
(2010) 05 P&H CK 0255
In the Punjab And Haryana At Chandigarh

Manohar Cold Storage and Ice Factory	APPELLANT
Vs	
Baldev Singh and Others	RESPONDENT

Date of Decision : 14-05-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 96

Citation : (2010) 159 PLR 155

Hon'ble Judges : Rakesh Kumar Jain, J

Bench : Single Bench

Judgement

Rakesh Kumar Jain, J.—This revision petition is directed against the order dated 09.1.2010 passed by learned Addl. District Judge, Nawanshahar, by which an application filed by the petitioner under Order 23 Rule 3 of Code of Civil Procedure, 1908 (for short "CPC") during the appeal to withdraw the suit to file a fresh one on the same cause of action, has been dismissed.

2. In brief, facts of the case are that the petitioner/plaintiff filed a suit for permanent injunction praying for a decree to restrain the defendants from interfering in the management, control and possession of the plaintiff firm, its business premises, super structure, machinery, plants, assets and building as shown in red colour in the site plan annexed with the plaint, alleging that the plaintiff firm is a duly registered partnership firm registered under the Indian Partnership Act, 1932, with the Registrar of Firms vide No. 2712 of 1997-98, of which Manohar Singh is the managing partner. It was formally constituted under the name and style of M/s Saini Cold Storage and Ice Factory vide partnership deed dated 2.11.1978 comprising of six partners. The said firm was running into losses and could not revive its financial position inspite of sufficient funds invested by Manohar Singh from his own resources who had to bear the financial liability alone as the other partners shirked their liabilities. He paid Rs. 8,25,000/- and Rs. 50,000/- in the Court of Mr. K.S. Kang, Addl. Civil Judge (Senior Division), Nawanshahar, in an execution application filed by Central Bank of India, Nawanshahr against the erstwhile firm M/s Saini Cold Storage and Ice

Factory. Due to financial crisis, one of the partners Baldev Singh/defendant sold his share in the firm M/s Saini Cold Storage and Ice Factory to Manohar Singh, managing partner vide agreement dated 31.3.1997 in lieu of payment of liability to be paid by Manohar Singh regarding share of loss of liability of Baldev Singh. Baldev Singh sold his entire share including share inherited by him being the legal heir of deceased Hukam Singh, one of the partners of M/s. Saini Cold Storage and Ice Factory. Manohar Singh was having General Power of Attornies of defendants Swaran Singh, Kewal Singh and Avtar Singh. The said partners opted to retire from the firm and executed an agreement dated 11.3.1998 in favour of Surjit Kaur, wife of Manohar Singh. Consideration of sale of their shares referred to above from Surjit Kaur was adjusted towards their liabilities cleared by Manohar Singh. Vide the said agreement, shares of these persons, which they inherited being legal heirs of one of the deceased partners late Hukam Singh also stood adjusted in the said firm. Similarly, Balbir Singh and Bhajan Singh, defendant Nos. 5 and 2 respectively in this suit who inherited 3.42% share in the assets & liabilities of the erstwhile partnership firm, being legal heirs of deceased partner Hukam Singh also opted not to contribute towards clearing the debts and liabilities of the erstwhile firm which they also inherited being legal representatives of deceased Hukam Singh and their liabilities having been cleared by Manohar Singh from his own resources. In nutshell, after clearing the debts and liabilities of the erstwhile partnership firm M/s Saini Cold Storage and Ice Factory and the voluntary opting out of the defendants and Avtar Singh from the management, control, possession, assets & liabilities of the erstwhile firm aforesaid, the firm as a matter of fact, became dormant body and it stood dissolved for all intents and purposes.

3. After winding up of the erstwhile firm M/s Saini Cold Storage and Ice Factory, the plaintiff firm was re-constituted afresh with Manohar Singh and Surjit Kaur, as its partners to the extent of 1/2 share i.e. each having 50% share in the assets & liabilities of the plaintiff-firm vide partnership dated 18.3.1998. The plaintiff-firm is stated to be in actual possession, control and management of the entire assets, property, building, machinery installed in the Cold Storage, super structure, fittings & fixtures and other activities. The defendants started threatening to interfere in the management, control business and management of the plaintiff firm, which led to the filing of the present suit.

4. The defendants had alleged that there is no Cold Storage under the name and style of M/s. Manohar Cold Storage and Ice Factory. The firm M/s Saini Cold Storage and Ice Factory is subsisting. Execution of agreement dated 31.3.1997 by Baldev Singh was denied and execution of agreement by Swaran Singh, Kewal Singh and Avtar Singh was also denied.

5. Plaintiff filed replication. On the pleadings of the parties, the trial Court framed the following issues on 22.2.1999:

1. Whether the plaintiff firm is under the name & style of M/s Manohar Cold Storage and Ice Factory instead of Saini Cold Storage? OPP

2. Whether the plaintiff is major partner of the firm, if issue No. 1. is proved? OPP
3. Whether the plaintiff is entitled for permanent injunction as prayed for? OPP
4. Whether the suit is not maintainable? OPD
5. Whether the plaintiff has no locus standi to file this suit? OPD
6. Whether the plaintiff is estopped by his own act and conduct to file the present suit? OPD
7. Whether the plaintiff has not come to the Court with clean hand, if so its effect? OPD
8. Whether the plaintiff has no cause of action to file the present suit? OPD
9. Whether the site plan produced by the plaintiff is wrong and incorrect? OPD
10. Relief.

6. Both the parties led their oral as well as documentary evidence.

7. The trial Court discussed issues Nos. 1, 2 and 3 together and returned a finding that "keeping in view the above detailed discussion, I am giving no finding on issues No. 1 and 2 in this mere suit for permanent injunction and issues No. 1 and 2 are decided accordingly. However, issue No. 3 is decided against the plaintiff and in favour of defendant". Issue No. 4. was as to "whether suit is not maintainable? OPD

8. The trial Court decided this issue against the plaintiff holding "where title of property is under challenge, a suit for mere injunction without praying for declaration of title is not maintainable. The plaintiff is not entitled to get any relief from this Court as his suit is not maintainable".

Issue No. 5 was as to "whether plaintiff has no locus standi to file this suit? OPD.

This issue was decided in favour of the plaintiff.

Issue Nos. 6 to 9 were discussed in which burden was upon the defendants and all the three issues were decided against them.

9. In nutshell, the trial Court did not decide issue Nos. 1 and 2.

Issue No. 5 was decided in favour of the plaintiff and issue Nos. 6 to 9 were decided against the defendants. Only issue Nos. 3 and 4 namely "whether the plaintiff is entitled to permanent injunction as prayed for? OPP" and "whether this suit is not maintainable? OPD" have been decided by the trial Court.

10. While deciding issue No. 3, the trial Court has held that "suit is for permanent injunction. Existence of plaintiff firm is under challenge, where title of property is under challenge, mere suit for injunction without praying for declaration of title is not maintainable. Plaintiff is not entitled to any relief from this Court as the suit is not maintainable. That being so, the suit for mere

injunction without praying for declaration is not maintainable and title cannot be decided in the suit".

11. Similar finding is given while deciding issue No. 4.12. Aggrieved against the judgment and decree of the trial Court, where the plaintiffs were non-suited on the ground of "non maintainability" of suit vide its judgment and decree dated 15.5.2007, the plaintiffs filed the first appeal u/s 96 of CPC, which came up before learned Addl. District Judge, Nawanshahr.

13. During the pendency of the appeal, the plaintiff filed an application under Order "23 Rule 3 of Code of Civil Procedure, 1908 (for short, "CPC") for permission to withdraw the suit with further permission to file afresh on the same cause of action. It was, inter-alia, alleged in the application that appeal is continuation of suit. No issue touching the title of the property has been decided. The suit has been decided only on the ground of "non maintainability on technical and formal defect in the suit that mere suit for injunction is not maintainable, unless a declaration is also sought, therefore, the plaintiffs prayed for permission to withdraw the suit to file a fresh suit for declaration and injunction on the same cause of action.

14. The said application was contested by the defendants.

15. Learned Addl. District Judge, Nawanshahar, vide his order dated 09.1.2010, dismissed the application on the ground that at the appellate stage, the plaintiff has no absolute right to withdraw the suit. Since in the present case, the application has been filed at the appellate stage, when the suit for permanent injunction has been dismissed, therefore, there is no ground to allow the suit to be withdrawn to file afresh on the same cause of action.

16. Learned Counsel for the petitioner has submitted that there is no bar seeking permission of the Court to file a fresh suit on the same cause of action by withdrawing it during the pendency of the appeal if the suit suffers from formal defect or even when the Court finds sufficient grounds as provided under Order 23 Rule 3 of CPC. It is also submitted that there is no finding on merit returned by the trial Court and the suit has been basically dismissed on the ground of "non-maintainability" as the plaintiffs did not seek a declaration while preying for permanent injunction, therefore, no right by virtue of dismissal of suit has vested in the defendants. It is submitted that in such cases where suit suffers from formal defect and has been dismissed as such by the trial Court, the plaintiffs can seek permission of the Court for withdrawal of the suit even at the stage of appeal for the purpose of filing a suit afresh on the same cause of action in terms of Order 23 Rule 3 of C.P.C. He relies upon a judgment of this Court in the case of Sant Baba Darshan Singh Sewak Baba Kharak Singh v. School Beerh Baba Budha Sahib and Ors. 2006 (2) R.C.R. 160.

17. On the other hand, learned Counsel for the respondent has argued that Order 23 Rule 3 of CPC provides right to the plaintiffs to withdraw from the suit as-long-as the suit is pending and no vested right has accrued in favour of the

defendants but once the suit is decided and decree is passed against the plaintiff exclusively determining the right of the parties with regard to the matter in controversy in the suit, the plaintiff does not enjoy any absolute right to withdraw the suit at the stage of appeal. In this regard, learned Counsel has relied upon two decisions of this Court in the case of Darshan Singh Vs. Kartar Singh and Others, and Bawa Singh and Others Vs. Smt. Tej Kaur alias Nachhatar Kaur, .

18. I have heard both the learned Counsel for the parties and have perused the record with their assistance.

19. In order to appreciate the controversy at hand, it would be appropriate to refer to the relevant provisions of Order 23 Rule 3 of C.P.C.:

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.

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 a fresh 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 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.

(4) Where the plaintiff-(a) 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 authorize the Court to permit one of several plaintiffs to abandon a suit or part of a claim under Sub-rule (1), or to withdrew, under Sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs.

20. Order 23 talks of three types of situation (i) after filing of the suit, the plaintiff can abandon his suit in its entirety or part of claim in his suit against all or any of the defendants (ii) where the plaintiff is minor or a legally disabled person, neither the entire suit nor any part of the claim can be abandoned without "leave of the Court" (iii) where the Court is satisfied that the suit must fail because of some formal defect or there are sufficient grounds to allow the plaintiff to institute fresh suit on the same cause of action or in respect of part of his claim which can permit him to withdraw with liberty to institute fresh suit in respect of the subject matter of such suit or part of the claim.

21. According to the defendants, Order 23 is applicable to the pendency of the suit, but once the suit of the plaintiff is dismissed, provisions of Order 23 could not be applied during the pendency of the appeal.

22. There is fallacy in the submission made by learned Counsel for the defendants in this regard because it is well settled that appeal is a continuation of suit and the provisions of Order 23 CPC are equally applicable to an appeal as well. Now the question involved is in what circumstances, the First Appellate Court could allow the plaintiff to withdraw the suit in order to file afresh suit on the same cause of action. Is the Appellate Court competent to allow the plaintiff to withdraw the appeal to institute fresh suit on the same cause of action if the trial Court has decided the suit on merit against the defendant? Answer is "No". Once the issues are decided by the trial Court on merit dismissing the suit of the plaintiff, he (plaintiff) in order to wriggle out of the findings returned on merit against him, cannot withdraw his suit for the purpose of filing another suit on the same cause of action which has already been adjudicated upon between the parties. But what would be the position if the suit of the plaintiff has been dismissed by the trial Court on account of formal defect in it. In this regard, answer is "Yes". The Appellate Court has the competence to allow the plaintiff to withdraw his suit in the appeal filed by him in order to institute fresh suit on the same cause of action if the suit has been dismissed purely on a formal defect.

23. Reverting back to the facts of the present case;

The trial Court has specifically recorded in para 19 of its judgment that "it is not deciding issue Nos. 1 and 2 which are the issues on merits. Issue Nos. 6 to 9 are decided against the plaintiff and against the defendants respectively. Only issue Nos. 3 and 4 have been decided against the plaintiff on the basis of which suit has been dismissed, wherein the trial Court has observed that mere suit for injunction is not maintainable as the plaintiff was also required to seek declaration as well because the defendants have alleged that Manohar Singh was not the managing partner of the firm. Thus, holding the suit to be not maintainable for want of seeking another prayer by the plaintiff is a formal defect which can be allowed to be cured by the plaintiff by way of withdrawing the appeal and to file fresh suit on the same cause of action is well in accordance with law. The judgments cited by learned Counsel for the respondents in the case of Darshan Singh v. Kartar Singh and Bawa Singh v. Smt. Tej Kaur (supra) are

distinguishable on the point that if there is no technical or formal defect in the suit and the finding has been returned by the trial Court on merits touching the rights of the parties, permission to withdraw the suit at the stage of appeal with permission to file fresh suit on the same cause of action cannot be given as a valuable right is already vested in the other side.

24. There is no quarrel with the law laid down in the aforesaid judgments. However, the said judgments are not applicable, rather the judgment relied upon by the learned Counsel for the appellant in the case of Sant Baba Darshan Singh Sewak (supra) squarely covers the case in hand in which it has been held by this Court that if the judgment of the trial Court is against the plaintiff on the ground of formal defect in the suit, the plaintiff has a right to apply to the Appellate Court under Order 23 CPC to seek permission to withdraw the suit to file fresh suit on the same cause of action as it would not effect the rights of the litigating parties as nothing is decided by the trial Court on merits.

25. In view of the above, impugned order dated 09.1.2010 passed by learned Addl. District Judge, Nawanshahar, is set aside and the present petition is allowed subject to payment of Rs. 20,000/- as cost to be paid by the petitioner/ plaintiff to the defendants/respondents in equal share by way of demand drafts drawn in the name of each of the defendant.