

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

Civil Revision No.65/2016

Raja Arshad Mahmood	Versus	Matloob Ellahi Paracha, etc.
Petitioner by:		Mr. Wajid Hussain Mughal, Advocate.
Respondent No.1 by:		Mr. Muhammad Rauf Chaudhary, Advocate.
Respondent No.2 by:		Mr. Niaz Ahmed Abbasi, Advocate.
Date of hearing:		27-05-2016.

JUDGMENT

MOHSIN AKHTAR KAYANI, J. Through the instant civil revision, the petitioner has assailed the order dated 24.11.2015 passed by learned Civil Judge 1st Class (West) Islamabad, whereby the application U/O VII Rule 11 CPC filed by the petitioner has been dismissed.

2. Brief facts leading to the instant civil revision are that respondent No.1 filed a suit for recovery of Rs.5,000,000/- alongwith interest at the prevailing bank rate on the ground that the agreement to sell was executed between respondents No.1,2 & the petitioner regarding land measuring 1200-Kanals located in Moza Gagri and Sihala, Tehsil & District Islamabad vide agreement to sale dated 20.07.2005 at rate of Rs.785,000/- per Kanal.

3. As per terms of the agreement to sale which has been agreed between the parties that the petitioner shall provide a compact piece of land whereas amount of Rs.5,000,000/- was paid to the petitioner but due to certain disputes respondent No.1 filed a civil suit No.205/2008 titled as “Matloob Ellahi Paracha versus Malik Murtaza, etc” before the Islamabad High Court, Islamabad for specific performance of agreement, the said suit was contested by present petitioner and respondent No.2 by filing written statement with specific contentions that matter has been resolved and the agreement in question has been cancelled on 01.08.2006 however, during the pendency of said civil suit before the Islamabad High Court respondent No.2 appeared before the Deputy Registrar (Judicial) on 06.05.2009 and

got recorded his statement in order to absolve his responsibility however, the said suit remained in field and was withdrawn on the request of respondent No.1 vide order dated 18.11.2013.

4. After the withdrawal of previous civil suit second suit was filed for recovery of earnest money of Rs.5,000,000/- in which question of maintainability has been decided by the learned Civil Court and dismissed the application U/O 7 Rule 11 CPC, hence the instant civil revision.

5. Learned counsel for petitioner contends that the petitioner entered into an agreement to sell with respondent No.1 to provide land measuring 1200 Kanal vide agreement to sell dated 20.07.2005 however, the said agreement has not been materialized and with the mutual consent of the parties the agreement was cancelled vide settlement dated 01.08.2006 which was written on the said agreement. Learned counsel further contends that after the cancellation of agreement to sell respondent No.1 had filed a civil suit No.205/2008 before the Islamabad High Court for specific performance of agreement to sell however, the said suit was withdrawn unconditionally from the Islamabad High Court vide order dated 18.11.2013 and thereafter respondent No.1 again filed a fresh suit dated 14.02.2014 for recovery of earnest money of Rs.5,000,000/-. Learned counsel further contends that second suit is not maintainable as the same is barred under Order II Rule 2 CPC as respondent No.1 has to include whole of his claim in the previous suit and when he omit to suit for relief of recovery in the earlier round of litigation he cannot subsequently file a fresh suit. Learned counsel for petitioner further contends that the suit of respondent No.1 is barred U/O 23 Rule 1 & 2 CPC as no permission has been obtained from the Islamabad High Court which is evident from the order dated 18.11.2013. Learned counsel further contends that suit of respondent No.1 is also barred U/S 19 of Specific Relief Act, 1877 as respondent No.1 did not opt to sue to compensation for alleged breach of agreement to sell dated 20.07.2005. Learned counsel further contends that the second suit filed by respondent No.1 is time barred as the original cause of action referred in paragraph No.16 of the plaint is dated 20.07.2005 when the parties entered into an agreement subsequently on 23.07.2005 when respondent No.1 instructed the bank to stop payment of second installment of the earnest money, thirdly on 05.08.2005 when the parties cancelled the agreement, hence, from the

perusal of paragraph No.16 the second suit is not maintainable. He has put his reliance upon 2013 SCMR 464, 2010 SCMR 1507, 2002 SCMR 144 & 2013 SCMR 1099.

6. Conversely, learned counsel for respondent No.1 put his appearance and vehemently contested the instant civil revision and contends that agreement to sell has been admitted between the parties however, during the proceedings of civil suit No.205/2008 which has been withdrawn vide order dated 18.11.2013 on the promise of petitioner that he is ready to pay the balance sale consideration of Rs.5,000,000/- and C.M. No.249/2013 was filed by respondent No.1 for permission to withdraw the suit for specific performance with permission to file a fresh suit however, when previous civil suit was fixed before the Islamabad High Court no such request was made neither the C.M. for withdrawal of suit was fixed even the counsel for respondent No.1 has not referred any other reason or draw the attention of the Court towards the pending C.M. without seeking any permission to file a fresh. Learned counsel further contends that by filing of application U/O 23 Rule 1 CPC that permission has been accorded to. Learned counsel has relied upon 1969 SCMR 933, 1970 SCMR 141, 2006 YLR 717, 1999 SCMR 1782, 2007 YLR 1540, 2005 YLR 756 [Lahore], 2004 MLD 943 & 2015 CLC 1423.

7. Arguments heard, record perused.

8. From the perusal of record, it has been revealed that the petitioner through his attorney respondent No.2 entered into an agreement to sell with respondent No.1 to provide land measuring 1200 Kanal located in Moza Gagri and Sihala, Tehsil & District Islamabad vide agreement to sell dated 20.07.2005 wherein first installment of Rs.5,000,000/- has been received by the petitioner, on verification of record it has been revealed that entire land is not based upon one compact piece and scattered into different pieces, therefore, agreement dated 20.07.2005 was cancelled vide cancellation dated 01.08.2006 but respondent No.1 filed a suit for specific performance before the Islamabad High Court through Civil Suit No.2289/2008 titled as “Matloob Ellahi Paracha versus Malik Murtaza, etc” and during the hearing of C.M. No.594/2008 U/O 39 Rule 1 & 2 CPC it has been admitted that the agreement dated 20.07.2005 has been cancelled on 01.08.2005 the same was also acknowledged in the said order dated 29.07.2008 as a result of said admission before the Court the C.M. U/O 39 Rule 1 & 2 CPC was dismissed. Later on, the suit has marked with a

new number as C.S. No.205/2008 and the same was withdrawn by respondent No.1 vide order dated 18.11.2013 before this Court wherein the following order was passed:-

“Learned counsel for the plaintiff at the very outset prays for permission to withdraw the captioned suit. Request is allowed and in consequence thereof, civil suit No.205/2008 is dismissed as withdrawn.”

It has further been observed that the instant suit was withdrawn without seeking any permission from the Court to file the fresh suit although, respondent No.1 has filed the C.M. No.249/2013 in the said suit with the prayer that he may be permitted to withdraw the suit with further permission to institute a suit of recovery Rs.5,000,000/- but surprisingly the said C.M. has never been fixed nor respondent No.1 has agitated the matter before this Court during the course of passing of order of withdrawal of the suit.

9. Respondent No.1 again filed a suit for recovery of Rs.5,000,000/- alongwith interest at the rate of prevailing bank rate against present petitioner before the Civil Court on 13.02.2014 with the same background, wherein paragraph No.16 has specifically been mentioned with details of cause of action, the said paragraph No.16 is reproduced as below:-

*“16. That the plaintiff has valid and running cause of action **firstly** accrued to the Plaintiff and against the Defendants on 20th July 2005 when the Defendants entered into Agreement, **secondly** on 23rd July 2005 when the Plaintiff instructed the bank to stop payment of second installment of the earnest money, **thirdly** on 5th August 2005 when the parties cancelled the Agreement and the Defendant No.2 had promised to pay back Rs.50,00,000/- of earnest to the Plaintiff, **fourthly** when the Defendants refused to pay back the earnest money to the Plaintiff as the Defendant No.2 promised and the Plaintiff filed suit, **fifthly** on 06-05-2009 when the Defendant No.1 produced and recorded his statement before Deputy Registrar Judicial of Islamabad High Court Islamabad, **sixthly** when the Plaintiff filed the Application before Honorable Islamabad High Court with the request to withdraw the pending suit with permission to file the fresh suit for recovery against the Defendants and the same was acceded by the Honorable High Court vide order 18-11-2013 and **finally** when the Defendants and especially the Defendant No.2 flatly refused to pay back Rs.50,00,000/- of earnest money to the Plaintiff and is still continue hence this suit.”*

In view of above mentioned paragraph referred by respondent No.1 in his second suit respondent No. 1 tried to justify his cause of action, wherein said suit was filed on the basis of initial cause of action i.e., agreement to sell dated 20.07.2005 and it has also been mentioned in the said paragraph that agreement was cancelled on 05.08.2005 wherein it has been referred that defendant No.2 has promised to pay back of Rs.5,000,000/- of the earnest money to the plaintiff hence it is manifestly clear that 2nd suit has been filed on the basis of cause of action of the first suit even the cancellation of the agreement has been

acknowledged therefore, there is no question left to understand factum of limitation. Even otherwise, the relief claimed by respondent No.1 at the time of filing of first suit was available but he intentionally opted to file the suit for specific performance of agreement to sell through C.S. No.2289/2008 which was later on converted into C.S. No.205/2008, hence, in view of Order II Rule 2 CPC the provision states as under:-

“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.

Relinquishment of part of claim—(2) 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.

Omission to sue for one of several reliefs—(3) 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.”

In view of above provision it is clear that if a person omits to sue on any relief he shall not afterwards sue any relief so omitted except with the leave of Court, wherein in the present case no such permission has been obtained by respondent No.1 although, respondent No.1 has filed a C.M. in this regard but the order dated 18.11.2013 demonstrates the simple withdrawal of the suit without seeking any permission.

10. Limitation for filing the suit for recovery under Article 181 of Limitation Act, 1908 is three years and if the cause of action available to respondent No.1 is 20.07.2005 on the basis of date of execution of agreement to sell or from the date of cancellation of agreement to sell dated 05.08.2005 the limitation shall start from the said date which has already been expired. Even the doctrine of election comes into play in such situation if considered in terms of Order II Rule 2 CPC especially when two remedies are available to the parties and if one remedy is opted, the other stands excluded. The other important aspect of the case is the fact of withdrawal of the earlier suit in terms of Order 23 Rule 1 CPC as the said order permits respondent No.1 to withdraw his suit or abandon any part of his claim with or without sufficient grounds however, if the plaintiff wants to file a fresh suit after obtaining the permission of withdrawal he can do so. In such eventuality the question of limitation does not exclude from the application in the matter in question as Order 23 Rule 2

CPC does not give any protection to the plaintiff/respondent No.1 however, Order 23 Rule 2

is here by reproduced as under:-

“2. Limitation law not affected by first suit.- In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted.”

I am fortified with the view taken in **2013 SCMR 1099, Mrs. Akram Yaseen and others versus Asif Yaseen and others**:-

“the plaintiff sought permission for withdrawal of appeal to file a fresh declaratory suit, and he was allowed permission---Plaintiff subsequently filed present (fresh) declaratory suit, against which defendant filed an application for rejection of plaint as being barred by time---Trial Court dismissed said application---Revision filed by defendant before High Court was allowed and application for rejection of plaint was accepted on the basis that plaint was barred by time---Pleas of plaintiff that cause of action accrued to him on 27-4-2005 when appeal before Supreme Court was withdrawn and permission was granted by Supreme Court to file fresh suit; that limitation would run from the date when permission was granted by Supreme Court; that his case was covered under S.14 of Limitation Act, 1908 as he had exercised due diligence and good faith in pursuing his remedy before the wrong court, therefore, period spent before wrong forum should be excluded from the period of computation of limitation--- Validity--- Words "with due diligence" and "good faith" used in S.14 of Limitation Act, 1908 were very important--- On 12-11-1987 Appellate Court while setting aside decree of Trial Court informed the plaintiff vide its judgment that in an administration suit it was not possible to determine ownership of properties---Plaintiff instead of abandoning the proceedings and filing a civil suit, choose to file a civil revision before the High Court, which was dismissed on 4-6-1998 on the same basis that it was not possible to determine title of properties in an administration suit---Plaintiff once again instead of filing fresh suit approached the Supreme Court and finally withdrew the appeal on 27-4-2005 with permission to file fresh suit---Plaintiff was not pursuing proceedings before the wrong forum with due diligence and good faith as he should have abandoned the proceedings and filed a fresh civil suit---Time for filing fresh civil suit started running from 12-11-1987 when the Appellate Court set aside decree of Trial Court---Even if date of judgment of High Court was considered i.e. 4-6-1998, the last date for filing fresh civil suit was 3-6-2004, but present suit was filed by plaintiff on 22-7-2005, which was much beyond the period of limitation---Order XXIII, R.1, C.P.C. provided for filing of fresh suit with permission of court, however under O.XXIII, R.2, C.P.C., a plaintiff was bound by law of limitation in the same manner as if the first suit had not been instituted, which for purpose of present case would mean that period of limitation started from the date when deceased expired i.e. 8-6-1977---High Court had rightly accepted application for rejection of plaint on the basis that plaint was barred by time---Appeal was dismissed accordingly.”

Hence, the limitation runs against respondent No.1 in the instant matter and withdrawal of the first suit with or without permission in terms of Order 23 Rule 1 CPC does not exempt respondent No.1 to seek permission and extend the period of limitation as there is no concept of extension of limitation under the law. I am fortified with the view taken in **2013**

SCMR 464, “Muhammad Yar (deceased) through L.Rs. and others versus Muhammad Amin (Deceased) through L.Rs. and others.”:-

“During pendency of a civil suit before the Trial Court, plaintiff/petitioner filed an application for withdrawal of the suit, with the request for permission of Court to be granted to the plaintiff to file a writ petition before the High Court---Trial Court dismissed suit simpliciter as withdrawn, without assigning any reasons and without expressly mentioning in its order whether permission was granted to file fresh suit/writ petition before High Court---High Court dismissed writ petition filed by plaintiff on the basis that bar contained under O.XXIII, R.1(1), C.P.C. was attracted to the case---Contention on behalf of plaintiff was that when the Trial Court had not specifically refused permission for filing fresh suit/writ petition before High Court and dismissed the suit simply as having been withdrawn, then it should be inferred and implied that permission to file fresh suit on basis of same cause of action was granted by the Court and the bar contained under O.XXIII, R.1(1), C.P.C. would not be attracted to the case---Validity---Plaintiff, in the present case, in his application before the Trial Court did mention that he should be permitted to withdraw the suit with an object to file a writ petition before the High Court, however when said application was taken up by the Trial Court, counsel for plaintiff did not press it for whatever reasons and his counsel simply stated that he would not like to pursue the matter and would like to withdraw---Such withdrawal by the plaintiff was withdrawal simpliciter as envisaged and covered by the provisions of O.XVIII, R.1(1), C.P.C., without there being any nexus and recourse to O.XVIII, R.1(2), C.P.C.---Plaintiff in such circumstances could not file a fresh suit/writ petition before the High Court---Petition for leave to appeal was dismissed in circumstances.”

11. In view of above mentioned judgments of the Hon’ble Apex Court learned trial Court has failed to appreciate the law on the subject and misconstrued the question of limitation, cause of action and has also ignored the provision of Order 2 Rule 2 CPC by simply declaring that factual controversy exists among the parties, therefore, this Court in terms of Revisional jurisdiction U/S 115 CPC has ample powers to correct any illegal exercise of jurisdiction or can also interfere in order which is without jurisdiction. I am fortified with the view taken in **2016 SCMR 24, Nazim-Ud-Din and others versus Sheikh Zia-ul-Qamar and others**:-

“It is settled law that ordinarily the revisional court would not interfere in the concurrent findings of fact recorded by the first two courts of fact but where there is misreading and non-reading of evidence on the record which is conspicuous, the revisional court shall interfere and can upset the concurrent findings, as well as where there is an error in the exercise of jurisdiction by the courts below and/or where the courts have acted in the exercise of its jurisdiction illegally or with material irregularity.”

12. In view of above circumstances instant civil revision is allowed the order dated 24.11.2015 is hereby set-aside and the suit titled “Matloob Ellahi Paracha versus Malik

Murtaza, etc” suit for recovery of Rs.5,000,000/- alongwith interest at the prevailing bank rate is hereby dismissed being barred by law.

(MOHSIN AKHTAR KAYANI)
JUDGE

Approved for reporting.

JUDGE

Irfan Ali

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