

SUPREME COURT OF AZAD JAMMU AND KASHMIR
[Appellate Jurisdiction]

PRESENT:

Raja Saeed Akram Khan, C.J.

Muhammad Younas Tahir, J.

Civil Appeal No. 239 of 2020
(PLA Filed on 09.11.2020)

Raja Shoukat Hayat & Co. Contractor Food Department,
Azad Jammu & Kashmir.

.....APPELLANT

VERSUS

1. Ch. Muhammad Sadiq & Co. Contractor Food Department, Proprietor Ch. Muhammad Pervaiz, House No. 7 Sector F-2, Mirpur.

.....RESPONDENT

2. Azad Jammu & Kashmir Government through Secretary Food Department, having his office at new Secretariat Muzaffarabad.
3. Secretary Food Department having his office at new Secretariat Muzaffarabad.
4. Director Food Department, having his office at D-151 Satellite Town Rawalpindi.
5. Sufiyan Hussain Contractor Food Transportation, AJK.

.....PROFORMA-RESPONDENTS

[On appeal from the judgment of the High Court dated
11.09.2020 in writ petition No. 263 of 2020]

FOR THE APPELLANT: Mr. Babar Ali Khan,
Advocate.

FOR THE RESPONDENT: Mr. Khalid Rasheed
Chaudhary, Advocate.

Date of hearing: 15.11.2021.

ORDER:

Muhammad Younas Tahir, J.– The captioned appeal by leave of the Court has been directed against the judgment of the High Court of Azad Jammu & Kashmir, dated 11.09.2020, passed in writ petition No. 263 of 2020.

2. The facts forming the background of the captioned appeal are that the respondent, herein, filed a writ petition before the learned High Court by challenging the tender notice published in the daily “*Khabrain*”, newspaper, dated 22.05.2020. The other side filed the para-wise comments on 23.06.2020 and thereafter the writ petition was fixed for hearing of the preliminary arguments on 12.08.2020. On 12.08.2020, the respondent, herein, filed an application for withdrawal of

the writ petition on the ground of some formal defects and also prayed for permission of filing of the fresh writ petition. The other side filed objections. The learned High Court after necessary proceedings, while accepting the application dismissed the writ petition as withdrawn and allowed the respondent, herein, to file a fresh writ petition, through the impugned judgment, dated 11.09.2020, hence, this appeal by leave of the Court.

3. Mr. Babar Ali Khan, Advocate, the learned counsel for the appellant argued that the impugned judgment of the learned High Court, is self-contradictory hence, is not sustainable in law. He further submitted that the judgment is violative of the provision contained in Order XXIII, Rule 1 of CPC. The learned counsel further argued that the reason listed in the application does not constitute formal defect within the meaning of Order XXIII, Rule 1 of CPC, hence, neither the petition can be allowed to be withdrawn with the permission to institute

the same afresh nor the power can be exercised on a vague and frivolous application. He finally requested for acceptance of appeal.

4. Conversely, Mr. Khalid Rasheed Chaudhary, Advocate, the learned counsel for the respondent, argued that the Court has exercised its discretion while allowing withdrawal of the writ petition with the permission to file the same afresh and this discretionary order cannot be interfered with. The learned counsel further argued that the withdrawal even otherwise can be allowed for sufficient cause. He finally requested for dismissal of the appeal.

5. We have heard the learned counsel for the parties and perused the record made available.

6. Order XXIII, Rule 1, CPC, is relevant for withdrawal and adjustment of suits, which provides as under:-

“Withdrawal of suit or abandonment 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 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 award and shall be precluded from instituting any fresh suit in respect of such subject matter or such of the claim.
4. Nothing in this rule shall be deemed to authorize to permit one of several plaintiffs to withdraw without the consent of the others.:

A plain reading of Order XXIII, rule 1, postulates that a plaintiff is at liberty after institution of suit to withdraw his suit or abandon a part of suit against all or any of the defendants without having prior permission of

the Court. However, no fresh suit can be filed by plaintiff regarding same subject-matter in case he adopts to withdraw suit without permission of Court. Under sub-rule 2 (a) if Court is satisfied that there is some formal defect in suit by reason of which suit must fail Court may allow withdrawal of suit with permission to file new suit. Sub-rule 2(b), provides that there are other sufficient grounds available for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of claim, Court 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 It is further postulated in Order XIII, Rule 3, plaintiff is barred to file fresh suit on same subject-matter if he fails to have prior permission to withdraw his suit with permission to file fresh one.

7. In the instant case, the petitioner-respondent, herein, sought the permission of the High Court to withdraw his petition with permission to file fresh petition on ground that some formal defects have occurred due to unavailability of certain relevant documents which were necessary to reach on the right conclusion and to meet the ends of justice and those could not be cured without withdrawal of instant writ petition by filing a new petition and to avoid multiplicity of proceedings.

8. The requisite of law i.e., sub-rule 2 (a) and (b) of Order XXIII, CPC, and test for exercise of discretion by the Court for allowing to withdraw with permission to file fresh cause depends upon 'satisfaction of Court'. To make the Court to reach at certain level of 'satisfaction' so that it may allow to withdraw and file fresh cause the plaintiff must bring forth material before the Court in his application. Court may not reach at 'satisfaction' on mere

vague assertions of plaintiff in absence of clear terms in application for withdrawal and permission to file fresh cause. Such permission cannot be allowed as a matter of routine or matter of right. It is incumbent upon petitioner to specifically mention in his application in clear terms to the effect that 'which are formal defects on reason of which the suit must fail, or what are 'some other grounds' are available with plaintiff to allow as such.

9. Our view finds support from the case reported as Muhammad Yar vs. Muhammad Amin [2013 SCMR 464] 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 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."

10. After juxtaposed perusal of the application of the petitioner, respondent, herein, along with the impugned order we are of the opinion that in absence of any clear averments and what are specific 'relevant documents' which were not available at the time of the filing of writ petition, in the application of the petitioner, respondent, herein, the learned High Court was not in position in absence of certain formal defects or certain documents which could lead the Court that to reach the conclusion that it is satisfied objectively as per dictum and wisdom behind the law. The impugned order is not a speaking order, because the learned single Judge in the High Court has not mentioned any specific formal defect or any referred document, absence of which might have caused some formal defects in the pending cause, which are necessary to reach on the right conclusion. The learned High Court failed to apply the law in its true

prospective keeping in view the facts of the case and averments made by the respondent in his application for withdrawal and permission to file fresh writ petition.

11. By reason of principle enunciated in the judgment of this Court in case, titled "*Bashir Ahmed Khan v. Azad Govt. and another 1997 SCR 67 (B)*" and judgment of the Supreme Court of Pakistan in case reported as, "*Karim Gul and another v Shahzad Gul and another 1970 SCMR 141*", that an application of the withdrawal of suit with permission to file fresh one is indivisible. It is 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).

For the above reasons, this appeal is accepted the impugned judgment of the High Court is set-aside and the case is remanded to the High Court with the direction that after considering all the facts and circumstances of

the case and after hearing both the parties afresh decide the application for withdrawal of the case. There is no order as to costs.

JUDGE

CHIEF JUSTICE

Mirpur,
19.11.2021.

Raja Shoukat Hayat

vs.

Ch. M. Saiq & others

ORDER:

The judgment has been signed. The same shall be announced by the learned Additional Registrar after notifying the learned counsel for the parties.

JUDGE

CHIEF JUSTICE

Mirpur,
19.11.2021.