IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
MR. JUSTICE UMAR ATA BANDIAL
MR. JUSTICE SAJJAD ALI SHAH
MR. JUSTICE MUNIB AKHTAR

CIVIL APPEAL NO.782 OF 2014
(On appeal from the judgment dated 11.03.2014 of the Lahore High Court, Lahore passed in Civil Revision No.260 of 2007.)

Khawaja Bashir Ahmed & Sons Pvt. Ltd. ... Appellant

vs

M/s Martrade Shipping & Transport etc. ... Respondents

For the Appellant : Malik M. Rafiq Rajwana, ASC

For the Respondents : Nemo.

Date of Hearing : 14.01.2021

JUDGMENT

Munib Akhtar, J.: At the conclusion of the hearing it was announced that the appeal was being dismissed. The following are our reasons for having done so.

2. Learned counsel for the appellant submitted that (sometime in 2005) the appellant filed a suit in the civil courts at Multan against the two respondents as defendants. It is stated that the suit is still pending. On or about 15.02.2007 the appellant filed an application in the suit. It was stated to be under O. 23, R. 1 CPC, and sought the withdrawal of the suit against the respondent No. 2 in the following terms:

> "Application under Order XXIII Rule 1 read with Section 151 CPC
>
> Respectfully Sheweth
>
> 1. That the abovementioned suit is pending and is fixed for today before this Hon'able Court.
>
> 2. That the applicant/plaintiff for the time being doesn't want to proceed further against

> Defendant No.2 M/s Al-Hamd International Container Terminal (Pvt) Ltd. The plaintiff reserves its rights to sue the said defendant whenever the necessity so arises.
>
> It is therefore respectfully prayed that the applicant/plaintiff may be permitted to withdraw the suit to the extent of Defendant No.2 with permission to initiate proceedings in accordance with law afresh, when the necessity so arises."

3. On this application the learned civil Judge made an order on 15.02.2007 dismissing the suit as withdrawn against the said respondent, but disallowed the filing of a fresh suit. The appellant filed a revision petition against this order in the High Court, which was dismissed by means of the impugned order dated 11.03.2014. Leave to appeal was sought, and was granted vide order dated 17.04.2014 to consider whether, as contended, the impugned order was contrary to the decision of this Court reported as *Muhammad Yar (dec'd) and others v Muhammad Amin (dec'd) and others* 2013 SCMR 464.

4. Learned counsel submitted that the application for withdrawal, though stated to be under Rule 1 of O. 23, was in substance in terms of Rule 2(b) thereof. The latter provision allows the court to permit a plaintiff, if sufficient grounds are disclosed, to withdraw the suit with permission to file a fresh one. Learned counsel contended that if at all the learned civil Judge had concluded that no such ground was disclosed he ought to have dismissed the application. It was submitted, relying in particular on the aforementioned decision and *Karim Gul and another v Shahzad Gul and another* 1970 SCMR 141, that an application of the sort moved by the appellant was indivisible. It had either to be allowed as a whole or dismissed as such. It could not be broken into parts so as to allow one (i.e., the withdrawal of the suit) but not the other (i.e., permission to file a fresh suit). Learned counsel submitted that he had himself appeared before the learned civil Judge, who had not announced his order at the conclusion of the hearing but later (it appears during the course of the day). If the order had been made in his presence, learned counsel submitted, he would have withdrawn the application. On queries from the Court as to why a review application was not filed before the trial Court, or whether the position as stated before us was set out in

the revision petition, learned counsel candidly submitted that such was not the case. It was prayed that the appeal be allowed or at the very least the application filed before the civil Court be treated as pending so as, as we understood it, to enable the appellant to withdraw the same there.

5. We have considered the submissions made and the case law relied upon. In *Muhammad Yar (dec'd) and others v Muhammad Amin (dec'd) and others* 2013 SCMR 464 (leave refusing order) Rule 2 of O. 23 is fully examined (see, especially, para 4 at pp. 471-2) and the case law is also considered (including the other decision relied upon before us). The facts of the case were that an application was moved in a suit seeking its withdrawal to enable the plaintiff to pursue his claim by way of a writ petition in the High Court, and permission was also sought to file a fresh suit. The suit related to pre-emption and certain orders made by the revenue authorities had been challenged therein. Those orders were now to be challenged by means of the writ petition. On this application the suit was dismissed as withdrawn, with no order being made on the permission sought to file a fresh suit. The writ petition was filed, and resisted on two grounds. One was that since the suit had been ordered as withdrawn simplicitor, the writ petition itself was barred by reason of Rule 3 of O. 23. Both grounds (the other being not relevant for present purposes) were found persuasive, and the petition was dismissed. Leave to appeal was sought, but was refused by means of the cited decision. In seeking leave it was sought to be argued that since the trial Court had not, as such, refused permission to file a fresh suit, there was a "necessary implication [that] it shall be presumed that the permission to file the fresh suit was granted" (pg. 469). This submission was, on the facts of the case, not accepted (see para 6, at pp. 475-6). As is obvious, the facts of this case were rather different from those before us.

6. In the other case, *Karim Gul and another v Shahzad Gul and another* 1970 SCMR 141 (leave refusing order), the facts were that a civil suit was filed by the respondent No. 1 in the courts at Mardan for possession of certain land, and injunctive relief was also sought against the defendants (petitioners before this Court). The suit was resisted on various grounds, of which the one

relevant for present purposes was that the respondent had earlier filed a civil suit in Multan but had applied to withdraw the same with permission to file a fresh suit. The civil Court had (by order dated 06.10.1960) dismissed the suit as withdrawn but refused permission to file a fresh suit. It was contended that the subsequent suit (i.e., the one filed in Mardan) was therefore barred in terms of Rule 3. This contention was accepted and the suit dismissed. The respondent appealed. The learned first appellate Court held that an application under O. 23, R. 2(b) (under which provision the application had been made in the earlier suit) was an indivisible whole and ought to be allowed or dismissed as such. On this basis it was held that the earlier order (of 06.10.1960) was unlawful and a nullity and hence the subsequent suit was not barred in terms of Rule 3. In the event, the appeal was allowed and the respondent's suit was decreed. The petitioners' appeal to the High Court failed (for the same reason as had found favor with the first appellate Court) and when the matter reached this Court, leave to appeal was likewise refused by means of the cited decision. Again, the facts of the cited case were rather different from those at hand.

7. Having considered the matter, we are of the view that the law has been correctly laid down in *Muhammad Yar (dec'd) and others v Muhammad Amin (dec'd) and others* 2013 SCMR 464. However, we would add a gloss to that decision. After considering the case law, it was there held as follows (pg. 475; emphasis supplied):

> "Upon the survey of the above cited (quoted) case-law, it is hereby enunciated, that where the plaintiff has applied for the withdrawal of his suit or has sought the abandonment of his claim or a part thereof, with the permission of the Court to bring a fresh suit, it is within the authority of the Court obviously with the parameters of sub-rule 2(a)(b) to either decline such request or allow the permission. In the eventuality of refusal the suit should not be dismissed simpliciter, rather the request for permission alone be turned down and the suit should continue, thus obviously the plaintiff shall have a right, to choose his further course of action and to decide whether he should withdraw the suit or not. In the other eventuality, there does not seem any problem except that the Court has to record its reasons justifying the permission, which in any case shall be so recorded in either of the eventuality as afore-stated. *However, the problem is faced where the request is not declined in express and clear words, yet the suit is 'dismissed as withdrawn' without recording the reasons; though such an*

> *order' shall be bad for failure to assign the reasons and if not assailed on that ground by the other side it shall attain finality, but in the situation it should be implied, considered and deemed that the Court has found it to be a fit case for the permission and has granted the plaintiff permission to file a fresh suit, because this is the [safer] course, which should be followed in the interest and promotion of justice, otherwise serious prejudice shall be caused to the plaintiff who shall have to face the bar of sub-rule (3) and shall be left in a flummox*."

8. At first sight, the passage extracted above (and especially the portion emphasized) appears to favor the appellant. However, when a closer look is taken a different conclusion emerges. Now, clause (a) of Rule 2 allows permission to be granted to file a fresh suit if the court is satisfied that the "suit must fail by reason of some formal defect". Clause (b) allows for such permission if "there are other sufficient grounds". We are of course concerned with the latter provision. In our view, for the provision to be at all applicable it is necessary that the facts disclosed in the application seeking permission must, in law, amount to a "ground". It is only then that the provision becomes applicable, requiring the court to satisfy itself as to the sufficiency (or lack) of the stated ground. The observations of this Court in the cited decision (and in particular in the passage extracted above) are necessarily premised on this. However, if what is stated in the application is not a "ground" at all then obviously no question would arise of the court having to consider whether there is any sufficiency or lack thereof. When the application in the present case is considered all it stated was that the appellant "for the time being doesn't want to proceed further against" the second respondent, and that the appellant "reserves its rights to sue the said defendant whenever the necessity so arises". This is, in law, no ground at all. A plaintiff cannot be allowed to file his suit and then, at his sweet will and pleasure, exit the litigation only to enter the arena again as and when he pleases. If this is permissible under Rule 2(b) then that effectively puts paid to the consequences envisaged by Rule 3. And, it must be remembered, there would be nothing, in principle, preventing a plaintiff from doing this *ad nauseam*. This cannot be the true meaning and scope of Rule 2(b). It is only when the facts disclose what can, in law, be regarded as a "ground" that it becomes necessary for the court to consider the sufficiency (or lack) thereof.

Here, there was no such thing. The application itself, on the face of it, purported to have been moved under Rule 1. Nothing was said before the learned trial Court as would have required it to conclude otherwise, nor was any attempt made then or later to withdraw the same. The order made by the Court was unexceptionable and in accordance with law. It did not warrant any interference, and the learned High Court was right to dismiss the revision petition. Likewise, there was no merit to this appeal and it accordingly stood dismissed as noted above.

9. Before concluding, we may note that at the commencement of the hearing we were informed that the respondents (who did not appear) had been served by way of publication. They were ordered to be proceeded against *ex parte*. There will be no order as to costs.

Judge

Judge

Judge

Islamabad,
14.01.2021
Naveed Ahmad/*
Approved for reporting