

S. No. 32
Regular Cause List

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

CR 20/2024

AJAZ AHMAD DAR AND ANR

...Appellant(s)/Petitioner(s)

Through: Mr. Shabir Ahmad Bhat, Advocate

Vs.

SHAKIR AHMAD BHAT AND ORS

...Respondent(s)

Through: Mr. Jahangir Iqbal Ganai, Sr. Advocate with Ms. Mehnaaz, Adv.

CORAM:

HON'BLE MR. JUSTICE VINOD CHATTERJI KOUL-JUDGE

ORDER

14.03.2025

1. Through the medium of this petition, the petitioners challenge the order dated 25.06.2024, passed by Sub Judge (CJM) Handwara (for short "*Trial Court*"), which reads as under: -

“...The above titled suit is pending disposal before this court. During proceedings, learned counsel for the applicants/plaintiff filed application seeking withdrawal of the suit with a liberty to file fresh one. Thus, in view of the above, the submission made by the Ld. Counsel for the applicants/plaintiff, the instant application is allowed and the instant suit is dismissed as withdrawn. In case any fencing has been done by the plaintiff after institution of suit same shall be dismantled as the case has dismissed as withdrawn. Interim direction, if any, shall stand vacated.

Suit is accordingly disposed of. File be compiled and consigned to records.”

2. What is evident from impugned order is that during pendency of suit, plaintiff/respondent herein made an application for withdrawal of suit with

liberty to file a fresh one. Application, in terms of impugned order, has been allowed by Trial Court.

3. Withdrawal with liberty is available in the Code of Civil Procedure.

Subrule (3) of Order 23 Rule 1 CPC empowers the court to allow plaintiff to withdraw his defective suit, take necessary steps to cure that defect and then institute a fresh suit on the same cause of action and claiming same reliefs. It provides that where the court is satisfied that a suit must fail by reason of some defect, or that there are sufficient grounds for allowing plaintiff to institute a fresh suit for the subject-matter of a suit or part of claim, it may, on such terms as it thinks fit, grant plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim. Conditional withdrawal of suit with liberty to institute a fresh one on the same cause of action with the leave of the court under sub rule (3) is permitted as it enables plaintiff to avoid the bar under Section 12 CPC. “*Invito beneficium non dature*”, 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 permission of the court to file a fresh suit after establishing either of the two grounds mentioned in Subrule (3) of Rule 1 of Order 23.

4. Insofar as revision petition is concerned, Section 115 of CPC provides for institution thereof, as such, it would be advantageous to reproduce it hereunder:

“...Revision.

(1) The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears.

- a. to have exercised a jurisdiction not vested in it by law, or
- b. to have failed to exercise a jurisdiction so vested, or
- c. to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit:

Provided that the High court shall not, under this section, vary or reverse any order made, or any order deciding a issue, in the course of a suit or other proceeding, except where the order, if it, had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.

2. The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.

3. A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.”

5. After going through the provisions as contained in Section 115 CPC and in view of provisions of Subrule (3) of Rule 1 of Order 23 CPC and considering the order impugned, no interference is warranted.
6. Therefore, instant revision petition is **dismissed** along with connected CM.

(VINOD CHATTERJI KOUL)
JUDGE

SRINAGAR
14.03.2025
“Imtiyaz”