

**Civil Revision Application No.106 of 2012**

**Present: Mr. Justice Nazar Akbar**

## ***JUDGMENT***

2. Briefly stated the facts leading to this Revision Application are that Respondent No.1 filed suit No.865/2009 for declaration, partition, possession, permanent injunction and mense profits

against the appellants claiming that his father Faqeer Muhammad had six children namely Saleem Kashani, Abdul Wahid, Rahim Bux, Mst. Zohra, Qadir Bux and Amina. Brother of Respondent No.1 namely Rahim Bux had left the house in 1955 out of annoyance with the father and other family members and brother Qadir Bux had left the house in 1970 and since then their whereabouts are not known. Respondent No.1's father was the owner of the house No.A-89, measuring 240 sq. yds. near Tall Haji Mureed Goth, Karachi, (hereinafter referred to as subject property) where his father had lived with the other children till his death in the year 1971. His father had surrendered his right by Gift in respect of subject property in favour of respondent No.1 of 160 sq. yds and 80 sq. yds in favour of his son Abdul Wahid. His father had handed over possession of 160 sq yds. to Respondent No.1 and possession of 80 sq. yds to the Abdul Wahid. Respondent No.1 had spent Rs.80,000/- over the subject property. Respondent No.1 alongwith his children used to live in the house and he also used to collect rent from the tenants of shops constructed on the plot. Respondent No.1 had filed a suit No.804/2005 before the 8<sup>th</sup> Civil Judge, Karachi Central for declaration, permanent injunction and possession. Applicants filed their written statement and expressed their willingness to give the legal share of Respondent No.1. However, Respondent No.1 has no title documents, therefore, he withdraw his said suit with permission to file fresh suit. Therefore, Respondent No.1 filed suit No.865/2009.

3. The applicants, despite service upon them, have not contested said suit, therefore, they were declared *exparte* vide order dated **25.1.2010** and respondent No.1 was directed to file affidavit-in-*exparte* proof. Thereafter the suit filed by respondent No.1 was decreed *exparte* and the Nazir of District Court was appointed as

commissioner to put the suit property to open auction. On coming to know about the suit applicant No.1 filed an applicaiton under **Order IX Rule 13 CPC** before the trial Court and during pendency of said applicaiton the suit property has been leased out to applicants No.3 and 4 and to one Faisal and the trial Court vide order dated **01.10.2010** rejected said applicaiton filed by the applicants. Agaisnt said order applicants preferred Civil Misc: Appeal No.28/2010 which was also dismissed by the appellate court and this Revision is directed against the said order of appellate Court.

3. I have heard learned counsel for the parties and perused the record.

4. Learned counsel for applicants has challenged the concurrent findings of two Courts below whereby their application under Order IX Rule 13 CPC was dismissed by the Senior Civil Judge and the order of dismissal was maintained by the appellate Court. The only requirement of challenging the order of a Civil Court after judgment and decree by the interested party is to prove that the exparte order passed by the trial Court was without due process of service of notice/summons on the said defendants/applicants. Learned counsel for the applicants on the point of effort of the Court to serve the defendants/applicants was unable to satisfy the Court that how the defendants/applicants remained unaware of the proceedings before the Senior Civil Judge. What was the defect in the process of service? Merely an assertion on oath that service effected on the defendants, who live in the same premises which is subject matter of a suit for administration of the property of deceased by the other legal heirs, is even otherwise a very weak claim for setting aside the exparte judgment and decree. It cannot be denied that the property which

was subject matter of the suit belong to late Faqeer Muhammad and the applicants alongwith respondents and others are the legal heirs of said Faqeer Muhammad. The suit has been decreed on **24.2.2010** and applicant for recalling the judgment was filed without showing that from which point of time and how applicants came to know about the exparte judgment and decree. Such conduct of the applicants clearly indicates that from day one they were aware of the proceedings but they wanted to prolong the proceedings as observed by the appellate Court in the impugned judgment dated 20.1.2012 in the following terms:-

*The appellants are dwelling in the subject matter and they just want to drag the matter for years, so that the other legal heirs should not get their share in the property of their deceased father-----  
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In the impugned judgment the appellate Court has very elaborately discussed the service of summons by referring to the record of the trial Court. It include existence of CNIC of Nabeel, one of the applicants, attached by the bailiff with his report for service of summons as well as Perfect Express Courier Service report dated 15.12.2009 followed by statement of bailiff Noor Muhammad on oath. The bailiff report, courier service reports and all the notices sent to the applicants were on the correct address on which the applicants live. The applicants have not denied and disputed the method and manner of service. The very fact that they have not disclosed in their memo of application under Order IX Rule 13 CPC as well as in appeal that how and when they came to know about the exparte order is more than enough to appreciate that they know the proceedings from day one and without any source of information they came to know about the exparte judgment. The applicants have failed to satisfy the Court that the summon was not served and, therefore, they were

prevented by sufficient cause from appearing when the suit was called for hearing. I may further refer the following proviso of **Order IX Rule 13 CPC** which reads as follows:-

*Provided further that no decree passed exparte shall be set aside merely on the ground of any irregularity in the service of summons, if the Court is satisfied, for reason to be recorded, that the defendant had knowledge of the date of hearing in sufficient time to appear on that date and answer the claim.*

The applicants have not even alleged any irregularity. The above proviso leaves no room for the Court to set aside exparte judgment and decree at the request of an applicant who on the one hand deny service through bailiff, by pasting and even through courier service and on the other hand he is unable to disclose that how and when he came to know about the very passing of the exparte decree.

5. In view of the above facts and law the concurrent findings of two Courts below cannot be interfered, therefore, this Civil Revision Application was dismissed by short order dated **16.5.2018**, above are the reasons for the same.

J U D G E

Karachi,  
Dated:09.07.2018

Ayaz Gul/PA