IN THE HIGH COURT OF SINDH, CIRCUIT COURT
H Y D E R A B A D

Civil Revision Application No.190 of 2018

Applicant:	*Muhammad Bachal S/o Muhammad Soomar Through Mr. Roshan Ali Azaeem Mallah, Advocate for whom Mr. Mumtaz Sachal Awan, Advocate held brief.*
Respondent No.2	*Ghulam Mustafa Dahri S/o Haji Shahzado through Mr. Waseem Hussain Jafri, Advocate*
The State:	*Mr. Wali Muhammad Jamari Assistant A.G Sindh.*

Date of hearing: 22.03.2019
Date of judgment: 22.03.2019

J U D G M E N T

KHADIM HUSSAIN TUNIO, J.- This order will disposed of the captioned Civil Revision Application filed by applicant Muhammad Bachal against the respondent being aggrieved and dissatisfied with the order dated 07.08.2018 passed by the learned IXth Additional District Judge, Hyderabad, whereby an application under Section 12(2) CPC filed in Summary Suit No.46 of 2016 (Re: Ghulam Mustafa v. Muhammad Bachal) for setting aside exparte judgment dated 13.03.2017 and Decree dated 18.03.2017, was dismissed.

2. Precisely, the facts of the instant application are that the respondent No.2 filed Summary Suit No.46 of 2016 in the District Court, Hyderabad, which was transferred to the Court of IXth Additional District Judge, Hyderabad, alleging therein that applicant / defendant had received an amount of Rs.20,00,000/-

(Rupees Twenty Lacs) from him in the month of May, 2015 and promised to return the same amount within six months or on demand. After expiry of six months, the respondent / plaintiff made request to the applicant / defendant for return the said amount, on which, the applicant / defendant issued three postdated cheques i.e. (i) Cheque No.1576433891 dated 12.01.2016 for Rs.500,000/- (ii) Cheque No.1576433892 dated 02.02.2016 for Rs.500,000/- and (iii) Cheque No.1576433893 dated 25.02.2016 for Rs.10,00,000/- of Muslim Bank Limited (MCB), Qasimabad Branch, Hyderabad. It is further alleged that the respondent / plaintiff presented the same cheques before the concerned bank, which were dishonoured with an endorsement of insufficient funds. Thereafter, respondent / plaintiff approached the applicant / defendant and apprised him regarding dishonouring of the cheques but the applicant / defendant kept him on hollow hopes, therefore, the respondent / plaintiff filed suit under Order XXXVII of CPC for recovery of Rs.20,00,000/- with 30% markup on the principal amount.

3. Summons were issued to the applicant / defendant, which returned un-served, therefore, the applicant / defendant was ordered to be served by substitute served by way of publication in daily “*Kawish*” Hyderabad.

4. After hearing the respondent / plaintiff’s Counsel the suit was decreed exparte vide judgment dated 13.03.2017 and decree dated 18.03.2017. Subsequently, the applicant / defendant on coming to know about the decree of the suit in the month of

April 2017 through his friend, he obtained copy of judgment and decree and filed an application under Section 12(2) CPC for setting aside *exparte* judgment and decree on the ground that the respondent / plaintiff has deliberately and willfully mentioned his wrong and incorrect residence, therefore, not a single summon was served upon him. On notice, respondent / plaintiff directly argued the matter instead of filing the objections to the application under Section 12(2) CPC. However, such application was dismissed by the trial Court through the impugned order, hence, this revision application.

5. Learned Counsel for the applicant has mainly contended that the impugned order is illegal and opposed by law and facts; that the judgment and decree have been passed by way of fraud and misrepresentation; that incorrect address of the applicant / defendant has been shown in the memo of plaint of the suit; that the applicant / defendant is resident of Ward No.2, Muhallah Chawhan Colony, Moro District Nausherhro Feroze and is not residing at the address mentioned by the respondent / plaintiff in the title of the suit; that the applicant / defendant subsequently came to know about the impugned judgment and decree through bank authorities; that the residential address of the applicant / defendant is A/45 but the respondent / plaintiff has intentionally mentioned the address as A/15; that the trial Court has not issued the summons to the applicant / defendant on the prescribed Form-IV Appendix “B” of CPC; that the summons were not issued by the trial Court to the applicant / defendant through

registered post A.D as required under Order V Rule 10-A CPC. Learned Counsel for the applicant further submits that the learned trial Court has failed to direct the respondent / plaintiff to furnish fresh address of the applicant / defendant for return of summons dated 28.09.2016 issued by the date of hearing viz. 10.10.2016 with endorsement of the process server / bailiff that one person namely Aftab came out from the house, who verbally disclosed that they are residing in the house and the person (applicant / defendant) of such name is not residing in the said house. Learned Counsel for the applicant further submits that the summons issued to the applicant / defendant for 05.09.2016 and 27.08.2016 returned with endorsement of Bailiff namely Muhammad Qasim that he on different dates i.e. 29.08.2016 and 03.09.2016 at different times proceeded to Naseem Apartment, Block-A and inquired / searched Flat No.A/15, 2nd Floor, he knocked the door and inquired from a boy, who came out of the said flat, apprised him about notice, on which he disclosed that they are tenants and Jamalis are owners of the said house. The said boy futher disclosed that they do not know the person, in whose name summons were issued. On inquiry, the Chowkidar of the area disclosed that he also do not know the applicant / defendant. The learned trial Court instead of order for pasting copy of notice at conspicuous place i.e. outer door of the house of the applicant / defendant in presence of two witnesses directly ordered for substitute service by way of publication in daily "*Kawish*", Hyderabad in its issue dated 20.10.2016, therefore, he prays that the impugned order may be set aside.

6. Conversely, learned Counsel for the respondent / plaintiff has vehemently opposed the revision application while arguing that summons were issued to the applicant / defendant through all modes including publication; that the judgment and decree have not been obtained by way of fraud and misrepresentation from the trial Court; that the judgment and decree have been passed by the trial Court within its jurisdiction; that no case is made out by the applicant / defendant for setting aside the exparte judgment and decree; that the applicant / defendant was well aware about pendency of the suit as well as grant of decree in favour of the respondent / plaintiff, therefore, this revision application merits no consideration, the same may be dismissed.

7. I have given due consideration to the arguments advanced by the learned Counsel for the respective parties and have gone through the material available on the record.

8. At the outset, I would like to add that vitality of the proper service/due service in Civil Administration of Justice can, never, be denied as satisfaction of the Court about proper service / due service upon a defendant may not only, legally, result in debarring him from his right of audience / hearing but may also result in presuming the claim of the plaintiff as unchallenged / un-rebutted. This has been the reason that a complete Chapter has been provided in the Code through which the Court, before proceeding further, must satisfy itself about proper service/due service upon the addressee (defendant). In

absence of reasons, proving the service to be duly served it would never be safe to proceed further thereby determining rights of the defendant at his back as same is, otherwise, negation to guarantee, provided by Article 10-A of the Constitution. Therefore, all the Court(s) before proceeding further would be required to detail reason of their being satisfied of due service upon the defendants and a mere mechanical order of service held good alone would never be sufficient to believe due / proper service.

9. Now, I would revert to merits of the case. From the perusal of record, it contemplates that the respondent / plaintiff had filed suit for recovery of Rs.20,00,000/- under Order 37 of CPC on 22.08.2016. It further shows that summons were ordered to be issued against the applicant / defendant for the dates of hearings i.e. 05.09.2016, 10.10.2016, 24.10.2016, 05.12.2016, 19.12.2016, 16.01.2017, 01.02.2017 and 16.02.2017, which returned un-served with an endorsement of the concerned bailiff to the extent that he, on different dates viz. 29.08.2016 and 03.09.2016 at different times, proceeded to Naseem Apartment, Block-A and inquired Flat No.A/15, 2nd Floor. He further endorsed that he knocked the door on which a boy came out of the flat, apprised him about notice, on which he disclosed that they are tenants and Jamalis are owners of the said house. He further disclosed that they do not know the person (applicant / defendant) in whose name summons were issued. On further inquiry of the Bailiff, one Chowkidar of the area disclosed that he also does not know the applicant / defendant. Since, the provision of Order V of

the *Code* places much emphasis on 'personal service' upon defendant himself *or* his agent which legally cannot be believed to be done if the 'address' of the defendant is incorrect / wrong. When endorsement of bailiff as well *inquiry* , conducted by him, *prima facie* suggest that address, given for service upon defendant, is not correct then it shall always be requirement of law and procedure to ask for correct address or 'second address'. Failure in this regard may result in taking away the otherwise guaranteed right of hearing / participation. In the case of *Muhammad Younis & 4 others v. Addl. District Judge & 2 others* 2006 MLD 963 it is observed as:-

> "7. At the very outset, it is observed that the learned trial Court directed the plaintiff / decree holder to file correct addresses of the defendants on 27.5.1981. It was not complied with. Compliance was required by order dated 24.6.1981, 25.7.1981, 27.9.1981 and 28.10.1981, but to no avail. The plaintiff contumaciously failed in compliance. In absence of correct addresses of the defendants issuance of summons / notices on correct addrersses in the first instance was not possible."

10. Be that as it may, perusal of record further shows that respondent / plaintiff had shown the address of the applicant / defendant in title of the suit as *"Muhammad Bachal S/o Muhammad Soomar, Muslim, Adult, resident of Flat No.A-45, 4th Floor, Naseem Apartment, Phase-I Qasimabad, Hyderabad."* Whereas, the applicant / defendant has mentioned his address in the memo of application filed by him under Section 12(2) of CPC as *"Muhammad Bachal, Muslim, Adult, resident of Ward No.2, Muhallah Chawhan Colony, Moro, Naushahro Feroze".* It further contemplates that the Affidavit filed by the applicant / defendant in

support of his application under Section 12(2) CPC has not been controverted by the respondent / plaintiff by way of filing Counter Affidavit, which clearly shows the admission itself of the facts mentioned in the application under Section 12(2) CPC and Affidavit filed in its support. It also appears from the record that the applicant / defendant was not served with the summons through ordinary mode and summons have also not been issued through A.D Registered Post, which is violation of mandatory provision of Order V Rule 10-A CPC. Further, the learned trial Court has not complied with the provisions of Order V Rule 18 of CPC for ordering the substitute service by way of publication against the applicant / defendant. In the case of Muhammad Younis (supra), it has further been held as:-

> "8. Order V, rule 20 C.P.C. provides for substituted service. Such a service in disregard ot the provision of Order V, rule 20 C.P.C. has been considered to be nullity in the eyes of law. Reliance can be had to …

11. In another case of ***Muhammad Zaman v. Muhammad Jamil & 4 others*** **1992 CLC 873 (Rel.P-877)** it is held as under:-

> "On close examination of the affidavit filed in support of application filed under Order V, rule 20, C.P.C. it can be seen that nowhere in the Affidavit it has been stated that the Applicant, who was the Defendant in the suit, could not be served through the ordinary mode of service. The Bailiff's report incorporated in the order sheet dated 26.5.1988 clearly shows that the Applicant had gone to Jhelum while all along in the address for summons, he has been shown to be resident of Karachi. The Trial Judge also did not give any reason to show that he was satisfied that the Applicant could not be served by the ordinary methods to allow such an application".

12. From above discussion and referral to record, it is quite evident that 'correct address' of the applicant / defendant was not brought on record hence question of 'due service' never arose; failure of learned trial Court in properly attending the report / endorsement of the Bailiff also made it (*trial Court)* to proceed further instead of ordering for supply of correct address. In the case of ***Atiqur Rehman v. Novell Data System Pakistan (Pvt.) Ltd.*** **2009 YLR 432** it has been held that:-

> "7. ….It is established from the record that no notice on correct address of the applicant / defendant No.2 was ever issued and service was not held good. Further, the plaintiff failed to get the notices issued on the address as mentioned in the affidavit-in-rejoinder to the counter-affidavit filed by the plaintiff, wherein the applicant clearly mentioned that he is residing at "306-Sharfabad, Bahadur Shah Zafar Road, Karachi"
>
> 9. …
>
> In the case of Ahmed Khan v. Haji Muhammad Qassim and others (2002 SCMR 664), ex parte decree was set-aside on the ground that defendant was condemned unheard as he did not reside at the address given in the plaint when the summonses were issued and that there was no proof of the fact that the trial Court took serious steps to effect personal service of the defendant before order for publication of notice in press was passed".

13. The above grounds are sufficient for setting aside impugned order but while perusing the record another *legal* aspect (though not involved) came on surface which, being legal, would be touched. It further reveals from the record that summons as issued by the trial Court to the applicant / defendant were not on the prescribed Form-IV of Appendix "B" of the Civil Procedure

Code. For the sake of convenience, it would be proper to reproduce the said prescribed form, which reads as under:-

> "(Name, description and place of residence)
>
> WHEREAS, ----has instituted a suit against you under Order XXXVII of the Code of Civil Procedure, 1908, for Rs.----- balance of principle and interest due to him as the ----- of a ----of which a copy is hereto annexed, you are hereby summoned to obtain leave from the Court within ten days from the service hereof to appear and defend the suit, and within such time to cause an appearance to be entered for you. In default whereof the plaintiff will be entitled at any time after the expiration of such ten days to obtain a decree for any sum not exceeding the sum of Rs.-----and the sum of Rs.-----for costs (together with such interest, if any, from the date of the institution of the suit as the Court may order).
>
> Leave to appear may be obtained on an application to the Court supported by affidavit or declaration showing that there is a defence to the suit on the merits, or that it is reasonable that you should be allowed to appear in the suit.
> Given under my hand and seal of the Court, this ----day of ----2019.
>
> Judge"

14. It further shows that the trial Court issued summons to the applicant / defendant for the dates viz. (i) 05.09.2016 (ii) 10.10.2016 (iii) 24.10.2016 (iv) 05.12.2016 (v) 19.12.2016 (vi) 16.01.2017 (vii) 01.02.2017 and (viii) 16.02.2017. Perusal of summons, it appears that the same were not issued by the trial Court as per the prescribed format (*supra*). One of the aforesaid summons i.e. the very first summon dated 05.12.2016 is reproduced hereunder:-

NOTICE ***Original/Copy/A.D/Courier***

OFFICE OF THE 9TH ADDITONAL DISTRICT JUDGE, HYDERABAD.
Summary Suit No.46/2016

Ghulam Mustafa Dahri S/o Haji Shahzado,
R/o House No.4, Tando Mai Mahan,
Defence Phase-I, Hyderabad. …… Plaintiff.

VERSUS

Muhammad Bachal S/o Muhammad Soomar Mallah
R/o Flat No.A-45, 4th Floor Naseem Apartment,
Phase-I, Qasimabad, Hyderabad. ..... Defendant.

To,

The Above named Defendant.

Whereas, the above named Plaintiff has filed Summary Suit for Recovery of Rs.20,00,000.00 U/S 37 Rule CPC against you, which is fixed for heairng on **05/12/2016 at 08:30 AM.** Before this Court.

You are, therefore, hereby required to appear before this Court on **05.12.2016 at 08:30 A.M.** personally or through your Advocate or any one else duly authorized by law and file Objections, if any, in case of making default the matter will be heard and decided in your absence according to law.

Given under my hand and seal of the Court this 30th day of November, 2016.

By……Order

Bailiff is required to paste the instant
notice on the outer door of the respondent
in presence of two witnesses in case of
un-served.

R E A D E R
9TH Additional District Judge Hyderabad

15. Therefore, in presence of the above irregularities, the exparte order dated 07.08.2018 has been passed illegally and malafidely by the trial Court and the applicant / defendant has

been precluded from joining the proceedings before the trial Court in order to contest the suit by filing his application under Order XXXVII Rule 3 of CPC for grant of leave to defend the suit. It is one of the cardinal principles that so long as substantial justice can be done and there is no serious technical or legal impediment, the decision of controversies on merits stands as a much higher level than the disposal on the basis of legal technicalities and technical bars. I am fortified in the view with the principle laid down in case of ***Master Moosa Khan and 03 others v. Abdul Haque and another (1993 SCMR 1304).***

16. In case of ***Yousaf Ali v. Muhammad Aslam Zia (PLD 1958 S.C 104)*** it has been held that if on the basis of a void order subsequent orders have been passed either by the same authority or by other authorities the whole series of such orders, together with the superstructure of rights and obligations built upon them, must, unless some statute or principle of law recognizing as legal the changed position of the parties is in operation, fall to the ground because such orders have as little legal foundation as the void order on which they are founded". This principle was reiterated by the Supreme Court in the case of ***Mansab Ali v. Amir & 03 others (PLD 1971 S.C 124 at 127),*** which reads as under:-

> "It is an elementary principle that; if a mandatory condition for the exercise of jurisdiction by a court, Tribunal or Authority is not fulfilled, then the entire proceedings which follow become illegal and suffers from want of jurisdiction, any order passed in continuation of these proceedings in appeal or revision equally suffers from illegality and is without jurisdiction".

17. It is settled law that justice should be done on merits rather than technicalities as well as no one should be condemned unheard. Since the summons were not issued to the applicant / defendant by the trial Court on the correct address as well as on the prescribed Form IV of Appendix “B” of Civil Procedure Code and so also through registered acknowledgement receipt in compliance of Order V Rule 10-A of CPC, which is mandatory in nature, and summons were not affixed on the conspicuous place of the house of the applicant / defendant as required under Order V Rule 18 CPC and that the Affidavit of the applicant has not been controverted by the respondent / plaintiff by filing counter affidavit, which amounts to admission of the averments made in the affidavit application.

18. In view of what has been discussed herein above, this Revision Application was allowed and the impugned order dated 07.08.2018 was set aside. The matter was remanded back to the learned trial Court to allow the respondent / plaintiff to file objections to the application filed by the applicant / defendant under Section 12(2) of CPC, if he intends so, frame the issues factual as well as on legal aspects of the case on the pleadings of the parties, record evidence of the parties and pass the order afresh fully in accordance with law after providing full opportunity of heairng to the parties. These are the reasons for short order dated 22.03.2019.

JUDGE

Shahid