

**IN THE HIGH COURT OF SINDH,
CIRCUIT COURT HYDERABAD**

R.A No. 57 of 2012

IInd Appeal No. 10 of 2012

CP No. S- 151 of 2012

DATE	ORDER WITH SIGNATURE OF JUDGE
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Date of Hearing : 08.05.2017.

Date of Order : 18.05.2017

Mr. Zaheeruddin S. Leghari, Advocate for applicant

Mr. Jhamat Jethanand, Advocate for respondents

ZULFIQAR AHMAD KHAN, J.- This order will dispose of Misc. Applications No. 613 of 2013, 614 of 2013 and 5081 of 2013 moved in the above numbered cases, wherein the respondent had sought orders for setting aside the exparte order dated 08.05.2013 and in the affirmation to re-hear the Civil Revision, Appeal and Constitutional Petition in R.A. No. 57 of 2012, IInd Appeal No. 10 of 2012 and CP No. S- 151 of 2012 respectively.

2. Brief facts breeding this chain of litigation are that respondent Jameel Ahmed filed a suit for specific performance of contract and the landlady appellant filed ejectment application against the respondent in respect of the property bearing Plot No. 15 Ex-Nayab Marriage Hall Unit No.2, Autobhan Road, Latifabad, Hyderabad in the court of IInd Senior Civil Judge, Hyderabad. Suit of the respondent was dismissed and the ejectment application of the appellant was allowed. Respondent filed 1st Appeal and also FRA against the judgment and order of the IInd Senior Civil Judge Hyderabad in the court of District Judge, Hyderabad which was transferred to the court of 1st Additional District Judge, Hyderabad. Respondent also moved application under Order 41 Rule 27 CPC for recording of additional evidence in the Civil Appeal, as well as, rent appeal and the learned 1st Additional District Judge, Hyderabad after hearing application under Order 41 Rule 27 CPC, set aside the judgment and decree of the trial court and ejectment order in the rent case vide order dated 13.02.2012 and remanded the case to the trial court of IInd Senior Civil Judge, Hyderabad for recording additional evidence and for the evidence of appellant in rebuttal.

3. Being aggrieved and dis-satisfied with the impugned order dated 13.02.2012 the appellant preferred the above mentioned IInd Civil Appeal No. 10 of 2012, CRA No. 51 of 2012 and CP No. S- 151 of 2012. Process was issued against the respondent in all the three matters but it is alleged that he avoided to get process served upon him and put off his appearance in all the three matters deliberately and malafidely. Resultantly publication was ordered to be made in a daily newspaper but inspite of that, the respondent still chose to remain absent and did not put his appearance neither in the appeal nor in the Civil Revision or the Constitutional Petition. The learned Single Judge of the High Court after being satisfied with the number of attempts made in process issued against the respondent for his appearance but after publication in a daily newspaper, in the absence of respondent, heard all the three matters and allowed the same vide judgment dated 08.05.2013. Para 7 of the judgment deals with service and I reproduce the same in the following:-

7. Notices were issued to the respondent through all first three modes but could not be served, hence he was ordered to be served through substituted service by way of publication in daily newspaper 'Nawa-e-waqt' on 12.10.2012. Even though he failed to appear before this Court.

4. Respondent thereafter moved M.A. No. 5081 of 2013, application under Order 41 Rule 21 read with Section 151 CPC for setting aside ex-parte judgment dated 08.05.2013. The said application was heard by this court and it was dismissed vide order dated 23.01.2015.

5. Respondent being aggrieved, preferred CP No. 174-K/2015, CP No. 175-K/2015 and CP No. 176-K/2015 before the Honourable Supreme Court of Pakistan where the Apex Court passed an order on 10.9.2015, which is reproduced as under:-

“By consent of learned ASCs appearing for the parties the impugned order dated 23.01.2015 is set-aside and all the three proceedings namely 2nd Appeal No. 10 of 2012, Revision Application No. 57 of 2012 and CP No. S- 151 of 2012 are remanded to the High Court of Sindh Circuit Court Hyderabad for rehearing and fresh decision in accordance with law. All the three matters are fixed before the court on 21.09.2015 for their hearing. The learned ASCs appearing for respective parties gave notice of this date and state that there is no need of issuing fresh notice to the parties by the High Court. The petitions stands disposed of in the above terms”

6. In view of the above consent order, the applications moved by the respondent in all the three matters for setting aside ex-parte judgment dated 08.05.2013 came for re-hearing today.

7. Mr. Jhamat Jethanand learned counsel for respondent commenced his submissions by taking this court to the orders passed by this court on 20.4.2012, 13.8.2012, 31.8.2012 and 8.10.2012. By placing specific emphasis on the last order of 8.10.2012, the learned counsel submitted that the learned Judge of this court without complying with the requirements of Order V Rule 20(1) CPC passed orders that the respondents be served through the substituted mode of service by way of publication in the Daily `Nawa-e-waqt`. Learned counsel referred to the full text of Order V Rule 20(1) CPC, which is reproduced hereunder:-

20. Substituted service. – (1) where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the court shall order for service of summons by—
- (a) Affixing a copy of the summons at some conspicuous part of the house, if any, in which the defendant is known to have last resided or carried on business or personally worked for gain; or
 - (b) any electronic device of communication which may include telegram, phonogram, telex, fax, radio and television; or
 - (c) urgent mail service or public courier service; or
 - (d) beat of drum in the locality where the defendant resides; or
 - (e) publication in press; or
 - (f) any other manner or mode as it may think fit;

Provided that the Court may order the use of all or any of the aforesaid manners and modes of service simultaneously.

8. Learned counsel next contended that before a court could order substituted service, it has to satisfy itself as to the requisites of having reasons to believe that (a) the defendant is keeping out of the way for the purpose of avoiding service, or (b) that for any other reason the summons cannot be served. The counsel submits that only in those circumstances, a court could order substitute service by publication under the said sub-Rule. By making specific reference to all the orders referred herein-above, learned counsel contended that in none of the previous orders, any determination that the respondent was keeping out of the way or that there was no other possibility of

-serving summons by ordinary mode upon the respondents was made, therefore, the judgment handed down by this court on 08.05.2013 in the absence of the respondent was violative of the legal principle of *audi alteram partem* (*no one be condemned unheard*) thus the said judgment is liable to be set-aside. In support of his contention, he has placed reliance on 1985 SCMR 1228, 2011 SCMR 1469 and 2012 MLD 39.

9. Mr. Zaheeruddin S. Leghari learned counsel for the appellant/applicant/petitioner submitted that the respondent has been avoiding service deliberately all along with malafide. The fact that in the previous litigation being F.C. Suit No. 94 of 2010, review of the diary sheet could show that the counsel of the respondent was handed down certified copies of interim orders dated 30.03.2012 and 31.08.2012 passed by this High Court in IInd Appeal No. 10 of 2012, therefore the contention that the respondent had no knowledge of the instant litigations is not based on truth. Learned counsel contended that since the respondent is illegally occupying the valuable property of the applicant/petitioner, he has left no stone unturned to use dishonest, deceitful and tricky means for the avoidance of service. He submitted that it was only on account of the orders passed by this court that till today no further evidence has been recorded by the trial court in F.C. Suit No. 94 of 2010, meaning thereby there was a direct connectivity between the two litigations and the counsel had complete knowledge of the instant litigation pending before this High Court. He next referred to various notices issued by this court which are detailed as under:-

1. Notice dated 6.4.2012 issued by Assistant Registrar (Civil) to Respondent for 20.4.2012 along with order dated 30.3.2012. The said notice was returned by the bailiff with the endorsement that the servant told him that "*the respondent was on tabligh and he will inform him about the notice and date as soon as he come back*".
2. Notice dated 23.4.2012 issued by Assistant Registrar (Civil) to Respondent for 14.5.2012. The said notice was returned by the bailiff with the endorsement that the servant told him that "*the respondent has gone to Punjab as his relative has passed away and he will inform him about the notice and date as soon as he come back*".
3. Notice dated 20.6.2012 issued by Assistant Registrar (Civil) to Respondent for 13.8.2012. The said notice was not returned either served or unserved.

4. Notice dated 16.8.2012 issued by Assistant Registrar (Civil) to Respondent for 31.8.2012 was sent through Bailiff, Register Post A.D. & Courier Service. The said notice was returned by the bailiff with the endorsement that "*the servant Muhammad Aslam told him that the respondent has gone to Tabligh and he will inform him about the notice and date as soon as he come back*". The report of TCS shows that the said notice was received by Arman Memon, seeming some male family member of the respondent.
5. Notice dated 06.9.2012 issued by Assistant Registrar (Civil) to Respondent for 20.09.2012. was sent through Bailiff, Register Post A.D. & Courier Service. The said notice was returned by the bailiff with the endorsement that "*the servant Shahid Ali told him that the respondent has gone to Tabligh and he will inform him about the notice and date as soon as he come back*".
6. Notice dated 11.10.2012 issued by Assistant Registrar (Civil) to Respondent for 20.09.2012 by way of publication through Daily Nawa-e-Waqt, Karachi.

11. By giving details of the above referred attempts, learned counsel contended that this court in all possible modes attempted to serve the respondent wherein no less than five attempts were made, whereafter notices were served by pasting and eventually the substituted mode of service by way of publication as provided under Order V Rule 20 CPC was used as the court was mindful that the respondent is deliberately avoiding the service as all possible efforts of service were defeated by the conduct of the respondent. In support of his contention, he placed reliance on 1978 SCMR 185 and 1985 SCMR 1305. He then referred to Sub Rule 20(2) of Order V where the above substituted mode of service is held to be as effective as if the service was made on the defendant personally. In support of this contention, reliance was made on PLD 1975 AJK 122.

12. Heard the counsel and perused the material available on record. It is an admitted fact that being landlord and tenant in adversal relation, the parties were at loggerheads in litigation atleast from 2010, whereas the present litigation was filed in this court in 2012 and certain orders passed in these matters were handed down to the counsel who were in litigation in the trial court, which court acted upon the orders of this court by not recording any further evidence in the matter. The key question posed before this court is whether the respondent was duly served as summons were sent to him through

bailiff which returned with various reports, all of which by referring to his family member and servant suggested that the respondent was out of station, however, the family member undertook to inform the respondent about the summons. In this regard it is pertinent to refer Order V Rule 15 CPC which provides that if summons were received by an adult member of the family in the absence of the defendant then the service made through a male family member in the circumstances where there the defendant was not found within reasonable time, would be considered effective through the male member of the family. Notwithstanding in the instant case the service was additionally held good by way of pasting through Order V Rule 17 CPC before the last effort was made through the substituted mode of service under Order V Rule 20 CPC.

13. It is apparent from a plain reading of Order V Rule 20 CPC that the substituted service can be ordered by the court once the court is satisfied that the respondent is deliberately avoiding service or for any reason summons cannot be served in the ordinary way. It is pertinent to mention that the court is not required to pen down those reasons before the mode of substituted service is chosen by the court. As long as court is cognizant of the fact that reasonable efforts have been made to serve the defendant by first three modes and that there was no error in the given address of the defendant, the application of order V Rule 20 CPC is the next logical step because the legal process cannot be stalled on the whims of a tricky and deceitful defendant who continuously chooses to stay away from the process of law, or in the alternate calls upon his family members to make false statements to the bailiff.

14. In the cases reported as 2001 SCMR 99 and 1996 SCMR 1703 the Apex Court has held that where inspite of various efforts and issuance of notices on different dates, service could not be effected on the respondent, directions by the Court for substituted service is as effective as personal service upon the respondent.

15. While there are numerous precedents where the courts have held that substitute process would not be opted for except when all procedural requirements had been met and until the court comes to a conclusion that the unserved party is avoiding service and no other means subsisted to bring the lis to respondent's notice (1995 MLD 170), however, in the case in hand it could be seen that more than five attempts were made for service by bailiff, registered mail and private courier, as well as, before the publication under Order V Rule

20 CPC was made, service was also held good by way of pasting under Order V Rule 17 CPC.

16. In the given circumstances, the contention of the learned counsel for the respondent that the order of service under Order V Rule 20 CPC was made in haste without making sure that the condition precedent thereto were duly fulfilled is not only unfounded but also meritless.

17. For the above-mentioned reasons, Misc. Applications No. 613 of 2013, 614 of 2013 and 5081 of 2013 are dismissed.

JUDGE