

IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

Present:

Justice Shahid Bilal Hassan
Justice Aamer Farooq

C.P.L.A.No.2270-L of 2016

(Against the judgment dated 01.06.2016 passed by Lahore High Court, Bahawalpur Bench, Bahawalpur in C.R.No.382 of 2010)

Muhammad Ashraf and others

... *Petitioner(s)*

Versus

Muhammad Khan and others

... *Respondent(s)*

For the Petitioner(s): Mian Muhammad Tayyib Watto, ASC

For Respondent: N.R.

Assisted By: Mr. Owais Nasir, L.C.

Date of Hearing: 03.04.2025

ORDER

SHAHID BILAL HASSAN, J. Dissatisfied with the judgment dated 1st June, 2016 passed in C.R.No.382-D of 2010 by the Lahore High Court, Bahawalpur Bench, Bahawalpur, the petitioner(s) have filed the instant petition under Article 185(3) of the Constitution of Islamic Republic of Pakistan, 1973, seeking indulgence of this Court while granting leave to appeal against the said judgment.

2. Tersely, the petitioner(s) instituted a suit for declaration with consequential relief on 05.11.1999 against the respondents by maintaining therein that the respondent No.9/defendant No.1 is step son of defendant No.2 Mst. Mumtaz Begum (deceased issueless) who was owner of land measuring 192 Kanals. The gift mutation No.74 dated 23.06.1998 was sanctioned out of the said property. Defendant No.2 entered into an agreement to sell the suit property with the respondents No.1 to 4 for a consideration of Rs.1,400,000/- and handed over the possession of the suit property, thereafter, mutation No.104 was sanctioned by the revenue officer on 27.05.1999. Defendant No.2 preferred an appeal against defendant No.1 germane

to the said gift mutation which is still pending. Allegedly, the respondents No.1 to 8/defendants without any lawful authority are adamant to snatch the suit property from the petitioner(s). The respondents/defendants were proceeded against ex parte on 25.04.2001. The suit of the petitioners/plaintiffs was dismissed on 19.11.2001. In appeal, the case was remanded. Defendant No.2 filed an application seeking setting aside ex parte proceedings, which was allowed and the defendant No.2 filed contesting written statement contending therein that she never gifted out the suit property to the defendant No.1/respondent No.9 and he (respondent No.9) committed fraud with her. In this respect, she also filed an application before the Anti-Corruption Establishment. The trial Court after framing issues and recording evidence of the parties as well as hearing arguments dismissed suit of the petitioners vide judgment and decree dated 29.03.2006, while culminated in preferring of appeal. During the pendency of the appeal, the petitioners moved an application under Order XXIII, Rules 1 & 2, Code of Civil Procedure, 1908 ("**The Code**") for withdrawal of suit for filing afresh on the basis of formal defect. The respondents No.1 to 8 filed reply to the said application. The appellate Court after hearing both the sides accepted the said application and gave permission to file afresh suit subject to payment of cost of Rs.5,000/- vide order dated 18.03.2010. The respondents No.1 to 8 being aggrieved filed revision petition before the High Court, Bahawalpur Bench, Bahawalpur which resulted in passing of the impugned judgment, indulgence whereof has been sought for.

3. Heard.

4. In order to avail the remedy provided under law under Order XXIII, Rules 1 and 2 of The Code, the petitioner(s) have to satisfy the Court as to certain formal defect(s) in the suit by pinpointing and referring the same in the application, moved for the said purpose, because the same is pre-requisite for supplicating to exercise such jurisdiction. For ready reference, the said provision of law is reproduced infra:

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 or 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) -----

(4) -----.'

However, in the present case, when the contents of application filed by the petitioner(s) are gone through, it appears and divulges that they could not refer to any 'formal defect' which could be: misdescription of parties, incorrect valuation, procedural errors or technical defects, which do not affect the merits of the case and if such defects go to the root of the case, the same cannot be considered as formal defects. This proposition has been pondered upon and responded to by this Court in judgment¹ rendered by a Two Member(s) Bench, relevant part thereof is reproduced as under:

'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

¹ MUHAMMAD YAR (DECEASED) through L.Rs. and others v. MUHAMMAD AMIN (DECEASED) through L.Rs. and others (2013 SCMR 464)

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).

(Underlined for emphasis)

The said observations have been reiterated and affirmed in subsequent judgment² by this Court comprising Three Member Bench, wherein it was held:

'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

² Khawaja BASHIR AHMED AND SONS PVT. LTD. v. Messrs MARTRADE SHIPPING AND TRANSPORT and others (PLD 2021 Supreme Court 373)

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.'

(Underlined for emphasis)

Even prior to this, in judgment³, a Three Member Bench of this Court after considering and making a detailed analysis of the law on the subject has held:

'The principle underlying this provision for the withdrawal of the suit or abandonment of the same is that the law confers upon a person no rights or benefits which he does not wish to retain. The object is to permit the plaintiff/party to have a fair trial on merits in cases where the defects are of formal nature. Further it is not an absolute right and is subject to certain limitations based on the principle that where third parties have acquired a right, there can be no withdrawal to their prejudice. This demonstrates that the party can disclaim any concession or right which he does not wish to retain any person can disclaim any right or benefit but adverse order passed by a Court of competent jurisdiction could only be done away with if the same is set aside.

It is a condition precedent for exercise of this power that the Court in order to grant such concession must be satisfied that the suit was likely to fail due to some formal defect or there are sufficient grounds for the exercise of the same. The defects should not go to the root of the case. It comes within the ambit of discretionary power, if aforementioned either of two conditions i.e. the formal defect or sufficient grounds are demonstrated and the Court is satisfied for the same. As already stated the withdrawal can only be allowed, if the defect is formal in nature and should not go to the root of the case. Reference is made to 1972 SCMR 205; Mrs. Rafiqah Iqbal Ahmad and others v. Muhammad Ali Hyder 1984 CLC 2886; Ch. Muhammad Ali and 3 others v. Sardar Muhammad. Kazim Ziauddin Durrani and 2 others 1999 CLC 1437.'

As in the present case, a verdict by the trial Court has been passed against the petitioner(s), obviously after considering and evaluating evidence on record, adduced by the parties, the same could only be wiped of by setting aside the same, such like proposition earlier came up before this Court in Haji Muhammad Boota's judgment *ibid* wherein

³ Haji MUHAMMAD BOOTA and others v. MEMBER (REVENUE), BOARD OF REVENUE, PUNJAB and others (PLD 2003 Supreme Court 979)

the same was responded to after pondering upon and discussing law and precedents as under:

'Furthermore, if the parties are allowed to do away with the judgments rendered against them by simple withdrawal of the suit without making formal order respecting setting aside of the decree of the subordinate Courts, it would give impetus to the adventurer who would enter the arena of litigation and having failed before all the forums ultimately withdraws the suit which would tantamount to completely frustrating the concept of justice. The, judgments or decrees in such-like cases as the present one can only be set aside on merits. Both the petitioners failed to substantiate their title to the disputed land and the petitioners in Civil Petition No.22/L of 2000 simply on an order of sanction of mutation passed by the revenue forums cannot say that by the withdrawal of the suit the judgments qua title rendered against them lost all their force.'

5. In view of the above discussion, we find no illegality in the impugned judgment passed by the High Court, warranting interference by us at this stage rather law on the subject has correctly and judiciously been appreciated and construed, because when a verdict against the plaintiff(s), petitioner(s) herein, exists in field, they cannot be allowed to step back, without disclosing formal defect in the plaint, by using the shoulder(s) of the Court.

6. The crux of the above is that we do not find it a fit case for grant of leave. Leave is refused, consequent whereof the petition in hand stands dismissed.

Judge

Judge

Lahore
03.04.2025
'Approved for reporting'
(M.A.Hassan)