

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CR No. 1492 of 2019 (O&M)
DECIDED ON: APRIL 09, 2019

NAVDEEP KAUR

.....PETITIONER

VERSUS

ATTAR SINGH

.....RESPONDENT

CORAM: HON'BLE MR. JUSTICE AVNEESH JHINGAN.

Present: Ms. Ritam Aggarwal, Advocate
for the petitioner.

AVNEESH JHINGAN, J (ORAL)

The present civil revision petition has been preferred against the order dated 17.01.2019 passed by Civil Judge (Jr. Division), Ludhiana (hereinafter referred to as 'Civil Court') dismissing the application filed under Order XXIII Rule 1 (4) (b) of the Code of Civil Procedure, 1908 (for short 'the Code').

The facts in brief are that the respondent-plaintiff filed a suit for mandatory injunction directing the petitioner-defendant to vacate and hand over the vacant possession of the property i.e. house measuring 100 sq. yards situated at village Taraf Karabara, Tehsil and District Ludhiana, details are given in the

suit. There were some formal defects in the said suit. A statement was made by the respondent-plaintiff before the Civil Court on 04.09.2013 that due to some formal defects, he wants to withdraw the present case with the permission to file a fresh one, same may be dismissed as withdrawn. The said statement was recorded by the Civil Court and order dated 04.09.2013 was passed in the presence of counsel for the petitioner-defendant. The order dated 04.09.2013 is reproduced as under:

*“Present: Plaintiff with counsel Sh. Avtar Singh, Advocate
Sh. S.S. Ahuja, Advocate for the defendant.*

The plaintiff want to withdraw the present case due to some formal defects. A separate statement in this regard has also been recorded. In view of the statement made by the plaintiff, the present suit is dismissed as withdrawn due to formal defects. File be consigned to the record room after due compliance.”

Thereafter, a fresh suit was filed on 22.02.2014. In the said suit, petitioner-defendant moved an application under Order Order XXIII Rule 1 (4) (b) of the Code stating that the earlier suit was withdrawn without any permission to file a fresh suit, hence, the suit is not maintainable. The application was dismissed vide impugned order. Aggrieved of the impugned order the present civil revision petition has been filed.

Learned counsel for the petitioner argues that in the order dated 04.09.2013, no permission for filing a fresh suit was given by the Civil Court. No details were given by the respondent-plaintiff with regard to the formal defects in the suit. Further, that no application was moved for the withdrawal of the suit and no opportunity was given to the petitioner-defendant to raise

objections.

Learned counsel for the petitioner has placed reliance upon the decision of the Supreme Court in *University of Agricultural Sciences vs. Smt. Saroj Gupta; 2017 (7) MLJ 726.*

The contention raised by learned counsel for the petitioner is not well founded.

Before dealing with the issue, it would be appropriate to reproduce Order XXIII Rule 1 (4) (b) of the Code. The same reads as under:-

“ORDER XXIII- WITHDRAWAL AND ADJUSTMENT OF SUITS

XX XX XX XX XX

(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 preclude from instituting any fresh suit in respect of such subject-matter or such part of the claim.”

In the present case, as is evident from the statement of the respondent-plaintiff, recorded by the Civil Court that plaintiff had made a request for the withdrawal of the suit, as there were some formal defects and a liberty was prayed to file a fresh suit. The Civil Court vide order dated 4.9.2013, permitted the respondent-plaintiff to withdraw the suit due to the formal defects. The order passed cannot be read in isolation, it has to be considered alongwith the prayer made by the respondent-plaintiff. By reading the statement of respondent-plaintiff and the said order, it is deemed that the withdrawal was with liberty to file a fresh suit.

This court in the case of **Lal Singh vs. Ajit Singh and another;** **2008 (3) RCR (Civil) 650;** has held as under:

“11. Admittedly, the application moved by the plaintiff is on record as Ex. PW6/1, which contains not only the prayer to withdraw the suit but also to file fresh, suit on the same cause of action. It is true that while passing the order, the Sub Judge, 1st Class, Tarn Taran, has recorded the statement of the learned Counsel for the plaintiff on 05.3.1985 and dismissed the suit as withdrawn and did not advert to the second prayer. But in Surjan Singh's case (supra), a similar order was passed which reads that "in view of the statement of learned Counsel for the plaintiffs, the suit is dismissed as withdrawn with no order as to costs. File be consigned".

12. In the same circumstances, this Court has held that the statement made by learned Counsel for the plaintiff has to be read as a whole and the same could not be split up into two parts i.e. permission to withdrawn the suit but without advertising to the other request of plaintiff for permission to file a fresh suit for same cause of action.”

In another case i.e. **Shri Rai Singh vs. Dr. Hemo Prabha Saikia and others; 2012 (1) PLR 155;** this court while relying upon the decision of Lal Singh's case (supra) has held as under:

*“In view of these facts, the only inference can be drawn is that permission to withdraw the suit for mere declaration vide order dated 4.10.2001 was deemed to be with liberty to file a fresh suit as there was formal defect in the earlier suit. Hence, there is no force in the argument of learned counsel for the petitioner that suit is barred either under Order 23 Rule 1 (4) of the Code or under Order 2 Rule 2 of the Code. On the point reliance is placed upon a judgment rendered by a coordinate Bench of this Court in **Lal Singh v. Ajit Singh** 2008(3) RCR (Civil) 650, wherein under*

similar circumstances it was observed that permission to withdraw is deemed to be with liberty to file a fresh suit as the Court would not permit withdrawal without permission to file fresh suit. In the present case as well, Court has not passed any specific order regarding assertion of respondent- plaintiff that she intends to file fresh suit for declaration and recovery of possession. Moreover, Court could not have refused permission to file fresh suit for declaration and possession regarding the subject matter in dispute as earlier suit was defective in view of peculiar facts and circumstances of the case.”

No shadow can be cast on the impugned order passed by the Civil Court.

The reliance of learned counsel for the petitioner placed upon the decision of the Supreme Court in Smt. Saroj Gupta's case (supra) does not enhance the case. The facts in the said case are totally different. In that case a suit was dismissed, aggrieved of the judgment and decree, appeal was preferred. In the appeal filed, the claimant withdrew the appeal as well as the suit without permission to file afresh. It was in that set of circumstances, that Supreme Court held that second suit is not maintainable.

In the present case a request was made by the respondent-plaintiff seeking withdrawal of the suit with permission to file afresh. There would not have been a partial acceptance of his prayer. Order XXIII Rule 1 (4) (b) of the Code will not be applicable in the facts of the present case as the respondent-plaintiff neither abandoned any suit or part of it nor it was withdrawn without permission to file afresh.

The grievance raised by learned counsel for the petitioner against

order dated 04.09.2013 passed by the Civil Court need not to be gone into at this stage, as the said order has neither been challenged earlier nor any challenge has been posed to it in the present civil revision petition.

No interference is called for in the impugned order. Accordingly, the present civil revision petition is dismissed.

APRIL 09, 2019
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(AVNEESH JHINGAN)
JUDGE

<i>Whether speaking/reasoned</i>	<i>Yes/No</i>
<i>Whether reportable</i>	<i>Yes/No</i>