

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

**CR No.1034 of 2019(O&M)
Date of Decision: 13.02.2019**

**Mukhtiar Singh since deceased through his LRs.
.....Petitioners**

Versus

Nirmal Singh and anotherRespondents

CORAM: *HON'BLE MR. JUSTICE RAJ MOHAN SINGH*

Present:Mr. Aayush Gupta, Advocate
for the petitioners.

RAJ MOHAN SINGH, J.

[1]. This revision petition has been preferred by the petitioners against the order dated 20.09.2018 passed by Additional District Judge, Ludhiana vide which the application filed by the petitioner(s) under Order 23 Rule 1 read with Section 151 CPC was dismissed.

[2]. Plaintiff Mukhtiar Singh filed a suit for declaration to the effect that he is exclusive owner in possession of suit land and sale deed dated 15.01.1969 in favour of father of the defendant was the result of fraud and misrepresentation. Earlier suit filed on the same cause of action was dismissed in default under

Order 9 Rule 4 CPC vide order dated 09.04.2008. The factum of dismissal of earlier suit was not disclosed. In the present suit, following recital was made in para No.13 of the plaint:-

“13. That no other suit or proceedings on the basis of the facts of the present case are pending in any Court or Tribunal nor any such suit or proceedings have ever been decided by any Court or Tribunal.”

[3]. Defendant/respondent No.1 filed written statement on 08.06.2010 and took preliminary objection with regard to dismissal of earlier suit on 09.04.2008. Despite the objections raised by the defendant in the written statement, plaintiff did not take any remedial step and kept on pursuing the litigation.

[4]. The suit was dismissed on merits by the trial Court. The appeal was filed before the Lower Appellate Court in which application was filed under Order 23 Rule 1 read with Section 151 CPC for withdrawal of the suit.

[5]. Perusal of the record would show that the plaintiff/petitioner(s) by way of concealment has not come to the Court with clean hands, rather made recital in para No.13 of the plaint which inflicted that an effort was made to mislead the Court. The suit has already been dismissed by the trial Court on merits. The defendant/respondent(s) was unnecessarily kept busy in litigation for the last more than 10 years. At the stage of appeal, now the plaintiff/petitioner(s) seeks to withdraw the

appeal as well as the suit with a liberty to move an application for restoration of the civil suit which was dismissed in default on 09.04.2008. The alleged formal defect in the suit in the light of concealment in the plaint and objections raised by the defendant/respondent No.1 in the written statement cannot be appreciated, particularly when the suit was dismissed by the trial Court on merits. Number of grounds may accrue to the defendant and permission to withdraw the suit at appellate stage would cause material prejudice to the defendant/respondent(s).

[6]. In view of ratio laid down in **Baru Ram Vs. Baldeva, 1994 PLJ 144, Piar Ram and another Vs. Ganesh Dass and others, AIR 1967, Punjab and Haryana 237** and **R. Rathinavel Chettiar Vs.V. Sivaraman, 1999(2) RCR (Civil) 447,** permission to withdraw the suit at appellate stage cannot be granted in view of facts and circumstances of the present case. The decree passed by the trial Court would give rise to number of grounds in favour of the defendant/respondent(s) to foreclose any further action on behalf of the plaintiff in respect of suit property. It would not be open to the plaintiff to withdraw the suit so as to destroy the decree and the rights which have come to be vested in the defendant in the suit. 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. Permission in terms of Order 23 Rule 1 CPC can only be granted if there is a formal defect in the suit and that defect will result in dismissal of the suit.

[7]. In the instant case, firstly the plaintiff did not plead the factum of earlier suit in the plaint. The said fact was duly pointed to the plaintiff in the written statement by the defendant, but still the plaintiff did not take any curative step and proceed to pursue the litigation which ultimately resulted in dismissal of the suit by the trial Court. Secondly, the reason for withdrawal of the suit at appellate stage is totally a vexatious ground and in view of ratio laid down in **Smt. Parveen Sharma Vs. Shri Jai Parkash Sharma and another, 2015(3) Civil Court Cases 803 (Delhi)**, no permission can be granted.

[8]. Plaintiff never made any application to withdraw the suit before the trial Court despite knowing the defect in the suit as was pointed out by the defendant. Having suffered findings from the trial Court, he cannot be permitted to get those findings null and void by way of mere withdrawal and to start *de novo* proceedings that too, after getting the earlier suit revived which was dismissed in default on 09.04.2008 i.e. after a period of 10 years. Cumulative facts and circumstances of the case would

show that the petitioner has not acted diligently, rather the pleadings in the suit were on account of concealment and the plaintiff has tried to mislead the Court.

[9]. For the reasons recorded hereinabove, I do not see any justification to interfere in the impugned order dated 20.09.2018 passed by Additional District Judge, Ludhiana. This revision petition is accordingly dismissed.

13.02.2019

Prince

(RAJ MOHAN SINGH)
JUDGE

Whether reasoned/speaking
Whether reportable

Yes/No
Yes/No