

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

RSA No.3588 of 2012(O&M)

Date of decision: 20.9.2019

Jagpal SinghAppellant

VERSUS

Rajinder SinghRespondent

CORAM: HON'BLE MRS. JUSTICE REKHA MITTAL

Present: Mr. Manjeet Singh, Advocate for the appellant.

Mr. Mani Ram Verma, Advocate for the respondent.

REKHA MITTAL, J.

CM No.9572-C of 2012

Prayer in this application is for condoning delay of 53 days in re-filing the appeal.

Heard.

In view of averments made in the application supported by an affidavit of Jagpal Singh, the appellant, the application is allowed. Delay of 53 days in re-filing the appeal stands condoned.

Disposed of accordingly.

RSA No.3588 of 2012

Challenge in the present appeal has been directed against concurrent findings recorded by the Courts whereby suit for declaration with consequential relief of permanent injunction by assailing sale deed No.266 dated 03.03.1990 and mutation No.1511 dated 28.12.1990 and

consequent entries in revenue records being illegal, null and void and not binding upon right of the appellant/plaintiff was partly decreed by the trial Court vide judgment and decree dated 29.04.2009. The appeal preferred by unsuccessful appellant did not find favour with District Judge, Jhajjar as the Appellate Court dismissed the appeal by affirming findings of the trial Court vide judgment and decree dated 23.11.2011.

Counsel for the appellant would apprise that notice of motion was issued as the appellant intends to withdraw the suit with liberty to file a fresh one by challenging sale deed No.4549 dated 10.03.1989. He would argue that the appellant filed the suit for declaration by challenging sale deed No.266, as was so recorded in mutation No.1511 dated 28.12.1990. The respondent/defendant filed the written statement and stated that sale deed was executed on 03.03.1989 but he had not given the number of sale deed. The appellant filed an application calling upon the respondent to produce copy of sale deed No.266 dated 03.03.1990 but in response thereto, he had submitted that he is not in possession of any such sale deed. It is further argued that complete particulars of the sale deed propounded by the respondent were brought on record when the respondent appeared in the witness box and produced copy of sale deed marked as Ex.D1. It is further argued that the appellant filed an application for amendment of the plaint before the first Appellate Court to challenge the sale deed dated 03.03.1989 but the same was dismissed while disposing of the appeal against the appellant. It is vehemently argued that as there was a formal defect in the suit filed by the appellant because of his having assailed sale deed No.266 dated 03.03.1990 in place of sale deed No.4549 executed on 03.03.1989 but registered on 10.03.1989, plea of the appellant seeking

permission to withdraw the suit with liberty to file a fresh one to assail sale deed No.4549 dated 10.03.1989 is covered within the purview and ambit of Order 23 Rule 1(3) of the Code of Civil Procedure, 1908 (in short 'CPC'). It is further argued that a serious prejudice shall be caused to the appellant in case necessary permission is not granted.

Counsel representing the respondent has strongly contested plea of the appellant. It is argued that since the appellant did not bother to raise any such plea before the trial Court despite a specific plea was raised in the written statement that sale deed in favour of the respondent is dated 03.03.1989 and even complete particulars of the said sale deed came on record when a certified copy of the sale deed No.4549 was marked as Ex.D1 on 20.02.2008 nor he filed application for amendment of the plaint before the trial Court, accepting plea of the appellant would cause a serious prejudice to the respondent who earlier remained litigating for the past about 16 years and would face trauma of litigation again. It is further argued that even before the first Appellate Court, the appellant did not file an application or made oral submissions seeking permission to withdraw the suit rather filed an application for amendment of the plaint which was rightly dismissed by the first Appellate Court.

Perusal of document Ex.PW1/C mutation No.1511 sanctioned in the year 1990 leaves no manner of doubt that in column No.13, there is reference to No.266 dated 03.03.1990 for a sum of Rs.6,000/- on the basis whereof the appellant filed the suit to challenge sale deed No.266 and the disputed mutation. The respondent/defendant in the written statement has averred that sale deed is dated 03.03.1989 but he neither produced a copy of the sale deed along with written statement nor disclosed its complete

particulars with regard to its number and date of registration as perusal of document Ex.D1 reveals that sale deed was executed on 03.03.1989 but the same was registered on 10.03.1989. However, it remains undisputed position of the case that copy of the sale deed dated 03.03.1989 was exhibited in the statement of the respondent when he appeared in the witness box and the appellant came to know about complete particulars of the sale deed propounded by the defendant/respondent. The evidence of the respondent/defendant was closed on 28.08.2008. Thereafter, the appellant sought permission of the Court for getting specimen thumb impressions of the appellant for the purpose of comparison with disputed thumb impression(s) on the sale deed in question which was allowed vide order dated 24.11.2008. The appellant examined Sh. V.B. Kashyap, Handwriting and Fingerprints Expert to prove that sale deed in question does not bear thumb impressions of the appellant. It appears that counsel for the appellant before the trial Court did not render proper advice to him either to seek amendment of the plaint or permission to withdraw the suit with liberty to file a fresh suit to challenge the sale deed with its correct particulars i.e. 4549 dated 03.03.1989. On the contrary, without appreciating that in absence of challenge to the sale deed actually in existence and propounded by the respondent, he proceeded on a different tangent and sought permission of the Court for obtaining specimen thumb impressions of the appellant for the purpose of comparison, got disputed thumb impressions and specimen thumb impressions compared from the Fingerprints Expert and examined him in rebuttal evidence. At that stage, even the trial Court allowed the application seeking permission to take specimen thumb impressions without appreciating that as plaintiff has not

challenged the sale deed, certified copy whereof is Ex.D1, no useful purpose would be served by permitting the appellant to seek comparison from an expert. In this view of the matter, it can safely be held that the appellant got caught in a difficult situation for want of proper legal advice by his counsel before the trial Court and thereafter before the first Appellate Court. Had he got proper legal advice, at an appropriate stage of the proceedings, he would have filed application calling upon the respondent to produce copy of sale deed dated 03.03.1989 in place of 226 dated 03.03.1990 and thereafter an appropriate application either for amendment of suit or permission to withdraw the same. A party should not be allowed to suffer for the lapse and negligence of his counsel particularly in the circumstances that the appellant is an illiterate rustic villager.

Order XXIII CPC deals with withdrawal and adjustment of suits. A relevant extract therefrom reads as follows:-

“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:

xx xx xx

(3) Where the Court is satisfied,—

(a) that a suit must fail by reason of some formal defect, or
 (b) xx xx xx 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.”

In the case at hand, there was a formal defect on the basis whereof suit filed by the plaintiff to assail the sale deed was dismissed by the trial Court and findings of the trial Court were affirmed in appeal. Keeping in view the above, the present case certainly falls within the purview and ambit of clause (a) of sub-rule (3) of Order 23 (1) CPC. Thus, permission can be granted to the appellants to withdraw such suit with liberty to institute a fresh suit in respect of the same subject matter.

The question that invites consideration is, whether the appellant should be denied this liberty as he failed to avail it of at an appropriate stage of the proceedings either before the trial Court or the first Appellate Court. No doubt, in case the appellant is granted the permission aforesaid, it would be of consequences for the respondent who had been litigating for the past about 16 years. The respondent can well be compensated with costs for failure of the appellant to take remedial measures at an appropriate stage of the proceedings. On the other hand, in case the appellant is not permitted to challenge the sale deed with correct particulars, he would be deprived of his legal remedy on account of failure of the revenue authorities to take note of correct particulars of the sale deed in mutation proceedings and thereafter negligence of his counsel representing him before the Courts. That being so, equities can be balanced by imposing reasonable compensatory costs. In this view of the matter, plea raised by the appellant seeking permission to withdraw suit and institute a fresh suit in respect of sale deed dated 03.03.1989 is allowed subject to payment of costs of Rs.50,000/-, to be paid to the respondent by way of demand draft.

In view of what has been discussed hereinbefore, the appeal stands disposed of. Judgments and decrees passed by the Courts are set aside. The suit filed by the appellant/plaintiff is allowed to be withdrawn with liberty to institute a fresh suit in respect of same subject matter by giving correct particulars of the sale deed dated 03.03.1989. The appellant shall be entitle to institute a fresh suit within a period of two months from receipt of certified copy of the judgment. The suit shall be entertained if he deposits costs of Rs.50,000/- by way of demand draft in the name of respondent well in advance. It is further clarified that permission granted by this Court would not enure to benefit of the appellant on the question of limitation, keeping in view the provisions of Order 23 Rule 2 CPC.

SEPTEMBER 20, 2019

‘D. Gulati’

(REKHA MITTAL)
JUDGE

Whether speaking/reasoned	:	yes/no
Whether reportable	:	yes/no