

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

1st Civil Appeal No.S-08 of 2022

Appellant : Amad Saeed, through
Farman Ali Rajput, Advocate

Respondent : Nemo

Date of hearing : 03.05.2024

Date of Decision : 03.05.2024

JUDGMENT

ARBAB ALI HAKRO, J:- Appellant has maintained this first appeal against the judgment dated 21.12.2021, passed in Summary Suit No.14 of 2018, by learned Model Civil Appellate Court / II-Additional District Judge, Sukkur (“**the trial Court**”), whereby suit of the appellant was dismissed.

2. The brief facts of the appellant’s case are as follows: He filed a suit for the recovery of an amount of Rs.400,000/- (Rupees Four Hundred Thousand) against the defendant. This amount had been paid to the defendant as advance money for purchasing five hundred date palm trees standing in his field. The purchase was for Bardana and Rangolate. The parties agreed that the date palm trees would be handed over to the plaintiff if he paid less than Rs.800,000/-. The appellant’s case was that, in lieu of the contract between the parties, the respondents issued a security cheque of Rs.400,000/- bearing No.27758354, dated 29.08.2016, from Habib Bank, Mal Road Branch, Khairpur. Upon presenting this cheque for re-depositing in his account, it was dishonoured as per the memo dated 02.09.2016. Therefore, he filed a suit to recover the amount.

3. After the defendant was served and admitted, he did not appear to contest the suit. As a result, he was declared exparte, and a judgment and decree were subsequently passed in terms of Order

XXXVII Rule 2 CPC, presuming the averments of the plaint to be true. However, the learned appellate Court dismissed the suit on the legal ground that a former suit, which had been filed by the appellant in respect of the same negotiable instrument (said cheque), was subsequently withdrawn by the appellant by filing an application under Order XXIII Rule 1 CPC. Such an order does not explicitly state a specific condition or permission to file a fresh suit. Thus, the present suit is not maintainable and is barred by Order XXIII Rule 1 (3) CPC. The appellant, aggrieved by the judgment, has filed this civil appeal.

4. Mr Farman Ali Rajput, counsel for the appellant, has argued that the judgment and decree of the trial court are based on a misconception of the law, and the findings of the trial court lack a judicious mind, which is unwarranted under the law. He argued that the application for withdrawal of the former suit was conditional and subject to the institution of a fresh suit. The trial court did not apply a judicious mind by not considering that permission was accorded and the suit was withdrawn. Although there is no implicit or explicit observation to institute a fresh suit, such an application was conditional. He further emphasized that the Court has jurisdiction only to accord permission for withdrawal. Without such permission, the Court has no jurisdiction to allow the application, and the suit shall continue to proceed as provided under the civil procedure code. He relied upon 2013 SCMR 464, PLD 1990 Supreme Court 596, and 2013 MLD 415.

5. None present for the respondent. Notices have been issued and are affected by all modes of service, including publication.

6. I have heard learned counsel for the appellant and also perused the record and proceedings of summary suit No14/2018

7. Upon perusal of the impugned judgment, it is clear that the dispute regarding the recovery of an amount of Rs.400,000/- has not been adjudicated by the trial Court, even though it is presumed to be true and correct by invoking Order XXXVII Rule 2(2) CPC if the defendant has been declared exparte. Upon reading the

trial court's judgment, it appears that the findings are based on the legal proposition of law by invoking Order XXIII Rule 1(3) CPC. The trial Court observed that explicit, specific, and clear permission has not been accorded to the appellant for instituting a fresh suit by passing the withdrawal Order dated 07.08.2018. The procedure to withdraw and abandon the portion or part of the claim in any suit is provided under Order XXIII Rule 1 CPC, and there are three Sub-rules provided by the legislation to be followed by the Court. From a perusal of Rule 1(3) CPC, it appears that it is the prerogative of the appellant to seek permission/abandon part of the claim as referred to in subclause (2) CPC to institute a fresh suit. However, in the absence of such a condition in the withdrawal statement of the application, he shall be precluded from instituting any fresh suit with respect to the subject matter or part of the claim. The main thrust of the arguments of counsel for the appellant is that once the application for withdrawal of former suit No.02/2018 was moved, and that condition subject to filing a fresh suit was allowed by the Court, it has to be presumed that permission to file a fresh suit is deemed to be granted. In support of his legal arguments, he also emphasized that for the sake of arguments, if the order of the trial court does not reflect permission to institute a fresh suit, then the conditional application of withdrawal ought to have been dismissed, and the former suit should continue to be decided as per procedural law. Such contention of the learned counsel for the appellants has legal force and weight, and in support, I have also gone through the dicta laid down by the Supreme Court of Pakistan in the case of Muhammad Yar (Deceased) through L.Rs. and others vs Muhammad Amin (Deceased) through L.Rs. and others (2013 SCMR 464), wherein the Supreme Court decided such a legal proposition of law that the plaintiff has a right to choose his further course of action and decide whether he should withdraw the suit. There does not seem to be any problem in the other eventualities except that the Court has to record its reasons justifying the permission, which shall be recorded in either of the eventualities as

afore-stated. However, the problem is faced where the request is not declined in express and clear words. Yet, the suit is dismissed as withdrawn without recording the reasons through such an order, which shall be bad for failure to assign the reasons, and if not assailed on the ground by the other side, it shall attain finality. Still, in the situation, it should be implied, considered, and deemed the Court has found it to be a fit case for the permission and has granted the plaintiff permission to file a fresh suit because this is the safer course, which should be followed in the interest and promotion of justice, otherwise serious prejudice shall be caused to the plaintiff who shall have to face the bar of sub-rule (3) and shall be left in a flummox.

8. For the foregoing reasons and the ensuing discussion, it is clear that the former suit was withdrawn with permission to file a fresh suit. Although the order of the trial court does not reflect a specific observation, it should be deemed that permission has been granted to institute a fresh suit. The trial court is under a misconception of the law and has not considered the legal proposition of law in its letter and spirit as laid down by the legislation. It has exercised jurisdiction without the application of a judicious mind. Consequently, the impugned judgment dated 21.12.2021 is hereby set aside. As a result, the appeal is **allowed**, and the matter is remanded to the trial court to decide the suit on merits in accordance with law, with no order as to costs.

JUDGE