

Judgment Sheet

**IN THE PESHAWAR HIGH COURT, ABBOTTABAD
BENCH
JUDICIAL DEPARTMENT**

Civil Revision No. 82-A/2018

JUDGMENT

Date of hearing.....**24.02.2020**.....

Petitioners (Noyeser Khan Jadoon) By Mr. Nasrullah Khan,
Advocate.

Respondent. (Khan Afsar Jadoon) By Mr. Junaid Anwar Khan,
Advocate.

SHAKEEL AHMAD, J.- This revision petition

has arisen out of the judgment dated 18.12.2017 passed by the learned Additional District Judge-III, Abbottabad in civil appeal No. 43 of 2013, whereby the judgment and decree dated 25.05.2016, passed by Civil Judge-IX, Abbottabad has been set aside and case was remanded back to the learned trial court for decision after recording evidence of the parties to the suit.

2. The facts of the case, in brief, are that in earlier round of litigation the respondent brought a suit for declaration to the effect that he was owner in possession of the land measuring ten (10) marlas situated in Khasra No. 739 at mauza Dhamtor Tehsil and District Abbottabad on the basis of mutation

No. 7047 attested on 20.10.1975, and mutation No. 7174 attested on 13.01.1977, during settlement in the year 1982-83, the width of field No. 739 was inadvertently mentioned at East-4 Karam and West-6 Karam against the actual dimension of East-6 Karam and West-4 Karam, this clerical mistake crept due to incorrect entry in the field book and Masavi, which needs rectification accordingly. As a consequential relief, the respondent sought perpetual injunction restraining the petitioner / defendant from posing himself to be the owner of the suit property or making interference in it, perpetually. During pendency of suit, the respondent / plaintiff submitted an application for striking of the name of the of petitioner / defendant, whereafter, the respondent got recorded his statement and withdrew the suit on the ground that his grievance has been redressed by the revenue hierarchy, praying for withdrawal of the suit with the permission to file a fresh one, if so needed. Vide order dated 05.04.2014, the learned trial court disposed of the suit as withdrawn. However,

on the application of the petitioner the revenue officer again brought changes in the revenue record and brought back the previous position. Not contented with same, petitioner again filed a civil suit seeking therein declaration etc. Petitioner after seeking impleadment in the suit filed an application under Order VII Rule 11 CPC for rejection of the plaint on the ground that earlier suit had been dismissed as withdrawn unconditionally, therefore, fresh suit on the same cause of action is not maintainable. The learned trial court after giving right of audience to both the parties accepted the application and rejected plaint under Order VII Rule 11 CPC on 25.05.2016. Dissatisfied with the same, respondent went in appeal before the Additional District Judge-III, Abbottabad, the learned appeal court after hearing learned counsel for the parties and scanning the record with their able assistance, accepted the appeal set aside the impugned judgment and decree of the learned trial court and remanded the case back to the learned trial court for decision afresh after recording pro

and contra evidence on 25.05.2016, hence, this revision petition.

3. Leaned counsel for the petitioner argued that plaint was rightly rejected as no permission was given to the respondent for filing a fresh suit.

4. Conversely, learned counsel for the respondent contended that rejection of plaint was unwarranted. He next contended that plaint had been rejected merely on technicalities, the respondent had filed second suit on accrual of fresh cause of action and there was no occasion for the learned trial court to reject the plaint under Order VII Rule 11 CPC.

5. I have heard the learned counsel for the parties at large and scanned the record with their able assistance.

6. Perusal of the record reflects that in earlier round of litigation the respondent brought a suit for declaration, however, the same was dismissed as withdrawn vide order dated 05.04.2014. The record is indicative of the fact that on 05.04.2014, respondent got recorded his statement before the learned trial court, stating therein that his grievance

has been redressed by the revenue hierarchy and nothing was left to be decided by the learned trial court. In support of his contention he produced Masavi field book and Fard Jamabandi for the year 2009-10 and also order of the Additional Commissioner as Ex.PA and sought permission to withdraw the suit with the permission to file fresh suit as and when needed. In view of the statement of the respondent the learned trial court passed the following order:

“My this order is directed to decide suit in hand on the basis of withdrawal statement recorded by the plaintiff, placed on file, perused, the same is self explanatory to the facts mentioned therein the application and it is requested that the suit of the plaintiff be disposed of accordingly.

In view of the statement of plaintiff, instant suit is hereby disposed of as withdrawn”.

7. After getting knowledge of the said rectification in the revenue record, the petitioner moved an application before the revenue officer for reversal of previous

position, which was accepted and previous position of the suit property was restored in the revenue record. Not contented with the same, respondent again brought a civil suit, however, on the application of the petitioner, the plaint was rejected vide order dated 05.04.2014. Order dated 05.04.2014 clearly reflects that it was passed in pursuance of the statement of the respondent. Law on the subject is well settled that whenever a suit is withdrawn, seeking permission to file a fresh, and if the court simply orders dismissed as withdrawn without advertng to the statement or contents of the application of the plaintiff and without recording any reason, it shall be presumed that despite not granting specific permission to file a fresh suit in the order disposing of the suit, permission for filing afresh suit is deemed to be granted with reference to the statement recorded before the court or prayer clause of the application if any, moved for this purpose. In this respect, reliance can be placed on the judgment reported as ***Muhammad Yar (Deceased) through LRs and others Vs Muhammad Amin (Deceased) through LRs and others***

2013 SCMR 464 wherein it was held as under:

“(e) Civil Procedure Code (V of 1908)---

---O.XXIII, R.1(2)--- Application for withdrawal of suit or abandonment of part of claim to institute fresh suit---Applicant / plaintiff seeking permission of Court in such regard---Court neither expressly granting permission nor refusing the same, but simply ordering that suit “dismissed as withdrawn”, without assigning any reasons--- Expression “dismissed as withdrawn” ---- Connotation --- Where such request of applicant/plaintiff was not declined in express and clear words, yet the suit was ‘dismissed as withdrawn’ without recording any reasons, it should be implied, considered and deemed that the Court had found it to be a fit case for granting permission to applicant/plaintiff to file fresh suit, because otherwise serious prejudice would be caused to the applicant/plaintiff, who would have to face the bar provided under O.XXIII, R.1(3), C.P.C. [pp. 473, 475] D & F”.

8. In this behalf further reliance can also be placed on the judgment reported as

***S.Nisar Ali Vs Feroz Din Rana and another
1969 SCMR 933 and Kiran Gul and another
Vs Shehzad Gul and another 1970 SCMR
141.***

9. Now turning to the merits of the case, it is by now settled that while invoking provision of Order VII Rule 11 CPC, only averments made in the plaint and documents appended therewith would be taken into consideration. Court cannot take into consideration the pleas raised by the defendant in the suit in his defence, as the pleas raised by the defendants are only contention in the proceeding unsupported by any evidence on record. It was specifically pleaded by the respondent / plaintiff in Para No. 11 & 12 of the amended plaint, appended as annexure-B at page No. 32 of the petition that during pendency of the suit, his grievance had been redressed, therefore, the suit was dismissed as withdrawn, but on reversal of previous position in the revenue record, a fresh cause of action accrued to him and he filed a fresh suit. The term cause of action as used in Order VII Rule 11 CPC represents all requisite facts which are necessary for the

plaintiff to prove before he can succeed in the suit. In the instant case, fresh cause of action accrued to the respondent / plaintiff on reversal of the previous position in the revenue record, therefore, the second suit was competently filed by him.

10. In the light of what has been discussed hereinabove, I am of the opinion that the suit was maintainable and not hit by Order XXIII Rule 1 CPC. The learned trial court while exercising jurisdiction had not applied its mind to the facts of the case and rejected the plaint without appreciating the law applicable to the case, thus, the said findings was rightly set aside by the learned appeal court and remanded back the case to the learned trial court for decision on merits after recording pro and contra evidence.

11. For the foregoing reasons, this revision petition, being bereft of any merits, is hereby dismissed. No order as to costs.

Announced:
24.02.2020

J U D G E

*/*Arshad Iqbal*/*