

ORDER XXIII

WITHDRAWAL AND ADJUSTMENT OF SUITS

(1) Withdrawal of suit or abandonment of part of claim...
(1) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.

(2) Where the Court is satisfied--

- (a) that a suit must fail by reason of some formal defect, or
- (b) that there are other sufficient grounds for allowing the 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 the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim.

(3) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub-rule (2), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(4) Nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others.

COMMENTS

Withdrawal of suit. Scope. Court to be set aside firstly, that the suit was liable to fail on account of some formal defect; secondly, that there were otherwise sufficient ground to grant permission and lastly, permission to be granted on such terms as Court would deem fit. [PLD 2004 Pesh. 198]. Suit can be withdrawn on ground of any formal defector sufficient ground was necessary cannot be claimed as matter of right. [PLJ 2014 AJ&K 312]

Formal defect. Permission can only be granted to remove a defect, which is apparent or formal, if it is latent and touches the merits of the case, then permission to withdraw the suit on this score cannot be granted. [PLJ 2000 S.C. 1831]. Non-joinder of parties is not a fatal for suit and as such a formal defect. [2001 SCMR 148] Improper valuation of subject matter of suit does not constitute formal defect. [2001 SCMR 148].

Matter of a civil suit. Where a civil suit was withdrawn without permission of the Court to file a suit for fresh cause of action then second suit on the same cause of action was barred. [PLJ 2011 Lahore 213]

Unconditionally withdrawn of petition. Petitioner was precluded to institute instant petition in view of unconditional withdrawal of earlier petition involving the same subject matter. [PLJ 2013 Lahore 402]

2. Limitation law not affected by first suit.--In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted.

COMMENTS

Limitation not affected. In view of judgment of the Supreme Court the right to bring afresh suit follows from the withdrawal so permitted. Court cannot at the same time allow to withdraw suit and refuse permission. [PLD 1990 S.C. 596].

3. Compromise of suit.--Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit.

High Court Amendments, Lahore. Add the following provisos to the rule:--

Provided that the hearing of a suit shall proceed and no adjournment shall be granted in it for the purposes of deciding whether there has been any adjustment or satisfaction, unless the Court for reasons to be recorded in writing, thinks fit to grant such adjournment, and provided further that the judgment in the suit shall not be announced until the question of adjustment or satisfaction has been decided.

Provided further that when an application is made by all the parties to the suit, either in writing or in open Court through their counsel, that they wish to compromise the suit, the Court may fix a date on which the parties or their counsel should appear and the compromise be recorded, but shall proceed to hear those witnesses in the suit who are already in attendance, unless for any other reason to be recorded in writing, it considers it impossible or undesirable to do so. If upon the date fixed no compromise has been recorded, no further adjournment shall be granted for this purpose, unless, the Court, for reasons to be recorded in writing considers it highly probable that the suit will be compromised on or before the date to which it proposes to adjourn the hearing.

COMMENTS

Undertaking. Compromise reached by the parties to vacate premises by specific date, and resultantly landlord withdrawing his ejection application, tenant cannot wriggle out of the undertaking given by him. [1995 SCMR 766].

Compromise on behalf of minor. It is the duty of the Court to safeguard the interest of the minors. No consideration appeared to have been passed for such compromise such application cannot be accepted and termed as valid and legal compromise. [1994 CLC 1079].

Compromise or adjustment. In case of a valid adjustment in pending suit through compromise of parties, Court cannot pass a decree except in accordance with terms of compromise. [PLJ 2013 Lah. 273]

Compromise by counsel. Parties who had accepted compromise making their statements in presence of their counsel cannot take advantage of non-representation of other parties who have not even chosen to challenge the compromise. [PLJ 2000 Lah. 1591].

Consent decree. Not binding on person not party to suit. [2007 MLD 831].

Right of appeal. If Court was satisfied that compromise or settlement was lawful, then it would pass the decree accordingly as provided under Order 23 Rule 3, CPC. Such decree or orders could not be called through an appeal. [PLJ 2012 Lahore 149 (DB)]

Not mention in plaint or prosecution witnesses in evidence the date, time and place where compromise or oath was effected. [PLJ 2011 Lahore 693]

Cancellation of appointment of referee. Application for cancellation of appointment of referee on ground of lack of confidence, therefore, recording of statement of referee by trial Court was without jurisdiction and of no legal effect qua rights of respondent. Trial Court was not obliged to decide suit in light of statement of referee recorded after application earlier lodged showing his lack of interest on the referee. [PLJ 2013 Lahore 320].

Lawful agreement or compromise. When application intimating settlement between parties was brought before the Court, it was incumbent upon Court to satisfy itself as to execution and existence of compromise. [PLJ 2013 Lahore 385]

4. Proceedings in execution of decrees not affected. Nothing in this Order shall apply to any proceedings in execution of a decree or order.

ORDER XXIV

PAYMENT INTO COURT

1. Deposit by defendant of amount in satisfaction of claim.--The defendant in any suit to recover a debt or damages may, at any stage of the suit, deposit in Court such sum of money as he considers a satisfaction in full of the claim.

2. Notice of deposit.--Notice of the deposit shall be given through the Court by the defendant to the plaintiff, and the amount of the deposit shall (unless the Court otherwise directs) be paid to the plaintiff on his application.

3. Interest on deposit not allowed to plaintiff after notice.--No interest shall be allowed to the plaintiff on any sum deposited by the defendant from the date of the receipt of such notice, whether the sum deposited is in full of the claim or falls short thereof.

4. Procedure where plaintiff accepts deposit as satisfaction in part.--(1) Where the plaintiff accepts such amount as satisfaction in part only of his claim, he may prosecute his suit for the balance; and, if the Court decides that the deposit by the defendant was a full satisfaction of the plaintiff's claim, the plaintiff shall pay the costs of the suit incurred after the deposit and the costs incurred previous thereto, so far as they were caused by excess in the plaintiff's claim.

(2) **Procedure where he accepts it as satisfaction in full.**--Where the plaintiff accepts such amount as satisfaction in full of his claim, he shall present to the Court a statement to that effect, and such statement shall be filed and the Court shall pronounce judgment accordingly; and, in directing by whom the costs of each party are to be paid, the Court shall consider which of the parties is most to blame for the litigation.

Illustrations

(a) A owes B Rs. 100. B sues A for the amount, having made no demand for payment and having no reason to believe that the delay caused by making a demand would place him at a disadvantage. On the plaint being filed, A pays the money into Court. B accepts it in full satisfaction of his claim, but the Court should not allow him any costs, the litigation being presumably groundless on his part.

(b) B sues A under the circumstances mentioned in illustration (a). On the plaint being filed, A disputes the claim. Afterwards A pays the money into Court. B accepts it in full satisfaction of his claim. The Court should also give B his costs of suit, A's conduct having shown that the litigation was necessary.

(c) A owes B Rs. 100, and is willing to pay him that sum without suit. B claims Rs. 150 and sues A for that amount. On the plaint being filed A pays Rs. 100 into Court and disputes only his liability to pay the remaining Rs. 50. B accepts the Rs. 100 in full satisfaction of his claim. The Court should order him to pay A's costs.

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ORDER XXV
SECURITY FOR COSTS

1. When security for costs may be required from plaintiff.--(1) Where, at any stage of a suit, it appears to the Court that a sole plaintiff is, or (when there are more plaintiffs than one) that all the plaintiffs are residing out of ¹[Pakistan] and that such plaintiff does not, or that no one of such plaintiffs does, possess any sufficient immovable property within ²[Pakistan] other than the property in suit, the Court may, either of its own motion or on the application of any defendant, order the plaintiff or plaintiffs, within a time fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant.

(2) **Residence out of Pakistan.**--Whoever leaves ³[Pakistan] under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of ⁴[Pakistan] within the meaning of sub-rule (1).

(3) On the application of any defendant in a suit for the payment of money, in which the plaintiff is a woman, the Court may at any stage of the suit make a like order if it is satisfied that such plaintiff does not possess any sufficient immovable property within ⁵[Pakistan].

2. Effect of failure to furnish security.--(1) In the event of such security not being furnished within the time fixed, the Court shall make an order dismissing the suit unless the plaintiff or plaintiffs are permitted to withdraw therefrom.

(2) Where a suit is dismissed under this rule, the plaintiff may apply for an order to set the dismissal aside, and, if it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from furnishing the security within the time allowed, the Court shall set aside, the dismissal upon such terms as to security, costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

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1. Subs. by the Central Laws (Statute Reform) Ordi. 1960 (21 of 1960) Section 3 and Second Sch. w.e.f. 14.10.1955.
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(3) The dismissal shall not be set aside unless notice of such application has been served on the defendant.

ORDER XXVI
COMMISSIONS

Commissions to Examine Witnesses

[See Sections 75 to 78]

1. Cases in which Court may issue commission to examine witness.--Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the Court or who is from sickness or infirmity unable to attend it.

COMMENTS

Power of the Court to issue Commissions. In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market value of any property, or the amount or any *mesne profits*, or damages or annual profits, the Court may under this Rule issue a commission to such person as it thinks fit directing him to make such investigation and report thereon to the Court. [PLD 2009 S.C. 16].

2. Order for commission.--An order for the issue of a commission for the examination of a witness may be made by the Court either of its own motion or on the application, supported by affidavit or otherwise, of any party to the suit or of the witness to be examined.

3. Where witness resides within Court's jurisdiction.--A commission for the examination of a person who resides within the local limits of the jurisdiction of the Court issuing the same may be issued to any person whom the Court thinks fit to execute it.

4. Persons for whose examination commission may issue.--(1) Any Court may in any suit issue a commission for the examination of--

- (a) any person resident beyond the local limits of its jurisdiction;
- (b) any person who is about to leave such limits before the date on which he is required to be examined in Court; and
- (c) ¹[any person in the service of the ²[State] who cannot, in the opinion of the Court, attend without detriment to the public service.

1. Subs. by the A.O., 1937, for "any civil or military officer of the Government."

2. Subs. by the P.O., 1961 (1 of 1961), Art. 2 and Sch. (w.e.f. the 23rd March, 1956), for "Crown".

(2) Such commission may be issued to any Court, not being a High Court, within the local limits of whose jurisdiction such person resides, or to any pleader or other person whom the Court issuing the commission may appoint.

(3) The Court on issuing any commission under this rule shall direct whether the commission shall be returned to itself or to any subordinate Court.

5. Commission or request to examine witness not within Pakistan.--Where any Court to which application is made for the issue of commission for the examination of a person residing at any place not within ³[Pakistan] is satisfied that the evidence of such person is necessary, the Court may issue such commission or a letter of request.

COMMENTS

Examination of witness through local commission. Court in appropriate cases, where it is not convenient to appear in Court and give evidence, if sufficient cause is shown can order for examination of witness on commission through interrogatories. [2009 CLC 149].

Revision. Refusal of Court to appoint commission for examination of witness. A "case decided" and amenable to revisional jurisdiction. [PLD 1997 Lah. 480]

6. Court to examine witness pursuant to commission.--Every Court receiving a commission for the examination of any person shall examine him or cause him to be examined pursuant thereto.

COMMENTS

Mesne profit. A Local Commissioner can be appointed by the Court to assess mesne profit, in absence of any objection such report can be approved. [1998 MLD 225].

7. Return of commission with depositions of witnesses.--Where a commission has been duly executed, it shall be returned, together with the evidence taken under it, to the Court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order; and the commission and the return thereto and the evidence taken under it shall (subject to the provision of the next following rule) form part of the record of the suit.

8. When depositions may be read in evidence.--Evidence taken under a commission shall not be read as evidence in the suit without the consent of the party against whom the same is offered, unless--

- (a) the person who gave the evidence is beyond the jurisdiction of the Court, or dead or unable from sickness or infirmity to attend to be personally examined, or exempted from personal appearance in Court, or is a ⁴[person in the service of the ⁵[State]] who cannot, in the opinion of the Court, attend without detriment to the public service, or
- (b) the Court in its discretion dispenses with the proof of any of the circumstances mentioned in clause (a), and authorizes the evidence of any person being read as evidence in the suit, notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same.

Commissions for Local Investigations

9. **Commissions to make local investigations.**--In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount or any *mesne profits* or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:

Provided that, where the ⁶[Provincial Government] has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

COMMENTS

Appointment of Local Commissioner. In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute or of ascertaining the market value of any property or the amount or any means profit or damages or annual profits, the Court may under O.XXVI, R.9 C.P.C., issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court. [PLD 2009 SC 16].

Legally there is no impediment in appointing a Local Commission when the evidence brought on record alone is not capable to resolve the controversy. [PLJ 2009-SC 307] Court can appoint a commission to make local inspection and its report is subject to scrutiny by the Court. [PLJ 2011 Peshawar 179]

Duty of Court. It was duty of Court to determine the amount of compensation. Recourse to Order XXVI, Rule 9 of CPC could have been made even without on application by any party. [PLJ 2009 SC 307]

4. Subs. by the A.O., 1937, for "civil or military officer of the Government."

5. Subs. by the P.O., 1961 (1 of 1961), Art. 2 and Sch. (w.e.f. the 23rd March, (1956) for "Crown".

6. Subs. by the A.O., 1937, for "Provincial Government."

Boundaries of land. Dispute regarding determination of boundaries of land, in
Local Commissioner appointed to resolve the dispute, judgment and decree not tenable
[1999 YLR 1979].

Appointment of Local Commissioner at Appellate stage. Appellate Court
has power to issue Commission for local investigation. [1981 CLC 368]. But Local
Commissioner cannot be appointed by Appellate Court just in routine without judicial
application of mind to the facts of a particular case. [1994 CLC 1343].

Power of High Court. High Court is fully competent to modify the order
passed by lower Court if the circumstances of the case so justified and for that purpose
the Court could pass any incidental order, including the order to appoint a Commissioner
to inspect the site, to satisfy itself if the condition of the premise was such that it
required modification of the *status quo* order passed in the case. [1993 SCMR 1473].

Procedure to appoint commissions. Procedure of commissioner
appointed for local investigations. [PLJ 2011 Lahore 67]

10. Procedure of Commissioner.--(1) The Commissioner
after such local inspection as he deems necessary and after reducing to
writing the evidence taken by him, shall return such evidence, together
with his report in writing signed by him to the Court.

(2) Report and depositions to be evidence in suit-
Commissioner may be examined in person.--The report of the
Commissioner and the evidence taken by him (but not the evidence
without the report) shall be evidence in the suit and shall form part of
the record; but the Court or, with the permission of the Court, any of
the parties to the suit may examine the Commissioner personally in
open Court touching any of the matters referred to him or mentioned in
his report, or as to his report, or as to the manner in which he has made
the investigation.

(3) Where the Court is for any reason dissatisfied with the
proceedings of the Commissioner, it may direct such further inquiry to
be made as it shall think fit.

COMMENTS

Scope. Rule 10 of O. XXVI provides that the Commissioner should submit his
report alongwith the evidence taken by him on local inspection to the Court which
should form part of record as evidence subject to examination by the parties. Any issue
for inquiry can be referred to Local Commissioner under this rule and his report
evidence in the suit. [PLD 2001 Lah. 135].

Commissions to Examine Accounts

11. Commission to examine or adjust accounts.--In any
in which an examination or adjustment of accounts is necessary,

Order XXVI]

Court may issue a commission to such person as it thinks fit directing him to make such examination or adjustment.

12. Court to give Commissioner necessary instructions.--

(1) The Court shall furnish the Commissioner with such part of the proceedings and such instructions as appear necessary, and the instructions shall distinctly specify whether the Commissioner is merely to transmit the proceedings which he may hold on the inquiry, or also to report his own opinion on the point referred for his examination.

(2) Proceedings and report to be evidence. Court may direct further inquiry.--The proceedings and report (if any) of the Commissioner shall be evidence in the suit, but where the Court has reason to be dissatisfied with them, it may direct such further inquiry as it shall think fit.

Commission to make Partitions

13. Commission to make partition of immovable property.--Where a preliminary decree for partition has been passed, the Court may, in any case not provided for by the Section 54, issue a commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree.

14. Procedure of Commissioner.--(1) The Commissioner shall, after such inquiry as may be necessary, divide the property into as many shares as may be directed by the order under which the commission was issued, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares.

(2) The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if so directed by the order) by metes and bounds. Such report or reports shall be annexed to the commission and transmitted to the Court; and the Court, after hearing any objections which the parties may make to the report or reports, shall confirm, vary or set aside the same.

(3) Where the Court confirms or varies the report or reports it shall pass a decree in accordance with the same as confirmed or varied; but where the Court sets aside the report or reports it shall either issue a new commission or make such other order as it shall think fit.