IN THE HIGH COURT OF SINDH AT KARACHI

PRESENT:

Mr. Justice Arshad Hussain Khan
Mr. Justice Amjad Ali Sahito

High Court Appeal No.266 of 2019

Appellant :	NED University of Engineering and Technology through its Registrar & other through Ms. Farkhunda Shaheen, Advocate
Respondents:	Abdul Qudus Alvi (since deceased) and other Respondent No.1(d) namely Abid Ali present in person. Ms. Amna Usman, Assistant Advocate General, Sindh
Date of Hearing :	29.10.2026
Date of Judgment:	29.10.2026

J U D G M E N T

Amjad Ali Sahito, J-. Through this appeal, the appellants have called in question the order dated 30.05.2019 passed by the learned Single Judge of this Court in Suit No.1878 of 2018, whereby their objection to the maintainability of the suit was declined.

2. Briefly stated, respondent No.1, Abdul Qudus Alvi, was employed as a Professor at NED University of Engineering and Technology and retired from service on 24.08.1999 upon attaining the age of superannuation. According to him, various retirement benefits, including provident fund, commutation, pension, salary and other service-related dues, remained unpaid by the appellants. The appellants, however, maintained that the amounts payable to respondent No.1 had been duly calculated in accordance with the applicable rules and that certain sums were liable to be adjusted against his outstanding liabilities, including the University's alleged entitlement to a share in his consultancy income.

3. Aggrieved by the withholding of his retirement benefits, respondent No.1 approached the Provincial Ombudsman, Sindh. Vide decision rendered in April 2010, the Provincial Ombudsman directed the Vice Chancellor of the University to release an amount of Rs.3,339,897.70 to the complainant within thirty days. The decision also recorded findings concerning the withholding of retirement benefits and the University's failure to establish the legality of certain adjustments made against the amounts payable to respondent No.1.

4. Subsequently, respondent No.1 instituted Constitutional Petition No.D-378 of 2011 before this Court, seeking release of his pensionary and allied benefits. During the pendency of the petition, the parties arrived at a settlement, pursuant to which respondent No.1 received an amount of Rs.1,08,46,074/- on 10.09.2018. Thereafter, the constitutional petition was withdrawn and dismissed as withdrawn vide order dated 26.09.2018. The appellants contend that the withdrawal was unconditional and that no permission was obtained from the Court to institute fresh proceedings in respect of the same subject matter.

5. On 08.10.2018, respondent No.1 instituted Suit No.1878 of 2018 against the appellants for recovery of Rs.54,304,551/-, together with markup and consequential reliefs. In their written statement, the appellants challenged the maintainability of the suit, primarily on the ground that, in view of the unconditional withdrawal of the earlier constitutional petition, the subsequent proceedings were barred by the principles embodied in Order XXIII Rule 1(3), CPC. Upon hearing the parties, the learned Single Judge declined to accept the objection, giving rise to the present appeal.

6. Learned counsel for the appellants contended that respondent No.1 had previously invoked the constitutional jurisdiction of this Court through Constitutional Petition No.D-378 of 2011, seeking substantially the same reliefs as those claimed in the present suit. It was argued that, after receiving a substantial amount from the appellants, respondent No.1 withdrew the constitutional

petition unconditionally without obtaining leave to institute fresh proceedings. According to learned counsel, the subsequent suit, being founded upon the same cause of action and seeking recovery of the retirement benefits already claimed, was barred under Order XXIII Rule 1(3), CPC. It was further contended that permitting the suit to proceed would enable respondent No.1 to circumvent the consequences of withdrawal of the earlier proceedings. Learned counsel, therefore, prayed that the impugned order be set aside and the plaint be rejected under Order VII Rule 11(d), CPC. In support of his contentions the learned counsel placed reliance upon the judgments of the Honourable Supreme Court 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).

7. It is pertinent to note that respondent No.1, Abdul Qudus Alvi, the original plaintiff, has since passed away. Accordingly, vide order dated 21.02.2025, his legal heirs were brought on record as respondents in the present appeal. Respondent No.1(d), Abid Ali, appearing in person, supported the impugned order and submitted that the suit had been instituted for recovery of legitimate retirement benefits which remained outstanding despite the decision of the Provincial Ombudsman. He maintained that the amount received during the pendency of the constitutional petition did not constitute full and final settlement of the entire claim and that the subsequent suit was confined to recovery of the remaining dues. It was further contended that withdrawal of the constitutional petition could not, by itself, extinguish the right of respondent No.1 to pursue an appropriate civil remedy for recovery of amounts lawfully payable to him. He accordingly prayed for dismissal of the appeal.

8. Learned Assistant Advocate General, appearing on behalf of the State, opposed the impugned order and submitted that the dispute had already been settled between the parties and the agreed amount had been paid by the appellant-University,

whereafter the constitutional petition was withdrawn. On this basis, it was contended that the subsequent suit was not maintainable and the appeal merited acceptance.

9. We have heard learned counsel for the parties and examined the available record with their assistance.

10. The controversy requiring determination is whether the withdrawal of Constitutional Petition No.D-378 of 2011, without obtaining permission to institute fresh proceedings, operates as a bar to the subsequent institution of Suit No.1878 of 2018 under Order XXIII Rule 1(3), CPC. The objection regarding maintainability was also considered by the learned Single Judge in the light of the authorities cited by the parties. Before addressing the rival submissions, it would be appropriate to reproduce the relevant provision:

> *"Order XXIII Rule 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."*

11. A plain reading of the aforesaid provision makes it evident that the statutory consequence contemplated under sub-rule (3) is attached to the withdrawal of a suit or abandonment of part of a claim without obtaining permission under sub-rule (2). The question, therefore, is not merely whether the earlier

constitutional petition and the subsequent suit relate to the same retirement benefits, but whether the prohibition contained in Order XXIII Rule 1(3), CPC, can be extended to a constitutional petition instituted under Article 199 of the Constitution.

12. In support of their objection, learned counsel for the appellants placed reliance upon the judgments of the Honourable Supreme Court 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). However, the said authorities deal with the consequences of withdrawal of civil suits and the application of Order XXIII Rule 1, CPC, in that context. They do not directly address the distinct question arising in the present case, namely, whether withdrawal of a constitutional petition, without permission to institute fresh proceedings, precludes the petitioner from subsequently pursuing an ordinary civil remedy. Consequently, the cited authorities do not advance the appellants' case on the precise issue requiring determination.

13. The controversy is, in fact, directly covered by the judgment of a learned Division Bench of this Court in *Amber Ahmed Khan v. P.I.A. Corporation* (PLD 2003 Karachi 405), wherein the effect of withdrawal of a constitutional petition followed by institution of a civil suit was specifically considered. The learned Division Bench, after acknowledging that the general principles and procedural provisions of the CPC may ordinarily apply to constitutional proceedings, held that Order XXIII Rule 1, CPC, cannot, having regard to the very nature of the jurisdiction exercised under Article 199 of the Constitution, be mechanically applied to a case where a constitutional petition is withdrawn and an ordinary civil suit is subsequently instituted.

14. The rationale underlying the said judgment is that the jurisdiction under Article 199 is extraordinary in nature and its invocation is subject to the condition that no other adequate and efficacious remedy is available. Where a petitioner subsequently

discovers that an ordinary civil remedy is available, requiring him to obtain permission under Order XXIII Rule 1, CPC, before withdrawing the constitutional petition would defeat the very object and nature of the constitutional jurisdiction. The learned Division Bench, therefore, repelled the objection that withdrawal of the constitutional petition precluded the petitioner from pursuing his remedy through a civil suit.

15. The same distinction finds support, though in a somewhat different context, in the judgment of the Supreme Court of India in *Sarguja Transport Service v. State Transport Appellate Tribunal, Gwalior and others* (AIR 1987 SC 88). In that case, the Court extended the principle underlying Order XXIII Rule 1, CPC, to the withdrawal of writ petitions under Article 226 of the Constitution of India, primarily to prevent abuse of the extraordinary constitutional jurisdiction and repeated invocation thereof on the same cause of action. However, the Court expressly observed that withdrawal of a writ petition without permission to institute a fresh petition would not bar other remedies, including an ordinary civil suit, as such withdrawal did not amount to res judicata. The distinction drawn therein between a fresh constitutional petition and the pursuit of an independent remedy through an ordinary civil suit is material to the controversy before us.

16. Applying the aforesaid principles to the facts of the present case, it is evident that Constitutional Petition No.D-378 of 2011 was instituted under Article 199 of the Constitution, whereas the subsequent proceedings were initiated by way of a civil suit for recovery of alleged outstanding monetary dues. Although both proceedings arise out of the respondent's claim for retirement benefits, their nature and jurisdictional basis are distinct. The withdrawal of the constitutional petition, without obtaining permission to institute fresh proceedings, cannot, in view of the law laid down in *Amber Ahmed Khan* (supra), be treated as attracting the statutory bar contained in Order XXIII Rule 1(3), CPC, against the subsequent institution of a civil suit.

17. We are also unable to accept the contention that receipt of Rs.1,08,46,074/- by respondent No.1 during the pendency of the constitutional petition, followed by its withdrawal, conclusively establishes full and final settlement of his entire claim. Whether the said payment constituted complete satisfaction of the respondent's entitlement or whether any further amount remained payable would necessarily depend upon the terms of the settlement, relevant service rules, accounts and other documentary evidence. These matters involve factual and legal questions which cannot be conclusively determined at the stage of deciding the objection under Order VII Rule 11(d), CPC, merely on the basis of the withdrawal of the earlier constitutional petition.

18. It is well settled that, while considering an application under Order VII Rule 11(d), CPC, the Court is required to determine whether the suit, as instituted, is barred by any law. In the present case, since the earlier proceedings were constitutional in nature and the subsequent proceedings constitute an ordinary civil suit, the prohibition contemplated under Order XXIII Rule 1(3), CPC, is not attracted. The appellants have, therefore, failed to establish that the plaint is liable to rejection on the ground urged by them. This, however, does not preclude the appellants from raising all legally available pleas concerning the alleged settlement, adjustment of dues or discharge of liability before the learned trial Court.

19. In view of the foregoing discussion, we find that the learned Single Judge has correctly appreciated the legal position and rightly declined to reject the plaint on the ground that the earlier constitutional petition had been withdrawn without permission to institute fresh proceedings. The impugned order, therefore, does not suffer from any illegality or jurisdictional infirmity warranting interference by this Court in its appellate jurisdiction. The appeal is consequently devoid of merit.

20. Accordingly, **High Court Appeal No.266 of 2019 is dismissed**, and the impugned order is maintained. The learned trial Court shall proceed with the suit in accordance with law

and adjudicate the respective claims and defences of the parties on their own merits, including the effect of the alleged settlement and the amount, if any, remaining payable to the plaintiff, without being influenced by any observation made herein. It is clarified that the findings recorded in this judgment are confined exclusively to the objection regarding maintainability of the suit under Order XXIII Rule 1(3), CPC, and shall not prejudice the determination of the substantive monetary claim.

JUDGE

JUDGE

KAMRAN/PS