

ORDER SHEET  
IN THE HIGH COURT OF SINDH AT KARACHI

**H.C.A. No.246 of 2023**

Raheel Shahzad  
Versus  
The province of Sindh and others

DATE	ORDER WITH SIGNATURE OF JUDGE(S).
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Hearing (priority) case

1. For order on office objection.
2. For hearing of main case.
3. For hearing of CMA No.2665/2023 (stay).

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**Dated 13.11.2023**

Mr. Zia-ul-Haq Makhdoom, Advocate for the Appellant.  
Mr. Irfan Hassan, Advocate for Respondent No.2/KMC.  
Mr. Abdul Jaleel Zubedi, Assistant Advocate General.

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Mr. Yahya Iqbal, Advocate undertakes to file vakalatnama on behalf of Respondent No.4.

Notices of this Appeal were issued on the last date and perhaps only counsels for Respondents No.2 and 4 have appeared besides learned A.A.G.

A suit for declaration was filed by the appellant in relation to an Award which, per appellant, had some procurement issues in terms of Sindh Public Procurement Rules, 2010 wherein he participated. A request was made to the learned single Judge for its withdrawal, which was declined for the reasons assigned, hence this Appeal.

It is appellant's case that the suit could not be seen as a public interest litigation, as vested right in terms of Section 42 of Specific Relief Act, 1877 of plaintiff is involved, hence such request could not be objected or altered as seen in the impugned order.

Mr. Yahha Iqbal, learned counsel appearing for Respondent No.4 as well as learned A.A.G have not objected to such withdrawal,

in fact no one has objected to the withdrawal of the suit before the learned single Judge.

As far as the withdrawal of the suit is concerned, that issue came up before learned Bench of this Court in the case of *Pakistan Defence Officers Housing Authority reported in PLD 2015 Sindh 239* where such issues have been analyzed and the bench laid down that in a suit perhaps the personal interests are involved, therefore, the withdrawal of the suit cannot be objected on the analysis of the public interest litigation. The critical analysis of the bench in the above case is necessary to be reproduced, which is reproduced as under:-

6. *There is no cavil to the well settled propositions of law that the plaintiff has absolute right to withdraw the Suit at any stage of proceedings, however if he wants to file fresh suit, only then the permission of court is required. In the case in hand, crucial question is that if the permission is not allowed, whether the court will prosecute the case in the absence of plaintiff or in place of plaintiff who will be transposed as plaintiff to proceed further and who will adduce the evidence. The court cannot proceed suit suo motu in absence of plaintiff. It is clear under Order IX Rue 8, C.P.C. that where the defendant appears and plaintiff does not appear when the suit is called for hearing the court shall make an order that the suit is dismissed. It is also well settled that even the date fixed for framing or settlement of issues is also a date of hearing and the suit can be dismissed for non-prosecution even at that stage. Even in the present situation when the plaintiff wants to withdraw the suit, Order XVII Rule 3, C.P.C. also does not apply. There is no provision in C.P.C. which requires the court to refuse permission to withdraw a suit or to compel a plaintiff to proceed with his suit. This is because withdrawal of the suit under sub-rule (1) of Order XXIII, C.P.C. is complete as soon as it takes place and in any case when the court is informed. Where the withdrawal of the suit is unconditional such prayer cannot be rejected and in absence of any adjudication of rights there is no question of passing a speaking order. It is also pertinent to observe that while examining the appropriateness of exercise of absolute right and unconditional power of the plaintiff to withdraw a suit, court cannot limit the exercise of such rights to circumvent, abridge, scuttle or destroy the right that the law grants to a plaintiff. The court therefore, in all such cases recognizing plaintiff's absolute right where none was injured. The object was to regulate the exercise of such absolute right for the balance administration of justice when to destroy the right.*

7. The principle underlying PA of O.XXIII of the Code is that when a plaintiff once institutes a suit in a court and thereby avails of a remedy given to him under law, he cannot be permitted to institute a fresh suit. in respect of the same subject matter again after abandoning the earlier suit or by withdrawing it without the permission of the court to file fresh suit. *Invito beneficium non datur*. The law confers upon a man no rights or benefits which he does not desire. Whoever waives, abandons or disclaims a right will lose it. In order to prevent a litigant from abusing the process of the court by instituting suits again and again on the same cause of action without any good reason the Code insists that he should obtain the permission of the court to file a fresh suit. Reference can be made to AIR 1987 SC 1988. (Sarguja Transport Service v. State Transport Appellate Tribunal and others).

8. The honourable Supreme Court in the judgment reported in PLD 2010 SC 913 also quoted their earlier dictum reported in 1992 SCMR 485 in which it was held that Order XXIII Rule 1 confers a right in the plaintiff to withdraw the suit at any time after the institution against all or any of the defendant. He can withdraw or abandon the entire or part of the claim. However, the general rule will not apply in cases where a preliminary decree has been passed in pursuance of such a decree a third party interest has been created which shall be adversely affected. In such circumstances, the right to withdraw the suit cannot be exercised without the consent of third party. In the case of Hulas Rai Baijnath v. K.Bass and Co. Limited reported in AIR 1963 Allahabad 368, it was held that in absence of preliminary decree or award or compromise, obviously it is open to the plaintiff to withdraw the suit. In the same judgment, apex court also quoted 1996 SCMR 1433 and PLD 1988 Karachi 560 in which it was held that where the nature of suit/proceedings is such that both plaintiff and defendant may be entitled to relief in the case. For instance in a suit for administration, for a suit for accounts or a suit for partition of the property the plaintiff cannot claim absolute right to withdraw the suit unconditionally, if the defendants opposed the prayer or where the defendant after filing of the suit acquires a right in respect of the subject matter of the suit, the plaintiff could not be allowed to withdraw the suit where the right acquired by defendant is likely to be defeated by withdrawal of the suit or where the purpose of withdrawal of proceedings is only to prevent the court from passing an order undoing a wrong or an injustice done to a party or the withdrawal would deprive the Government or a public functionary to receive or recover the public dues, or the withdrawal would otherwise defeat the ends of justice, decline the prayer for withdrawal or where all the parties are treated as plaintiffs, and defendants for the purpose of grant of relief or in a case where the grant of the same, would perpetuate injustice or fraud. In the judgment reported in 2013 CLC 1691, (Karachi Cooperative Housing Society Union v. Province of Sindh others), authored by one of us Muhammad Ali Mazhar, J, the concept of transposition of

*parties has been discussed and held that in appropriate cases, transposition of the parties may be made but for that reason each case and its facts have to be examined separately with aims and objectives as to what purpose will be served in case of transposition of parties.*

9. *It is well settled exposition of law that an appeal is continuation of the suit and the appellate court is also competent to grant permission for the withdrawal of the suit in view of section 107 subsection (2), C.P.C. The appellate court has in general all the other powers and duties of the trial court. The appeal is considered to be an extension of the suit because under section 107 of the C.P.C. the appellate court has the same powers as are conferred by the C.P.C. on the courts of original jurisdiction in respect of the suit instituted therein hence while exercising the Appellate jurisdiction, this court is profusely competent to grant leave to the plaintiffs to withdraw their suits under Order XXIII, Rule 1, C.P.C.*

Accordingly, the Appeal is allowed, the impugned order to the extent whereof the withdrawal application was declined, is allowed, the suit [suit No.1740/2022] is dismissed as withdrawn with no order as to costs.

JUDGE

JUDGE

Ayaz Gul