JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

F.A.O No. 72708 of 2023

Muhammad Zulfiqar Ali

Versus

Rashid Mehmood Sidhu

JUDGMENT

Date of hearing	*20.02.2024*
Appellant by	*Mr. Shehzada Muhammad Zeeshan Mirza, Mr. Inam Ul Haq Buttar and Ms. Yamna Baig, learned Advocates.*
Respondent by	*Mr. Muhammad Shakeel Abid, learned Advocate.*

SULTAN TANVIR AHMAD, J:– Through this appeal, filed under section 19 of Intellectual Property Organization of Pakistan Act, 2012, the appellant has raised challenge against order dated 12.10.2023 passed by learned Intellectual Property Tribunal, Lahore (the '***Tribunal'***).

2. The respondent filed a suit for permanent and mandatory injunction against the appellant at Islamabad, which was returned vide order dated 22.06.2021 and it was presented before the learned *Tribunal* on 14.07.2021 (hereinafter called as the '***first suit***'). The suit was being contested by the appellant, however, as a consequence of application for early hearing the same was fixed and then allowed to be withdrawn with permission to file fresh after removing some formal defect on 21.05.2022. After obtaining this permission, on the same day, another suit No. 259/IPT/2023 titled *"Rashid Mahmood Sidhu vs. M. Zulfiqar Ali"* seeking permanent

injunction, damages etc. (hereinafter called as the '***second suit***') was filed. The order dated 21.05.2022 of the learned *Tribunal*, allowing to withdraw the *first suit* with the permission to institute a fresh, was assailed in F.A.O. No. 46771 of 2022 and this Court vide order dated 08.03.2023 directed the learned *Tribunal* to consider the matter afresh. Resultantly, the *first suit* was fixed for rehearing and on 12.07.2023 the learned *Tribunal* refused the application filed under Order XXIII Rule 1(2)(a) and (b) of Civil Procedure Code, 1908 ('***CPC***').

3. The *second suit*, which was filed as a result of order dated 21.05.2022, remained pending in this duration having adjourned *sine die* vide order dated 03.05.2023. The learned *Tribunal* on 03.08.2023 permitted to revive the *second suit*. This order was challenged in F.A.O. No. 54707/2023 and this Court vide order dated 05.09.2023 disposed of the appeal in the following manner: -

> *"…Learned counsel confronted that even if this legal position is accepted, how the Tribunal will decide the question of maintainability of second suit, unless the same is restored and parties are heard on this legal question before passing a reasoned order. Learned counsel in response candidly submits that he will not press this appeal in order to file appropriate application with the learned Tribunal regarding maintainability of first suit, however, requests that direction may be issued for early decision of said application if filed. Order accordingly. Appeal is disposed of…"*

As a consequence of above order the case was heard by the learned *Tribunal* on 12.10.2023 when it was concluded that filing of the *second suit* is not hit by the bar contained in Order XXIII Rule 1(3) of *CPC* and permitted the respondent to maintain the same. This order is challenged in

the present appeal.

4. Mr. Shehzada Muhammad Zeeshan Mirza, learned counsel for the appellant has submitted that the impugned order is against law and admittedly the *second suit* was based upon the order dated 21.05.2022 granting permission to withdraw *first suit* and file a fresh, which finally merged into the order of simpliciter dismissal as withdrawn; that the *first suit* since was dismissed without permission to file a fresh, the provision of Order II Rule 2 of *CPC* was required to be considered and applied to the case. Learned counsel for the appellant has also argued his case on the basis of principle of *res judicata* and he has stated that while deciding the matter the learned *Tribunal* has not even discussed Order II Rule 2 or Section 10 of *CPC*. In course of arguments learned counsel has relied upon various judgments, including the cases reported as *"Trustees of the Port of Karachi Versus Organization of Karachi Port Trust Workers and Others*" (**2013 SCMR 238**), *"Ghulam Abbas and Others Versus Mohammad Shafi through LRs and Others"* (**2016 SCMR 1403**), *"Shahbaz Khan vs. Additional District Judge, Ferozewala and others"* (**2017 SCMR 2005**), *"Khawaja Bashir Ahmed and Sons Pvt. Ltd. Versus Messrs Martrade Shipping and Transport and Others"* (**PLD 2021 Supreme Court 373**), *"Malik Ehsan Ullah etc. Versus Province of the Punjab etc.*" (**PLJ 2021 Lahore 352**), *"Nasir Ali vs. Muhammad Asghar"* (**2022 SCMR 1054**) and *"Kamilaaamir and another Versus Additional District & Session Judge and Others*" (**PLJ 2023 Lahore 735**). It is added that very institution of the *second suit* was a part of the strategy of the respondent to defeat the justice, to wriggle out of the bar of Order II Rule 2 of *CPC*, which is against the intent of the legislature behind the said provision.

5. Mr. Muhammad Shakeel Abid, learned counsel for the respondent, has opposed this appeal and he has argued

that the learned *Tribunal* has correctly concluded that Order XXIII of *CPC* restricts filing of fresh suit and mere reading of wording of the said Order of *CPC* makes it amply clear that the bar is only applicable when the subsequent suit is filed after withdrawing the earlier suit, whereas, in the present case the *second suit* was pending at the time of dismissal of the *first suit;* that the law envisages that upon decision of an earlier suit, a fresh suit cannot be instituted, however, pending suit can be adjudicated on its merits. Learned counsel has relied upon cases titled *"Ghulam Nabi and others vs. Seth Muhammad Yaqub and others"* (**PLD 1983 SC 344**) and *"The Commissioner of Income Tax N.C.A. Circle, Karachi and another vs. Haji Ashfaq Ahmad Khan and 10 others"* (**PLD 1973 SC 406**). The learned counsel has further submitted that bar of Order II Rule 2 of *CPC*, in circumstances of the case, are subject to Order XXIII Rule 1 of *CPC*.

6. The arguments are heard and the available documents have been perused.

7. The pivotal questions emerging from the arguments of the learned counsel of the parties are:

(a) If the *second suit*, which was pending at the time of unconditional dismissal as withdrawn of the *first suit*, is liable to be rejected under the bar contained in Order XXIII Rule 1(3) of *CPC*?

(b) If the very institution of the *second suit* was just a ploy to defeat the interest of justice or the object of the above provisions?

The arguments made in this regard require discussion regarding the provisions of Order II Rule 2 and Order XXIII Rule 1 of *CPC*, which read: -

Order II Rule 2:

"2. Suit to include the whole

claim.--(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim.--Where a plaintiff ***omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished****.*

(3) Omission to sue for one of several reliefs.--A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, ***except with the leave of the Court****, to sue for all such reliefs,* ***he shall not afterwards sue for any relief so omitted****.*

Explanation.---For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action"

Order XXIII Rule 1:

"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****.*
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> *(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.*
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> *(Emphasis supplied)*

8. Order II Rule 1 of *CPC* requires every suit to include whole claim in respect of the cause of action in one suit. Claimants are permitted to relinquish any portion of their respective claims. Order II Rule 2 of *CPC* provides that where a plaintiff omits to sue in respect of or intentionally relinquish, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. Order II Rule 3 of *CPC* requires leave of the Court, to sue for the claim that the plaintiff was entitled but he omitted, provided his case is covered thereunder. However, Order XXIII, Rule 1(3) of the *CPC* reads that *where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission under sub-rule 2, he shall be precluded from instituting any fresh suit.*

9. Ample deliberations have been made by the Courts of Sub-continent as to the collective wisdom of the above reproduced provisions and when facing the situation that earlier suit is withdrawn after instituting a subsequent one. In case titled *"Karamat Ali Khan and another Versus Sardar Ali and 29 Others*" (**PLD 2001 Supreme Court (AJ&K) 30**) an approach was adopted by the Supreme Court of AJ&K that in the absence of the permission to institute a new suit, even if the subsequent was pending at the time of withdrawal of previous, permitting to maintain the same shall amount to defeat the provisions in question. The relevant part reads:-

> *"In the instant case neither there was a prayer on the part of plaintiffs-respondents that on account of formal defects in the former suit the permission may be granted to institute the fresh suit nor the permission to institute the fresh suit was granted to plaintiffs-respondents, thus in our considered view the first suit which was filed in 1975 stood withdrawn by the plaintiffs-respondents vide order of the trial Court dated 29-8-1988, while the subsequent suit filed in 1979 without seeking the permission of the Court to institute the fresh suit is hit by the provisions of Order XXIII, sub-rule (3). In the instant case the subsequent suit was filed during the pendency of the former suit and the prayer for withdrawing the first suit was made after so many years. Even the prayer was for withdrawal of suit not to reinstitute the fresh suit but to introduce an amendment in the subsequent suit. The principle which we have laid down that in presence of first suit the subsequent suit without the permission of Court to reinstitute the first suit on the basis of formal defects squarely applies to cases which are being withdrawn. The provisions of Order XXIII, sub-rule (3) cannot be defeated by instituting a fresh suit before withdrawing the previously filed suit. It is well-settled principle of law that what is not allowed to be done directly cannot be allowed to be done indirectly. Therefore, sub-rule (3) mentioned above applies to the present case."*
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> *(Underlining is added)*

Later, the Supreme Court of AJ&K, in case titled *"Shabina Kousar Versus Nargis Khatoon and 11 Others*" (**2017 CLC 822 Supreme Court (AJ&K)**), could not succeed to find support of *"Karamat Ali Khan and another*" case (***supra***) because of absence of any clear provision and concluded that a party cannot be non-suited on presumptive or non-speaking wisdom of the legislature by any stretch of

imagination or interpretation of statute. Paragraph 10 of the judgment reads as follows: -

> *"10. The collective wisdom of all the Courts of sub-continent is supportive to the principle of law laid down in Muhammad Bashir Khan's case [PLJ 2005 SC AJ&K) 89]. Therefore, we have paid our utmost attention and also taken into consideration the relevant statutory provisions of Civil Procedure Code but could not succeed to find out any support in favour of the view adopted in Karamat Ali Khan's case.* ***The consensus of the legend jurists of the subcontinent is clear that if a suit is already pending and after filing of subsequent suit, the first suit is withdrawn, in such case, the provision of sub-rule (3) of rule 1 of Order XIII, C.P.C., precluding the plaintiff from instituting fresh suit is not applicable****. This view appears to be most logical and just. Even otherwise, to non-suit a party is clear penalty and for imposing such penalty, there must be some clear expressed statutory provision.* ***Thus, in absence of any clear statutory provision, a party cannot be non-suited on presumptive non-speaking wisdom of the legislature by any stretch of imagination or interpretation of statute****."*
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> *(Emphasis supplied)*

10. In case titled *"The Commissioner of Income Tax N.C.A. Circle, Karachi and another"* (***supra***) the Honourable Supreme Court of Pakistan resolved that the bar of Order XXIII Rule 1 of the *CPC* does not apply where the subsequent suit was already pending before the previous suit is withdrawn. The relevant extract reads as follows:-

> *"...In the case of Hira Singh v. Puran and another (1) it was held that the provisions of Order XXIII, rule 1 of the Code of Civil Procedure did not apply where the second suit was already pending on the date of the withdrawal of the first suit. With this view the High Court in the present case agreed. We agree with the*

> *views of the High Court. We do not think that in the facts and circumstances of the case Writ Petition No. 638 of 1962 was not maintainable. This view finds support from the decision in Daryao v. State of U.P. (2).”*

This view was reiterated by the Supreme Court of Pakistan in *“Ghulam Nabi and others”* case (***supra***). The following part of the said judgment will be beneficial to be reproduced:-

> *“….A fresh suit envisaged in the rule is one filed subsequent to the withdrawal of the earlier suit.* ***On the question whether the rule barred a suit which at the time of the withdrawal of the earlier suit had already been instituted and pending, we find that in Ram Mal v. Upendra Datt (1) relying on P.Surja Reddi v. Subba Reddi (2), it was held that a second suit will not be barred in the case of withdrawal of a previous suit unless conditions of Order XXIII rule 1, C.P.C. are fully satisfied and that if the subsequent suit was already pending at the time of the withdrawal of the previous suit, the provisions could not be attracted****. A Division Bench of the Lahore Court in Mungi Lal v. Radha Mohan (3) held that:*
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> > *“Order XXIII, rule 1 refers to permission to withdraw a suit with liberty to institute a fresh suit after the first one has been withdrawn. It appears to me that the section cannot be read so as to bar a suit which has already been instituted before the other suit had been abandoned or dismissed.”*
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> *This judgment had been followed in Abdullah v. Bashiran Bibi (4) and it had been held that a fresh suit which had been pending at the time of withdrawal of a previous suit was not barred. The view taken in Mungi Lal’s case had also been followed by this Court in Commissioner of Income-tax v. Ashfaq Ahmad (5), wherein it had been held that where one writ petition had been filed during the pendency of a*

> *previous writ petition, the withdrawal of the previous writ petition before reaching the stage of hearing on merit would not affect the maintainability of the second petition which could legally proceed in spite of the withdrawal of the previous petition. The Sindh High Court has also been of the same view which is reflected in its judgments reported as Ashfaq Ahmad Khan v. Custodian of Evacuee Property (6) and Irshad Ali v. Islamic Republic of Pakistan (7).* ***We are, therefore, not inclined to agree that the suit in question was affected by Order II, rule 2 or Order XXIII, rule 1, C.P.C****."*
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> *(Emphasis supplied)*

Further reference approving the above interpretation can be made to cases titled *"Naveed Rukhsar and another Versus Muhammad Salim Lakhani*" (**2018 MLD 401**), *"Vimlesh Kumari Kulshrestha v. Sambhajirao & Anr."* (**AIR 2009 Supreme Court 806**), *"Mrs. Razia Ahmed and another Versus Karachi Building Control Authority through Chief Controller of Buildings, Karachi and 2 Others*" (**PLD 2000 Karachi 288**) and *"Malik Zarin Khan Versus Adnan Ali Malik and 2 Others*" (**2023 CLC 1368**).

11. Shehzada Muhammad Zeeshan Mirza, learned counsel for the appellants, has shown some serious apprehensions, regarding the situation that the above resolution can result into successive suits on same cause and it can result into assistance to litigant, who with *malafide* can succeed in relentlessly vexing defender of one cause or same set of causes. He also specified that it is now not rare that even the pendency of the earlier cases is not disclosed in the subsequent and then if such litigants are allowed to maintain the subsequent suit after unconditional withdrawal of earlier, will defeat the ends of justice. A part of the arguments and interpretation put forth by the learned counsel for the appellants, find support from case titled *"Virgo Industries*

(ENG.) Private Limited vs. Venturetech Solutions Private Limited" (**(2013) 1 Supreme Court Cases 625**), wherein the following has been observed: -

> *17. The learned Single Judge of the High Court had considered, and very rightly, to be bound to follow an earlier Division Bench order in R. Vimalchand v. Ramalingam holding that the provisions of Order 2 Rule 2 CPC would be applicable only when the first suit is disposed of. As in the present case the second set of suits were filed during the pendency of the earlier suits, it was held, on the ratio of the aforesaid decision of the Division Bench of the High Court, that the provisions of Order 2 Rule 2(3) will not be attracted. Judicial discipline required the learned Single Judge of the High Court to come to the aforesaid conclusion. However, we are unable to agree with the same in view of the object behind the enactment of the provisions of Order 2 Rule 2 CPC as already discussed by us, namely, that Order 2 Rule 2 CPC seeks to avoid multiplicity of litigations on the same cause of action. If that is the true object of the law, on which we do not entertain any doubt, the same would not stand fully subserved by holding that the provisions of Order 2 Rule 2 CPC will apply only if the first suit is disposed of and not in a situation where the second suit has been filed during the pendency of the first suit. Rather, Order 2 Rule 2 CPC will apply to both the aforesaid situations. Though direct judicial pronouncements on the issue are somewhat scarce, we find that a similar view had been taken in a decision of the High Court at Allahabad in Murti v. Bhola Ram and by the Bombay High Court in Krishnaji Ramchandra v. Raghunath Shankar."*
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> (*Underlining is added*)

12. In the present case, the learned *Tribunal* granted permission to the respondent to withdraw from the *first suit* and to file the *second suit*. This permission was granted by the

learned *Tribunal* on 21.05.2022, upon which the *second suit* was filed on the same day. Though, the decision to grant permission to file a fresh suit was later recalled, after an order of remand dated 08.03.2023 passed by this Court in F.A.O No. 46771 of 2022 but the respondent has not made any concealment in the entire proceedings. The *second suit* was filed with permission of the learned concerned Court as envisaged under Order XXIII of the *CPC*. I have not found any maliciousness on the part of the respondent to repeatedly vex the defender / appellant. The respondent, apparently, is only pursuing his alleged cause(s). Even otherwise, the view adopted by the learned *Tribunal* in the impugned order**,** is in accordance with principle of the law enunciated by the Supreme Court in the cases of *"Ghulam Nabi and others"* and *"The Commissioner of Income Tax N.C.A. Circle, Karachi and another"* (***supra***), which is binding on all the Courts in Pakistan, under Article 189 of the Constitution of Islamic Republic of Pakistan, 1973. Thus, this Court cannot hold differently, either. The position perhaps can be different if any malice is found floating on the surface in filing the subsequent suit and the such suit is filed merely with the object of subjecting a defender to manifold litigation and multiple suits.

13. So far as the above discussed apprehension of Mr. Zeeshan Mirza (learned ASC) regarding successive suits by hiding the earlier case(s) or misuse of above interpretation of law with bad intention is concerned. It appears to me that one of the common principles engrafted in Order II as well as Order XXIII of *CPC* is that unless the Court is satisfied as to the reasons given in the relevant rules of the said Orders, the defenders should not be subjected to more than one suits for the same cause. It is significant to notice that in Order II Rule 2 of *CPC* the legislature has used words *where a plaintiff omits to sue… shall not afterwards sue.* Likewise, Rule 2 of the said

Order says that a person if entitled to more than one relief may sue for all or any of such relief, but if omits, *except with the leave of the Court….he shall not afterwards sue for any relief so omitted*. The word '*afterwards'*, in the above rules, is not used with reference to decision of cases. It is used with regard to the word "*sue*", therefore, the relevant Courts, when the pendency of the earlier suit is disclosed, can control the situation by taking an action, at earliest. When it comes to the surface that filing earlier suit is not disclosed in the subsequent, the learned trial Courts are sufficiently empowered to curb and regulate such situation on account of non-disclosure of fatal information as per law laid down in case titled "*Asad Zaheer through Attorney Versus Muhammad Ismail and another"* (**2019 CLC 804**).

14. In the wake of above discussions, I am of the opinion that the learned *Tribunal* has adopted correct approach of the matter. This petition is, therefore, ***dismissed***. No order as to costs.

(Sultan Tanvir Ahmad)
Judge

Announced in open Court on 18.04.2024.

Approved for reporting

Judge

JA. Hashmi/-