

# IN THE HIGH COURT OF SINDH AT KARACHI

Present: **Mohammad Ali Mazhar** and **Agha Faisal, JJ.**

CP D 7483 of 2015 : Siraj ul Haq vs.  
Mazharuddin & Others

For the Petitioner : Mr. Muhammed Umer Lakhani  
Advocate

For the Respondent : Mr. Mirza Moazzam Baig  
Advocate

Dates of Hearing : 03.04.2019, 17.04.2019  
& 15.05.2019

Date of Announcement : 31.05.2019

## JUDGMENT

**Agha Faisal, J:** The present petition was filed assailing the judgment dated 11.11.2015 (“**Impugned Order**”) delivered by the Court of the learned Additional District and Sessions Judge-VIII, Karachi-East, in Civil Revision 69 of 2015 (“**Civil Revision**”). It is borne from the record that Suit 777 of 2013 (“**Suit**”) was filed before the Court of learned IVth Senior Civil Judge Karachi-East by the respondent No.1 against the petitioner and the respondent No.2 herein. The said Suit was decided vide judgment and decree dated 25.02.2014 (“**Judgment**”) in favour of the plaintiff therein, being the present respondent No.1. The petitioner filed an application under Section 12(2) CPC assailing the Judgment and the same was dismissed vide order dated 14.07.2015 (“**12(2) Order**”). The record demonstrates that no appeal was filed against the Judgment and decree, however, the present petition was filed against the Impugned Order, wherein the revision filed by the petitioner in respect of 12(2) Order was dismissed.

2. Mr. Muhammed Umer Lakhani, advocate appeared on behalf of the petitioner and submitted that the Impugned Judgment was delivered ex-parte and the same was challenged by the petitioner vide a Section 12(2) CPC application, which was dismissed without proper appreciation of the facts. Learned counsel submitted that no notice of the Suit was ever received by the petitioner hence the Judgment was delivered while

depriving the petitioner of the right to defend himself and this fact was not appreciated by the learned trial court. Per learned counsel, the revisionary court also failed to appreciate that the contentions of the petitioner in their appropriate perspective, hence, the Impugned Order compounded the infirmities that were alleged to be apparent from the order / judgment rendered there before. It was thus argued that the Impugned Order, 12(2) Order and the Judgment have been delivered in violation of the law and ought to be set aside.

3. Mr. Mirza Moazzam Baig, advocate on behalf of the respondent No.1 controverted the arguments advanced on behalf of the petitioner. Learned counsel sought to demonstrate from the record that the proceedings in the Suit were in the knowledge of the petitioner and that he opted to ignore the said proceedings and that his subsequent actions are intended purely to subvert the due process of the law. Learned counsel painstakingly guided the Court through the reasoning and rationale employed by the learned judges in the respective orders, under surveillance in this petition, in order to demonstrate that the conclusions arrived at were duly supported by the facts and circumstances and were delivered within the confines of the law. It was, therefore, prayed that the present petition may be dismissed forthwith.

4. We have considered the arguments advanced by the respective learned counsel and have also perused the record arrayed before us. The entire premise of the petitioner appears to be that he had no knowledge of the Suit, hence, the Judgment and all the orders that followed were without the sanction of the law. It is thus considered appropriate that the deliberation herein may be confined to said issue.

5. The Judgment clearly addresses the issue of service and the pertinent observation of the learned Judge is reproduced herein below:

“After registration of the suit process issued to the defendant, through bailiff, courier service, by way of pasting and lastly through publication vide daily newspaper “Express” dated 19.09.2013, but in spite the knowledge defendants deliberately avoided to appear before the court, therefore this court having founded no other way hold the service good upon the defendants vide order dated 11.10.2013 again chance provided for filing written statement, but they failed to file the same, resultantly they were debarred from filing the written statement and this court also ordered to proceed this

case exparte against the defendants vide order dated 11.11.2013.”

It is clearly manifest from the aforesaid that the learned trial judge took every possible step to effect service upon the petitioner. It is imperative to record at this juncture that the address of the petitioner filed in the Suit, as apparent from the title page of the Judgment, is exactly the same that has been represented by the petitioner in the memorandum of the present petition. We have also noted from the record filed before us, a copy of the report filed by the bailiff of the learned trial court wherein it has been stated that the notice sent to the address of the petitioner was refused to be accepted. The Judgment further went on to delve into the merits of the case and after examination of the evidence decreed the Suit.

6. The petitioner did not file any appeal against the Judgment (dated 25.02.2014) within the statutory period of limitation or at any time thereafter, despite claiming to have come into the knowledge of the same on 10.04.2014. Alternatively, the petitioner preferred an application under Section 12(2), CPC, which was decided vide 12(2) Order. It is considered appropriate to reproduce the relevant content thereof:

“On the other hand learned counsel for the plaintiff stated that address of defendant No.1 is not disputed. The notice sent through perfect express courier No.0009980424 dated 11.07.2013 sent to defendant No.1 was refused by the defendant No.1 as per report of courier service. The bailiff report dated 15.07.2013 reveals that the brother of defendant No.1 refused to receive the notice and stated that the defendant No.1 has gone to interior Sindh. The notice sent to defendant No.1 through perfect express courier with No.0009981287 dated 20.07.2013 reveals that the defendant No.1 refused to receive the notice vide report of courier. The pasting was made and ultimately the publication was also made for service upon the defendant No.1. Hence the service upon defendant No.1 was held good vide order dated 11.02.2013 and the matter was fixed for filing written statement. The defendant No.1 failed to file written statement hence he was debarred from filing written statement vide order dated 11.11.2013. The plaintiff filed affidavit in ex parte proof on 11.12.2013. He produced his documents on 19.12.2013 and the ex parte judgment passed on 25.02.2014. The defendant No.1 being complainant in criminal case No.02/2013 was attending the court of learned Judicial Magistrate VII<sup>th</sup> East Karachi, he personally

submitted an application on 05.10.2013 before learned court of Judicial Magistrate VII<sup>th</sup> Karachi East and specifically stated about the pendency of suit No.777/2013. The defendant No.1 was personally aware having knowledge regarding pendency of this suit filed by him. The defendant No.1 being complainant in criminal case No.02/2013 under section 489-F/420 PPC of police station Al-Falah while facing cross-examination on 10.02.2014, was suggested regarding the pendency of the civil suit for cancellation of cheque. The defendant No.1 was in knowledge of the present case and he was avoiding the service of notice upon him hence the application under consideration is not maintainable and liable to be dismissed. He placed his reliance on 2012 YLR 1891, 2000 CLJ 61, 1987 CLC 1120, PLJ 2000 Peshawar 319, 2000 YLR 2482, 2001 SCMR 46, 2003 SCMR 1050 & 1991 CLC 329.

I have heard both the parties at length and perused the record minutely. The several notices were issued by the trial court which were returned, summons were not received by brother of defendant No.1 and due to non-service, the mode of substituted service provided in order V rule 20 of the CPC was adopted. The record showed that the summons was affixed on the outer door of the house of the defendant No.1 which was in his possession and the publication was made in newspaper the defendant No.1 was in knowledge of the proceedings but failed to appear and contest the proceedings therefore there was no illegality in the proceedings. The reliance is placed on 2012 YLR 1891. Exparte order would be unquestionable when filing of suit and its pendency was well within knowledge of defendant through notice affixed on door of his house. The reliance is placed on 2000 CLJ 61. The summon proved to be duly served on absentee defendant no.1 through publication in newspaper. The order for exparte proceedings passed by this court was in accordance with order IX rule VI (i)(a) CPC. The reliance is placed on 1987 CLC 1120.

In the circumstances mentioned above, it is crystal clear that the defendant No.1 was in knowledge about the pendency of this case but he was avoiding service and to contest the case. The defendant No.1 has therefore failed to make out a case to set aside the judgment dated 25.02.2014 under section 12(2) CPC. The application under consideration is therefore not maintainable and dismissed with no order as to costs.”

7. The 12(2) Order was assailed by the petitioner in Civil Revision which was determined by the learned revisionary court vide Impugned Order. The Impugned Order considered the pleas raised extensively and after adverting to the law settled by the superior Courts in such regard was pleased to dismiss the Civil Revision filed by the petitioner. It may be pertinent to reproduce the relevant findings herein below:

“11. From the above paragraph of the impugned order it appears that the same contained the complete scene of the procedure adopted by learned trial Court for the purpose of the service of Court summons on the applicant who was defendant in said civil suit. In such paragraphs, learned trial Court has mentioned that summons issued by the Court were sent but not received by the brother of the applicant thereafter, the same were again sent with pasting direction and bailiff complied the same, also publication was made in daily newspaper in compliance of order 5 rule 20 of CPC. Applicant was well in knowledge but he did not appear and contest the proceedings therefore he was declared ex parte. In support of such view, learned trial Court relied on several citations of Hon'ble apex Courts.

12. In order to appreciate the findings of learned trial Court, it would be appropriate to refer here the R&Ps position. From the perusal of the R&Ps it appears that after admitting the suit of the respondent No.1, learned trial Court summoned the defendants/applicant. From perusal of the endorsement of bailiff on the reverse of summons it appears that bailiff went to the given address, which is undisputed one, where he could not find the applicant while brother of the applicant refused to receive the Court summons. It further appears from the Court record that ..... there was refusal from the applicant side for receiving the Court summons therefore, the same were returned by the courier of the company with his remarks “refused”. This means that courier service result sheet is strong substance in support of the bailiff endorsement that applicant side refused to receive the Court summons. It further appears from the R&Ps that not only this, learned trial Court also got the copy of summons pasted on the given address of the applicant, which is an undisputed. It further appears from the said R&Ps that learned trial Court also adopted the procedure provided in order 5 rule 20 of CPC by publication of Court summons being substitute way of service. This position of the record reflects that after adopting complete legal procedure, learned trial Court further proceeded in the matter. This means that the allegations regarding passing of ex parte judgment in hasty manner against the learned trial Court are nothing but false finds no merit for the reason that proper opportunity was provided and that took time thereafter, learned trial Court proceeded further in the matter.

13. Arguments advanced by learned counsel for the respondent No.1 and record referred by him in support of such arguments shows that same parties were also involved in criminal litigations before the Court of learned 7<sup>th</sup> Judicial Magistrate, Karachi, East wherein applicant was cross examined by learned counsel for the accused who is respondent No.1 in this civil revision. Learned counsel has referred the said cross examination and annexed copy of the same with his counter affidavit perusal of which reveals that during such cross, there is suggestion from the

accused/respondent No.1 side regarding pendency of civil suit which the applicant/complainant denied. This means that matter of civil suit was properly brought to the knowledge of the applicant much prior to passing of ex parte judgment but he did not bother to contest the same for decision on merit.

.....

14. So far as the objection regarding non-framing of issue for deciding the application under section 12(2) of CPC is concerned, suffice to mention here that such objections merits no consideration for want of legal resistance and such view finds support of case law of full bench of Hon'ble supreme Court reported in 2000 SCMR 46 regarding Nazir Ahmed V/s Muhammad Sharif and others wherein Hon'ble Supreme Court of Pakistan full bench has made it clear that Court is not under obligation in every case to frame issue, record evidence of the parties and follow the procedure prescribed for decision in a suit. Matter is left to the satisfaction of the Court which has to regulate the proceedings and keeping in view the nature of the allegations in the application, the Court may in its discretion adopt any mode for its disposal. This observation of Hon'ble Supreme Court is strong favour to this Court instant view, accordingly, objection of learned counsel for the applicant in such respect has become infructuous.

15. Since, the above discussion makes it clear that once learned trial Court had adopted complete legal procedure for serving the defendant including the applicant with Court summons through different modes provided in law and later, matter was properly brought to the knowledge of the applicant with further initiative on the part of learned counsel for the respondent No.1 in cross examination of the applicant in connection with criminal case prior to ex parte judgment, therefore, there is not question of fraud or misrepresentation on the part of the respondent No.1 against the applicant.....

16. For the above discussion, this Court is of the opinion that impugned order passed by the learned trial Court does not suffer from any illegality or irregularity, therefore, the same including the ex parte judgment dated 25.02.2014 stands maintained. This civil revision failed which is accordingly dismissed without order as to cost.”

8. The learned counsel for the respondent also drew the Court's attention to an application that has been filed in Criminal Case 02 of 2013, then pending between the petitioner and the respondent No.1, wherein disclosure was made of the Suit. Learned counsel sought to demonstrate from the said application that the proceedings in the Suit were in the knowledge of the petitioner and further that the existence of the Suit was also specifically recorded during the cross examination of the petitioner in the said proceedings. Learned counsel for the petitioner

admitted the aforesaid, however, stated that while the suit number was in the knowledge of the petitioner, the respondent No.1 failed to disclose as to what court the said proceedings were pending in.

9. It is gleaned from record that the learned trial Court duly exercised discretion vested therein and decided the Suit. No justification has been placed before us for the failure of the petitioner to file an appeal against the Judgment. The learned counsel for the petitioner has been unable to demonstrate any infirmity with respect to the Judgment and / or the 12(2) Order, which appear to have been rendered upon due appreciation of the facts and the law. The issue came before the learned revisionary Court and an exhaustive order was passed upholding the conclusion arrived at by the learned trial Court. The ambit of the learned revisionary Court is circumscribed to the prescription of Section 115 CPC and a bare perusal of the Impugned Order demonstrates that the same has been rendered within the four corners of the provision enabling such jurisdiction. It has been held in the case of *Asif Rafique vs. Mst. Quratullain & Others*, reported as 2016 MLD 425, that the exercise of Constitutional jurisdiction in such matters was only warranted in rare circumstances if the findings recorded by the Courts below are arbitrary and suffering from the vice of misreading or non-reading of evidence. In this matter, it is the considered view of this Court that the findings of the learned revisionary Court suffer from no such infirmity and that the petitioner has failed to plead any rare circumstance, which would attract the jurisdiction of this Court.

10. In view of the reasoning and rational contained hereinabove we observe that no case has been made out by the petitioner and that no interference is merited in the Impugned Order, which is hereby maintained and upheld. The petition, along with listed applications, is hereby dismissed with no order as to costs.

JUDGE

JUDGE