

ORDER SHEET
THE HIGH COURT OF SINDH, KARACHI
 Suit No. 1124 of 2021

Dated: _____ Order with signature of Judge(s) _____

1. For hearing of CMA No. 8678 of 2021
2. For hearing of CMA No. 1722 of 2023
3. For hearing of CMA No. 11470 of 2023

Date of Hearing : 11 September 2023, 14 September 2023, 22 September 2023 and 6 October 2023

Plaintiff : Hakim Ali through **Mr. Khalid Javed, Advocate**

Defendant No. 1 : Province of Sindh through **Mr. Asad Iftikhar, Assistant Advocate General Sindh**

Defendant No. 2 : The Additional Secretary (Technical) Works and Services, **through Mr. Asad Iftikhar, Assistant Advocate General Sindh**

Defendant No. 3 : The Executive Engineer, Provincial Costal Highway, Division Hyderabad **through Mr. Asad Iftikhar, Assistant Advocate General Sindh**

Defendant No. 4 : The Chief Engineer Highways through **Mr. Asad Iftikhar, Assistant Advocate General Sindh**

ORDER

MOHAMMAD ABDUR RAHMAN, J. By this order I will be disposing of an application listed at Serial no. 3 bearing CMA No. 11470 of 2023 being an application under Order XXIII Rule 1 (2) (b) of the Code of Civil Procedure, 1908 that has been maintained by the Plaintiff in this Suit and whereby the Plaintiff has sought to withdraw this suit with permission to be accorded to the Plaintiff to refile a new suit for the same cause on certain grounds as specified in the affidavit in support of that application.

2. The Plaintiff was appointed as a contractor of the Province of Sindh for the "Collection of Toll Tax of Saussi Toll Plaza at Karachi-Thatta Dual Carriageway" for a period commencing from 1 August 2020 and which was to end on 31 January 2021 (hereinafter referred to as the "Contract") and which was purportedly extendable for a further period of 6 months up until the Karachi-Thatta Dual Carriageway was "handed over."

3. The Plaintiff has pleaded that the possession of the Toll Plaza for the recovery of Right of Toll was handed over to him by the Province of Sindh at 00:00 hours on 1 September 2020 i.e. one month after the commencement of the term of the Contract. Since the Karachi-Thatta Dual Carriageway was not "handed over" the contract was extended by the Province of Sindh on the same terms and conditions for a further period of 4 months with effect from 1 March 2023 and which was to expire on 30 June 2021.

4. The Plaintiff has pleaded that the concession granted to him was severely impacted by the COVID-19 pandemic on account of restrictions that were imposed by the Province of Sindh on both Inter Provincial and Inter City transportation and which directly impacted his ability to recover under the Contract and which he represents had impacted his ability to collect monies for toll and which resulted him defaulting on payments that were to be made by him to the Province of Sindh under the Contract.

5. The Plaintiff through the suit pleads that on account of the intervening COVID-19 pandemic:

- (i) he is absolved of his obligation to make payments under the Contract until the restrictions imposed by the COVID 19 pandemic are withdrawn;

- (ii) the Province of Sindh is not entitled to terminate the Contract on account of such a breach on the part of the Plaintiff; and
- (iii) he is entitled continue performing on the Contract until the handing over of the Karachi-Thatta Dual Carriageway.

6. The Suit was instituted on 7 May 2021 and on which date CMA No. 8679 of 2021 being an application under Order 39 Rule 1 and 2 read with Section 151 of the Code of Civil Procedure, 1908 was maintained by the Plaintiff and on which application ad interim injunctive orders had been passed on that date restraining the Defendants from taking any coercive action as against the Plaintiffs subject to the Plaintiff making payments to the Nazir of this Court of the amounts due under the Contract with a concession of 5% on the amount due for “off days” subject to the undertaking that in the event that the Plaintiff suit failed he would be compelled to make good the payment of the balance 5% due.

7. During the pendency of CMA No. 8679 of 2021, the Plaintiff has chosen to maintain CMA No. 11470 of 2023 being an application under Order XXIII Rule 1 (2) (b) of the Code of Civil Procedure, 1908 whereby the Plaintiff has sought to withdraw this suit with permission to be accorded to the Plaintiff to file for the same cause on the same cause of action. Notice was issued on this Application on 28 August 2023 and where after the Province of Sindh had filed their Counter Affidavit on 2 September 2023. The Plaintiffs have chosen not to file a rejoinder to the Counter Affidavit.

8. The Plaintiff in his affidavit in support of CMA No. 11470 of 2023 has sought permission of this Court to withdraw this Suit with permission to:

- (i) refer the matter to an Arbitrator; or

- (ii) refer the matter to a Committee constituted by the Defendants.

and dependent on the adjudication of the dispute by either the Arbitrator or the Committee to challenge the decision of that adjudication if the Plaintiff finds himself aggrieved by that decision. He premises his application on an order passed by this Court in Suit No. 1643 of 2021 wherein on 19 November 2021 in similar circumstances the following order was passed:

- “ ... (1) the defendants No. 2 to 4 shall reauction the subject matter issue within fifteen days as per their Rules;
- (2) That plaintiff will hand over the possession to new successful bidder, whosever may be, without and delay in re-auction process;
- (3) Defendant No. 2 and 3 shall refer the dispute with regard to outstanding amount to the arbitrator as referred in the Contract who shall decide the fate of installments not paid by the plaintiff due to the restriction applied by Government while taking the plead of pandemic (covid-19). Plaintiff will be at liberty to challenge the findings of the arbitrator if aggrieved. However on that plea he would not be debarred to participate in the re-auction process;
- (4) Intervenor would also be at liberty to participate the re-auction proceedings.”

9. In the Counter Affidavit that has been filed by the Province of Sindh to CMA No. 11470 of 2023 and while not making any averment as to the request of the Plaintiff to refer the matter to an arbitrator or a committee to be constituted by the Province of Sindh, it has simply been stated that as the Plaintiff is willing to withdraw the suit, directions should be given to the Plaintiff to make good the balance 5% of the payment that was due to be paid by the Plaintiff to the Province of Sindh under the Contract, and which had been conditionally withheld by the Plaintiff under the cover of the interim order dated 7 May 2021 passed on CMA No. 8679 of 2021 with the Nazir of this Court with the obligation on the Plaintiff to pay the same to the Defendant No. 1 in the event that the Suit failed. No rejoinder was filed by the Plaintiff to rebut the contentions of the Province of Sindh as averred in the counter affidavit.

10. Mr. Khalid Javed has appeared on behalf of the Plaintiff and conceded that the suit may be deemed withdrawn and the interim order may be vacated subject to the Plaintiff's cause in this *lis* being referred to either an arbitrator or to a committee constituted by the Province of Sindh so that the issue of the losses suffered by him during the period of COVID 19 can be addressed. He forwarded a very interesting argument that as the Province of Sindh had made such a concession to the Plaintiff in Suit No. 1643 of 2021 in similar circumstances, to not grant the same right to the Plaintiff in this suit would tantamount to discrimination in terms of Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973. On this basis he maintained that this Court should direct that the matter be referred to either an arbitrator nominated by this Court or to permit the Province of Sindh to constitute a committee to address the Plaintiffs grievance and against which he could maintain his right to challenge any order passed thereon.

11. Mr. Asad Iftikhar, Assistant Advocate General Sindh advanced arguments on behalf of the Province of Sindh and has contended that he does not consent to CMA No. 11470 of 2023 and opposes any order being passed on that application that would be similar to the order passed in Suit No. 1643 of 2021.

12. I have heard the Counsel for the Plaintiff and the Assistant Advocate General Sindh and have perused the record. The interpretation of Rules 1 and 2 of Order XXIII of the Code of Civil Procedure, 1908, are relevant to the decision of CMA No. 11470 of 2023 and which read as under:

- “ ... 1. (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) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to withdraw without the consent of the others.

2. In any fresh suit instituted on permission granted under the last preceding rule the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted.

13. As is now well settled, Order XXIII Rule 1 of the Code of Civil Procedure, 1908 provides for two forms of withdrawal of a *lis*. The first, as clarified in Sub-Rule 1 of Rule 1 of Order XXIII of the Code of Civil Procedure, 1908 is what is referred to colloquially as an “unconditional” withdrawal of a *lis*. The consequences of such an “unconditional” withdrawal are clarified in Sub-Rule 3 of Rule 1 of Order XIII of the Code of Civil Procedure, 1908 wherein aside from permitting the Court to impose costs on the Plaintiff, the withdrawal would thereafter also preclude the Plaintiff **“from instituting any fresh suit in respect of such subject matter or such part of the claim.”** An application of the consequences of such “unconditional” withdrawal are found in the decision of the Supreme Court of Pakistan reported as **Muhammad Nawaz and 4 others vs. Allah Wasay and 6 others**¹ wherein on an adjudication in a Petition for Leave to Appeal that had been preferred before the Supreme Court of Pakistan and which was withdrawn unconditionally by the Petitioner; when the Petitioner thereafter preferred a second Petition for Leave to Appeal before the Supreme Court of Pakistan, that Court while applying order XXXVII Rule 1 of the Supreme Court Rules, 1980 which gives effect to the provisions of Order XXIII Rule 1 of the Code of Civil Procedure, 1908 held that:

¹ 1980 SCMR 181

“ ... Now the Subject matter of the former petition filed in this Court and which was dismissed as withdrawn at the request of the petitioners is the same which is the Subject matter of the present petition. The fact, however, is that they had withdrawn the previous petition at their own request and not on account of a permission granted to them in pursuance of any request made in that behalf that the said petition was bound to fail due to some formal defect or that there existed other sufficient grounds for allowing them to withdraw the same with permission to institute the present. In this view of the matter the present filed by them is clearly barred under rule 1 of Order XXXVII of the Rules of this Court.”

14. The Second form of withdrawal and which is colloquially referred to as a “Conditional” withdrawal and which is sought by the Plaintiff through CMA No. 11470 of 2023 has come to be interpreted by the Supreme Court of Pakistan in the decision reported as **Muhammad Anwar (decd.) through L.R.s. and others vs. Essa and others**² wherein it was held that:

“ ... 8. In the like manner, Order XXIII Rule 1 CPC, which allows the plaintiff to withdraw his suit or abandon part of his claim, empowers the Court to allow such withdrawal with permission to file a fresh suit. However, such permission is to be granted by the Court after satisfying itself and recording reasons that unless such permission is allowed, the suit would fail by reason of some formal defect. The Court can also allow such withdrawal with permission to file a fresh suit in case where the Court is of the view that there are other sufficient grounds for allowing plaintiff to withdraw his suit with the permission to file a fresh suit. A case law study shows that the suit may be allowed to be withdrawn in a case where the plaintiff fails to implead necessary party or where the suit as framed does not lie or the suit would fail on account of misjoinder of parties or causes of action or where the material document is not stamped or where prayer for necessary relief has been omitted or where the suit has been erroneously valued and cases of like nature. It is always to be kept in mind that where such defect could be remedied by allowing amendments, the Court should liberally exercise such powers but within the parameters prescribed by Order VI Rule 17 CPC. Besides while exercising powers under this provision the Court must identify the defect and record its satisfaction that the defect is formal and does not go to the root of the case. It is also to be kept in mind that such withdrawal would not automatically set-aside the judgment and decree which has come against the plaintiff unless such judgment and decree is set-aside by the Court after due application of mind. In the instant case, the suit was concurrently dismissed by the Courts after having been found barred by law/ time, therefore, the High Court had no power to allow withdrawal of the suit with the permission to file a fresh unless it had reversed the concurrent findings on the question of limitation. Even otherwise, if permission is granted for filing a fresh suit under Order XXIII Rule I CPC, then, pursuant to Order XXIII Rule 2, the plaintiff is bound by the law of limitation in the same manner as if the first suit had not been filed, therefore, no fresh cause of action would accrue from the date when such permission was granted by the Court. Reference is made to the cases of Muhammad Saeed Bacha and another vs. Lute Buds/ink Amir and others (2011 SCMR 345).”

(Emphasis is added)

² PLD 2022 SC 716

As is apparent the grounds for permitting a conditional withdrawal are where:

- (i) there is a formal defect in the pleadings which warrant the conditional withdrawal; or
- (ii) where there are sufficient grounds for allowing plaintiff to withdraw his suit with the permission to file a fresh suit.

15. The Supreme Court of Pakistan has also clearly mandated that where such an application is maintained, while dismissing an application for conditional withdrawal it is not permissible for a court to dismiss the *lis* as having been withdrawn unconditionally.³

16. The Plaintiff in his pleadings in CMA No. 11470 of 2023 has not contended that he wishes to withdraw this Suit on account of their being a formal defect. Rather he contends that there are “sufficient grounds” which would permit him to withdraw his suit and which he has in the affidavit in support of CMA No. 11470 of 2023 indicated to be the order dated 19 November 2021 passed in Suit No. 1643 of 2021 wherein he contends the Province of Sindh had in similar circumstances conceded to that *lis* being referred to a Committee to be constituted to consider the claim and on the basis of which he claims similar relief in this *lis*. He further contends that as and when the Committee gives its decision, the withdrawal of this *lis* should not preclude him from maintaining a claim once again on the same cause if he is not satisfied with that order.

15. I find myself unable to agree with the contentions of the Plaintiff as to whether the circumstances as indicated in the affidavit in support of the application would constitute sufficient grounds for a conditional withdrawal

³ *Haji Abdul Rashid Sowdagar vs. S. M. Lalita Roy and Others* PLD 1959 SC 287; *Ismail vs. Fida Ali* PLD 1965 SC 634 and *Moula Bukhsh vs. Muhammad Zahid* PLD 1990 SC 596.

of this *lis* thereby granting him permission to file afresh on the same cause or as to whether this court has jurisdiction to refer this matter to an arbitrator or committee under the provisions of the Code of Civil Procedure, 1909 on which CMA No. 11470 of 2023 is premised.

16. To my mind, if this *lis* is withdrawn either conditionally or unconditionally, the decision of the Committee or the Arbitrator would amount to a new cause of action and which would be to determine whether the adjudication of the rights by the Committee or the Arbitrator, as the case may be, was done correctly or incorrectly. The Plaintiff would therefore retain his right to premise a new *lis* on that new cause of action **and** clearly having availed and obtained relief on his original cause of action through that adjudication any subsequent claim for relief on the same ground would thereafter be barred under the doctrine of election.⁴

17. Secondly, to claim an entitlement to such a right to the appointment of an arbitrator or commissioner, on the basis of the order dated 19 November 2021 passed in Suit No. 1643 of 2021, would necessitate an adjudication as to a legal issue and which at present aside from being beyond the pleadings of this Suit cannot be granted under the cover of an application under Order XXIII Rule 1 (2) (b) of the Code of Civil Procedure, 1908. To maintain such a right, the Plaintiff would necessarily have to maintain an application under Order VI Rule 17 of the Code of Civil Procedure, 1908 to amend the pleadings seeking therein declaratory relief as to the right claimed by him and also seeking a mandatory injunction for the constitution of a committee and if granted, the Defendants would have the right to file or amend their written statement. Once done, the Plaintiff

⁴ See. *Muhamamd Raqeeb vs. Government of Khyber Pakhtunkhwa through Chief Secretary Peshawar and others* 2023 SCMR 992; *Mir Mujib-ur-Rehman Muhammad Hassani vs. Returning Officer, Pb-41 Washuk; Trading Corporation Of Pakistan Vs. Devan Sugar Mills Limited* PLD 2018 SC 828

would then have to consider on the basis of the pleadings as to whether he could maintain an application under Order XV Rule 3 of the Code of Civil Procedure, 1908 to have the issue regarding the alleged discrimination adjudicated as a point of law. Clearly all of this cannot be determined in the application as maintained by the Plaintiff under Order XXIII Rule 1 (2) (b) of the Code of Civil Procedure, 1908.

18. For the foregoing reasons, I am therefore clear that the grounds as claimed in CMA No. 11470 of 2023 cannot be considered a “sufficient ground” for permitting the conditional withdrawal of this suit under Order XXIII Rule 1 (2) (b) of the Code of Civil Procedure, 1908. CMA No. 11470 of 2023 is therefore misconceived and is dismissed with no order as to costs.

J U D G E

Karachi dated 4 December 2023

ANNOUNCED ON 4 December 2023

BY

SANA AKRAM MINHAS, J.