

**JUDGMENT SHEET**  
**ISLAMABAD HIGH COURT, ISLAMABAD,**  
**JUDICIAL DEPARTMENT**

**R.S.A. No.07/2013**  
Dr. Muhammad Pervaiz Satti  
*versus*  
Jan Muhammad & 2 others

Appellant by: Mr. Tahir Mehmood Abbasi, Advocate.  
Respondents by: Mr. Shahid Mumtaz Bukhari, Advocate for  
respondent No.3 (CDA).  
Date of Hearing: 26.11.2019.

**MOHSIN AKHTAR KAYANI, J:** Through the instant regular second appeal, the appellant has called in question judgment and decree dated 11.06.2012 of the learned District Judge-West, Islamabad, whereby appeal filed by the appellant against order of the learned Civil Judge, 1<sup>st</sup> Class, Islamabad, dated 25.06.2010, was dismissed.

2. Brief facts referred in the instant appeal are that Dr. Muhammad Pervaiz Satti/appellant entered into agreement to sell dated 07.02.2005 with Jan Muhammad/Respondent No.2 regarding purchase of Plot No.95, measuring 139 Sq. yds., Sector D-12/1, Islamabad (*hereinafter referred to as "suit plot"*) against total sale consideration of Rs.2,800,000/-, out of which an amount of Rs.500,000/- was paid by the appellant as earnest money through cheque No.0650094, dated 29.01.2005, drawn at Citi Bank, Blue Area Branch, Islamabad. However, the failure on the part of Respondent No.1 in honoring the said agreement and transferring the suit plot constrained the appellant to file a suit for declaration, specific performance of agreement and permanent injunction against Respondent No.1. During pendency of the suit, respondent No.1 committed to transfer the suit plot in favour of the appellant, on the basis of which the suit of the appellant was withdrawn vide order dated 10.06.2005. Subsequently, respondent No.1 once again backed out from his commitment and refused to transfer the suit plot

in favour of the appellant, whereupon the appellant again filed a suit for declaration, specific performance and permanent injunction, however plaint of the said suit was rejected vide impugned order dated 25.06.2010 while adjudicating upon petition filed by Respondent No.1 under Order VII Rule 11 CPC. Feeling aggrieved thereof, the appellant preferred an appeal, which was dismissed vide impugned judgment and decree dated 11.06.2012. Hence, the instant regular second appeal.

3. Learned counsel for appellant contended that both the Courts below have erred in appreciating the law and facts of the case; that pursuant to withdrawal of the earlier suit, respondent No.1 once again failed to honor his commitment, due to which a fresh cause of action was arisen and both the Courts below have failed to appreciate this factum; that filing of fresh suit was not barred by Order II Rule 2, Order XXIII Rule 1(3) or Order VII Rule 11 of the CPC, but the both the Courts below misunderstood the said provisions and passed the impugned order, followed by the impugned judgment and decree, which are liable to be set-aside and the case may be remanded to the learned trial Court for decision afresh.

4. Conversely, learned counsel for respondent No.1 while opposing the instant appeal and supporting the impugned order as well as the impugned judgment and decree of both the Courts below contended that the appellant had withdrawn his earlier suit, but later on filed another suit, which is not maintainable under Order II Rule 2 of the CPC as well as under Order XXIII Rule 1 CPC; that both the Courts below have rightly appreciated the law together with the facts of the case and passed the impugned order as well as impugned judgment and decree, therefore, the same are liable to be maintained and the instant appeal may be dismissed.

5. Arguments heard, record perused.

6. Perusal of the record reveals that the appellant filed a suit for specific performance of an agreement dated 07.02.2005 against respondent No.1 with the allegation that he entered into agreement to sell the suit plot, allotted to him by the Federal Government Employees Housing Foundation/respondent No.2 vide allotment letter dated 10.11.1994, against total sale consideration of Rs.2,800,000/-, out of which the appellant had paid an amount of Rs.500,000/- as earnest money through cheque No.0650094, dated 29.01.2005, drawn at Citi Bank, Blue Area Branch, Islamabad. During pendency of the suit, the service of respondent No.1 was not effected on 28.04.2005, 09.05.2005 and 21.05.2005, whilst the appellant ultimately withdrew his suit for specific performance with the following statement:

10/06/2005" کونسل مدعی حاضر بیان قلمبند ہووے۔

بیان ازاں کونسل مدعی بلا حلف

بیان کیا کہ دعوٰی ہذا کی مزید ضرورت نہ ہے۔ لہذا دعوٰی ہذا بصیغہ واپسی خارج فرمایا جاوے۔

سکر درست تسلیم کیا۔

حکم: بروئے بیان کونسل مدعی دعوٰی ہذا بصیغہ واپسی خارج کیا جاتا ہے۔ مثل بعد ترتیب و تکمیل داخل دفتر ہوئے۔ سنایا گیا۔

7. After withdrawal of said suit, the appellant filed another suit for specific performance on same cause of action on 10.02.2007 i.e. approximately after two years, with the claim that the matter was compromised in previous round, but respondent No.1 again resiled from his commitment.

8. On the other hand, respondent No.1 has been represented through his legal heirs, who filed their written statement and raised the objection of maintainability of the suit in terms of Order VII Rule 11 CPC on the ground that second suit on same cause of action is not maintainable, and as such, neither any agreement was executed nor any amount was received by respondent No.1. In Para-15 of the written statement, the respondent's legal heirs acknowledged the

filing of earlier civil suit and compromise between the parties, although the details of compromise have not been referred.

9. The learned Trial Court after hearing the parties has dismissed the suit in terms of Order VII Rule 11 CPC vide impugned order dated 25.06.2010 mainly on the ground that the appellant being plaintiff has not sought any permission at the time of withdrawal of his earlier suit in terms of Order XXIII Rule 1(3) CPC and as such, he is precluded from bringing a fresh suit on same cause of action. The said order has been maintained by the learned first Appellate Court vide impugned judgment and decree dated 11.06.2011, who referred additional ground of rejection of the plaint being incompetent and hit by provision of Order II Rule 2 CPC.

10. Learned counsel for appellant, in resistance to the above referred verdicts of both the Courts below, has heavily relied upon 2013 SCMR 464 (Muhammad Yar vs. Muhammad Amin through L.Rs.) and PLD 1990 SC 596 (Moula Bukhsh vs. Muhammad Zahid) and 2008 SCMR 1037 (Q.B.E. Insurance (International) Ltd. vs. Jaffar Flour and Oil Mills Ltd.).

11. Perusal of the aforesaid pronouncements of the apex Court revealed that the concept of Order XXIII Rule 1 CPC has exhaustively been explained in the case of *Muhammad Yar supra (2013 SCMR 464)*, wherein it has been held that:

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.

5. ....

6. Now coming to the facts of the instant case and evaluating whether the noted principle(s) is/are applicable and attracted hereto, it may be mentioned that though in his application, the petitioner did mention that he should be permitted to withdraw the suit with an object to file a writ petition, but the order dated 14-10-2006, which was passed on that application reads as below:--

14/10/2006" مثل درخواست پر برآمد ہو کر پیش ہوئی۔ کونسل مدعی زاہد محمود چوہدری حاضر۔

وہ حاضری عدالت بیان دینا چاہتے ہیں قلمبند کیا جاتا ہے۔

بیان کونسل مدعیان

برخلاف بیان کیا کہ دعوٰی کی مزید پیروی مطلوب نہ ہے یا صیغہ واپس خارج کیا جائے۔

سکر درست تسلیم کیا۔

From the above, it seems, when the application was taken up by the Court, the counsel appearing for the petitioners for whatever reasons it may be, did not press the application, may be that the permission was being declined by the Court and he promptly and immediately decided to change his course of action and the strategy and take resort to simple withdrawal of the suit; but the fact remains that the counsel in clear and unequivocal terms pleaded to the Court and got his statement recorded, that the petitioners would not like to pursue the suit and would like to withdraw. This is a withdrawal simpliciter as envisaged and covered by the provisions of Order XVIII, Rule 1(1), C.P.C., without there being any nexus and recourse to sub-rule (2)(a)(b). Thus, in view of the above peculiar circumstances of this case, the petitioner could not file a fresh civil suit to challenge the same decision/verdicts of the Revenue Courts through which their pre-emption suit was discarded.

12. In view of the aforementioned in-depth reasons, there is nothing left to consider the cause argued by the appellant in this case as the appellant himself had withdrawn the earlier suit without seeking any permission and even not

referred any ground of withdrawal, rather simply made a request before the Court on 10.06.2005 that the suit is no more required. Such expression on the part of the appellant clearly spells out that he withdrew his claim, his cause of action and the main prayer of the suit regarding specific performance of the agreement on the reasons best known to him. However, he again filed a civil suit after two years with the same plea that he entered into agreement with respondent No.1 regarding purchase of suit plot against sale consideration of Rs.2,800,000/-, out of which, the appellant had paid Rs.500,000/-, which otherwise spells out that he neither paid the balance sale consideration in any manner nor attempted to pay the balance amount to show his bona fide, even otherwise, the other side denied the very execution of such agreement, but even then the claim of appellant has to be seen in the light of celebrated judgment reported as 2017 SCMR 2022 (Hamood Mehmood vs. Mst. Shabana Ishaque), wherein it has been held that the plaintiff, if failed to pay the amount immediately at the time of filing of suit, his suit fails showing no bonafide on his part.

13. Besides the above referred position, Order II Rule 2 CPC also comes into play, whereby the withdrawal of earlier suit without mentioning the reason comes under provision of Order II Rule 2 CPC, which reads that:

*"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."*

The appellant, in the case in hand, had withdrawn his entire claim regarding his cause of action on which the suit was brought without seeking any permission to file fresh suit, even no formal defect has been highlighted at the time of withdrawal of earlier suit and as such, when the suit is withdrawn simpliciter without assigning reason, it could not be claimed subsequently that it was withdrawn on any formal defect or on the basis of any commitment, especially when there is nothing on record to suggest that respondent No.1/defendant in

the suit had ever agreed to the demands and claim of the appellant, therefore, there is no question of law apparent on record to adjudicate upon or and has not been decided in this case.

14. In view of above discussion, the instant regular second appeal is without merits as the question raised by the appellant has already been settled and adjudicated upon by both the Courts below and as such, the mandate expressed by the apex Court in the case of *Muhammad Yar supra* (2013 SCMR 464) also defies the claim of appellant in this regard, therefore, the instant regular second appeal is hereby **DISMISSED**.

(MOHSIN AKHTAR KAYANI)  
JUDGE

Announced in open Court on: **29.11.2019**.

JUDGE

Khalid Z.