

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

206

CR No.7258 of 2012

Date of Decision: 09.12.2022

Jai Ram

....Petitioner

VERSUS

Santosh and Others

.....Respondents

CORAM : HON'BLE MRS. JUSTICE ALKA SARIN

Present : Mr. Anurag Jain, Advocate for the petitioner.

Mr. Ajay Jain, Advocate for the respondents.

ALKA SARIN, J. (Oral)

The present revision petition has been filed under Article 227 of the Constitution of India challenging the order dated 05.11.2012 whereby permission to withdraw the suit with liberty to file afresh on the same cause of action has been denied by the First Appellate Court.

The brief facts relevant to the present *lis* are that the plaintiff-petitioner filed a suit for declaration to the effect that the property as described in the head-note of the plaint was owned and possessed by one Bhagat Ram and being ancestral property devolved upon his sons. It is further the case set up in the plaint that the property was divided by the parties with the help of the *Panchayat* and their close relatives and that as per the oral settlement the properties were to be divided in the manner as fully described in the plaint. It was further averred that on 03.05.1991 the said settlement was reduced into writing. The parties went to trial and on the

basis of pleadings and evidence led, the suit was dismissed by the Trial Court holding that the family settlement was undated and that it has not been mentioned thereon as to who had scribed or typed the family settlement. It was further held that even the site plans were undated and there was no mention as to who had prepared those site plans. It is pertinent to note that *qua* issue no.6 as to whether suit was bad for non-joinder of parties, the said issue was not pressed and was decided against the defendants. At the appellate stage, permission was sought to withdraw the suit with liberty to file afresh on the ground that there was formal defect in the plaint as all the legal representatives of Bhagat Ram, who were necessary parties, had not been joined in. It was further contended that since the defendants disputed the settlement, therefore, a suit for partition would be maintainable. The said prayer for withdrawal of the suit with liberty to file afresh was contested by the defendant-respondents and vide the impugned order dated 05.11.2012 the said application was dismissed.

Learned counsel for the plaintiff-petitioner has contended that there is a formal defect in the suit inasmuch as all the legal representatives were not impleaded. It is further the contention that as the said family settlement was denied, hence, the plaintiff-petitioner would now file a suit for partition since the property is ancestral in nature. In support of his arguments, learned counsel for the plaintiff-petitioner has relied upon judgment of Hon'ble Supreme Court in case of **Baniram & Ors. vs. Gaiind & Ors. [1981 (4) SCC 209]** and that of this Court in cases of **Veer Bhan & Anr. vs. Madan Gopal [1991 (1) PLR 199]**, **M/s Subhash Chander**

Raman Kumar vs. Rattan Chand [1991 (1) PLR 204] and Nand Lal vs. Bhim Sen [2000 (3) RCR (Civil) 173].

Per contra learned counsel for the defendant-respondents has contended that once a decree is passed by the Trial Court and it is challenged in appeal, it would not be open to the plaintiff-petitioner to withdraw the suit so as to destroy the decree. It is further the contention that the suit of the plaintiff-petitioner was dismissed wherein a declaration had been sought that there was an oral family settlement with the help of *Panchayat* and relatives, which was later reduced into writing. Once a finding has been returned by the Court stating that the case as set out by the plaintiff-petitioner was not made out, withdrawing the present suit at the appellate stage would cause irreparable harm and injury to the defendant-respondents. In support of his arguments, learned counsel for the defendant-respondents has relied upon judgment of Hon'ble Supreme Court in case of **R. Rathinavel Chettiar vs. V. Sivaraman [1999 (2) RCR (Civil) 447]** and that of this Court in cases of **Jubedan Begum & Ors. vs. Sekhewat Ali Khan [AIR 1984 Punjab 221]**, **Bharat Bhushan vs. Kamal Singh [2020 (1) PLR 80]** and **Chhidda vs. Jagdish [2019(2) PLR 319]**.

I have heard learned counsel for the parties.

Order XXIII Rule 1 CPC reads as under :

(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:

Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court."

In case of **R. Rathinavel Chettiar** (*supra*), their Lordships of Hon'ble Supreme Court had held as under :

“9. Once the matter in controversy has received judicial determination, the suit results in a decree either in favour of the plaintiff or in favour of the defendant.

10. What is essential is that the matter must have been finally decided so that it becomes conclusive as between the parties to the suit in respect of the subject matter of the suit with reference to which relief is sought. It is at this stage that the rights of the parties are crystallised and unless the decree is reversed, recalled, modified or set aside, the parties cannot be divested of their rights under the decree. Now, the decree can be recalled, reversed or set aside either by the Court which had passed it as in review, or by the Appellate or Revisional Court. Since withdrawal of suit at the appellate stage, if allowed, would have the effect of destroying or nullifying the decree affecting thereby rights of the parties which came to be vested under the decree, it cannot be allowed as a matter of course but has to be allowed rarely only when a strong case is made out. It is for this reason that the proceedings either in appeal or in revision have to be allowed to have a full trial on merits.

11-17.

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18. In view of the above discussion, it comes out that where a decree passed by the trial court is challenged in appeal, it would not be open to the plaintiff, at that stage, to withdraw the suit so as to destroy that decree. The rights which have come to be vested in parties to the suit under the decree cannot be taken away by withdrawal of suit at that stage unless very strong reasons are shown that the withdrawal would not affect

or prejudice anybody's vested rights. The impugned judgment of the High Court in which a contrary view has been expressed cannot be sustained.”

This Court in case of **Bharat Bhushan** (*supra*) held as under :

“6. 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 appellate 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 prejudiced has been shown to be caused to the defendant.

7. 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”.

The judgments relied upon by learned counsel for the plaintiff-petitioner in the case of **Baniram** (*supra*) is contained in one paragraph and the facts are not ascertainable from the said order. In view thereof, no advantage can be derived by learned counsel for the plaintiff-petitioner. In the case of **Veer Bhan** (*supra*), the Appellate Court specifically came to a finding that there were formal defects in the suit and hence permitted the plaintiff to withdraw the same. In the present case, there is no such finding

the reasons for permission to withdraw the suit was that proper pleas and material documents were not placed on the record, which went to the root of the case. However, in the present case it is not the case set up that certain pleas are left out. By withdrawing the suit with liberty to file afresh, the plaintiff-petitioner is seeking to destroy a decree whereby the plea of the plaintiff-petitioner qua an oral settlement subsequently stated to have been reduced into writing has been rejected.

In the present case, the specific declaration sought by the plaintiff-petitioner was that the property stood partitioned by way of an oral settlement, which was subsequently reduced into writing. The Trial Court returned a categorical finding that the plaintiff-petitioner had failed to prove his case. The argument of learned counsel for the plaintiff-petitioner that the suit suffers from a formal defect cannot be accepted inasmuch as no formal defect has been pointed by learned counsel for the plaintiff-petitioner nor was the suit dismissed for the reason that the suit suffered from any formal defect. Further, the argument of learned counsel for the plaintiff-petitioner that necessary parties were not impleaded deserves to be rejected on the ground that issue no.6 was framed *qua* mis-joinder of parties which was decided against the defendant-respondents. However, on issue no.4 it has been held that the suit is not maintainable in the present form only on the basis of findings on issue nos.1 and 2. Issue nos.1 and 2 read as under :

1. Whether the plaintiffs are owners in possession of the land, as detailed in the plaint and are entitled to relief of injunction against the defendants against their forcibly dispossession or against alienation of the suit land ? OPP

2. Whether the plaintiffs are entitled to relief of mandatory injunction directing the defendants to hand over the vacant possession of pucca house, as detailed in the plaint ? OPP

It is only in this context that the suit was not found maintainable. Once a finding has been returned rejecting the family settlement, the plaintiff-petitioner cannot be allowed to withdraw the suit and re-agitate the matter. It has been held in the case of **Bharat Bhushan** (*supra*) that withdrawal can be permitted at the appellate stage subject to the condition that no prejudice is caused to the defendants. In the present case, once the oral settlement stood rejected by the Trial Court, withdrawal of the suit with permission to file afresh would certainly cause prejudice to the defendant-respondents.

In view of the above, I do not find any merit in the present revision petition, which is accordingly dismissed. Pending applications, if any, also stand disposed off.

Any observation made herein shall not be treated as an expression of opinion of this Court on merits of the case since the appeal itself is pending adjudication before the First Appellate Court.

09.12.2022
jk

(ALKA SARIN)
JUDGE

NOTE: Whether speaking/non-speaking: Speaking
Whether reportable: YES/NO