IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Civil Revision Application No.S-112 of 2016

Applicant:	Syed Muzaffar Hussain Shah through Mr. Muhammad Asim Malik, advocate
Respondents:	Riaz Ali son of Imam Bux and others through Mr. Sarfaraz A. Akhund, advocate
The State:	Mr. Mehboob Ali Wassan, AAG
Date of hearing:	17.10.2022
Date of decision:	24.10.2022

O R D E R

KHADIM HUSSAIN TUNIO, J.- Through this revision application, the applicant has called in question the order dated 02.09.2016 passed by the IIIrd Additional District Judge Sukkur whereby order passed by the IInd Senior Civil Judge Sukkur in FC Suit No. Nil of 2013 was maintained and appeal of the applicant/appellants was dismissed.

2. Precisely, facts of the instant revision application are that the applicant had filed FC Suit No.101 of 2012 against the respondent Riaz Ali for pre-emption and permanent injunction, but during pendency, the applicant filed an application for withdrawal of the suit with the prayer to be granted permission to file the suit afresh after correction of typographical mistakes. However, while dismissing the suit as withdrawn, learned IInd Senior Civil Judge refused to accord permission for filing the suit afresh. However, the applicant filed FC Suit No. Nil of 2013 *(Re – Syed Muzaffar Shah v/s Riaz Ali and others)* which, vide impugned order dated 06.03.2013, was rejected. Against this, the applicant preferred an appeal before the IIIrd Additional District Judge Sukkur where, after hearing the parties, learned appellate court dismissed the

appeal while observing that the applicant had never been granted permission for filing the suit afresh.

3. Learned counsel for the applicant argued that the learned two courts below have dealt with the matter in a hasty manner; that the learned trial Court could not allow for withdrawal of the suit and refused to accord permission for filing a fresh suit on the same cause of action; that the learned Appellate Court failed to consider the factual aspects of the case; that the impugned judgment and decree is against the cannons of justice and guarantees enshrined in the Constitution of Islamic Republic of Pakistan. In support of his contentions, he has cited the case law reported as ***2013 SCMR 464***.

4. I have heard learned counsel for the parties and perused the record.

5. Learned AAG assisted by the learned counsel for respondents, while supporting the impugned orders, contended that the applicant had failed to challenge the earlier order of the learned trial Court whereby permission to file a fresh suit on the same cause of action was refused to him and instead chose to file a new suit without any prior permission; that the order of the learned trial Court was a speaking one where the applicant had been allowed to withdraw the suit while being disallowed to file a fresh claim.

6. From the perusal of record, it is revealed that vide order dated 28.02.2013, learned IInd Senior Civil Judge Sukkur, while dismissing the suit on withdrawal application did not grant him permission to file one afresh while observing that:-

> "Suit is fixed for hearing of three applications U/O 1 R 10 CPC as well as amendment of plaint and the application U/O VII R 11 CPC, on call defendant No. 1 has appeared

> with his learned counsel, while plaintiff is absent, however learned counsel for the plaintiff has been appeared and filed statement of withdrawal of suit on the ground of technical mistake and has prayed to accord permission to file a fresh, surprisingly the suit of similar nature was filed prior to the suit in hand bearing F.C Suit No.81/12, its plaint was rejected U/O VII R 11 CPC on 5.12.12. Thereafter this suit was repeated, however, the specific technical mistake has not been mentioned in the statement in hand that which of the defect/fault appears in the memo of plaint of the suit which the plaintiff party intend to rectify in order to file afresh the suit in hand has already taken much time of the Court after its institution. Therefore if such practice is frequently allowed it will overburden the court, hence in view of statement of learned counsel for plaintiff, the suit in hand stands dismissed as withdrawn with no order as to costs, however the prayer of permission to file fresh is hereby declined as the court is not bound to conduct the proceedings on wish and will of the parties."

7. In the instant matter, the first issue that arises is that the plaintiff failed to challenge the initial order dated 28.02.2013 whereby permission to file the suit afresh was not granted to him and instead he chose to file a fresh suit bearing F.C Suit No. Nil of 2013, plaint of which was rejected u/o VII R 11 CPC vide order dated 06.03.2013 by the learned IInd Senior Civil Judge Sukkur as follows:-

> "The order passed on withdrawal statement dt. 28.02.13 is still in field, whereby the permission was declined by the court to file fresh suit, plaintiff party instead of challenging the said order has directly filed present plaint of suit for its admission, but the order above comes in the way of present plaint of suit, hence without lengthy discuss I have come to the conclusion that there is no substance in arguments advanced by earned counsel for plaintiff as plaint of suit in hand is not maintainable as it does not disclose any cause of action to approach this court third time, hence it falls within Order VII R 11 CPC which is hereby rejected U/O VII R 11(a) with no order as to costs."

8. In failing to challenge the order dated 28.02.2013, the same does in fact remain in field. Instead of preferring an appeal against the same, the applicant attempted to

circumvent the proceedings and directly filed a fresh suit despite having not been accorded the permission to do so. Coming to the withdrawal of the suit under O. 23, there is a distinction between applications filed under O. 23, Rule I, Sub-rule (1) and Sub-rule (2), In a case where a plaintiff does not make a prayer for withdrawing the suit with liberty to institute a fresh suit in respect of the subject matter of such suit and keeps no reservation, the plaintiff has an absolute right under sub-rule (1) of Rule 1 of Order 23 to withdraw from his suit and such permission cannot be refused. However, when the withdrawal of the suit on the ground that the suit was failing by reason of some formal defects is added with the condition of allowing the plaintiff to institute a fresh suit coming under Order 23 Rule 1 sub-rule 2(b), he would have to show sufficient grounds for him being accorded such permission. The Hon'ble Apex Court, in the case of ***Khawaja Bashir Ahmed and sons Pvt. Ltd. vs. Messrs Martrade Shipping and Transport and others (PLD 2021 SC 373)***, has been pleased to observe that:-

> "Now, clause (a) of Rule 2 allows permission to be granted to file a fresh suit if the court is satisfied that the "suit must fail by reason of some formal defect". Clause (b) allows for such permission if "there are other sufficient grounds". We are of course concerned with the latter provision. ***In our view, for the provision to be at all applicable it is necessary that the facts disclosed in the application seeking permission must, in law, amount to a "ground". It is only then that the provision becomes applicable, requiring the court to satisfy itself as to the sufficiency (or lack) of the stated ground.*** The observations of this Court in the cited decision (and in particular in the passage extracted above) are necessarily premised on this. However, if what is stated in the application is not a "ground" at all then obviously no question would arise of the court having to consider whether there is any sufficiency or lack thereof... ***A 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.***"

9. In the absence of an actual application and in the absence of a legitimate ground for filing a *lis* afresh, the statement of the counsel for the applicant at the stage of withdrawal can only be treated as one under O. 23 R. 1 sub-rule 1 rather than one being under R. 1 sub-rule 2(b). There was nothing to show why request for withdrawal with liberty to institute a fresh suit should be granted. In these circumstances, the request was turned down. No application was submitted even in writing and the above request was only made orally. The counsel for the applicant further contended that the learned Appellate Court failed to consider the merits of the decision and instead based its decision completely on the order of the trial Court. Suffice it to say that the grant or refusal of permission to file a claim afresh was within the discretion of the Court and the learned trial Court had given very good and cogent reasons for refusing such permission. The proper function of an appellate Court is to correct an error, if one exists, in the judgment or proceedings of the Court below and not to adjudicate upon a different kind of dispute, one that had never been raised before the Court below. Not only this, where the question of discretion is involved and the learned trial Court had exercised its discretion reasonably, the appellate Court or this Court would not interfere with that discretion as held in the case of ***Naseer Ahmed Siddiqui vs. Aftab Alam (PLD 2013 SC 323)***.

10. For the foregoing reasons, this Court is of the considered view that the impugned orders passed by the two courts below are legal and do not call for any interference, as

such instant civil revision application being without any substance or merit is dismissed.

J U D G E