

Before J. V. Gupta, J.

JUBEDAN BEGUM AND OTHERS,—Appellants.

versus

SEKHEWAT ALI KHAN,—Respondent.

Regular Second Appeal No. 451 of 1983

March 6, 1984.

Code of Civil Procedure (V of 1908)—Order 23 Rule 1—Suit for declaration dismissed by the trial Court—Plaintiff filing an appeal—Appellate Court allowing the suit to be withdrawn—Such withdrawal—Whether legal—Words ‘at any time’ in Rule 1 of Order 23—Whether apply to a suit pending in the trial Court.

Held, that the appellate Court acts illegally in allowing the plaintiff to withdraw the suit after setting aside the judgment and decree of the trial Court dismissing the suit. The words ‘at any time’ in Rule 1 of Order 23 of the Code of Civil Procedure, 1908 would apply to the suit pending in the trial Court. Once the decree is passed by the trial Court, then certain rights are vested in the party in whose favour the suit is decided. Thus, the plaintiff is not entitled to withdraw the suit, as a matter of course, at any time after the decree is passed by the trial Court. The plaintiff cannot be allowed to withdraw the suit at the appellate stage.

(Para 4).

Regular Second Appeal from the order of the Court of Shri Rajinder Kumar Synghal, Additional District Judge, Sangrur, dated 25th October, 1982 reversing that of the order of the Court of Shri Jagroop Singh, Sub-Judge First Class, Malerkotla, dated 3rd January, 1981 accepting the appeal and setting aside the judgment and decree passed by the learned trial court and allowing the plaintiff to withdraw the suit and, as such the same is hereby dismissed with costs as withdrawn.

J. R. Mittal Advocate and Pawan Bansal, Advocate, for the Petitioner.

H. L. Sarin Advocate with M. L. Sarin, Advocate, for the Respondent.

JUDGMENT

J. V. Gupta, J.

(1) This appeal is directed against the order of the Additional District Judge, Sangrur, dated 25th October, 1982, whereby the

plaintiff was allowed to withdraw the suit, after setting aside the judgment and decree of the trial Court, dismissing his suit.

(2) The plaintiff-respondent who is a tenant under the defendants filed the suit for declaration and permanent injunction, alleging that he had taken the house in dispute on rent seven years back from the defendants and had been paying rent regularly and the rent upto November, 1979 had been paid by him, but the landlords never issued any receipt in this respect. Since the defendants were threatening to dispossess him forcibly, on the ground of non-payment of rent, he filed the suit for declaration to the effect that he had already paid rent upto 30th November, 1979 and thus, prayed for a decree for permanent injunction, restraining the defendants from dispossessing him forcibly from the suit property. However, the suit was contested on behalf of the defendants. Ultimately, the trial Court found that the rent at the rate of Rs. 80 per mensem upto 31st August, 1974 only had been paid by the plaintiff and thereafter the rent had not been paid, as alleged in the plaint. Consequently, plaintiff's suit was dismissed. In appeal filed on behalf of the plaintiff, an application under Order 23 Rule 1 of the Code of Civil Procedure, was filed wherein it was prayed that he be allowed to withdraw the suit. The application was resisted on behalf of the defendants, on the ground that there was no sufficient reason for withdrawing the suit, and the application was filed by the plaintiff simply to avoid decision which has been given in favour of the defendants by the learned trial Court. However, the learned lower Appellate Court found that as the defendants could not be said to have acquired any right under the decree and the withdrawal of the suit would not adversely affect the substantive rights of the defendants—the plaintiff was entitled to withdraw the same. Consequently, the application was allowed. The judgment and decree of the trial Court were set aside and the plaintiff's suit was dismissed as withdrawn. Dissatisfied with the same, the defendants have filed the second appeal in this Court.

(3) The learned counsel for the appellants contended that the plaintiff could not be allowed to withdraw the suit in appeal, because a categorical finding has been given by the trial Court that he had failed to prove that he had paid rent upto 30th November, 1979. According to the learned counsel, this finding is very material as the defendants have already filed an application for ejection against the plaintiff before the Rent Controller. On the other hand, the learned counsel for the respondent contended that the appeal is a

continuation of the suit and therefore, in view of the provisions of Order 23 Rule 1 of the Code, the plaintiff was entitled to withdraw the suit at any time. On behalf of the appellants reliance was placed on *Kanhaiya & Others v. Mst. Dhaneshwari & another*.

(4) After hearing the learned counsel for the parties, I am of the considered view that the lower Appellate Court has acted illegally in allowing the plaintiff to withdraw the suit after setting aside the judgment and decree of the trial Court dismissing the suit. The words "at any time" in Rule 1 of Order 23 of the Code would apply to the suit pending in the trial Court. Once the decree is passed by the trial Court, then certain rights are vested in the party in whose favour the suit is decided. Thus, the plaintiff is not entitled to withdraw the suit, as a matter of course, at any time after the decree is passed by the trial Court. The judgment relied upon by the learned counsel for the respondent, *Kamta v. Gaya Prasad* (2) was dissesnted subsequently by that Court in *Kanhaiya's* (supra). In paragraph 6 thereof, it was obsesrved as under:—

"A learned Single Judge of this Court in *Kedar Nath v. Chandra Kiran*, A.I.R. 1962 All 263 also took the view that Order XXIII, Rule 1(1) does not give an absolute right to the plaintiff to withdraw the suit at the stage of second appeal and that the matter of wihdrawal of the suit under the aforesaid provision of the Code lay within the discretion of the Court. This case was cited with approval in the case of *Vidhadhar Dubey*, 1970 All LJ 732—A.I.R. 1971 ALL 41 (supra). The observation of the learned Single Judge in *Kamta's* case, 1971 All WR (HC) 667 = (A.I.R. 1971 All 143) (supra) that the view taken in *Kedarnath's* case (supra) has been rendered nugatory due to the law laid down by the Supreme Court in the case of *M/s. Hulas Rai*, A.I.R. 1968 SC 111 (supra) does not appear to be justified. The case of *M/s. Hulas Rai* had nothing to do with the right of an appellant to withdraw the suit at the appellate stage."

Thus, keeping in view the facts and circumstances of the present case, the plaintiff could not be allowed to withdraw the suit at appellate stage. Consequently, the appeal succeeds. The order of the learned lower Appellate Court allowing the plaintiff to withdraw this suit,

(1) A.I.R. 1973 All 212.

(2) A.I.R. 1972 All 143.

is set aside and the case is sent back to the District Judge for deciding the appeal on merit in accordance with law.

(5) The parties have been directed to appear in his Court on 30th of March, 1984.

N.K.S.