994 PLJ 144**, the controversy was considered by the Court at the threshold of Order 23 Rule 1 CPC and prayer was declined on the ground that the provisions in terms of Order 23 Rule 1(3) CPC cannot be allowed to be utilized by the plaintiff who was negligent throughout. The object of Order 23 Rule 1(3) CPC is to permit the plaintiff to have a fair trial on merits in case where the defect is merely a technical defect and the same can be rectified only by a *de-novo* trial, but in case the plaintiff wants to avoid his previous negligent conduct and the defect has occurred due to his own fault resulting in passing of decree by the trial Court, the withdrawal of suit with a liberty to file fresh suit at appellate stage cannot be allowed in such eventuality. By doing so, the

defendant would be deprived of his legal defence in terms of Order 2 Rule 2 CPC in the event of filing fresh suit by the plaintiff. It has to be presumed that the plaintiff was aware of the defect and he still proceeded with the suit to fight it out infancy before the trial Court. Order 23 Rules 1 and 2 CPC cannot be resorted to. Reference can also be made to **Piar Ram and another Vs. Ganesh Dass and others, AIR 1967, Punjab and Haryana 237.**

It is a settled principle of law that once a decree is passed by the trial Court and the same is challenged in appeal, it would not be open to the plaintiff to withdraw the suit so as to destroy the decree and rights which have accrued and have come to be vested in favour of the defendant unless and until a very strong case is made out that it would not affect or prejudice anybody's vested rights. The ratio as laid down in **R. Rathinavel Chettiar Vs. V. Sivaraman, 1999(2) RCR (Civil) 447** can be relied in the aforesaid context.

Plaintiff does not have any unqualified or unfettered right under Order 23 Rule 1 CPC to withdraw the suit at appellate stage when the rights have accrued to the defendant under a decree. The findings recorded by the trial Court are binding upon the parties and the Court should not deprive the defendant of the plea of *res judicata* or Order 2 Rule 2 CPC by allowing the plaintiff to withdraw the suit at the appellant stage.

The right of the plaintiff to withdraw the suit at appellate stage is not an absolute right, but the same is subject to the condition, showing a very strong case where no prejudice has been shown to be caused to the defendant.

In the instant case, no such parameters exist in favour of the plaintiff. The permission granted by the lower Appellate Court cannot be legally sustained. Hence, the present revision petition is allowed. The Impugned order dated 12.10.2017 passed by the Additional District Judge, Narnaul is set aside. Normal consequences to follow.

November 19, 2019
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(RAJ MOHAN SINGH)
JUDGE

Whether reasoned/Speaking

Yes/No

Whether reportable

Yes/No