

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

**Civil Revision Application No.71 of
2017**

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 Date Order with signature of Judge

Present: Mr. Justice Nazar Akbar

Applicant : Mirza Moazzam, Baig in Person.

Versus

Respondent No.1 : Muhammad Saliheen S/o Muhammad Rafi
 Respondent No.2 : Muhammad Arif S/o Muhammad Rafi
 Respondent No.3 : Muhammad Faisal S/o Muhammad Rafi
 Respondent No.4 : Muhammad Obaid S/o Muhammad Saliheen
 Through Ch. Saeed-uz-Zaman, Advocate.

Date of hearing : **22.11.2018**

Decided on : **24.12.2018**

JUDGMENT

NAZAR AKBAR, J:- This Revision Application is directed against the order dated **03.03.2017** whereby 1st Additional District Judge, Central, Karachi, has been pleased to dismiss Review Application filed by the applicant to recall order dated **03.3.2016** whereby Civil Miscellaneous Appeal **No.02/2016** filed by the respondents against the dismissal of their application under **Order IX Rule 13 CPC** was allowed and the trial Court was directed to decide suit No.664/2014 afresh on merit after recording evidence.

2. Brief facts of the case are that the Applicant filed suit against the Respondents for recovery of Rs.20,00,000/- before the trial Court stating therein that Applicant is a senior Advocate of High Court of Sindh, and Respondent No.1 approached him somewhere in 2011 through Darogha Iqbal when the Respondents No.2 & 3 were facing trial in several Criminal and civil Cases. The professional fee was decided and agreed upon Rs.300,000/- for each case in lower court and Rs.500,000/- for the cases in the High Court of Sindh, excluding

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was also settled that under all circumstances the Respondents were liable to pay professional fee and Darogha Iqbal was also present at that time, thereafter Vakalatnama in several cases were filed. The Applicant appeared in all the cases. In the month of January, 2014, the applicant demanded the professional fee from respondents. On **20.02.2014**, Respondent No.1 informed the applicant on cell phone that they have decided to engage some other advocate, as such, Respondents were asked to attend the office of the applicant with regard to payment of professional fee but Respondents avoided. On **08.03.2014**, first reminder was sent to the Respondents but they did not contact, therefore, on **14.03.2014** another reminder was sent but no positive response was received. Therefore, the applicant in all the cases filed applications for discharge of his Vakalatnama and informed the respondents. Thereafter, applicant sent legal notice to the respondents but the same was also not replied, therefore, the applicant filed suit for recovery of professional fee before the trial Court with prayer as under:-

The applicant prayed for passing judgment & Decree in his favour and against the respondents directing the respondents to pay jointly and severally Rs. 20,00,000/- to the applicant with 20% markup from the date of institution of the suit, and any other better or further relief which this court deems fit and proper under the circumstances of the case and also cost of the suit.

3. On service of summons/notices, neither the respondents appeared nor filed written statements, resultantly by order dated **23.10.2014**, the respondents were debarred from filing of written statement and declared ex-parte. Thereafter, applicant filed affidavit-in-ex-parte proof and since the respondents have failed to appear before the learned trial Court, as such the learned trial Court passed exparte judgment and decree. The Respondents later on filed an

application under **Order IX Rule 13 CPC** for setting aside the ex-parte judgment and decree dated **18.12.2014**. Notice of said application was served on applicant, who filed counter affidavit. Learned Counsel for Respondents in rebuttal to counter affidavit filed affidavit-in-rejoinder. The trial Court by order dated **14.12.2015** dismissed the said application.

4. The Respondent preferred Civil Miscellaneous **Appeal No.02/2016** against the order of dismissal of their application under **Order IX Rule 13 CPC**. The appellant filed his objections / counter affidavit to the Miscellaneous Appeal. The appellate Court after hearing the parties by order dated **03.03.2016** allowed the appeal. The Applicant against the said order filed Review Application under **Section 114 CPC**. On notice of said Review Application, the Respondents filed objection on **10.05.2016** and the applicant filed reply to objection on **13.05.2016** and the Respondents also filed counter-affidavit to the reply of objection of the applicant on **30.05.2016**. Ultimately the said Review Application was dismissed by order dated **03.03.2017** and against the order of dismissal of the said review application the applicant has filed the instant Revision Application.

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

6. The Applicant has contended that the documents of service were available on the record which seems to have been ignored by the Court in the order dated **03.3.2016** whereby the appeal of Respondents against the dismissal of their application under Order IX Rule 13 CPC has been allowed. Learned counsel insist that the appellate Court ought to have considered registered A.D receipt and

courier being public documents and since the same were sent on the proper and correct address, the presumption should have been that the Respondents have been served. The contentions of learned counsel appears to be misconceived since this is an appeal against the review order dated **03.3.2016** and all the documents which he has referred to have been examined by the appellate Court before allowing the appeal. If the appellate Court has not given due consideration of legal presumption attached to the documents or have not properly considered in accordance with law, the applicant should have filed appeal / revision. Such contentions were not supposed to be a ground for review of the order. In review petition the Court is not required to correct its order on the basis of same arguments and same documents which have been discussed and examined by the Court in the order for which the review has been prayed for.

7. The perusal of record shows that appellate Court while allowing CMA No.02/2016 has very minutely examined the record including the documents on the basis of which the applicant claims that error was apparent on the face of the order of allowing appeal. The Courts are **not** supposed to declare service held good on the basis of documents. It is the satisfaction of the Court that matters in holding service good subject to compliance of requirement of **Order V Rule 20 CPC**. Learned counsel has not referred to the provision of **Order V Rule 20 CPC** which have been discussed by the appellate Court in coming to the conclusion that the service held good by the trial Court was contrary to law. I have noticed that the learned counsel for the applicant has not referred to the case laws relied upon by the appellate Court in coming to the conclusion that the exparte judgment was result of an improper order of holding the service good.

The trial Court has failed to appreciate the facts on record that the bailiff has not fulfilled the requirements of **Order V Rule 20 CPC** in effecting service through pasting at the address of the respondents. Once Court has ordered service of summons through pasting and found that the bailiff of the Court has not done it in accordance with the requirement of law then either the Court should have issued fresh order for service through pasting or the Court should have taken one step ahead that is to say service by way of publication. The service in terms of **Order V Rule 20 CPC** is mandatory and indicative of fact that possibility of fraud and misrepresentation in showing service of summons on respondents should be properly examined by the Court. That is why if even service through TCS is affected and parties do not come forward, the Court is supposed to go to second step of effecting service through pasting instead of holding service good through TCS or by way of sending summons through Registered post A/D. The very fact that the pasting was not proper is enough to appreciate that notices were not properly delivered to the respondents. The postal authorities or TCS authorities were not called upon to verify that whether the notices have been delivered to the right person at the right address. Be that as it may, the dissatisfaction of the appellate Court to the method and manner in which the service was held good by the trial Court is unexceptionable. Therefore, the order of the appellate Court was not reviewable merely on the ground that through registered A/D and TCS notices have been served on the respondents.

8. Another aspect of the case is that the learned counsel for the applicant himself has contended that after institution of the suit, the Respondents/defendants have approached the applicant and even paid a sum of **Rs.500,000/-** through cheques but they have chosen

not to come to the Court and, therefore, it cannot be said that the Respondents were unaware of the proceedings in which *exparte* decree has been passed against them. He contended that he himself as applicant has mentioned this fact in his affidavit in *exparte* proof. The perusal of para-19 of affidavit-in-evidence shows that through Darogha Iqbal Rs.5,00,000/- was paid but the applicant has not amended the plaint and the trial Court has not erred only in holding service good in violation of requirement of **Order V Rule 20 CPC**, but the judgment of trial Court was also contrary to evidence on record as it was **“decree as prayed”**. This was another example of lack of application of judicial mind by the trial Court. However, I have noticed that in the judgment and the decree correction has been made in the handwriting of Court staff without any order of correction by the Court. Without scoring of OR deleting the words “as prayed” from the judgment Court staff has inserted in affidavit-in-*exparte* proof of Rs.15,00,000/-. There is no signature of Presiding Officer of Court on the judgment. This suit was decreed as prayed it is not supposed to be **decree as prayed in affidavit-in-*exparte* proof of Rs.15,00,000/-**. The plaint should have been amended before it was decreed for a sum other than it was prayed.

9. In view of the above facts and discussion, this Revision Application is dismissed with no order as to cost. However, the applicant is directed that before proceeding further in the trial Court he should file amended plaint. After amendment in plaint, the respondent will also be allowed to file amended written statement and trial Court should proceed in accordance with law after recording proper evidence and decide the suit in accordance with law.

JUDGE

No.2608/2011, FIR No.471/2011 under Section 420/489-F PPC, PS North Nazimabad, Karachi before XIth J.M. Karachi (Central) and the Respondent No.1 himself alongwith other persons namely Shahid and Abdul Waheed was facing trial in Criminal Case No.2689/2011, FIR No.223/2011 under Section 506-B/34 PPC, P.S. Supermarket, Liaquatabad, Karachi. The Respondent No.1 was also Complainant in FIR No.213/2011 under Section 381/420/34 PPC against Asad and Zahid. A civil suit was also pending against Respondents which was filed by Asad for recovery of money and after consulting a notice was sent by the Applicant to the opponents of the Respondents namely Zahid and Asad.

Criminal Case under Section 489-F/420 PPC was hotly contested, resultantly, the trial Court acquitted the Respondents No.3 and 4 vide judgment dated **21.05.2013**. It is further the case of the applicant that applicant as per instruction of Respondent No.1, filed acquittal appeal No.82/2013 before this Court, which was admitted and fixed for appearance of Asad, Zahid and Respondent No.1. After acquittal of Respondents No.3 & 4, the son of Respondent No.2, namely Rameez was kidnapped for ransom and Respondent No.1 filed FIR No.282/2013 against Asad and Zahid & their Associates but they released Rameez after 10 days on receipt of Rs.13,00,000/-. The applicant also provided legal assistance at every step and sent several applications and also filed his Vakalatnama before ATC-II Karachi and appeared on several dates. The said Asad and Zahid filed Pre-Arrest Bail Application No.880/2013, which was contested and the same was dismissed vide order dated **26.08.2013**. The said Zahid and Asad also filed pre-arrest bail Application No.1034/2013, which is still pending before this Court. During this period, the Respondents did not pay professional fee of lower court and paid only Rs.13,00,000/- leaving the balance of Rs.200,000/- and also professional fee of bail application No.880/2013. During this period, it was made clear to all the Respondents that they have to pay Rs.500,000/-for each case pending before this Court and ATC-II, Karachi. All the Respondents agreed and promised to pay the same and the responsibility was taken by Darogha Iqbal by saying that respondents are facing financial problems.