

Civil Revision No.231 of 2012

MUHAMMAD SHAFIQUE VERSUS MUHAMMAD RAFIQUE etc.

26.01.2012 Rai Shahid Saleem Khan Advocate for
Petitioners.

This Civil Revision has been instituted by the petitioners who are the defendants Nos. 1 to 5 of the suit instituted by the respondent No.1 Muhammad Rafique and is directed against the judgment dated 20-12-2011 passed by the learned Addl. District Judge, Lahore whereby an appeal preferred by the respondent No.1 against the order dated 30-3-2010 passed by the learned Civil Judge Ist Class, Lahore was allowed.

2. Briefly stating the facts of the case are that the respondent No.1 Muhammad Rafique instituted a second suit for declaration with consequential relief of permanent injunction on 10-4-2009 before the learned Senior Civil Judge, Lahore against the present petitioners and the Patwari Halga Hadbast Mauza Ladhekey Uche, Tehsil Cantt District Lahore. The respondent No.1 contended in the plaint that he is sole absolute owner of land measuring 13 Kahals, 18 Marlas situated and described in para-1 of the plaint. The respondent, No.1 has six sons and the present petitioners are five out of his six sons whereas the 6th one is Muhammad Taufiq. It was further pleaded by the respondent No.1 that he sold only 10 Kanals of land out of his total ownership in

favour of the petitioners through a sale-deed dated 18-2-2005 registered in the office of Sub-Registrar and a Mutation No.2057 also stood incorporated in the Revenue Record. The respondent No.1 wanted to sell out the remaining 3 Kanals, 18 Marais of 'land to his sixth son and went to the Halga Patwari who is the defendant No.6 in the suit, for obtaining the necessary copies of the record and it transpired to respondent No.1 that instead of 10 Kanals of land the entire land measuring 13 Kanals, 18 Marlas has been reflected in the sale deed and the Revenue entries at the instance of the present petitioners who are the defendants Nos.1 to 5. The respondent No.1 further contended that he instituted a suit earlier with a declaration that the sale-deed reflecting the sale of whole ownership of the respondent No.1 of 13 Kanals, 18 Marlas of land in favour of the petitioners/ defendants Nos.1 to 5 was illegal and fraudulent.

3. This first suit was pending before the learned Senior Civil Judge, Lahore and a compromise was effected between the parties whereby the present petitioners i.e. defendants Nos.1 to 5 of the suit undertook to get the land measuring 3 Kanals, 18 Marlas transferred back to the plaintiff/ respondent No.1 and upon this assurance and undertaking of the defendants Nos.1 to 5 of the suit, the respondent No.1/plaintiff withdrew the earlier suit on 27-10-2005. Upon the failure of the petitioners/defendants Nos. 1 to 5 to fulfil their commitment and undertaking as given in the earlier suit the respondent No.1 instituted a second suit on 10-4-2009.

The petitioners who are the defendants Nos.1 to 5 appeared before the learned Civil Judge, Lahore and moved an application under Order VII Rule 11 of C.P.C. for rejection of the plaint of the suit of the respondent No. 1. This application was resisted by the respondent No.1 and the, learned Civil Judge, Lahore vide order dated 30-3-2010 accepted the application of the petitioners moved under Order VII, Rule 11 of C.P.C. and rejected the plaint vide order dated 30-3-2010. The respondent No.1 preferred an 'appeal against the order dated 30-3-2010 of the learned Civil Judge, Lahore which appeal came up for hearing before a learned Addl. District' Judge, Lahore and was allowed vide the impugned judgment dated 20-12-2011 and the order dated 30-3-2010 of the learned Civil Judge, Lahore was set aside and the suit of the respondent No.1/ plaintiff was declared to be pending before the learned trial Court. This judgment dated 20-12-2011 of the learned Addl. District Judge, Lahore has been assailed through the instant Civil Revision.

4. It is contended by the learned counsel for the petitioners that the respondent No.1 instituted the earlier suit on the same cause of action and withdrew the same unconditionally therefore this second suit instituted by the respondent No.1 on the same cause of action was barred by law. The learned counsel for the petitioners has relied upon the judgments reported as "Ch. Ghulam Rasul v. Mrs. Nusrat Rasool and 4 others" (PLD 2008 SC 146), "Riaz Ahmed, S.D.O.

Telephone and Telegraph v. Malik Naazar Hussain, Advocate" (2006 MLD 488), "Muhammad Hassan v. Nazar Muhammad alias Nazir Khan through Legal heirs." (2006 YLR 717) and "Muhammad Hayat and 13 others v. Muhammad Ali and 2 others" (2006 YLR 1147) to contend that a suit withdrawn by the respondent No.1/plaintiff unconditionally creates a legal bar under Order XXIII Rule 1(3) of C.P.C. against the respondent No. 1/plaintiff for instituting a second suit upon the same cause of action. Thus the learned counsel for the petitioners contended that the learned Addl. District ' Judge passed the impugned judgment dated 20-12-2011 contrary to the provisions of Order XXIII Rule 1(3) of C.P.C. and the case-law cited by the learned counsel for the petitioners.

5. I have heard the arguments of the learned counsel for the petitioners and perused the record.

6. The respondent No.1 admittedly instituted an earlier suit with the same contention and praying for the same relief and got recorded his statement on 27-10-2005 before the learned Civil Judge, Lahore which statement has been reproduced by the learned Addl. District Judge in the impugned judgment dated 20-12-2011 in paragraph No.7.

"27-10-2005 مسل بر درخواست مدعی برآمد ہو کر پیش ہوئی ہے۔
مدعی اصالتاً حاضر ہے، بیان دینا چاہتا ہے قلمبند ہووے
بیان ازاں محمد رفیق مدعی (بر حلف)
بیان کیا کہ میری مدعا علیہم سے صلح ہو گئی ہے۔ دعویٰ کی مزید پیروی مطلوب نہ ہے
بھیغہ دست برداری خارج کیا جاوے۔ سن کر درست تسلیم کیا"

The earlier suit was not withdrawn unconditionally but on the basis of a compromise as claimed by the respondent No.1 reflected against an undertaking by the present petitioners who were also the defendants Nos. 1 to 5 in the earlier suit that they would return the land measuring 3 Kanals, 18 Marlas through a document duly executed in favour of the respondent No. 1. The learned Addl. District Judge, Lahore relied upon the judgments reported as "Khairo and another v. Muhammad Yakub and 8 others"(1991SCMR 1957), "Muhammad Akram and others v. Member, Board of Revenue and another" (2007 SCMR 289) and "Ghulam Nabi and others v. Seth Muhammad Yaqub and others" (PLD 1983 SC 344) for holding that the previous suit instituted by the respondent No.1 was withdrawn on the ground that a settlement has been arrived at between the respondent No.1 and his sons, the present petitioners, who are defendants Nos.1 to 5 in the earlier suit, as recorded in the order sheet and reproduced in para-7 by the learned Addl. District Judge, Lahore in the judgment dated 20-12-2011 therefore this withdrawal of the earlier suit would not operate as rest judicata and a second suit instituted on the same cause of action is entertainable as the earlier suit which was withdrawn on the basis of compromise did not amount to adjudication of the suit on merits. The present petitioners have not even alleged in their application moved under Order VII Rule 11 of C.P.C. that the earlier suit which was withdrawn by the respondent No.1 on the basis of an

undertaking and assurance given by the present petitioners as got recorded by the respondent No.1 in his statement dated 27-10-2005 was not at all so compromised between the parties. The case-law cited by the learned counsel for the petitioners is distinguishable as in none of those cases the earlier suit was withdrawn on the basis of a settlement having been arrived at between the parties. The judgments relied upon by the learned Addl. District Judge, Lahore are to the effect that in the first instance the earlier suit was not withdrawn unconditionally and that it was withdrawn on the basis of a compromise having been effected between the parties and such a withdrawal of the suit does not operate as a res judicata nor is hit by the provisions of Order XXIII, Rule 1 of C.P.C. It cannot be held in view of the peculiar facts of the instant case that the first suit was unconditionally withdrawn. The statement got recorded by the respondent No.1 on 27-10-2005 which is a matter of record and which fact has not been denied by the present petitioners in their application under Order VII Rule 11 of C.P.C. does not make the provisions of Order XXIII Rule 1(3) of C.P.C. squarely applicable to the facts and circumstances of the instant case. The learned Addl. District Judge, Lahore therefore rightly accepted the appeal of the respondent No.1 against the rejection of the plaint by the learned trial Court. The impugned judgment therefore is passed in accordance with law and does not call for any interference by this court in exercise of the Revision

jurisdiction. The instant Civil Revision being devoid of any legal force is accordingly dismissed in limine.

(NASIR SAEED SHEIK)
Judge