
(2008) 07 P&H CK 0112

In the Punjab And Haryana At Chandigarh

Case No : C.M. No. 4305-C of 2008 in Regular Second Appeal No. 147 of 2006

Kuldip Singh and Others

APPELLANT

Vs

Smt. Kaushalya Devi and Others

RESPONDENT

Date of Decision : 08-07-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1, Order 23 Rule 1(3), Order 23 Rule 1(5), Order 32 Rule 1, Order 32 Rule 10

Citation : (2009) 1 ILR (P&H) 936 : (2009) 5 RCR(Civil) 640

Hon'ble Judges : Permod Kohli, J

Bench : Single Bench

Advocate : Rakesh Nehra, for the Appellant;

Final Decision : Dismissed

Judgement

Permod Kohli, J.—Through the medium of this application, the Appellants except No. 6 seek to withdraw this appeal.

2. Vide introlutory order dated 8th May, 2008, learned Counsel for the Appellants sought some time to examine the question whether some of the Appellants are entitled to withdraw the appeal without the consent of the others, in view of the specific provisions contained under Sub-rule (5) of Rule 1 of Order 23.

3. The counsel for the Appellants has argued that the Appellants are entitled to withdraw the appeal without the consent of Appellant No. 6. Reliance is placed on the following judgments:

Nilappagouda Goudappgouda Vs. Basangouda Sangangowda, wherein following observations have been made:

This is an application by Appellant No. 6 to withdraw from the appeal. There are other Appellants Nos. 1 to 5 with whom he had joined in presenting this appeal. The application is opposed by the learned pleader for Appellants Nos. 1 to 5 on

the ground that under Order 23, Rule 1, the Court cannot allow a co-Plaintiff to withdraw without the consent of the other Plaintiffs. Under Sub-rule (1), however, it is open to the Plaintiff against all or any of the Defendants to withdraw his suit or abandon part of his claim. When the particular Appellant wants to withdraw, it seems to me that it is open to him to do so. Having regard to the circumstances of the case, the Court may make a suitable order with a view to see that by his withdrawal the other Appellants are not unfairly prejudiced. But I am unable to accept the contention urged by Mr. Desai that Sub-rule (4) governs Sub-rule (1), and that without the consent of the co-Appellants he cannot withdraw the appeal. It seems to me that the authorization of the Court contemplated by the sub-Rule refers to the permission of the Court which is contemplated by Sub-rule (2) allowing the Plaintiffs or any of them to withdraw from the suit with liberty to institute a fresh suit. Sub-rule (3) appears to me to make this position clear. It may be mentioned that under the old Code, with reference to Section 373 it had been held that the consent of the co-Plaintiffs was not necessary to enable a Plaintiff to withdraw the suit, but that such consent was necessary when he wanted to withdraw from the suit with the permission of the Court to file a fresh suit. See *Mohamaya Chowdhraim v. Durga Churn Shaha* (1). The addition of Sub-rule (1) and the re-arrangement of that Section 373 in the present rule (1) do not alter the position on this point. I am therefore, of opinion that it is not open to the Court to disallow the present application on the ground that the consent of the co-Appellants is not forthcoming.

4. Similar view was held in *Baidyanath Nandi and Ors. v. Shyama Sundar Nandi and Ors.* AIR (30) 1943 Cal 427 the relevant observations in the said judgment are "In my opinion, having regard to the cases cited above, the conclusion can properly be drawn that when one of several Plaintiffs desires to withdraw from the suit without reserving a liberty to institute a fresh suit in respect of the same matter, the consent of the co-Plaintiff is not necessary and Sub-rule (4) of Rule of 0.23, Civil P.C., has no application to such cases.

5. Both these judgments have been rendered interpreting Sub-rule (4) of Rule 1 of Order 23, which reads as under:

Nothing in this rule shall be deemed to authorise the Court to permit one of several Plaintiffs to withdraw without the consent of the others.

6. However, CPC was amended,--vide CPC (Amendment) Act, 1976 and entire Rule 1 of Order 23 was substituted. Amended Rule 1 of Order 23 is quoted hereunder:

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 apart 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.

(2) An application for leave under the proviso to Sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

(3) Where the Court is satisfied:

(a) that a suit must fail by reason of some formal defect, or (b) that there are sufficient grounds for allowing the Plaintiff to institute afresh suit for the subject-matter of a suit or part of a claim. it may, on such terms as it thinks fit grant the Plaintiff permission to withdraw from such suit 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.

(4) Where the Plaintiff-fa) 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 precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(5) Nothing in this rule shall be deemed to authorise the Court to permit one of several Plaintiffs to abandon suit or part of a claim under Sub-rule (1), or to withdraw, under Sub-rule (3), any suit or part of a claim, without the consent of the other Plaintiffs.

7. Sub-rule (4) has been replaced by sub-Rule 5. A bare perusal of Sub-rule (5) clearly draws a distinction between sub-Rule 4 of the unamended CPC and new Sub-rule (5). Sub-rule (4) prior to amendment did not refer to Sub-rule (1) or Sub-rule (3) or any other Sub-rule of Rule 1 of Order 23 of Code of Civil Procedure.

8. The Courts in the above referred judgments have held that the consent of the co-Plaintiffs is needed only where the suit is sought to be withdrawn with liberty to file a fresh suit. As mentioned hereinabove, there is a marked distinction between the earlier Sub-rule (4) and the present Sub-rule (5), Sub-rule (5) imposes restrictions on the power of the Court to permit one of the several Plaintiffs to abandon a suit or part of a claim under Sub-rule (1) or to withdraw, under Sub-rule (3), without the consent of the other Plaintiffs.

9. This clearly indicates that the withdrawal whether with liberty to file a fresh one or simplicitor i.e. without liberty which can be termed as absolute withdrawal-both are regulated and controlled by sub-Rule 5.

10. Similar issue came up for consideration before this Court and various other Courts. It will be useful to notice some of the judgments on the issue. Suresh Chand Chaudhary v. Shashi Prabha Nangia 2000 (2) All LLR 517 wherein

following observations have been made:

First of all, I would like to meet with the second proposition which has been set up by the learned Counsel for the Petitioner. Order 23 Rule 1(5) reads as under:

Nothing in this rule shall be deemed to authorise the Court to permit one of several Plaintiffs to abandon a suit or part of a claim under Sub-rule (I) or to withdraw, under Sub-rule (3), any suit or part of a claim, without the consent of the other Plaintiffs.

A reading of the above would show that if a suit is instituted on behalf of more than one Plaintiff and if one Plaintiff withdraws or abandons his claim, such withdrawal is not legal in the absence of the consent of the other co-Plaintiff.

11. In Bhagwan Dass and Ors. v. Paramjit and Ors. (2002-1) Vol. CXXX The Punjab Law Reporter 648 it was observed as under:

Thus, all these facts taken together go a long way to show that consent of Paramjit was never obtained for withdrawal of the suit. The provisions of Order XXIII Rule I (5) of the CPC have been totally bypassed. There is no compliance of the Order at all which provides that nothing in this rule shall be deemed to authorise the Court to permit one of several Plaintiffs to abandon a suit or part of a claim under Sub-rule (I), or to withdraw, under Sub-rule (3), any suit or part of a claim, without the consent of the other Plaintiffs.

12. In view of the aforesaid judgments, the true and correct interpretation of Sub-rule 5 of Rule 1 of Order 23, the interpretation sought to be placed by the applicant is not possible, the amended provisions are clear and unambiguous in terms. Sub-rule 5 do not permit withdrawal by some of the co-Plaintiffs/Appellants, without the consent of others.

13. This application is accordingly dismissed.