

Before T.H.B. Chalapathi, J

SOHAN SINGH & OTHERS,—*Appellants.*

versus

AJIT SINGH & OTHERS,—*Respondents.*

R.S.A. No. 2589 of 1996

24th May, 1999

Code of Civil Procedure, 1908—O.23 Rl. 1 & S. 100—Plaintiff's suit dismissed after contest—Right accruing in favour of defendants—First appeal unsuccessful—Regular second appeal filed—Misc. application filed under O.23 Rl. 1 to withdraw the suit—Suit cannot be permitted to be withdrawn to deprive defendants of the benefit of the judgment—On facts found that third defendant did not support the case of defendants 1 & 2—If the suit is permitted to be withdrawn it may well be that third defendant may file separate suit against defendants 1 & 2 and defendants would again have to establish the validity of the will which had been upheld by the judgments of the Courts below—Application under O.23 Rl. 1 CPC liable to be dismissed—Second appeal dismissed on merits as well.

(Satish Bhardwaj v. Dhani Ram, 1988 (2) R.C. R. 132, dissented)

Held that, the Court should not permit a suit to be withdrawn at the stage of appeal unless there are very good and strong grounds therefor since the result of withdrawal cannot be to deprive the defendant of the benefit of the judgment in his favour. In the case on hand, the defendants set up a will said to have been executed by their father in their favour. It is also pertinent to note that the 3rd defendant in the suit did not support the case of defendants 1 and 2 that their father executed a Will. The 3rd defendant said to be the daughter of Sadhu Singh and she was a party to the present suit and she will be bound by the decrees of the Courts below if they are allowed to stand. In case the plaintiffs are allowed to withdraw the suit at the appellate stage, the 3rd defendant may file a separate suit against the defendants 1 & 2 and the defendants may have to again establish and prove that their father executed a valid Will. That Will deprive them of the benefit of the judgment rendered in their favour. The object of the Order 23 Rl. 1 of the Code of Civil Procedure is to put an end to the litigation by allowing the plaintiff of withdraw the suit in such cases where he does not want the liberty to file a fresh suit, but the same cannot be granted

at the stage of appeal since the valuable right has accrued to the defendants.

(Para 12)

J.S. Toor, Advocate, *for the Appellants.*

Kuldip Singh, Advocate, *for the Respondents.*

JUDGMENT

T.H.B. Chalapathi, J.

(1) This application is filed by the appellants to permit them to withdraw the suit filed by them.

(2) The appellants filed the suit for a declaration that they alongwith defendants 1 and 2 are owners in joint possession of the suit land in equal shares. According to them the suit property was owned by Sadhu Singh and he was father of plaintiffs 1 to 3 and defendants 1 and 2 and husband of plaintiff No. 4. The said Sadhu Singh died on 27th May, 1983. Since the defendants are alleging that they are owners of the suit property in dispute on the basis of the Will dated 26th August, 1980 said to have been executed in their favour, the plaintiffs filed the suit claiming that the Will is not genuine one and it is a result of fraud played upon Sadhu Singh.

(3) The defendants *inter alia* contended that Sadhu Singh executed the Will on 26th August, 1980 in their favour. Therefore, the plaintiffs are excluded from inheriting the suit property. The trial Court dismissed the suit by its decree and judgment dated 17th August, 1988. On appeal by the defendants, the decree and judgment of the trial Court dated 17th August, 1988 was set aside and the matter was remanded by the learned Additional District Judge, Gurdaspur by his order dated 4th September, 1989. After remand the Senior Sub Judge, Gurdaspur, by his decree and judgment dated 22nd November, 1991 held that Sadhu Singh executed a valid Will in favour of defendants 1 and 2 on 26th August, 1980 and, therefore, defendants 1 and 2 became the exclusive owners of the suit property and they are in possession thereof. Against the said decree and judgment, the plaintiffs filed an appeal to the learned Additional District Judge, Gurdaspur unsuccessfully. Thus, both the Courts below recorded the concurrent findings of fact that the Will has been proved and defendants 1 and 2 became entitled to the suit property and the plaintiffs cannot claim any right in the same. Aggrieved by the dismissal of the suit by the Courts below the plaintiffs filed the second appeal.

(4) In this appeal, the plaintiffs filed an application in CM. No. 1250 of 1999 to withdraw the suit. The learned Counsel appearing for the respondents-defendants 1 and 2 objected that the suit cannot be permitted to be withdrawn since a valuable right has accrued in their favour. Therefore, the application is liable to be dismissed.

(5) On merits, it was contended by the learned Counsel for the appellants that the Will set up by the defendants was not proved in accordance with law. Therefore, the findings of the Courts below are liable to be set aside. On the other hand, it was contended by the learned Counsel for the respondents that the findings of the Courts below are concurrent findings of fact. Therefore, there is no merit in this appeal.

(6) First I take up the application filed by the plaintiff-appellants to withdraw the suit. The learned Counsel for the appellants relied upon a decision of this Court in *Satish Bhardwaj v. Dhani Ram* (1) wherein a learned single Judge of this Court held that since the appeal is a continuation of the suit and when the plaintiff is not seeking permission of the Court to file a fresh suit, the permission to withdraw from the suit has to be granted to the plaintiff in terms of Order 23 Rule 1 C.P.C. I am unable to agree with this view of the learned single Judge. According to the learned single Judge the view he has taken finds support from the judgment of the Supreme Court in *Shaik Hussain and Sons v. M.G. Kannaiah and another* (2). The facts in Shaik Hussain's case are that a writ petition was filed by M.G. Kannaiah challenging the grant of a route permit issued to Shaik Hussain and Sons, who was appellant before the Supreme Court by the R.T.A. under the Motor Vehicles Act. That said writ petition was allowed against which the writ appeal was filed. During the pendency of the writ appeal, the respondent therein who was the writ petitioner filed an affidavit in which it was stated as follows :—

“In order to avoid public inconvenience and with a view not to disturb the existing playing of the vehicle on the route Lingagasamudram to Ongole, I intend to withdraw the writ petition since I ceased to have any interest in the subject matter in issue.”

On those facts, the Apex Court held as follows :—

“The appellant who had been granted permit by the R.T.A. has come up in appeal to this Court complaining against the

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- (1) 1988 R.C.R. 132.
(2) AIR 1981 S.C. 1725.

appellate order of the High Court on several grounds, the main ground being that if the writ petitioner before the High Court himself wanted to withdraw the petition and had given good reasons for the same, the High Court was not at all justified in not considering that application or passing orders thereon. It may be noted that apart from respondent No. 1 and the appellant there were no other parties in the writ appeal excepting the formal parties like the R.T.A. In our opinion, the contention raised by the appellant is well founded and must prevail. It is not necessary for us to go into the merits of the case when the respondent himself did not want to invoke the writ jurisdiction of the High Court or having invoked the same did not want to press his writ petition. For these reasons, therefore, we allow this appeal, set aside the judgment of the High Court in appeal as also that of the single Judge allowing the writ petition. The result of our order would be that the writ petition before the High Court would be treated as having been withdrawn and not pressed. The appeal is accordingly allowed, but as the respondent has not appeared, there will be no order as to costs."

(7) In the case before the Apex Court, there was no question of any right accrued to the contesting respondent.

(8) It is pertinent to note that the Supreme Court has itself observed that apart from respondent No. 1 and the appellant, there were no other parties in the writ appeal. The above decision cannot be termed as laying down the law that when once the rights have accrued to the parties, the same cannot be nullified by allowing the plaintiff to withdraw the suit. Another learned single Judge of this Court in *Gian Chand v. Pavitar Singh* (3) has also taken the view that the plaintiff who after contest suffered a decree against him is not entitled, as a matter of right, to withdraw the suit in appeal. If he is permitted to do so, it would deprive the defendants of the benefit of the trial Court's judgment in their favour. His Lordship relied upon two earlier decisions of this Court in *Gurnek Singh and another v. Gurbachan Singh and others* (4) and in *Shri Guru Maharaj Anandpur Ashram Trust, Guna and others v. Chander Parkash and others* (5). In *Gurnek Singh's* case (supra), it has been held that a very strong case has to be made out for allowing the suit to be withdrawn at the appellate stage and in that

(3) 1983 PLJ 368

(4) 1986 (1) PLR 309

(5) 1986 PLR 319

case it was held by the Court that no case has been made out by the plaintiff to withdraw the suit at the appellate stage and in Shri Guru Maharaj Anandpur Ashram's case (supra) it has been held that the plaintiff is not entitled, as a matter of right, to withdraw the suit.

(9) The learned Counsel for the plaintiff-appellants placed reliance on the decision of the Supreme Court in *M/s Hulas Rai Baij Nath v. K.B. Bass and Co.* (6). But in that case, the plaintiff filed an application to withdraw the suit under Order 23 Rule 1 of the Code of Civil Procedure. It is not a case where the suit is decreed and at the appellate stage the plaintiff wanted to withdraw the suit. On the facts of the case the Apex Court held that the language of Order 23 Rule 1, sub rule (1) C.P.C. gives an unqualified right to a plaintiff to withdraw from a suit if no permission to file a fresh suit is sought under sub rule (2) of Rule 1.

(10) It is useful to refer to the decision of the Supreme Court in *R. Ramamurthi Aiyar v. Raja V. Rajeshwara Rao* (7), wherein it has been held as follows :—

“On behalf of the appellant it has been contended that under Order 23 Rule 1 C.P.C. there is an unqualified right to withdraw the suit if the plaintiff does not wish to proceed with it. It is conceded that if any vested right comes into existence before the prayer for withdrawal is made, the Court is not bound to allow withdrawal. But it is suggested that this can happen only in very limited circumstances i.e. where a preliminary decree had been passed or in those cases where a set off has been claimed or a counter claim has been made.”

(11) Again it has been held in paragraph 12 as follows :—

“If the plaintiff is allowed to withdraw the suit after the defendant has gained or acquired the advantage or the privilege of buying the share of the plaintiff in accordance with provisions of the Partition Act. It would only enable the plaintiff to defeat the purpose of Section 3 (1) and also to deprive the defendant of the above option or privilege which he has obtained.”

(12) Thus, I am of the opinion that the Court should not permit a suit to be withdrawn at the stage of appeal unless there are very good and strong grounds therefor since the result of withdrawal cannot be to deprive the defendant of the benefit of the judgment in his favour.

(6) A.I.R. 1968 S.C. 111

(7) A.I.R. 1973 S.C. 643

In the case on hand, the defendants set up a Will said to have been executed by their father in their favour. It is also pertinent to note that the 3rd defendant in the suit did not support the case of defendants 1 and 2 that their father executed a Will. The 3rd defendant said to be the daughter of Sadhu Singh and she was a party to the present suit and she will be bound by the decrees of the Courts below if they are allowed to stand. In case the plaintiffs are allowed to withdraw the suit at the appellate stage, the 3rd defendant may file a separate suit against defendants 1 and 2 and the defendants may have to again establish and prove that their father executed a valid Will. That will deprive them of the benefit of the judgment rendered in their favour. The object of the Order 23 Rule 1 of the Code of Civil Procedure is to put an end to the litigation by allowing the plaintiff to withdraw the suit in such cases where he does not want the liberty to file a fresh suit, but the same cannot be granted at the stage of appeal since the valuable right has accrued to the defendants.

(13) In this view of the matter, I am of the opinion that no permission to withdraw the suit can be granted at this stage.

(14) The Civil Misc. Application is, therefore, dismissed.

(15) Both the Courts below concurrently found on the basis of the evidence on record that Sadhu Singh executed the Will in favour of defendants 1 and 2 on 26th August, 1980 which is marked as Exhibit D-1 and registered it on the same day. Thereafter he remained alive for a period of three years. In order to prove the Will, the defendants produced Scribe who has been examined as DW-1 and the attesting witness who has been examined as DW-2. PW-2 who has been examined by the plaintiffs themselves deposed in the cross-examination that she appeared before the Sub Registrar, who read over the Will to Sadhu Singh who affixed his thumb mark on the endorsement of the Sub Registrar which is marked as Exhibit D1/A. It is also in her evidence that she was a member of the Panchayat of the Village. On a consideration of the evidence on record, both the Courts below rightly came to the conclusion that Sadhu Singh executed the Will Exhibit D-1 in favour of defendants 1 and 2. I do not, therefore, find any ground warranting interference with the decrees and judgments of the Courts below.

(16) The second appeal, therefore, fails and is, accordingly, dismissed. No order as to costs.

R.N.R.