IN THE SUPREME COURT OF AZAD JAMMU AND KASHMIR
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE KHAWAJA M. NASIM
MR. JUSTICE RAZA ALI KHAN

CIVIL APPEAL NO. 312 OF 2023
CIVIL PLA No. 491 OF 2023
Civil Misc. No. 329 of 2023
(Against the judgment dated 24.06.2023, passed by the High Court in writ petition 1227 of 2023)

M/s Sardar Ilyas Alam Construction Company through its Managing Director Sardar Ilyas Alam s/o Fateh-Alam Khan r/o Abbaspur Dhuli Road Bagh, Tehsil and District Bagh.

...Appellant

VERSUS

Secretary Public Works Department Azad Government of the State of Jammu and Kashmir and 12 others.

...Respondents

Appearances:

For the Appellant:	Mr. Haroon Riaz Mughal, Advocate.
For the Respondents:	Raja Sajjad Ahmed Khan, Advocate.
Date of hearing:	08.11.2023

ORDER:

Raza Ali Khan, J:- Through this petition, leave to appeal has been sought against the judgment of the High Court dated 24.06.2023, whereby, the writ petition filed by

the appellant, herein, has been dismissed. As the substantial questions of law of public importance are involved in the case, which need detailed deliberation, therefore, while dispensing with the mandatory requirements of the rules, this petition is converted into appeal.

2. The brief facts of the case are that the respondents, herein, invited bids for construction of RCC Bridge 105.50 meter span over Jehlum River at Ratti Dheri-Dupatta, District Muzaffarabad in lieu of an estimated cost of 264.966 Million for which the category/ Code CE-01 having license of C3 & above was required. The appellant, being eligible, applied for the tender books of the aforesaid construction by submitting bid security of Rs. 08 Million in the account of Executive Engineer PWD, Highways Muzaffarabad, but the bid of the appellant was rejected on the ground that the appellant has no past experience as required in bid documents. Feeling aggrieved, the appellant filed an application before Grievance Redressal Committee (GRC), who vide its decision dated 17.01.2023, declared the appellant as responsive and issued a decision in his favour. After the aforesaid decision, the Department issued notices to all the successful bidders for opening of financial bids. The appellant as well as private respondent appeared before Bid Evaluation Committee (BEC) and participated in the process. The appellant was declared as lowest bidder, meanwhile, the decision of GRC was challenged before the Public Procurement Regulatory Authority (PPRA). The Managing Director AJK PPRA set-aside the decision of GRC vide order dated 16.03.2023. The appellant, herein, feeling aggrieved, initially preferred a writ petition before the High Court, however, the same was later on withdrawn and a fresh writ petition was filed by challenging the order dated 16.03.2022 as well as for setting-aside the letter of acceptance dated

27.03.2023, issued in favour of the private-respondent. The learned High Court after necessary proceedings, has also dismissed the writ petition through the impugend judgment dated 24.06.2023.

3. Mr. Haroon Riaz Mughal, the learned counsel for the appellant after narration of the necessary facts submitted that the impugend judgment of the High Court is against law, the facts and the record of the case. He argued that the appellant was declared the successful bidder on the ground that he is 1st lowest one whose quoted rates are 30 million and less than other participants. He added that the file of the said tender was also approved from the office of Chief Engineer and the tender process has been completed, hence, now the accrued right has been vested to the appellant which cannot be denied after the completion of whole tendering process. He further argued that respondent No. 2, without any authority, issued the order dated 16.03.2023, in violation of PPRA Act, 2017, as no appeal before any Managing Director is provided in the Act. He added that the private respondent, on the basis of political influence, has succeeded to obtain an illegal order from a non-competent forum. The learned Advocate further contended that the impugend order dated 16.03.2023 has been passed without awarding the opportunity of hearing to the appellant which fact has also not been considered by the High Court.

4. On the other hand, Raja Sajjad Ahmed Khan and Mr. Muhamad Asad, the learned Advocates representing the respondents submitted that the writ petition before the learned High Court was not competent, as Mr. Haroon Riaz Mughal, was not authorized to file the writ petition before the High Court on behalf of the appellant, therefore, the learned High Court has rightly dismissed the writ petition. They further argued that BEC was a necessary party who has not

been impleaded as a party in the writ petition. They added that the respondents in their written statement before the High Court has categorically taken the stand that BEC has not been impleaded as party whereas, only the Chairman and Members of the BEC have been arrayed as such, in such scenario, the writ petition of the appellant has rightly been dismissed by the learned High Court. They emphasized on the point that earlier, the writ petition filed by the appellant, herein, challenging the order dated 16.03.2023, was withdrawn by the appellant and without the permission of the Court, the same order cannot be challenged in the writ petition again. Therefore, this appeal having no substance in it, may be dismissed with cost.

5. We have heard the learned Advocates for the parties and gone through the record of the case. It divulges from the record that the respondents, herein, invited bids for construction of RCC Bridge 105.50 meter span over Jehlum River at Ratti Dheri-Dupatta, District Muzaffarabad of an estimated cost of 264.966 Million for which the category/ Code CE-01 having license of C3 & above was required. The appellant, being eligible, applied for the tender books of the aforesaid construction by submitting bid security of Rs. 08 Million in the account of Executive Engineer PWD Highways Muzaffarabad, but the bid of the appellant was rejected being non-responsive for the reason that the appellant has no past experience as required in bid documents. The appellant moved an application before GRC who vide its decision dated 17.01.2023, declared the appellant as 'responsive'. The aforesaid decision of GRC was challenged before the PPRA Authority. The Managing Director AJK PPRA set-aside the decision of GRC vide order dated 16.03.2023. The appellant, herein, feeling aggrieved, initially preferred a writ petition No. 1092/23 before the High Court on 18.03.2023, wherein, he challenged the decision dated 16.03.2023, however, later on

owing to the issuance of acceptance letter in favour of the private-respondent, the appellant sought withdrawal of the writ petition before the High Court. The learned High Court through the order dated 28.03.2023, ordered withdrawal of the same in the light of the statement of the learned counsel for the appellant. The same is reproduced hereunder for better appreciation: -

> "The learned counsel for the appellant moved application for withdrawal of the writ petition as well as early hearing of the date of writ petition which is fixed for 06.04.2023. It is stated at bar that he does not want to press the captioned writ petition, therefore, the same may be dismissed.
> In the light of statement made by the learned counsel for the appellant at bar, the instant writ petition stands dismissed being not pressed and the same shall be consigned to record."

6. It is pertinent to mention here that in the abovesaid order, the High Court did not grant any permission to file the fresh writ petition, rather, on the request of the learned counsel for the appellant for withdrawal of the writ petition, the same was consigned to record. The appellant has not bothered to challenge the said order before this Court nor filed any review petition before the High Court rather filed a fresh writ petition on the same grounds as taken in the earlier writ petition. The perusal of the impugend judgment reveals that the learned High Court has observed in the impugend judgment that under Order 23 Rule 1, the appellant was barred from filing the fresh writ petition ostensibly on the same subject that had been unconditionally withdrawn. Here, it is to be noted that the point emerged in this case is of vital importance that whether Order 23 Rule 1(3) CPC would apply to the cases of withdrawal of the petition filed under Article 44 of Interim Constitution, 1974 and whether the learned High Court has rightly dismissed the writ petition on this ground? The learned counsel for the respondents has the stance that the statutory provision i.e. Order 23 Rule 1,

served as bar for filing the petitions under Article 44 of the Constitution, which had been unconditionally withdrawn. In this case we are called upon to consider the effect of the withdrawal of the writ petition filed under Article 44 of the Constitution without the permission of the High Court to file a fresh petition. The provisions of the Code of Civil Procedure. 1908 *(hereinafter referred to as 'the Code')* are not in terms applicable to the writ proceedings although the procedure prescribed therein as far as it can be made applicable is followed by the High Court in disposing of the writ petitions. First of all, we would like to deal with the relevant statutory provision i.e., Rule 1 of Order XXIII, of the Code which provides for the withdrawal of a suit and the consequences of such withdrawal. For reference, Rule 1 of Order XXIII, CPC, is reproduced hereunder: -

> **"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) ..."

7. There are certain conditions for withdrawal of the suit. First is that, if the Court is satisfied that a suit must fail by reason of some formal defect and second is that, there are other sufficient grounds for allowing plaintiff to institute a

fresh suit for the subject-matter of a suit or a 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 claim. Without passing of formal order for permission to file fresh suit by the learned trial Court in terms of Order XXIII Rule 1(2)(b) C.P.C., it cannot be presumed mechanically that permission to file fresh suit has been granted by mere mentioning in the petition filed for withdrawal of suit; learned Court is required to pass specific order granting permission to the plaintiff for filing the fresh suit after being satisfied in terms of order supra. The principle underlying rule 1 of Order XXIII of the Code is that when a plaintiff once institutes a suit in a Court and thereby avails of a remedy given to him under law, he cannot be permitted to institute a fresh suit in respect of the same subject-matter again after abandoning the earlier suit or by withdrawing it without the permission of the Court to file fresh suit, *Invito benificium non datur*. The law confers upon a man no rights or benefits which he does not desire. Whoever waives, abandons or disclaims a right will loose it. In order to prevent a litigant from abusing the process of the Court by instituting suits again and again on the same cause of action without any good reason, the Code insists that he should obtain the permission of the Court to file a fresh suit after establishing either of the two grounds mentioned in sub-rule (2) of rule 1 of Order XXIII.

8. The principle underlying the above rule is rounded on public policy, but it is not the same as the rule of res judicata contained in section 11 of the Code which provides that no Court shall try any suit or issue in which the matter directly or substantially remained in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the

same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court. The rule of res judicata applies to a case where the suit or an issue has already been heard and finally decided by a Court. In the case of abandonment or withdrawal of a suit without the permission of the Court to file a fresh suit, there is no prior adjudication of a suit. yet the Code provides, as stated earlier, that a second suit will not lie in sub-rule (3) of rule 1 of Order XXIII of the Code when the first suit is withdrawn without the permission referred to in sub-rule (2) in order to prevent the abuse of the process of the Court.

9. The question for our consideration is whether it would or would not advance the cause of justice if the principle underlying rule 1 of Order XXIII of the Code is adopted in respect of writ petitions filed under Articles 44 of the Constitution also. It is common knowledge that very often after a writ petition is heard for some time when the petitioner or his counsel finds that the Court is not likely to pass an order admitting the petition, request is made by the petitioner or by his counsel, to permit the petitioner to withdraw from the writ petition without seeking permission to institute a fresh writ petition. A Court which is unwilling to admit the petition would not ordinarily grant liberty to file a fresh petition while it may just agree to permit the withdrawal of the petition. It is plain that when once a writ petition filed in a High Court is withdrawn by the petitioner himself, he is precluded from filing an appeal against the order passed in the writ petition because he cannot be considered as a party aggrieved by the order passed by the High Court. Reliance in this regard, may be placed to an authoritative judgment of the Supreme Court of India, rendered in case titled *Sarguja*

Transport Service v. State Transport Appellate Tribunal, Gwalior & Ors.[1], wherein, it has been observed as under: -

> "The point for consideration is whether a appellant after withdrawing a writ petition filed by him in the High Court under Article 226 of the Constitution of India without the permission to institute a fresh petition can file a fresh writ petition in the High Court under that Article. On this point the decision in Daryao's case (supra) is of no assistance. But we are of the view that the principle underlying rule 1 of Order XXIII of the Code should be extended in the interests of administration of justice to cases of withdrawal of writ petition also, not on the ground of res judicata but on the ground of public policy as explained above. It would also discourage the litigant from indulging in bench-hunting tactics. In any event there is no justifiable reason in such a case to permit a appellant to invoke the extraordinary jurisdiction of the High Court under Article 226 of the Constitution once again. While the withdrawal of a writ petition filed in a High Court without permission to file a fresh writ petition may not bar other remedies like a suit or a petition under Article 32 of the Constitution of India since such withdrawal does not amount to res judicata, the remedy under Article 226 of the Constitution of India should be deemed to have been abandoned by the appellant in respect of the cause of action relied on in the writ petition when he withdraws it without such permission. In the instant case the High Court was right in holding that a fresh writ petition was not maintainable before it in respect of the same subject-matter since the earlier writ petition had been withdrawn without permission to file a fresh petition. We, however. make it clear that whatever we have stated in this order may not be considered as being applicable to a writ petition involving the personal liberty of an individual in which the appellant prays for the issue of a writ in the nature of habeas corpus or seeks to enforce the fundamental fight guaranteed under Article 21 of the Constitution since such a case stands on a different footing altogether."

---

[1] [AIR 1987 SC 88]

8. There is sufficient case laws on withdrawal simplicitor and bar on institution of fresh suit. It would be helpful to discus certain judicial opinions here. In *Hashim Khan v. National Bank of Pakistan*[2], the appellant had filed a civil suit for the recovery of certain money allegedly misappropriated by an employee of the respondent-Bank. The suit was decreed ex parte. On an appeal, the High Court set aside the ex parte decree and remanded the case. During the proceedings after remand, the parties patched up the matter. The appellant agreed to receive some portion of the money. As a consequence of the compromise, the suit of the appellant for the remaining amount was withdrawn. Subsequently, he filed a fresh suit for recovery of certain other portion of the money with interest at the prevailing bank rate. The respondent-Bank contested the suit. The trial Court decreed the suit. The High Court set aside the decree on appeal. It was argued before the Supreme Court on behalf of the appellant that the subsequent suit for another amount with interest constituted a fresh cause of action, as such, Order XXIII, rules 1(3) and 2, CPC, were not applicable in the case, however, the Court ruled that: -

> "The withdrawal order passed by the Court mentioned hereinabove further shows that withdrawal simplicitor was without granting permission to file a fresh suit. Under the circumstances, such withdrawal under the above mentioned orders debars institution of any proceedings concerning such matter or part thereof ."

9. Another case in which withdrawal simplicitor was considered as an issue is *Muhammad Yar v. Muhammad Amin*[3] In this case, the respondent's claim of pre-emption on the basis of tenancy succeeded before the Revenue Officer.

---

[2] (PLD 2001 Supreme Court 325)
[3] (2013 SCMR 464 [Supreme Court of Pakistan].

The appellant (vendees) filed appeal which was dismissed, followed by revision before the Board of Revenue, which, too, met the same fate. The orders of the Revenue forums were challenged in a civil suit. An application for withdrawal was allowed so as enable the appellant challenge the concurrent findings of the revenue officers before the High Court in a writ petition. One key question raised before the High Court was the effect of withdrawal simplicitor. The Court elaborated the text of the law laid down in Order XXIII, Rule 1, CPC, in the following words: -

> "From the clear language of the above, it is vivid and manifest that the noted rule mainly compromises of two parties; 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."

10. The Supreme Court of Pakistan reviewed the dicta enunciated in the cases S. Nisar Ali vs. Feroze Din Rana and another (1969 SCMR 933); Tehsil Council Rajanpur through Nazim vs. Additional District Judge Rajanpur and 11 others (2005 MLD 1597); and Karim Gul and another vs. Shahzad Gul and another (1970 SCMR 141). From the above referred

cases, the Court concluded that firstly, if a request for permission to file a fresh suit is accompanied with a request for withdrawal or abandonment of claim or a part thereof, the Court has the authority within the purview of sub-rule 2(a(b) "to either decline such request or allow the permission." Secondly, in the event of refusal, the dismissal simplicitor should not be ordered, but the request for permission alone should be declined, which would mean that the suit shall continue. Thirdly, and more importantly, it would be problematic "if the request is not declined in express and clear words, yet the suit is dismissed as withdrawn' without recording any reasons. It seems worth mentioning here that the august Court has eloquently advised the courts that such an order would be bad for being silent on giving reasons and would be more amenable to be put at naught if assailed; though would become final if not challenged. Fourthly, and finally, for the sake of safe administration of justice, such an order would be deemed and implied that the Court has found it fit for permission to file a fresh suit.

11. In the case in hand, no permission for filing the fresh writ petition was granted by the High Court, hence, the writ petition (*as discussed hereinabove)* was bar under Order XXIII Rule 1 of the CPC. The learned High Court, has, therefore, rightly dismissed the writ petition on this ground.

2. It is also pointed out by the learned counsel for the respondents that Bid Evaluation Committee (BEC) declared the appellant’s company as non-responsive which order was challenged before the GRC but the appellant has not arrayed the BEC as party in the line of respondents who was a necessary party. The argument of the learned counsel for the petitioner has substance as it is settled principle of law that without impleadment of necessary party, no effective writ could be issued. The BEC was a necessary party who

passed the order against the appellant, hence, he was to be impleaded as such in the line of respondents, therefore, the appeal is also liable to be dismissed on this ground too. Reliance in this regard may be placed to the case reported as *Sardar M. Naseem Khan vs. Brig. (R) Muhammad Akbar Khan and others*[4], wherein, an identical proposition came into the consideration of this Court and the Court observed as under:

> "The first point requiring determination as to whether the writ petition without impleading the Board of Governors as party in the proceedings was not maintainable and liable to be dismissed on the sole ground and particularly in the circumstances when all the members of the Board of Governors were impleaded as party in the proceedings. By now, it is a settled law that the authority which has passed the order is a necessary party in the proceedings. The writ petition is held not competent in the circumstances when necessary party is not arrayed as a party. Reliance in this regard is placed on a case titled Rabat Saeed Bukahri and another vs. Saadia Shah and another [Civil Appeal No.23 of 1995 decided on 17.5.1995] wherein it was observed as follows
> "The order shows that the direction was given to the Nomination Board and costs were also ordered to be paid by that Board. It appears that it escaped the notice of the learned Judge of the High Court that Nomination Board had not been arrayed as a respondent. Under the relevant Government order the power to make nominations against reserved seats is vested in the Nomination Board. That is the reason that in the order of the High Court direction for admission of respondent Saadia Shah was issued to the nomination Board. The Board as a whole is a person within the meaning of section 44 of the Azad Jammu and Kashmir Interim Constitution Act, 1974 as distinct from its Chairman and Secretary. It is a fundamental requirement of law that if an order of a public functionary Has to be challenged in the High Court through a writ petition that functionary must be impeladed as a party. Similarly if a direction or prohibitation is sought against a public functionary that

---

[4] [2003 SCR 142]

> functionary is a necessary party without which neither a writ petition is maintainable nor an effective order can be passed. In the present case the direction issued to the Nomination Board has been given in its absence and that Board is, therefore, not bound by the order of the High Court. The Chairman and the Secretary of the Nomination Board are not the same as Nomination Board itself. Thus the writ issued in the case is not effective."

In the light of above detailed discussion, we have reached the conclusion that the learned High Court has rightly dismissed the writ petition, therefore, this appeal, having no merit, is hereby dismissed. There shall be no order as to costs.

JUDGE **JUDGE**

Muzaffarabad,
29.11.2023
Approved for reporting.