

**IN THE HIGH COURT OF SINDH AT
KARACHI**

Suit No. 1878 of 2018

Plaintiff : Abdul Qudus Alvi, through Mr.
Maula Bux Khatian, Advocate.

Defendants : The NED University of Engineering
Nos. 1 and 2 and Technology & another,
through Mr. Khalid Javed,
Advocate.

Date of hearing : 09.05.2019

ORDER

YOUSUF ALI SAYEED, J. – In terms of the Order made on 21.02.2019, a question of maintainability was framed, which turns on the point of whether the present Suit is barred under Order 23 Rule 1(3) CPC, in as much as Constitutional Petition No. 378 of 2011 had earlier been filed by the Plaintiff before this Court on ostensibly the same subject, and had then been unconditionally withdrawn. For ease of reference, Order 23 Rule 1 CPC, states as follows:

“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) ...”

2. Learned counsel were heard on this aspect, and in an endeavour to demonstrate that Order 23 Rule 1(3) CPC served as a bar, reliance was placed by learned counsel for the Defendants Nos. 1 and 2 on the Judgments of the Honourable Supreme Court in the cases reported as Hashim Khan v. National Bank of Pakistan PLD 2001 SC 325, Malik Shahid Mehmood v. Malik Afzal Mehmood and others 2011 SCMR 551, and Shahbaz Khan v. Additional District Judge, Ferozewala and others 2017 SCMR 2005.
3. However, it merits consideration at the outset that all of the aforementioned Judgments pertain to the withdrawal of a Suit, in which regard the law is well settled, whereas the proposition involved in the matter at hand is different, and gravitates around whether Order 23 Rule 1(3) CPC would apply to cases of withdrawal of a Petition under Article 199 of the Constitution. Needless to say, this point was not considered or determined in the cited Judgments, which are therefore clearly distinguishable.
4. Conversely, learned counsel for the Plaintiff placed reliance on the Judgment of a learned Division Bench of this Court in the case reported as Amber Ahmed Khan v. P.I.A. Corpn PLD 2003 Karachi 405, wherein precisely the question at hand was addressed, it being held that:

“With reference to the same plea, we would like to add that admittedly the Constitutional petition before this Court was eventually withdrawn by the plaintiff and it is not possible to say that upon such withdrawal the plaintiff stood precluded from seeking relief through ordinary proceedings. Indeed under Order 23, Rule 1, C.P.C a plaintiff cannot file a second suit after withdrawing the first one on the same cause of action, unless permission to do so has been accorded by the Court. Nevertheless, we are of the view that though normally the broad principles and procedural provisions of C.P.C. are applicable to Constitutional petitions, the provisions of Order 23, Rule 1, C.P.C cannot by the very nature of the jurisdiction under Article 199 apply to cases of withdrawal of a Constitutional petition and filing a civil suit subsequently. It needs to be kept in view that a pre-condition for invoking the jurisdiction under Article 199 is the absence of an alternate remedy. If a petitioner on account of some mistake or misconception files a Constitutional petition seeking a particular relief and subsequently realizes that an alternate and equally efficacious remedy by way of a civil suit was available the right course for him ought to be to withdraw the petition and file a suit. To insist that he could not do so without obtaining the permission of the Court before whom the petition is filed would amount to ignoring the extraordinary nature of proceedings under Article 199 and defeating the concept of Constitutional remedies. We, therefore, find no force in this objection and repel the same.”

5. If any further authority is required, reference may also be made to the dictum of the Supreme Court of India in the case reported as *Sarguja Transport Service v. State Transport Appellate Tribunal, Gwalior & Ors.* AIR 1987 SC 88, where whilst taking a different view in extending the principles underpinning Order 23, Rule 1 CPC to cases of withdrawal of writ petitions under Article 226, subject to certain stated qualifications, the Court nonetheless went on to observe that the withdrawal of such a petition may not bar other remedies, such as a suit. The operative part of that Judgment reads as follows:

“The point for consideration is whether a petitioner 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 petitioner 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 petitioner 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 petitioner prays for the issue of a writ in the nature of habeas corpus or seeks to enforce the fundamental right guaranteed under Article 21 of the Constitution since such a case stands on a different footing altogether. [Underlining added]

6. Under the circumstances, it is apparent that the withdrawal of Constitutional Petition No. 378 of 2011 does not serve to bar the Suit under Order 23 Rule 1(3), and the question of maintainability arising in terms of the Order of 21.02.2019 stands decided accordingly

JUDGE

Karachi
Dated _____