

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CR No.14306 of 2018(O&M)
Date of Decision: 24.01.2019

Vidya Sagar
Versus
Amita Walia and others

.....Petitioner
.....Respondents

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. Gaurav Aggarwal, Advocate
for the petitioner.

RAJ MOHAN SINGH, J.

[1]. Petitioner has challenged the order dated 22.11.2018 passed by Additional District Judge, Patiala vide which the application filed by the petitioner under Order 23 Rule 1(3) read with Section 151 CPC for withdrawal of the suit at the appellate stage was dismissed.

[2]. Perusal of the record would show that plaintiff/petitioner filed a suit for permanent injunction, restraining the defendants from alienating, mortgaging or creating any charge over the suit property.

[3]. The suit was dismissed vide judgment and decree dated 27.02.2015 passed by Civil Judge (Junior Division), Patiala. Thereafter, appeal was filed before the Lower Appellate

Court and an application was filed under Order 23 Rule 1(3) read with Section 151 CPC for seeking leave of the Court to withdraw the original suit with a liberty to institute fresh suit on the same cause of action.

[4]. The said application was dismissed by the Lower Appellate Court vide the impugned order. That is how, the present revision petition came to be filed.

[5]. I have heard learned counsel for the petitioner.

[6]. Learned counsel for the petitioner relied upon **M/s Manohar Cold Storage and Ice Factory Vs. Baldev Singh, 2010(3) RCR (Civil) 388** and contended that appeal is a continuation of suit, therefore, provisions in terms of Order 23 CPC can be resorted to at this stage. Appellate Court can allow the plaintiff to withdraw the suit, if the same was dismissed purely on a formal defect.

[7]. Perusal of the judgment and decree dated 27.02.2015 would show that trial Court framed as many as 5 issues. Issue No.1 was to the following effect:-

1. Whether the plaintiff is entitled to relief of permanent injunction as prayed for? OPP

[8]. Since the suit was filed on the basis of agreement to sell, therefore, trial Court considered the provisions in terms of Sections 38(2) and 41 of the Specific Relief Act and decided

issue No.1 against the plaintiff. Issues No.2, 3 and 4 were decided against the defendants as no evidence was led by the defendants to prove the aforesaid issues. Resultantly, the suit was dismissed on merits with costs.

[9]. 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. 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 suit for permanent injunction was filed on the basis of agreement to sell. The object of Order 23 Rule 1(3) CPC is to permit the plaintiff to have a fair trial on merits in case where 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 plaintiff's own fault resulting in passing of decree against him, the withdrawal of suit with a liberty to file fresh suit at appellate stage cannot be allowed as in such eventuality, the defendants would be deprived of their 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 still proceeded to fight it out. In such circumstances, Order 23 Rules 1 and 2 CPC cannot be resorted to. Reference can be

made to **Piar Ram and another Vs. Ganesh Dass and others,**

AIR 1967, Punjab and Haryana 237.

[10]. 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 come to be vested in the defendant(s) to the suit unless a very strong case is shown 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 proposition.

[11]. 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 defendants under a decree. The findings recorded by the trial Court are binding upon the parties and Court should not deprive the defendants of the plea of *res judicata* or Order 2 Rule 2 CPC by allowing the plaintiff to withdraw the suit at 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 is shown to have been caused to the defendants. In the present case, prejudice will be caused to the defendants in case, fresh suit is

allowed to be filed on the same cause of action i.e. agreement to sell and in such eventuality, defendants would be deprived of their legal plea of *res judicata* and Order 2 Rule 2 CPC. Their valuable rights will come to an end without there being any adjudication of appeal against the decree vide which the suit of the plaintiff was dismissed. The aforesaid distinction would make the present case distinct from the ratio of **M/s Manohar Cold Storage and Ice Factory's case (supra).**

[12]. For the reasons recorded hereinabove, I do not find any error of jurisdiction in the impugned order dated 22.11.2018 passed by Additional District Judge, Patiala. This revision petition is found to be totally devoid of merits and the same is accordingly dismissed.

24.01.2019

Prince

**(RAJ MOHAN SINGH)
JUDGE****Whether reasoned/speaking
Whether reportable****Yes/No
Yes/No**