

**IN THE HIGH COURT OF SINDH BENCH AT SUKKUR**

**1<sup>st</sup> Civil Appeal No.S-32 of 2020**

Appellant : Ashique Ali Sahito  
Through Mr. Fida Hussain Sahito, Advocate

Respondent : Nemo

Date of hearing : 19.01.2024

Date of Decision : 16.02.2024

**J U D G M E N T**

**ARBAB ALI HAKRO, J.-** Through this Appeal under Section 96 of the Code of Civil Procedure, 1908 ("**of the Code**"), the Plaintiff (appellant herein) has impugned Order dated 07.11.2020, passed by Additional District Judge (MCAC) Kandiaro ("**the trial Court**"), in Summary Suit No.45 of 2019, whereby the application under Order VII Rule 11 of the Code filed by the defendant (the respondent herein) was allowed and plaint of the suit was rejected.

2. The brief facts of the case are that the appellant filed a suit for recovery of Rs.9,000,000/- (rupees ninety lac) under Order XXXVII Rule 1 of the Code, on the basis of Cheque No.17846708 dated 27.8.2018, drawn on Sindh Bank Ltd, Khairpur Branch. The appellant claimed that the respondent approached him, stating that he was in need of an amount of Rs.9,500,000/- for personal use, and promised to return the same in August 2018. On his request, the appellant paid Rs.9,500,000/- to the respondent in the presence of witnesses, namely Moledino Budh and Ghulam Rasool. In return for the above amount, the respondent issued two cheques: one referred to above and another Cheque No.17846709 for an amount of Rs.500,000/-, drawn on the same bank. It is averred that the cheque issued for Rs.500,000/- was encashed, while the cheque for Rs.9,000,000/- was

dishonoured on 01.10.2018. Upon the respondent's refusal to pay the cheque amount, the appellant filed a suit for recovery on 27.03.2019.

3. Upon receiving notice, the respondent appeared and filed an application for leave to defend. Additionally, an application under Order VII Rule 11 of the Code was filed for the rejection of the plaint on the grounds that, earlier, based on the same cause of action, the respondent had filed a suit for recovery of rupees ninety lacs, which was unconditionally withdrawn. The appellant contested this application by filing objections. The trial Court, vide the impugned Order dated 07.11.2020, allowed the application under Order VII Rule 11 of the Code and rejected the plaint of the appellant's suit.

4. At the outset, the counsel for the appellant argued that the trial court improperly dismissed the plaint by applying the provisions of Order VII Rule 11 of the Code and overstepped its jurisdiction by not considering the provision of Order XXIII Rule 1(3) of the Code. The counsel contended that the provision of Order II Rule 2 of the Code is not applicable in this case, particularly regarding the withdrawal of the earlier suit filed by the appellant, which was not decided on its merits. The appellant withdrew the suit on the condition that the respondent assured payment of the due amount within 15 days. Upon the respondent's refusal, the appellant had a cause of action to file the suit. Lastly, the counsel submits that the plaint discloses a cause of action and that the withdrawal condition does not bar the appellant from filing a fresh suit. Therefore, the counsel requests that the impugned Order be set aside and the appellant's suit be remanded to the trial court for a decision on its merits. He relied upon the case law reported as **PLD 2021 Sindh 103**.

5. I have heard the arguments advanced by learned counsel for the parties and minutely perused the material available on record, including the case law cited at the bar.

6. Upon examining the records, it is evident that both suits were filed based on Cheque No.17846708, dated 27.8.2018, drawn on Sindh Bank Ltd, Khairpur Branch, for an amount of rupees ninety lac. This cheque was dishonoured on 01.10.2018. The respondent withdrew the earlier suit on 25.02.2019. In this context, it becomes crucial to revisit the withdrawal statement made by the appellant and the Order dated 25.02.2019. The details of these are as follows: -

*"I do hereby withdraw the above suit."*

*Sd/-25-2-2019  
Advocate for  
Plaintiff*

**ORDER**

*Suit is dismissed as withdrawn, with no order as to costs.*

*Sd/-25.2.2019  
Addl. District Judge, Kandiaro"*

7. Upon reviewing the above endorsement and Order, it's evident that no request or approval for filing a fresh suit was made. In the plaint, the appellant did not assert that he sought permission for a fresh suit that was denied. The appellant merely mentioned in the contents of present plaint that he had retracted the suit based on the respondent's promise to settle the payment within fifteen days. The record indicates that the appellant did not withdraw the previous suit due to a formal defect or the potential for the suit to fail. It is evident from the Order in which the first suit was withdrawn that it was merely withdrawn without any specific reason.

8. The dispute centres on Order XXIII, Rule 1 of the C.P.C., which is replicated 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."*

9. A detailed interpretation of Order XXIII Rule 1(3) of the Code reveals that if a plaintiff, against all or any of the defendants, decides to withdraw a lawsuit or abandon a part of his claim without the permission referred to in sub-rule (2), he is held accountable for any costs that the Court may decide to award. Furthermore, this rule prevents the plaintiff from filing any new lawsuit concerning the same subject matter or the same part of the claim that was previously withdrawn or abandoned. This provision ensures that the legal process is not misused by repeatedly instituting suits on the same subject matter or claim. It also safeguards the defendants from being subjected to repeated litigation over the same issue. Thus, this rule plays a crucial role in maintaining the integrity and efficiency of the judicial process. In the case of Muhammad Yar (Deceased), through L.Rs. and others v. Muhammad Amin (Deceased) through L.Rs. and others(2013 SCMR 464), the Supreme Court of Pakistan, after examining Order XXIII Rule 1(3) of the Code, made the following observations:–

*"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)."*

10. The same rule has been restated in the case of Azhar Hayat v. Karachi Port Trust through Chairman and others (2016 SCMR 1916) in these words:-

*"6. We shall first deal with the legal objections taken by the learned counsel for the respondents. The petitioner had filed C.P. No.D-2602/2014 which was "not pressed" on 19th August, 2014 and then filed the suit on 26th August 2014 (which was converted into a petition wherein the earlier petition filed by the petitioner was mentioned in paragraph 13 by stating that, "the same has been withdrawn by the Plaintiff as fresh cause of action has accrued to the Plaintiff." The respondents had objected to the subsequent filing of the suit-petition as the requisite permission had not been obtained from the Court when it was not pressed and dismissed. The impugned Order took notice of this fact, but the learned judges did not non-suit the petitioner on this ground evident through he could have been because sub-rule (3) of Rule 1 of Order XXIII of the Code stipulates that where the plaintiff withdraws from a suit without being given permission to institute a fresh suit in respect of the same subject-matter or such part of claim he would be precluded from doing so."*

11. The Supreme Court of Pakistan examined the issue of withdrawing a suit based on an oral compromise in the case known as Ghulam Abbas and others v. Mohammad Shafi through L.Rs. and others (2016 SCMR 1403). In this case, the Supreme Court of Pakistan determined that if a suit is withdrawn due to an oral compromise, it either signifies that the plaintiff's claim has been satisfied or that the plaintiff has chosen to abandon their grievance or cause of action. These rulings underscore the legal implications of an oral compromise and its potential to resolve disputes without further litigation, thereby contributing to the efficiency of the judicial process. Plaintiff cannot be allowed to file his suit and then, at his sweet will and pleasure, exit the litigation only to enter the arena again as and when he pleases. If this is permissible under Rule 2(b) then that effectively puts paid to the consequences envisaged by Rule 3. And, it must be remembered, there would be nothing, in principle, preventing a plaintiff from doing this ad nauseam. This cannot be the true meaning and scope of Rule 2(b). It is only when the facts disclose what can, in law, be regarded as a "ground" that it becomes necessary for the court to consider the sufficiency (or lack) thereof.

Here, there was no such thing. The application itself, on the face of it, purported to have been moved under Rule 1. Nothing was said before the learned trial Court as would have required it to conclude otherwise, nor was any attempt made then or later to withdraw the same. Reference may be made to the dictum laid down by the Supreme Court of Pakistan in case of Khawaja Bashir Ahmed and Sons Pvt. Ltd. v. Messrs Martrade Shipping and Transport and others (PLD 2021 Supreme Court 373).

12. In accordance with the principles established by the Supreme Court of Pakistan in the aforementioned judgments, it is my opinion that the appellant, having unconditionally withdrawn the previous suit based on mere verbal assurances from the respondent, which are unproven, is now barred from re-litigating the same cause of action in Court based on the same cheque. The subsequent suit filed by the appellant is prohibited under Order XXIII Rule 1(3) of the Code. This rule prevents a party from re-initiating a suit on the same grounds once they have voluntarily withdrawn their claim without obtaining the permission of the Court. Therefore, the appellant's action is legally untenable. It is matter of record that the fresh Suit of the Appellant/Plaintiff was based on the same cause of action and the Appellant/Plaintiff has not shown fresh cause; therefore, the Appellant shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim. Thus, the Suit of the Appellant was barred under Order XXIII Rule 1(3), of the Code.

13. For the foregoing reasons, the impugned Order for rejecting the plaint passed by the trial Court is correct and in accordance with the relevant law; therefore, the same is maintained and upheld. Consequently, the instant appeal being devoid of merits is accordingly **dismissed** leaving the parties to bear their own costs.

**JUDGE**

Suleman Khan/PA