IN THE HIGH COURT OF SINDH AT KARACHI

J.M No.55 of 2014

DATE	ORDER WITH SIGNATURE OF JUDGE

Applicants No.1, 3, 4 & 6:	**Royal Rice Millers Ltd. & others Through Muhammad Salim Thepdawala, Advocate.**
Applicants No.2 & 5:	**Farid-ur-Rehman and Hassan Farid, Through Umer Riaz Advocate.**
Respondent:	**Habib Metropolitan Bank Ltd. Through Mr. Muhammad Naseer, Advocate.**
Dates of Hearing:	**13.02.2018 & 08.03.2018**
Date of Order:	**30.03.2018**

O R D E R

Muhammad Junaid Ghaffar J. This Judicial Miscellaneous (**J.M**) has been filed under Section 12 of the Financial Institutions (Recovery of Finances) Ordinance, 2001, ("**FIO, 2001**") read with sections 12(2) and 151 CPC by the applicants impugning the ex-parte Judgment and Decree dated 28.03.2012 passed in Banking Suit No.B-82 of 2010.

2. The precise case of the Applicants is to the effect that Applicants No.2 to 4 and 6 are residing abroad permanently, whereas, the Applicant No.5 is also not a resident of the address mentioned in the Plaint and according to the applicant while filing the plaint, the Respondent Bank deliberately failed to give the correct address, that is the registered and official address of Applicant No.1 Company and so also the address of other

applicants. It is the case of the Applicants that due to such conduct of the Respondent Bank, the notices were not properly served, and therefore, the impugned Judgment and Decree which has been passed Ex-parte is liable to be set-aside.

3. Learned Counsel for the Applicants No.2 & 5 has contended that firstly no proper address of any of the Applicants was mentioned in the Plaint, whereas, the notices were not served properly either through Bailiff, courier or registered A/D, whereas, the diary of the Additional Registrar (Original Side) also reflects that no proper service was affected. Learned Counsel has contended that the correct address i.e. the registered and Official Address of Applicant No.1 was very much available on record with the Respondent Bank; but despite this an improper address was mentioned in the Plaint, and therefore, misrepresentation and fraud has been committed. Learned Counsel has further contended that though some publication was made but it is the case of the Applicants that they were residing abroad, which fact was in the knowledge of the Respondent Bank as they had earlier made correspondence on those addresses, therefore, even the publication made in the local newspaper is no good service and in support of this contention, he has relied upon **2011 SCMR 2011** ***(Mubarak Ali v. First Prudential Modarba)***. Per learned Counsel notwithstanding these infirmities in the proper service regarding issuance of summons, subsequently on 30.04.2011, CMA No.557/2011 was filed by the Respondent Bank for amendment of Plaint under Order 6 Rule 17 CPC, and without issuance of a fresh notice, the same was allowed, whereas, on the very next date, the Suit was decreed without proper application of mind and no reasons were mentioned in the order for grant of Judgment and

Decree. According to the learned Counsel once an amended plaint was filed and accepted, the applicants in law were entitled for a notice and to contest the matter, if so needed. Per learned Counsel when the Applicant No.2 arrived in Pakistan and applied for a copy of **"Fard"** maintained by the Revenue Department of the properties only then it came to his knowledge that the properties in question are attached and on further enquiry, the Applicants came to know of such ex-parte Judgment and Decree on 05.08.2014 and immediately action was taken and within 21 days of such notice, instant J.M was filed and restraining orders were obtained. In support of his contention, learned Counsel has relied upon **2009 CLD 1699,***(Haji Muhammad Yaqoob Akhtar v. Habib Bank Ltd)*, **2007 CLD 1371** *(Mst. Zarina Shamim v. Zarai Tarqiati Bank Ltd.)*, **2005 CLD 1119** *(Shabbir Ahmed v. Zarai Tarqiati Bank Ltd.),* **2003 CLD 254** *(Quetta Silk Center v. Muslim Commercial Bank Ltd.)*, **2006 CLD 1403** *(Zahid Mahmood through Attorney v. Zarai Tarqiati Bank Ltd.)*, **2011 CLD 790** *(Shaz Packages v. Bank Al-Falah Ltd.)*, **2005 CLD 930** *(Muhammad Aslam Tahir v. Union Bank Ltd)*, **2010 CLD 1057** *(Muhammad Tahir v. Emirates Bank International PJSC),* **1986 CLC 6** *(Karamat Hussain v. Naik Khan Muhammad)*, **1996 SCMR 1703** *(Akbar v. Gul Baran)* & **1985 SCMR 1228** *(Muhammad Anwar v. Abdul Haq).*

4. Insofar as Counsel for Applicants No.1,3,4 & 6 is concerned, he has adopted the arguments of the Counsel for the other Applicants and additionally contended that the addresses were not properly mentioned in the Plaint and at least in law the Applicant No.1 was required to be arrayed on the registered address, whereas, subsequently, while filing execution application, the Respondent Bank has used and mentioned the correct registered

address, which speaks malafide and misrepresentation while obtaining Judgment and Decree against the Applicants.

5. On the other hand, learned Counsel for the Respondent Bank has contended that the Applicants were fully aware of the proceedings inasmuch as they availed the finance facility and then defaulted and have only come before the Court after attachment of the properties, whereas, it is not disclosed nor supported by any document that why only on 05.08.2014, it came to their knowledge while allegedly obtaining **"Fard"** from the Revenue Department. According to the learned Counsel, copy of such application allegedly made is not on record nor a personal affidavit of the concerned person, who allegedly informed them about the attachment has been placed on record; nor even his name has been disclosed. Per learned Counsel there are various applicants and it is only Applicant No.2, who has come before the Court and filed his affidavit through attorney, whereas, in the affidavit sworn before the Identification Branch, the same address is mentioned, which was disclosed in the Plaint. Therefore, no case is made out regarding any alleged fraud. Learned Counsel has further contended that summons were issued through all modes including TCS and Registered A/D, which were duly served, whereas, publication was made in two leading newspapers i.e. daily **"JANG"** and **"DAWN"** dated 24.06.2010, hence they were properly served as required in law. Learned Counsel has also referred to some correspondence made by the Applicants and has contended that on such Letters, the same address is mentioned in respect of another Company, which reflects the address on the Plaint was the address of the applicants and they were using the same. Learned Counsel has further contended that no case for any fraud or

misrepresentation within the contemplation of Section 12 of FIO, 2001 or under Section 12(2) CPC is made out as according to the learned Counsel proper service was affected and upon their failure to seek leave to defend, the Court was well within its justification to decree the Suit as prayed and for that no reasons were required to be stated. Per learned Counsel it is settled law that in Banking Suit, service through any one of the modes is good service and there cannot be any exception to it as pleaded. In support he has relied upon **2017 CLD 1247** ***(Abdul Sattar v. The Bank of Punjab through Branch Manager)***, **PLD 2015 SC 401** ***(District Bar Association v. Federation of Pakistan)***, **2017 CLD 1076** ***(Rafaqat Ali v. Messrs United Bank Limited)***, **2017 CLD 1140** (***Dr. Javed Iqbal and 2 others v. Askari Bank Limited through Attorney***), **PLD 1990 SC 497** ***(Messrs Ahmad Autos and another v. Allied Bank of Pakistan Limited)***, **2004 CLD 1555** ***(Khawaja Muhammad Bilal v. Union Bank Limited through Branch Manager)***, **2015 CLD 818** ***(Messrs Waris Steel Mills Through Proprietor and another v. Silk Bank Limited through Branch Manager)***, **2015 CLD 439*****(Muhammad Afzal Deura v. Orix Leasing Pakistan and others)***, **2015 CLD 759** ***(Allied Bank of Pakistan Limited v. Sultan Ali J. Lilani)*** and **2002 SCMR 476** ***(Messrs Simnwa Polypropylene (Pvt.) Ltd. And others v. Messrs. National Bank of Pakistan).***

6. While exercising right of rebuttal, learned Counsel for the Applicant has reiterated his arguments and further submitted that the service was required to be held good on the registered address of the Applicant No.1 , whereas, the Applicants were out of country at the time of publication and admittedly on the application of amendment of Plaint no notice was ordered, therefore, entire due

process is lacking in this matter, hence this is a case, wherein, appropriate relief must be granted by the Court.

7. I have heard all the learned Counsel and perused the record. The primary dispute raised through this J.M is to the effect that no proper service was affected on the applicants, and therefore, the ex-parte Judgment and Decree must be set-aside. The precise facts as pleaded on behalf of the Applicants is to the effect that the addresses mentioned on the Plaint is not correct, whereas, the notices sent through TCS and registered Post A/D were not delivered and so also the notice served through Bailiff is also improper. Though on the face of it these grounds appear to be attractive insofar as the Applicants case is concerned; but one thing is to be kept in mind that these proceedings are not ordinary proceedings under the Code of Civil Procedure but under a Special law i.e. **FIO, 2001**, and therefore, they are to be governed within the contemplation of the relevant provisions of **FIO 2001**. The procedure as provided in Order 5 Rule 20 CPC regarding substituted service and the case law developed on its interpretation is not relevant for the present purposes and it is only the special provision of S.9(5) of FIO, 2001, which is to be applied and followed. The Honorable Supreme Court very recently in the case reported as ***Gulistan Textile Mills Ltd v Soneri Bank Limited***- **2018 CLD 203** through judgment dated 2.1.2018, has delved upon this issue and has come to the following conclusion which appears to be relevant for deciding the issue in hand. The relevant findings are at Para No.6 and reads as under;

> 6. This brings us to a discussion of Section 7 of the Ordinance. Sub-section (1) part (a) of Section 7 ibid provides that in exercise of its civil jurisdiction a Banking Court shall have all the powers vested in a Civil Court under the CPC. One may argue that

since, in exercise of its powers under the CPC, a Civil Court is empowered to pass an order for interim sale of property, furnished as security to a financial institution, before the final determination of the case under Order XXXIX Rule 6 of the CPC or whilst exercising its inherent jurisdiction under Section 151 of the CPC, therefore by virtue of Section 7(1)(a), which is legislation by reference, the Banking Court too would possess such power. This view is incorrect because according to the principle of harmonious interpretation the special law would take precedence over the general law (generalia specialibus non derogant). The Ordinance is a special law, and therefore its specific provisions will displace the general law which shall be deemed to be inapplicable. Reference in this regard may be made to the judgment reported as ***Neimat Ali Goraya and 7 others Vs. Jaffar Abbas, Inspector/Sargeant Traffic through S.P., Traffic, Lahore and others (1996 SCMR 826)***. This position is also supported in Section 4 of the Ordinance which provides that "*the provisions of this Ordinance shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force*". The reason behind this is logical in that the legislature, having devoted attention to a special subject and provided for all the peculiar circumstances that may arise in respect thereof (*the legislature is presumed to know the law when enacting legislation*), it cannot intend to derogate from such special enactment by allowing the general law to override the special law, unless it does so through express and specific mention of its intention to that effect. Thus when Section 16 of the Ordinance has provided a comprehensive list of the specific types of orders (*which do not include sale of property*) that a Banking Court is empowered to pass with respect to property that is pledged, hypothecated etc. prior to the final judgment of a suit for recovery by sale, there is no doubt that such provision was intended to be all-inclusive, leaving no room to read in the power to sell by means of applying the general provisions of the CPC, i.e. Order XXXIX Rule 6 or the inherent powers under Section 151 of the CPC. However, the legislature did intend that nothing in sub-sections (1) to (3) of Section 16 should affect the powers of the Banking Court under Order XXXVIII Rules 5 and 6 of the CPC to attach before judgment any property other than property mentioned in sub-section (1) and therefore specifically provided for the above in Section 16(4) of the Ordinance. The saving of certain provisions of the CPC within Section 16, as done through Section 16(4), augments the view that the said section was meant to be comprehensive and it does not permit sale before judgment.

This opinion is further bolstered by the fact that Section 7(1) of the Ordinance itself begins with the words "*Subject to the provisions of this Ordinance, a Banking Court shall*…". Section 7(2) further clarifies and provides that:-

> "A Banking Court shall in all matters with respect to which the procedure has not been provided for in this Ordinance, follow the procedure laid down in the Code of Civil Procedure, 1908 (Act V of 1908), and the Code of Criminal Procedure, 1898 (Act V of 1898)." (Emphasis supplied)

Therefore a Banking Court is to follow the procedure laid down in the CPC in all matters **with respect to which the procedure has not been provided for in the Ordinance**, whereas the procedure to prevent property which has been pledged or hypothecated etc. from being transferred, alienated etc. has been duly and exhaustively provided for in Section 16 of the Ordinance

(*save for Section 16 (4) thereof*). Therefore, to this extent the application of the CPC has been excluded.

The Hon'ble Supreme Court in the aforesaid case has laid down a principle that if there are special provisions in the FIO, 2001, for a specific purpose (like holding service as good in this matter), then they are to be followed and not the provisions of CPC for such purposes. For this it would be advantageous to refer Section 9(5) of the FIO 2001, which reads as under:-

> 9. Procedure of Banking Courts.-
>
> (1) …….
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> (2) ……..
>
> (3) ……
>
> (4) …..….
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> (5) On a plaint being presented to the Banking Court, a summons in Form No. 4 in Appendix 'B' to the Code of Civil Procedure, 1908 (Act V of 1908) or in such other form as may, from time to time, be prescribed by rules, shall be served on the defendant through the bailiff or process-server of the Banking Court, by registered post acknowledgement due, by courier and by publication in one English language and one Urdu language daily newspaper, **and service duly effected in any one of the aforesaid modes shall be deemed to be valid service for purposes of this Ordinance.** In the case of service of the summons through the bailiff or process-server, a copy of the plaint shall be attached therewith and in all other cases the defendant shall be entitled to obtain a copy of the plaint from the office of the Banking Court without making a written application but against due acknowledgement. The Banking Court shall ensure that the publication of summons takes place in newspapers with a wide circulation within its territorial limits."

8. The aforesaid provisions provides that when a plaint is presented to the Banking Court, summons in the prescribed Form, as prescribed by Rules shall be served on the Defendants through bailiff or process server of the Banking Court, by registered post A/D, by courier and by publication in one English language and

one Urdu language daily newspapers and *service duly affected in any one of the aforesaid modes shall be deemed to be valid service for the purposes of this Ordinance*. It further provides that in case of service of summons through Bailiff or Process Server, a copy of the Plaint shall be attached therewith and in all other cases, Defendants shall be entitled to obtain a copy of the Plaint from the office of the Banking Court without making a written application but against due acknowledgement, whereas, the Banking Court shall ensure *that the publication of summons takes place in newspapers with a wide circulation within its territorial limits*. It is to be appreciated that the Ordinance itself provides the mechanism for service and its effect. And this provision is somewhat different and is not akin to the provision of Order 5 CPC, which deals with service of summons and its substituted service. Though the learned Counsel for the Applicants has made an attempt that service through Bailiff, TCS and Registered A/D was not proper, but it is not in dispute that notwithstanding this objection, the publication as required under the Ordinance in one English language and one Urdu language daily newspapers was made. Again it is not being disputed that both these newspapers have a wide circulation. The only objection in respect of service being held good through publication is to the effect that at the relevant time, the applicants were out of country. To that I may observe that firstly nothing has been placed on record, which could reflect that such information was communicated to the Respondent Bank within time or thereafter, that for the purposes of correspondence or publication their address has changed and now they are to be served on the address outside Pakistan. Mere mention of any foreign or different address in any of the correspondence with the

Applicants by the Respondent is not relevant. Learned Counsel for the Applicants made efforts to justify the stance by relying upon the copies of the Passport, but in view of the aforesaid mandatory provisions of the Ordinance, they do not appear to be of any help. The law is very clear and firstly it provides that service through any of the mode shall be deemed to be valid service for the purposes of this Ordinance and secondly the only rider is that it should be in one English language and one Urdu language daily newspaper having wide circulation within the territorial limits of Banking Court. In this case all the requirements as per the Ordinance stands fulfilled, therefore, this argument regarding the applicants being out of country has no force.

9. Insofar as reliance on the case of *Mubarak Ali (supra)* in support of such contention is concerned; firstly it may be observed that the facts of that case were somewhat on a different footing, inasmuch as in that case it had come on record through Bailiff report that the Defendant / Customer was not residing on the given address, but was permanently residing at his native village and one person on the given address had categorically informed that the Defendant no more resides on such address. In that case, the Honourable Supreme Court came to the conclusion that since the publication was made in newspapers, which do not reach the village of the Defendants, whereas, it was a matter of record that defendant was residing in his native village, and therefore, it was held that service was not properly affected and Judgment and Decree was set aside. Notwithstanding the aforesaid observation of the Honourable Supreme Court it may be observed that in the Ordinance, the requirement is that publication should be made in

a newspaper, which has a wide circulation within the territorial limits of the ***Banking Court*** and not of the ***Defendant***.

10. Be that as it may, even otherwise, there is a plethora of case law of the Hon'ble Supreme Court as well as various High Courts, which have come to a contrary view and it has been consistently held that service through any one of the modes, as prescribed in Section 9(5) of the **FIO, 2001,** is proper service duly affected and no plea can be taken otherwise by a Defendant customer. The first case in this context is reported as ***Ahmed Autos v Allied Bank of Pakistan Limited*** (**PLD 1990 SC 497**), wherein the Hon'ble Supreme Court has been pleased to uphold this view in the following manner;

> 9. We are inclined to hold that the view taken in the last referred case of Karachi is in consonance with the spirit of the Ordinance and the Rules framed thereunder. It is a matter of common knowledge that defaulter borrowers in suits brought against them particularly by the financial institutions used to delay the disposal of the suits by avoiding the service of the summons. In order to expedite the disposal of the suits to be brought by the Banking Companies the Ordinance was promulgated, which contains special provisions and which inter alia provide that a suit brought by a Banking Company for the recovery of loan is to be tried in summary manner under Order XXXVII. Section 15 of the Ordinance empowers the Federal Government by a notification in the official Gazette to make rules for carrying out the purposes of the Ordinance. In pursuance whereof the rules have been framed. The underlined object of Rule 8 is to avoid the delay in the service of the summons and, therefore, it has been provided that the summons are to be issued simultaneously in three different modes referred to hare in above, which is the requirement of the above rule. Obviously for the reason that if the summons is not served through a bailiff or by a registered post acknowledgement due, it would be served in any case by publication. In other words, the service is to be held good if a defendant is served by any of the above three modes of service provided for in Rule 8. The unamended Rule 8 was silent on the question, whether in order to hold service of summons good, it should be effected by all the three prescribed modes or whether service of the summos by one of the modes was sufficient. In the case of M/s. Allied Bank of Pakistan Limited v. M/s. Tahir

Traders and 8 others reported in P L D 1986 Kar 369 a learned Single Judge of the Sindh High Court had taken the view that mere publication of summons under Rule 8 would not be a proper service unless it was proved that defendant was avoiding the service of summons issued through bailiff and registered post or his whereabouts were not known. A contrary view was taken in a subsequent case referred to here in above namely in the case of M/s. Union Bank of Middle East Limited v. M/s. Zubna Limited and 3 others P L D 1987 Kar. 206, relevant portion of which has been quoted here in above. The framers of the Rules by amending Rule 8 by SRO No.71(1)/88 dated 31-1-1988 have resolved the above controversy. It may be advantageous to reproduce the original rule and the addition made by the above S.R.O. dated 31-1-1988 which read as follows:--

(original Rule 8 as framed)

> "8. Mode of service of summons and notice.-----The Reader shall, on receipt of a plaint, order immediate issue of summons and notices to the defendant simultaneously through the Bailiff of the Court, by registered of the post acknowledgement due and by publication, "an service in Any aforesaid modes shall be deemed proper and valid service for the purposes of the Ordinance."
>
> (Underlining is ours and is the addition made by SRO No.71(1)/88 dated, 31-1-1988)

10. However, we may observe that it appears that neither the Courts below nor the learned A.S.C. appearing for the petitioners and the respondent/caveator have taken notice of the above amendment as it has not been referred to in the judgments nor it was referred before us during the arguments. However, we may point out that there was no need to amend the above Rule 8 as the correct legal position was that the service was to be held to be good service if it was effected by any one or more modes of service provided for in the above-quoted Rule 8. If we were to take a contrary view, it would be in conflict with the object of the Ordinance and the Rules framed thereunder, as it would make the service more difficult. It would instead of suppressing the mischief which prompted the framing of above Rule 8, would encourage the mischief as a defendant may successfully avoid service by one of the above three modes of service for considerable period by maneuvering.

The above judgment was cited with approval to the extent of holding service as good, if it is done under any one of the modes as prescribed in the special law, in the case reported as ***Qureshi Salt & Spice Industries v Muslim Commercial Bank Limited*** (**1999 SCMR 2353**).

A learned Single Judge of this Court in the case reported as ***Union Bank of Middle East Limited v Zubna Limited*** (**PLD 1987 Karachi 206**) has been pleased to follow the same view in the following manner;

> 15. Thus, the ultimate question which arises in the case is what will in the reasonable construction of rule 8? Does it require the defendant to be served with the summons and notices by all the three modes or by any two or any one of them. The proposition that it requires service by all the three modes is to be rejected simply because it cannot be the object of a remedial statute, such as the present Ordinance, as it will create more difficulties than pre-existing, in the service of summons on the defendants. In fact, it will be contrary to the very object of the Ordinance for which, it was promulgated on rule 8 was framed. Does it, then, require service by two modes? There seems to be nothing to support the answer to this proposition in the affirmative. There remains now the third alternative i. e. the service by anyone of the three modes. I think, the acceptance or this construction is more apt to the occasion inasmuch as it is in more accord with the object of the Ordinance. It also finds its support from, section 4 which, though in a different situation, provides that notice be; served by the Banking Company on the borrower in any of the modes,, namely by being given or tendered to him or sent by registered post, or affixed on a conspicuous part of his last address known to the Banking Company or publication in a newspaper. I am, therefore, of the view that the summons and notices shall be issued to the defendants simultaneously through bailiff, by registered post A. D. and by publication. It is the statutory requirement and it must be complied with. Once it is shown that the summons or notices or notices have been issued by the office, the service on the defendant by anyone of the three modes will be considered as service on the defendant. The question that the plaint cannot be annexed in the case of publication should not be held to be an impediment in holding such service to be good inasmuch as, firstly, the copy of the plaint has been annexed to the summons sent to the defendant through bailiff as well as by registered post and secondly, the defendant is on notice to collect the copy of the plaint from the office and, in any case, there can be no impediment in making just an application for leave to defend, even without a copy of the plaint, within the statutory period. The grounds for leave to defend maybe submitted later on, after the receipt of the copy of the plaint

A learned Division Bench of the Lahore High Court in the case of reported as ***Khwaja Muhammad Bilal v Union Bank Limited*** (**2004 CLD 1545**) while following the view of the Hon'ble Supreme Court in the case of ***Ahmed Autos (Supra)*** has been pleased to take

the same view that service through any one of the modes (including publication) under the FIO, 2001, is good service and there cannot be any exception to it.

The Hon'ble Supreme Court in the case reported as ***Simnwa Polypropylene (Private) Limited v National Bank of Pakistan*** (**2002 SCMR 476**) has been pleased to hold that service under any one of the modes as prescribed in the Banking Law is good service. It has been observed in Para-5 of the reported case as follows;

> 5. Learned counsel for the petitioners submitted that since in this case, the petitioners were served through three modes in the following manner (1) through publication in the newspaper on 2-6-2000, (2) allegedly through registered post acknowledgement due on 1-6-2000 and (3) through bailiff of the Court on 15-6-2000, therefore, for the purpose of computing the period of limitation, the service effected through Bailiff of the Court should be taken into consideration and not the other as-the same is comparatively more valid having been made in the prescribed mode by delivery of copy of the plaint in such suit whereas through other modes, the copies of the plaints were not delivered. The argument has no force. It has been declared under section 9(3) of the Ordinance that service in any of the modes shall be deemed to be valid service for the purpose of the Ordinance, therefore, the petitioners could not argue that the latest service mode of the three modes should be taken into consideration for computing -the period of limitation and not the other. The view finds support from the judgments reported as Messrs Qureshi Salt and Spices Industries, Khushab and another v. Muslim Commercial Bank Limited, Karachi through President and 3 others (1999 SCMR 2353) and Messrs Ahmad Autos and another v. Allied Bank of Pakistan Limited (PLD 1990 SC 497).

In the case reported as ***Allied Bank of Pakistan v Sultan Ali. J. Lilani*** (**2015 CLD 759**) a learned Division Bench of this Court has been pleased to reiterate the same view.

A learned Division Bench of the Lahore High Court in the case reported as ***Dr. Javed Iqbal v Askari Bank Limited*** (**2017 CLD 1140**) has been pleased to hold as under;

> 6. The argument of learned counsel for the appellants that respondent bank was duly informed regarding change of address through letter dated 21.10.2015 has also no basis. The said letter shows that same was received by bank on 21.10.2016 which was much after passing of decree on 24.5.2016. Reliance of the

> appellants on rent deed is also misplaced. The said rent deed in favour of appellants for House No.243, H.3, Johar Town, Lahore is dated 30.6.2016, which is also after the judgment and decree passed by the learned Court. The plea of the appellant No.3 that he was out of country at relevant time was never raised before learned Court below, hence this ground cannot be agitated for the first time in appeal. Even otherwise, copies of passport enclosed does not show that when respondent No.3 entered in Pakistan if at all he was out of country.
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> 7. From above discussion, it is evident that address given in the plaint was last known address available with the respondent bank and therefore, appellants were not only served through affixation but also through publication in newspapers. The appellants were bound to file their PLA within 30 days and in case of failure, the Banking Court had rightly passed the decree under section 10 of the Ordinance. The appellants could file application under section 12 of the Ordinance within 30 days to set aside the decree dated 24.5.2016, however, the same was filed on 27.6.2016, beyond the limitation period prescribed under the law. The appellants have also not shown any element of fraud or mis-representation on part of respondent bank in obtaining judgment and decree dated 24.5.2016, therefore, provision of section 12(2), C.P.C. was also not attracted.

In the case reported as ***Abdul Sattar v Bank of Punjab*** (**2017 CLD 1247**) a learned Division Bench of the Lahore High Court has been pleased to observe that Service by either of the three modes was considered as good service, sufficient to draw an inference that a person was served in due course of law and Publication which was one of the modes of service, was also considered as a valid service, whereas, it was not necessary to prove service through all three modes simultaneously and any one of them should be sufficient in such regard.

Therefore, in view of the facts and circumstances of this case as well as the case law cited above, the argument of the learned Counsel for the Applicants that they were not served with all three modes, including through Bailiff, Registered A.D. and Courier is not tenable, as admittedly, publication was made and that is a matter of record, therefore there no exception can be drawn so as

to accord any leniency to the Applicants regarding non-service of summons as alleged. Accordingly, the argument of the Applicants to the effect that they were not properly served, is misconceived and cannot be entertained or looked into in these proceedings. On this account this J.M. fails.

11. However, three is one more additional issue, which requires consideration by this Court i.e. filing of an application for amendment of Plaint under Order VI Rule 17 CPC. It appears that such application was filed on 30.11.2011 through which the Respondent Bank sought amendment in the description of property mortgaged with it. Such application was placed before the Court on 01.11.2011 when the following order was passed:-

> "1. Learned counsel for the plaintiff bank states that no leave to defend application was filed by any of the defendants. He submits that inadvertently description of the mortgaged property as in Para 06 of the plaint is incorrect and this application CMA No.5537/2011 has been moved to correct the error and properly describe the property. Application is allowed. Amended plaint may be filed within one week.
> 2. Adjourned at the request of learned counsel for the plaintiff to 24.11.2011."

Pursuant to the above order, matter was fixed for final disposal on 28.03.2012 and upon filing of the amended plaint, the following order was passed:-

> "Amended plaint has been filed in terms of the order dated 01.11.2011. None of the Defendants has put in appearance nor filed any leave to defend application. Accordingly Suit is decreed as prayed."

12. Perusal of the aforesaid orders reflects that firstly when CMA No.5537/2011 was placed before the Court, without issuance of any notice on such application, the same was allowed on the ground that no leave to defend application was filed by any of the

Defendants/Applicants. Again after grant of such permission, when amended plaint was filed and was on record, on 28.03.2012 it was observed that *amended paint has been filed, whereas, none of the Defendants has put in appearance nor filed any leave to defend application* and accordingly Suit was ordered to be decreed as prayed. It is to be noted that though this is a Banking Suit but as and when any proceedings are undertaken by the Court and are not covered by any of the specific provisions of **FIO 2001** they are to be dealt with either under C.P.C or for this Court, at least under Sindh Chief Court Rules (Original Side). Firstly, it may be noted that no notice was ordered on the application under Order VI Rule 17 CPC and this was merely done on the statement of the respondents Counsel that since no leave to defend application has been filed, amendment be allowed. Perhaps in that the Court was not properly assisted as it is settled law that if any application has been filed for amendment in the Plaint, the Defendant must be put to notice for such an amendment. Even if, such amendment is not of a major effect, proprietary demands that the Defendant be put to notice on such amendment. Not only this, once the amendment is allowed, it is an inalienable right of the Defendant to file an amended written statement, if so desired (the question is not that here no leave to defend was filed, therefore no question of a written statement arises). In this case, firstly no notice has been ordered and secondly, the amendment has been taken on record without providing any opportunity for filing of an amended leave to defend. Moreover, when the proposed amendment which was subsequently allowed is even otherwise perused, it reflects that the amendment made in the Plaint was substantial inasmuch as the description of the property was not only extended but an additional property was

also mentioned. Though it is not in dispute that these were mortgaged properties; but even then the applicants ought to have been put to notice to this effect as it is not only the Borrower, which was arrayed as a Defendant but so also the Guarantors. There may be a case when one party even after service of notice does not wish to contest the Suit and may not file any leave to defend; but if any amendment is made, then there may be a case that due to such amendment, the guarantor or for that matter, the Borrower is being effected to some extent and is aggrieved, then the right of such borrower or guarantor to file a subsequent leave to defend or to contest the amendment application cannot be curtailed or denied. This procedure has not been adopted or followed in this case, whereas, the application under Order VI Rule 17 CPC is to be governed by the procedure as prescribed under the Civil Procedure Code as well as under the Sindh chief Court Rules of the Original Side. Chapter-6 of Sindh Chief Court Rules (Original Side) pertains to process and the relevant rules are Rules No.140 to 146, which provide a complete mechanism for the manner in which a proper service is to be affected for summons and notices. They are not to be discussed in detail as admittedly no notice was ordered on the amendment application, and therefore, no question of its service or otherwise arises. These rules provide a complete procedure to deal with the process of service and in this matter since no notice was ordered, there is no question of any further process being followed. In the case reported as ***Muhammad Nawaz v Allah Diwaya*** (**1990 CLC 1580**), the issue before the learned single judge of the Lahore High Court was that a defendant had not filed its written statement despite being served and thereafter an application for amendment of the plaint was filed in terms of Order

6 Rule 17 CPC, to which the other defendants were given an option to file amended written statement, but the defendant who had been declared Ex-parte was refused such permission. The learned Judge was of the view that this was not proper course adopted for advancing the cause of justice. It was held that:

> 16. Applying these principles to the facts of this case it is apparent that I respondent/plaintiff did not allege in his plaint the circumstance of his want of possession; that in written statement furnished by the remaining respondents, it was alleged that the plaintiff was out of possession; that after the permission of amendment respondents Nos.2 to 4 have filed their amended written statement; that the petitioner defendant is the person from whom defendants Nos.2 to 4 purchased the land in dispute. Therefore, I have no hesitation in coming to the C conclusion that the original Court was required to give an opportunity to the petitioner for filing his written statement in respect of amendment, therefore, the original Court flouted the principle of law; "that the parties must be given adequate opportunity of hearing" and so orders of the original Court as well as the first appellate Court cannot be sustained---being in defiance of law.

In the case reported as ***Muhammad Abdullah Khan Niazi v Rais Abdul Ghafoor*** (PLD 2003 SC 379), the Hon'ble Supreme Court has been pleased to hold as under;

> 4. We have carefully examined the judgment/decree dated 20-10-1977 passed by learned Civil Judge, Rahimyar Khan, judgment and decree dated 29-4-1978 passed by learned District Judge, Rahimyar Khan and order dated 24-5-1980 of High Court whereby the case was remanded for a fresh decision. We have also perused the judgment/decree of learned Additional District Judge-II, dated 11-7-1981 and judgment impugned. We have scanned the entire evidence with the eminent assistance of learned counsel. It may be noted that in a suit of pre-emption an amendment was allowed after lapse of eleven years which has adversely affected the interest of the petitioners as the amendment got incorporated has changed the status of respondent's plaintiffs from "co-sharers" to that of "owners". A bare perusal of the judgment impugned would reveal that it mainly prevailed upon the High Court that respondents/plaintiffs could not prove their right of pre-emption being co-owners in the Khata but according to High Court they were succeeded in establishing their ownership of the estate and thus on the basis of such superior right the suit had rightly been decreed. It however, escaped notice while arriving at the said conclusion that initially the respondents/plaintiffs tiled a suit and claimed pre-emption on the basis of their preferential right being co-sharers which was subsequently modified due to an amendment permitted to be made by learned Additional District

> Judge. It also escaped notice that the said permission was granted after lapse of eleven years in a pre-emption suit and has adversely affected the case of petitioner. For the sake of argument if it is admitted that the amendment had not changed the complexion of the suit even then it was a substantial change. It is quite amazing that no opportunity was afforded to the petitioners to lead fresh evidence or rebut subsequent claim of respondents/plaintiffs who claimed preferential right being owners of the estate. The High Court has placed much reliance on Exh.P/1 which is a 'Jamabandi' and cannot be considered exclusive proof of ownership. It is to be mentioned here at this juncture that the amendment in the plaint was allowed at belated stage to assert the right of co-owner in the estate and, therefore, petitioner should have been given an opportunity to lead evidence to rebut the said assertion which admittedly has not been given.

The Hon'ble Supreme Court of Azad Jammu & Kashmir in the case reported as ***Saleem Akbar Kayani v Dr. Rehana Mansha Kayani*** (**2016 YLR 2851**) has dealt with a similar question, wherein, the Family Court after declaring the defendant as Ex-parte, allowed an amendment application of plaint under Order 6 Rule 17 CPC. The relevant observation (pg:2860) is as under.

> Thus, it was mandatory for the Family Court that after allowing the amendment application, a notice should have to be served upon the defendant and he should have been provided an opportunity to file the written statement, Without seeking written statement and issuance of notice to the defendant in the amended suit, the decree for maintenance charges claimed in the amended plaint cannot be passed and is not maintainable.

The inference from the stated case law which can be drawn is that whenever a plaint is allowed to be amended, a right accrues to the opposite party to file the amended written statement. It cannot be pleaded by the Plaintiff / Respondent that since after issuance of summons (and duly served as held hereinabove), no written statement was filed, on an amendment of the plaint, even a notice is not required! I am not inclined to accept this proposition, as this goes against the basic principle of justice. May be the Court comes to a conclusion after issuance of notice, that there is no need to file

a written statement (leave to defend in this matter), but in no circumstances, any dispensation can be made in respect of a mandatory notice to the opposite party. This also applies even if the amendment is of a minor nature. As this is not for the Court to immediately conclude that it is of what nature. But can only be ascertained properly, once the opposing party has been put to notice. It is also important to state that a right of a defendant declared as Ex-parte in a Suit does not dies out or fades away, as long as the proceedings are alive. The order for Ex-parte proceedings may remain valid, but not for every future act, especially when there is a change being brought in pleadings, as such change may or may not have an effect of substantial nature against the contesting party, whereas, a party cannot be forbidden to take part in future proceedings in whatever might remain in the Suit before the Court. It is also important to observe that a party cannot be relegated to the position that he occupied at the commencement of the trial. Once the amendment request is made and allowed, then the opposing party must be given a chance to amend its pleadings accordingly and this is for the reason that the original pleadings are not a matter of record anymore.

Under the Banking Laws this issue can also be further elaborated in a different manner. In Banking Suits after filing of the Suit, summons are issued and the borrower has to file a leave to defend application. After filing of leave to defend, the plaintiff is entitled to file a replication. But it is settled law that in Replication no new plea can be taken or document relied upon. This is based on the sound principle of law, that once a leave to defend is filed, the defendant has no further chance to rebut any new pleas so taken in the Replication. Reliance in this regard may be placed on

the case of ***The Bank of Punjab v Arif Ali Shah Bukhari*** (**2016 CLD 1301)**, wherein, a learned Single Judge of this Court has been pleased to observe that defects in a plaint are not curable or rectifiable through replication, whereas, the scope of Section 10(7) of FIO, 2001, has a very limited scope in that it only permits giving reply to a leave to defend application. The same principle would apply in this case inasmuch as even if it presumed that the defendants were served, and they did not chose to file any leave to defend, as it can be argued that the original plaint did not required them to do so. But as soon as the amendment was sought, there can be a presumption that such changes necessitated to file objections to the amendment application. In the given facts it is not relevant for the present purposes that what sort of amendment was being sought.

13. In view of hereinabove facts and circumstances of this case and the discussion made as above, the Applicant has made out a case of grant of this J.M. to the extent that since no notice was ordered on the application for amendment of plaint, therefore, the judgment and decree passed on such basis is not sustainable. Accordingly, the impugned judgment and decree dated 28.03.2012 passed in Suit No.B-82 of 2010 are hereby set-aside. The Applicants shall file their leave to defend application in respect of the amended plaint within 2 weeks from the date of this order, which will then be heard and decided in accordance with law.

14. J.M. sands allowed as above.

Dated: 30.03.2018

Judge