

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
Suit No.1445 of 2016

Date	Order with signature of Judge
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1. For hearing of CMA No.15402/2016.
 2. For hearing of CMA No.10231/2016.
 3. For hearing of CMA No.9453/2016.
 4. For hearing of CMA No.10088/2016.
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22.12.2016

Mr. Shaikh Javed Mir alongwith Mr. Zulfiqar Haider Advocates for Plaintiff.

Mr. Khawaja Shamsul Islam, Advocate for Defendant No.1.

Mr. Taimur Ali Mirza, Advocate for defendant No.2.

1. Through this Application (CMA No.15402/2016), the defendant No.1 seeks rejection of plaint on the ground that the Suit is barred under Section 54 and 56 of the Specific Relief Act, read with Order 23 Rule 3 CPC. Learned Counsel for defendant No.2 has contended that earlier a petition bearing C.P No.D-985/2016 was filed by several petitioners including present plaintiff, however, after passing of certain orders, same was withdrawn on 13.05.2016 and such withdrawal order did not permit filing of any further proceedings including the present Suit, therefore, instant Suit is not maintainable and the plaint be rejected under Order VII Rule 11 CPC. In support of his contention he has relied upon the cases reported as **2006 PTD 251** (*Messrs Pakistan Vinyl Industries, Lahore v. Central Board of Revenue through Secretary (Customs Tariff-1) and 2 others*) and **PLD 2001 SC 325** (*Hashim Khan v. National Bank of Pakistan, Head Office I.I Chundrigar Road, Karachi and Branch Office at M.A. Jinnah Road, Quetta*).

On the other hand, learned Counsel for the plaintiff submits that the provisions of CPC are not applicable on the Constitutional Petition and therefore, the bar contained under Order 23 Rule 3 CPC is not applicable to the case of the plaintiff and therefore, this application be dismissed.

Similarly, learned Counsel for defendant No.1 supports defendant No.2 and seeks rejection of the Plaint by adopting his arguments.

I have heard all the learned Counsel and perused the record. It appears to be an admitted position that earlier several petitioners, who claimed to be residents of the same area, wherein, defendant No.2 is purportedly running a School had filed Petition bearing C.P No.D-985/2016 and on 13.05.2016, the same has been withdrawn by making a statement before the Court that they intend to avail their remedy in an earlier Suit bearing No.396/2016 or by filing a separate Suit as they may deem fit. Upon such statement, petition was dismissed as withdrawn, and the order reads as under:-

“Affidavit-in-rejoinder has been filed by learned counsel for the petitioners, which is taken on record.

Learned counsel for the petitioners states that the petitioners have instructed him to withdraw this petition as they intend to avail their remedy either in Suit No.396/2016 (Mr. Muzzafar Ali Shah Bukhari versus Miss Huma Farooq Ahmed and others) pending at the original side of this Court or by filing a separate Suit, as they may deem fit. In view of his Statement, this petition and CMA No.4503/16 filed by the petitioners stand dismissed as withdrawn, and CMA No.11331/16 filed by respondent No.3 also stands dismissed having become infructuous.”

Insofar as the objection taken by the learned Counsel for the plaintiff that provisions of CPC are not applicable on Constitutional Petitions is concerned, the same appears to be misconceived and not tenable in view of the dicta laid down by the Hon’ble Supreme Court in the case of **Hussain Baksh V. Settlement Commissioner, Rawalpindi (PLD 1970 SC 1)** and **Ardeshir Cowasjee and others V. Karachi Building Control Authority and others (PLD 2004 SC 70)**.

However, the objection raised by the learned Counsel for defendant No.2 by relying upon Order 23 Rule 3 CPC in respect of the Constitutional Petition earlier filed by the plaintiff and others, is also misconceived and it would suffice to observe that such question has already been dealt with by a learned Division Bench of this Court in the case of **Amber Ahmed Khan v. Pakistan International Airlines, Corporation, Karachi Airport, Karachi** reported as **PLD 2003 Karachi 405**, wherein, it has been held that withdrawal of a Constitutional Petition without permission would not preclude the party from seeking relief through ordinary proceedings by filing Civil Suit. The relevant finding is as under:-

“12. 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 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.”

The aforesaid Judgment of the learned Division Bench is squarely applicable to the present controversy and therefore, the question that whether while allowing withdrawal of the petition through Order dated 13.05.2016, the learned Division Bench had given any permission or not to initiate further proceedings is not relevant and need not to be dilated upon at this stage of the proceedings. The Judgments relied upon by the learned Counsel for defendant No.2 are premised on different set of facts and therefore are not applicable in the present circumstances.

In view of hereinabove facts and discussion, the application under Order VII rule 11 CPC is hereby dismissed.

2 to 4. Since the defendants have already filed Suit No.396/2016 in which restraining orders have been passed and so also in the present Suit, whereas, the matter involves running a School, therefore, let both these Suits be fixed immediately after winter vacations as per roster when all pending applications be listed for hearing. Interim order, passed earlier, to continue till the next date of hearing.

JUDGE