

JUDGMENT SHEET
IN THE HIGH COURT OF BALOCHISTAN, QUETTA

Civil Revision Petition No. 813 of 2021
(CC# 100107405205)

Bismillah and others
Versus
Naik Muhammad (late) through legal heirs and others

JUDGMENT

Date of hearing: 16 March, 2023. Announced on 17 March, 2023.

Petitioners: by M/s Atta Muhammad Tareen and Najeebullah Kakar, Advocates

Respondent: No. 1-A to 1-E and 3 by Mr. Jamal Khan Lashari and Mr. Abdul Tahir, State Counsel for respondent No. 4.

GUL HASSAN TAREEN J: - Through this civil revision petition, filed under section 115, the Civil Procedure Code, 1908 (“the Code”), the petitioners have called in question order dated 18 September, 2021, passed by learned Civil Judge-VI, Quetta (“Trial Court”) in Civil Suit No. 46/2019 (“impugned order”) and judgment dated 01 December, 2021, passed by learned Additional District Judge-V, Quetta (“Appellate Court”) in Civil Appeal No. 73/2021 (“impugned judgment”), whereby an application made by the respondent Nos. 1 to 3 (“respondents”) under Order XXIII rules 1 and 2, the Code was concurrently allowed.

2. Briefly stated, facts of the case are that the respondents instituted a Civil Suit No. 46/2019 for declaration and perpetual injunction against petitioners and the respondent No. 4 with the averments that they are the owners and in possession of land, specifically described in para No. 2 of the plaint (“suit property”). The respondents averred that the petitioners started illegal interference in their peaceful possession over

the suit property despite of the fact that, they were approached and refrained from doing as such. Finally, the respondents prayed declaration of title in respect of the suit property and a perpetual injunction to be executed through the respondent No. 4. The petitioners submitted a common written statement. On such pleadings, the Trial Court framed issues and the respondents produced and examined three witnesses. Record transpires that the respondents made an application under Order VI rule 17, the Code, for amendment in their pleading. The petitioners contested it and the Trial Court vide order dated 15 April, 2021 dismissed it. Civil Revision Petition No. 08/2021 filed against such order by the respondents met the same fate. Later, the respondents made an application under Order XXIII rules 1 and 2, the Code for conditional withdrawal of the suit. The petitioners contested it and vide impugned order, the Trial Court allowed such application and permitted respondents to institute a fresh suit subject to cost of Rs.3000/-. The petitioners impugned such order in Civil Appeal No. 73/2021, before the Appellate Court. After hearing both sides, the Appellate Court vide impugned judgment dismissed the appeal.

3. Messrs. Atta Muhammad Tareen and Najeebullah Khan Kakar, counsels, appearing on behalf of the petitioners, state that the application made by the respondents for conditional withdrawal of suit had not contained description of 'formal defect' or 'any other sufficient ground', whereas under Order XXIII rule 1(2)(a) and (b), the Code, the respondents should have mentioned 'formal defect' or 'any other sufficient ground' in their application made for the conditional withdrawal of suit; that the respondents examined three witnesses which were cross-

examined by the petitioners' counsel and in order to overcome the lacunas of their testimonies, the respondents made an application for amendment in their pleading which was concurrently rejected; therefore, the application for conditional withdrawal of the suit was made with mala fide intention. Concluding arguments, they state that the impugned order and judgment are brief and non-speaking and placed reliance on the following case laws:

Haji Muhammad Yunis (Deceased) through legal heirs and another v. Mst. Farrukh Sultan and others
2022 SCMR 1282

Muhammad Yar (Deceased) through L.Rs. and others v. Muhammad Amin (Deceased) through L.Rs. and others
2013 SCMR 464

Sharaf-ud-Din v. Abdul Wadood and 3 others,
2022 CLC 1282

Muhammad Ibrahim v. Mahrban and 5 others
2021 CLC 1001

4. Conversely, Mr. Jamal Khan Lashari, Advocate, appearing on behalf of the respondents, states that the petitioners have impugned concurrent order and judgment of the courts below; whereas scope of a civil revision petition under section 115, the Code is limited and petitioners' counsel have failed to argue any material illegality and irregularity or jurisdictional defect in the impugned order and judgment; that the impugned order and judgment have not caused any prejudice to the petitioners; therefore, on this sole ground, this civil revision petition deserves dismissal; that the respondents' predecessor Naik Muhammad was of extreme old age who visited the Civil Court premises and without disclosing, fact of his intention of instituting a civil suit, to the respondents, engaged a counsel who was not communicated description of

the entire properties which should have been mentioned in the plaint. Concluding his arguments, the learned counsel states that the civil revision petition should be dismissed.

5. Mr. Abdul Tahir learned State Counsel, appearing on behalf of the respondent No. 4 supported the impugned order and judgment.

6. Heard learned counsel for the parties at length and gone through record of the case and case laws cited at bar by the petitioners' counsels.

7. There is no legal compulsion for a plaintiff to proceed with the suit in all circumstances. The provisions of Order XXIII rule (1) sub rule (1), the Code allows a plaintiff to withdraw his suit partly and wholly or abandon any part of his claim/suit as against all or any of the defendants after institution of a suit, at any time during pendency of suit or appeal and even at revisional stage before a High Court. However, where such a plaintiff intends to withdraw his suit with permission to file a fresh one then in such case, he must mention, in his application for conditional withdrawal of suit, 'formal defect' or 'any other sufficient ground' per, Order XXIII rule 1(2) (a) & (b), the Code. Perusal of the application made by the respondents under Order XXIII rules 1 and 2, the Code does not disclose a 'formal defect or any other sufficient ground' for conditional withdrawal of the suit. For ease of reference, the relevant extract from the application is reproduced hereunder:

"2. That applicant is not in possession of some martial documents in regard of shamalat land, therefore the applicants wants to withdraw the suit in hands with permission to file a fresh when ever he is possession of certain revenue documents."

The respondents mentioned that they intend to withdraw the suit because they are not in possession of some material documents in respect of shamilat land and whenever they would be in possession of such revenue record, they will file a fresh suit. The reason mentioned in afore-reproduced paragraph does not amount to a 'formal defect or any other sufficient ground' for conditional withdrawal of the suit. The respondents could have collected the mentioned revenue record from the concerned Revenue Authority and to place them on the record under Order XIII rule 2, the Code.

8. The expression 'formal defect' is not defined in the Code. The term 'formal defect' refers to a defect in the form prescribed by the rules of procedure. Formal defect should be of a nature as to entail dismissal of the suit. It means, every kind of defect not going to the root of the case and not affecting the merit of the case. The formal defect should be specifically set out and not vaguely asserted in the application made for conditional withdrawal of the suit. Apart from plaintiff, the court ceased with such an application should specify nature of a formal defect or any other sufficient ground in its order, allowing conditional withdrawal of the suit.

9. The respondents have failed to plead, in their application, any formal defect or any other sufficient ground, for conditional withdrawal of the suit. The impugned order of the Trial Court is brief and non-speaking which is reproduced hereunder for ease of reference:

"Called. Mr. Ghulam Haider Mengal advocate present for plaintiffs who filed an application for the withdrawal of instant suit with permission to file a fresh and contended that there are legal and formal defects in this suit. In the beginning plaintiff was

not known about the mutation entries which are forty (40) in numbers and same came into the knowledge of plaintiff during pendency of instant suit. Application is allowed and instant suit is disposed of as withdrawn with permission to file a fresh with conditional cost of Rs.3000/-. File after completion and compilation be consigned to record.”(emphasis supplied)

10. According to Order XXIII rule 1(2), the Code, the Court may grant plaintiff permission to withdraw from suit or abandon any part of his claim with liberty to institute a fresh suit in respect of subject matter of such suit or such part of a plaint where the Court is satisfied that the suit must fail by reason of some formal defect or there are sufficient grounds for allowing the plaintiff to institute a fresh suit on the same subject matter of the suit or part of a claim. The power of the Court to permit a plaintiff to file a fresh suit are not unbridled but, are subject to afore-referred conditions as prescribed by Order XXIII rule 1(2)(a) and (b), the Code. The impugned order does not disclose reasons in sufficient detail which is; therefore, a ‘Non Speaking’ order.

11. The Supreme Court of Pakistan in Muhammad Yar (Deceased) through L.Rs’ case has held as under:

“4.However, sub-rule 2 (a)(b) is/are a kind of an exception to the sub-rules (1) and (3), in that, where a plaintiff wants to file a fresh suit after the withdrawal of his pending suit on the basis of the same cause of action about the same subject matter and the same defendant(s), he shall then be obliged to seek the permission of the Court in that regard; however such permission shall not be granted as a matter of right or as a matter of course/routine, rather the judicial conscious of the Court should be satisfied that, if the permission is not given the said suit shall fail on account of any formal defect, (Note: for the present what is a 'formal defect' is not a moot point therefore, this aspect is not being touched herein) or that there are other sufficient grounds for allowing the plaintiff to withdraw the suit with a permission to institute a fresh suit; in respect of "sufficient

grounds" no hard and fast criteria can be laid down and it depends upon the facts of each case, whether a case in that regard is made out or not. However, it is the legal requirement that where the plaintiff is asking for the permission of the Court to file a fresh suit, in his request in that behalf, he must elucidate and explain to the Court the reason(s) for the withdrawal, justifying for the permission of the Court. Likewise, the Court while allowing or disallowing the permission is duty bound to advert to the reasons propounded by the plaintiff and to pass a speaking order assigning reasons for its conclusion meeting the objective requirement of rule of 'satisfaction' as is envisaged by sub-rule (2)....."

In Sharaf-ud-Din's case, this Court has held as under:

"10. A reading of the above mentioned statutory law and precedents makes it abundantly clear that a suit can be withdrawn on the ground of any formal defect or other sufficient grounds. No formal defect was pointed out by the learned trial court in the suit filed by the plaintiff/petitioner. Before allowing the withdrawal application, the satisfaction of the Court regarding formal defect or other sufficient grounds was necessary."

12. A plain reading of this would indicate that an application under Order XXIII rule (2), the Code should disclose formal defect in the suit and the order of Court must contain legal reasonings while granting such an application. The application made by the respondents was reasonless and was liable to dismissal; however, the Trial Court completely overlooked the contents of the application and provisions of Order XXIII rule 1, the Code. The perusal of impugned order reveals that the Trial Court has not applied at all its judicious mind to the facts as well as the law on the subject and in a slipshod manner allowed the application of the respondents. The error committed by the Trial Court is not merely a material illegality but suffers from jurisdictional error and material

irregularity. The petitioners assailed the impugned order in appeal; however the Appellate Court has repeated the same illegality and failed to exercise jurisdiction vested in it by law. As such, the impugned order and judgment attract the provisions of section 115 sub-section (1) (a) (b) & (c), the Code.

13. On the wake of the aforesaid, I am inclined to interfere with the impugned order and judgment of the Trial Court and the Appellate Court. As such, this revision petition is allowed and consequently the impugned order and judgment are set aside. Resultantly, the application made by the respondents for conditional withdrawal of the suit under Order XXIII rules 1 and 2, the Code stands rejected. The suit is deemed to be pending before the Trial Court.

The parties shall bear their own costs.

Announced in open Court.
Dated: 17 March 2023.

Judge