

2023 C L C 2042

[Lahore (Rawalpindi Bench)]

Before Mirza Viqas Rauf, J

**Messrs BEST WAY CEMENT LTD. through Duly Authorized Representative--
--Petitioner**

Versus

YASIR SALEEM and 2 others----Respondents

Writ Petition No.1645 of 2021, decided on 8th September, 2022.

(a) Civil Procedure Code (V of 1908)---

----O. XXIII, Rr. 1&2---Withdrawal of suit---Formal defect---Instances of formal defect are (i) Misjoinder of parties or causes of action which will result in the failure of the suit, (ii) erroneous valuation of the subject matter; (iii) insufficient description of the property involved in the suit; (iv) failure to disclose a cause of action; (v) material document not properly stamped; (vi) non-impleading of necessary party and (vii) form of suit.

(b) Civil Procedure Code (V of 1908)---

----O. XXIII, Rr. 1&2---Withdrawal of suit---Formal defect, non-disclosure of---Plaintiff moved an application seeking withdrawal of suit with permission to file afresh---Trial Court dismissed said application---Appellate Court allowed revision moved by the plaintiffs against which judgment the defendant invoked constitutional jurisdiction of the High Court contending that the application for withdrawal of suit did not disclose any formal defect---Validity---Expression formal defect must be given a liberal meaning and should be of nature as to entail dismissal of the suit but every kind of defect not going to the root of the case or not affecting the merits of the case---Plaintiff could only be allowed to withdraw his suit or abandon part of his claim if he succeeded to establish that suit must fail by reason of some formal defect---For the purpose of seeking permission of withdrawal of suit in order to file afresh, plaintiff on the one hand was bound to disclose some formal defect and on the other, Court was also obliged to satisfy itself that formal defect was of such a nature that suit must fail---It was thus incumbent upon the plaintiff to point out a formal defect on the plaint justifying withdrawal of his suit with permission to file afresh---Said permission could not be allowed in a mechanical and haphazard manner---Court was also duty bound to examine the contents of the application seeking such permission---From the perusal of the application moved by the respondent it was clearly evident that the same was bereft of any content disclosing formal defect in the plaint---Civil Court was justified to refuse the application seeking permission to withdraw the suit in order to file afresh whereas the Revisional Court had clearly transgressed its powers and

as such impugned judgment was illegal and unlawful ---Constitutional petition was allowed, in circumstances.

Sardar Muhammad Kazim Ziauddin Durrani and others v. Sardar Muhammad Asim Fakhuruddin Durrani and others 2001 SCMR 148; Muhammad Yousaf and others v. Nazeer Ahmed Khan (deceased) through LRs and others 2021 SCMR 1775; Muhammad Yar (deceased) through L.Rs. and others v. Muhammad Amin (deceased) through L.Rs. and others 2013 SCMR 464 and Haji Muhammad Boota and others v. Member (Revenue), Board of Revenue, Punjab and others PLD 2003 SC 979 ref.

(c) Civil Procedure Code (V of 1908)---

---O. XXIII, Rr. 1 & 2---Constitution of Pakistan, Art. 199---Constitutional jurisdiction of the High Court---Withdrawal of suit---Formal defect, non-disclosure of---Plaintiff moved an application seeking withdrawal of suit with permission to file afresh---Trial Court dismissed said application---Revisional Court allowed revision moved by the plaintiffs against which judgment the defendant invoked constitutional jurisdiction of the High Court contending that the application for withdrawal of suit did not disclose any formal defect---Validity---Constitutional jurisdiction of the High Court was though discretionary and used in rare and extraordinary circumstances but the present case was a classic one for exercise of such jurisdiction in terms of Art. 199 of the Constitution---In absence of disclosure of formal defect, the Civil Court was justified to refuse the application seeking permission to withdraw the suit in order to file afresh whereas the Revisional Court, had clearly transgressed its powers and as such impugned judgment was illegal and unlawful---High Court set aside impugned order passed by the Appellate Court and consequently order passed by the Trial Court, dismissing an application for restoration of suit filed by the respondents/plaintiffs, stood maintained---Constitutional petition was allowed, in circumstances.

Abdul Rehman Qadar for Petitioner.

Syed Amir Hussain Kazmi for Respondent No.1.

Date of hearing: 8th September, 2022.

JUDGMENT

MIRZA VIQAS RAUF, J.---This petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 stems out from a judgment dated 13th April, 2021 passed by the learned Additional District Judge, Rawalpindi, whereby while allowing the revision petition filed by the respondent No.1 (hereinafter referred to as "respondent") he proceeded to set aside the order dated 15th March, 2021 passed by the learned Civil Judge Class-I, Rawalpindi.

2. Facts in brevity necessary for adjudication of instant petition are that a suit for declaration, specific performance and injunction was instituted by "respondent" before the learned Civil Judge Class-I, Rawalpindi. Suit was contested by the petitioner, who submitted his written statement. During the pendency "respondent" moved an application seeking withdrawal of the suit with permission to file afresh. The application was declined by the learned Civil Judge through order dated 15th

March, 2021. Feeling aggrieved, the "respondent" filed a revision petition before the learned Additional District Judge, Rawalpindi, which was allowed by way of impugned judgment.

3. Learned counsel for the petitioner contended that a party cannot be allowed to withdraw a suit with permission to file afresh unless he discloses some formal defect in the plaint. He submitted that the application for withdrawal of suit was since not disclosing any formal defect, so it was rightly dismissed by the learned Civil Judge. Learned counsel emphasized that the learned revisional court while allowing the "respondent" to withdraw the suit to file afresh has committed patent illegality and impugned judgment is not tenable under the law.

4. Conversely, learned counsel for the "respondent" while defending the impugned judgment submitted that plaint was suffering with certain formal defects which were not curable. He added that learned revisional court was competent to allow the "respondent" to withdraw the suit and to file afresh and this petition is misconceived.

5. Heard. Record perused.

6. The moot point involved herein is rested upon implication of Order XXIII, Rule 1 of the Code of Civil Procedure (V of 1908) (hereinafter referred to as "C.P.C."). For ready reference and convenience same is reproduced below :-

"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 withdraw his suit or abandon part of his claim.

(2) Where the Court is satisfied after recording reasons-

(a) that a suit must fail by reason of some formal defect, or

(b) that there are other 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 abandon such part of a claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of a claim.

(3) Where the plaintiff withdraws from a suit or abandons part of a claim without the permission referred to in sub-rule (2), 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.

(4) Nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others."

(Underlining supplied for emphasis)

From the bare perusal of above referred provision it is clearly manifest that in terms of sub-rule (1) a plaintiff is always at liberty to withdraw a suit or abandon part of claim at any time against all or any of the defendants after the institution. Sub-rule (2), however, places certain restrictions on withdrawal if the plaintiff intends to institute a fresh suit in respect of the subject matter of the suit or part of claim. In

order to get a permission for a fresh suit a plaintiff has to demonstrate to the satisfaction of the court that the suit must fail by reason of some formal defect or there are other sufficient grounds for allowing him to institute a fresh suit for the subject matter of the suit or part of claim. It is obligatory upon the court to record reasons for allowing the plaintiff to institute a fresh suit in respect of subject matter of the suit or such part of claim on such terms as it thinks fit. Sub-rule (3) provides the consequences of withdrawal or abandonment of part of claim if it is without permission of the court as is referred in sub-rule (2). In terms thereof, if the plaintiff withdraws from a suit or abandons part of claim without permission of the court he shall be liable for such costs and shall be precluded from instituting a fresh suit in respect of such subject matter or such part of claim.

7. The term "formal defect" used in the rule *ibid* is of significant importance. Formal defect is a defect which may be of technical nature. Law does not permit the knocking out the parties on the basis of technicalities. The object of sub-rule (2) of Order XXIII of "C.P.C." is to prevent the defeating of ends of justice on account of technicalities. In order to further elaborate the term it can be said that following may be the most relevant instances of formal defect :-

- (a) Mis-joinder of parties or causes of action which will result in the failure of the suit.
- (b) erroneous valuation of the subject matter.
- (c) Insufficient description of the property involved in the suit.
- (d) Failure to disclose a cause of action.
- (e) Material document is not properly stamped.
- (f) Non-impleading of necessary party.
- (g) Form of suit etc.

8. It is also pertinent to mention here that the expression formal defect must be given a liberal meaning and should be of a nature as to entail dismissal of the suit but every kind of defect not going to the root of the case or not affecting the merits of the case. To this effect guidance can be sought from the case of *Sardar Muhammad Kazim Ziauddin Durrani and others v. Sardar Muhammad Asim Fakhuruddin Durrani and others* (2001 SCMR 148) wherein the Hon'ble Supreme Court of Pakistan defined the expression "formal defect" in the following manner :-

- "8. We have carefully noted the contents of application to know whether the suit was suffering from "formal defects" or otherwise, and their removal has become essential to save it from failure. It is noteworthy that under Order XXIII, rule 1, sub-rule (2) law has foreseen two situations, i.e. incorporated in clauses (a) and (b) warranting withdrawal of suit. In the instant case petitioners have prayed for relief in view of clause (a) which deals with the failure of the suit due to "formal defect". Under C.P.C. expression "formal defect" has not been defined anywhere. As such, we have to refer to its meaning as per dictionary which reads as under;--

"The want or absence of some legal requisite; deficiency; imperfection; insufficiency. The want or absence of something necessary for completeness or perfection; a lack or absence of something essential to completeness; a deficiency in something essential to the proper use for the purpose for which a thing is to be used (Black's Law Dictionary, Vth Edition, page 376)."

From perusal of above meaning of the word "defect" conveniently it can be visualized with reference to a suit framed under the C.P.C. that if it is not arranged in accordance with Order VI, Rules 1 to 4, 14, 15 or Order VII, Rules 1 to 7, C.P.C. then it would be deemed that suit suffers from defect. However, such defect itself shall not be sufficient to grant permission to withdraw the suit unless it is not shown that for any one of formal defects the suit is likely to fail, which mean that the nature of the defect must be apparent but not latent because as far as former category of defect is concerned, it is visible and is not liable to be explored after an inquiry, because if there is procedural departures in the form or arrangement of the suit obviously it would be apparent and if there is substantial defect in the suit, it would fall under the latter category which can only be unearthed after recording of evidence. Therefore, permission can only be granted to remove a defect, which is apparent or formal and its presence in the suit may fail it, but if it is latent and touches merits of the case, then permission to withdraw the suit on this score cannot be granted. Reference in forming this opinion is placed on the cases of Muhammad Din v. Atta Muhammad and others (PLD 1957 (W.P.) Lahore 971), Ahmad Bakhsh v. Allah Bakhsh and another (PLD 1962 (W.P.) Lahore 476), Aqil Hussain v. Muhammad Sadiq and 7 others (1986 CLC 1316) and Ahmad Din and 3 others v. Town Committee, Depalpur (1972 SCMR 203)."

After having an overview of the relevant provision of law and the principles laid down in the judgment supra there remains no cavil to hold that a plaintiff can only be allowed to withdraw his suit or abandon part of his claim if he succeeds to establish that suit must fail by reason of some formal defect. In other words, for the purpose of seeking permission of withdrawal of suit in order to file afresh, a plaintiff on the one hand is bound to disclose some formal defect and on the other court is also obliged to satisfy itself that formal defect is of such a nature that suit must fail. It is thus incumbent upon a plaintiff to point out a formal defect in the plaint justifying withdrawal of his suit with permission to file afresh. Furthermore permission to withdraw a suit and file afresh cannot be allowed in a mechanical and haphazard manner. Court is also duty bound to examine the contents of the application seeking such permission. From the perusal of the application moved by the "respondent" it is clearly evident that the same is bereft of any content disclosing formal defect in the plaint. Reliance in this respect can also be placed on Muhammad Yousaf and others v. Nazeer Ahmed Khan (deceased) through LRs and others (2021 SCMR 1775) wherein it is held that if the formal defect is material and substantial and affects the merits of the case or goes to the root of the claim it cannot be termed as a formal defect within the scope and meaning of sub-clause (a) of Rule 1(2) of Order XXIII of "C.P.C."

9. In the case of Muhammad Yar (deceased) through L.Rs. and others v. Muhammad Amin (deceased) through L.Rs. and others (2013 SCMR 464) the Hon'ble Apex elaborated the Order XXIII, Rule 1 of "C.P.C." in the following words :-

"4. As far as resolving the proposition about the effect and the bar contained, regarding the institution of a fresh suit, as envisaged by Order XXIII, Rule 1, C.P.C. is concerned, it seems expedient to reproduce the said provision, which reads as below:--

"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, withdraw his suit or abandon part of his claim

(2) Where the Court is satisfied-

(a) that a suit must fail by reason of some formal defect, or

(b) that there are other 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 abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim.

(3) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub-rule (2), 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.

(4) Nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others."

From the clear language of the above, it is vivid and manifest that the noted rule mainly comprises of two parts; sub-rule (1) entitles the plaintiff of a case to withdraw his suit and/or abandon his claim or a part thereof, against all or any one of the defendants, at any stage of the proceeding and this is his absolute privilege and prerogative (Note: except in certain cases where a decree has been passed by the Court such as in the cases pertaining to the partition of the immovable property etc.). And where the plaintiff has exercised his noted privilege he shall be precluded from instituting a fresh suit on the basis of the same cause of action qua the same subject matter and against the same defendant(s) and this bar is absolute and conclusive, which is so visible from the mandate of sub-rule (3). However, sub-rule 2 (a)(b) is/are a kind of an exception to the sub-rules (1) and (3), in that, where a plaintiff wants to file a fresh suit after the withdrawal of his pending suit on the basis of the same cause of action about the same subject matter and the same defendant(s), he shall then be obliged to seek the permission of the Court in that regard; however such permission shall not be granted as a matter of right or as a matter of course/routine, rather the judicial conscious of the Court should be satisfied that, if the permission is not given the said suit shall fail on account of any formal defect, (Note: for the present what is a 'formal defect' is not a moot point

therefore, this aspect is not being touched herein) or that there are other sufficient grounds for allowing the plaintiff to withdraw the suit with a permission to institute a fresh suit; in respect of "sufficient grounds" no hard and fast criteria can be laid down and it depends upon the facts of each case, whether a case in that regard is made out or not. However, it is the legal requirement that where the plaintiff is asking for the permission of the Court to file a fresh suit, in his request in that behalf, he must elucidate and explain to the Court the reason(s) for the withdrawal, justifying for the permission of the Court. Likewise, the Court while allowing or disallowing the permission is duty bound to advert to the reasons propounded by the plaintiff and to pass a speaking order assigning reasons for its conclusion meeting the objective requirement of rule of 'satisfaction' as is envisaged by sub-rule (2). If the permission however is being refused, the suit should not then be dismissed as withdrawn, because the plaintiff in such an eventuality may review his stance and then not press for his request of withdrawal at all, because otherwise he may have to face the Bar and the preclusion of filing a fresh suit, which disability/bar he may not like to incur and might like to continue with his same suit. In the other eventuality, where the Court allows the requisite permission, the order in that behalf must spell out the objectivity test of 'satisfaction' so that it can be gauged and judged that the request of the plaintiff for withdrawal was/is not tainted with an oblique and mala fide motive; it is not meant to cause harm and prejudice to the defendant(s) and put him in disadvantageous position; and the request is not motivated to misuse the authority of the Court and abuse the process of law. The noted aspects are relevant to be kept in view by the court while granting the permission and the order in that behalf shall not be whimsical and against the settled norms of justice."

Reference in this respect can also be made to Haji Muhammad Boota and others v. Member (Revenue), Board of Revenue, Punjab and others (PLD 2003 Supreme Court 979).

10. Though there is divergence of views of the courts below but after having considered the scope and object of Order XXIII of the "C.P.C." and the principles laid down in the judgments supra, no cavil left that the learned Civil Judge was justified to refuse the application seeking permission to withdraw the suit in order to file afresh. The learned Additional District Judge being the revisional court has clearly transgressed its powers and as such impugned judgment is illegal and unlawful. The constitutional jurisdiction is though discretionary and used in rare and extraordinary circumstances but this is a classic case for exercise of such jurisdiction in terms of Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 as the revisional court has committed an illegality, while setting at naught well-reasoned order of the learned Civil Judge.

11. For the foregoing reasons, I am inclined to allow this petition, while setting aside the judgment dated 13th April, 2021 as being illegal and unlawful, consequently order dated 15th March, 2021 passed by the learned Civil Judge is restored with no order as to costs.

MQ/B-22/L Petition allowed.

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