

Form No. HCJD/C-121
ORDER SHEET

**LAHORE HIGH COURT,
RAWALPINDI BENCH, RAWALPINDI.
JUDICIAL DEPARTMENT**

W.P.No.4158 of 2023

MUHAMMAD AURANGZEB, ETC. *Versus* **LEARNED ADDL. DISTRICT JUDGE, ETC.**

S.No.of order / Proceeding	Date of Order/ Proceeding	Order with signature of Judge, and that of parties counsel, where necessary
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13.12.2023 Ms. Shahida Tanveer, Advocate for the petitioners.

The petitioners instituted a suit for declaration, specific performance and injunction against respondents No.3 and 4 (hereinafter referred to as “respondents”) before the learned Civil Judge Class-I, Rawalpindi. On account of their absence, the “respondents” were proceeded against ex-parte vide order dated 7th February, 2020 and ultimately suit was decreed as such vide judgment dated 5th July, 2021. An application under section 12 (2) of the Code of Civil Procedure (V of 1908) (hereinafter referred to as “CPC”) was moved by the “respondents” seeking annulment of the decree, which was though resisted by the petitioners but it was accepted vide order dated 7th July, 2023. Feeling aggrieved, the petitioners filed revision petition before the learned Additional District Judge but of no avail as the same was dismissed through order dated 14th October, 2023, hence this petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973.

2. *Learned counsel for the petitioners contended that the “respondents” since did not appear despite publication, so trial Court had rightly proceeded against them ex-parte. She added that ex-parte decree was though passed after observing all the codal formalities but it is*

annulled on the application of “respondents” without assigning any lawful reasoning. Learned counsel maintained that even the revisional Court did not take into consideration the material irregularity committed by the trial Court and affirmed the order in a mechanical manner.

3. *Heard. Record perused.*

4. *Suit was instituted by the petitioners mentioning that the “respondents” are residents of Nai Abadi Thokal, Mirpur, Azad Kashmir. It appears that initially for procuring the attendance of the “respondents”, trial Court directed the issuance of process but summons could not be issued due to non-deposit of process fee by the petitioners. Instead of proceeding against the petitioners on account of their failure to deposit the process fee, the trial Court opted to issue proclamation in the newspaper.*

5. *Order V “CPC” relates to issuance and service of summons. Ex-parte proceedings were ordered against the “respondent” while resorting to the mode of substituted service through publication in newspaper. Order V Rule 20 “CPC” prescribes the mode of substituted service, which is reproduced below for ready reference and convenience :-*

“20. Substituted service.--(l) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order for service of the summons by-

(a) affixing a copy of the summons at some conspicuous part of the house, if any, in which the defendant is known to have last resided or carried on business or personally worked for gain; or (b) any electronic device of communication which may include telegram, telephone, phonogram, telex, fax, radio and television; or (c) urgent mail service or public courier services; or (d) beat of drum in the locality where the defendant resides; or (e) publication in press; or (f) any other manner or mode as it may think fit;

Provided that the Court may order the use of all or any of the aforesaid manners and modes of service simultaneously.

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Effect of substituted service.-- (2) Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally.

Where service substituted time for appearance to be fixed.-- (3) Where service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require which shall not ordinarily exceed fifteen days.”

Though Rule 20 provides the mechanism of substituted service but before resorting to said provision of law it is incumbent upon the Court to first ensure the adherence to Rules 16, 18 & 19 of Order ibid.

6. *In terms of Rule 16 it is obligatory for a serving officer who delivers or tenders a copy of the summons to the defendant personally, or to an agent or other person on his behalf, that he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgment of service endorsed on the original summons. Rule 18 further directs the manner of service in which the same is served, to mention the name and address of the person (if any) and identify the person served and witnesses of the delivery or tender of the summons. Rule 19 further goes on to lay down the procedure for the Court that where a summon is returned under Rule 17 aforesaid duly verified, the serving officer shall be examined on oath and may make such inquiry in the matter as it thinks fit and shall either declare that the summons is duly served or as it thinks fit and after his full satisfaction to proceed further. The provisions mentioned hereinabove are not illusory but it is bounden duty of the Court to make substantial compliance of the same before directing the substituted service in terms of Order V Rule 20 of “CPC”. The Court for the said purpose has to satisfy itself that all the efforts to effect service in the ordinary mode have failed. Non-adherence to the mandatory provisions would render the process invalid and the edifice built thereon would automatically fall*

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down. Reliance in this respect can be placed on Mrs. NARGIS LATIF vs Mrs. FEROZ AFAQ AHMED KHAN (2001 SCMR 99) and Haji AKBAR and others vs GUL BARAN and 7 others (1996 SCMR 1703).

7. *In the case of WAPDA vs GHULAM HUSSAIN (2000 CLC 530) this Court, while outlining the scope and object of Order V Rule 20 of “CPC” held as under :-*

“12. The object behind substitutive service is that the defendant may either himself learn about the proceedings pending against him in the court, or he may be informed by some other person, who has read such notice in the newspaper, in case the defendant has not read the same. Another object behind service through publication is that the proceedings in the suit may continue and the same may not be defeated, merely because the defendant cannot be served with summons in. the ordinary manner.

13. The petitioner had made no attempt to avoid acceptance of service in ordinary way. The Trial Court by ordering substitutive service without justifying the legal position had proceeded against the petitioner ex parte.

14. Notice of a proceeding is a basic right of party and notice by substituted service cannot be ordered unless Court comes to the conclusion that party was avoiding service of notice or personal service was not reasonably practicable upon all defendants. Mere issue of notice several times upon the defendants/party without any report of bailiff, that it was not reasonably practicable for him to serve such notice, would not lay foundation for publication of notice. In this context a reference can be made to a case of M. Saadullah and 28 others v. Tahir Ali and 2 others 1986 CLC 2643, Major Taj-ud-Din and others v. Muhammad Akhtar and others 1989 CLC 2183, Shakoor Hussain v. Muhammad Sadiq 1991 MLD 67, Javed Raza v. Razi Ahmad 1991 MLD 2602, Major (Retd.) Muhammad Yusuf Baig v. Mst. Saeeda Parveen 1984 CLC 668.”

Reliance in this respect can also be placed on Syed SAJJAD HUSSAIN SHAH vs Messrs FEDERATION OF EMPLOYEES COOPERATIVE HOUSING SOCIETIES LTD. through General Secretary (2003 CLC 1011).

8. *The “respondents” were admittedly residing abroad. Rule 25 of Order V of “CPC” deals with service where defendant resides out of Pakistan, which reads as under: -*

“25. Where the defendant resides out of Pakistan and has no agent in Pakistan empowered to accept service, the summons shall except in the cases mentioned in rule 26A be addressed to the defendant at the place where he is residing and sent to him by post, if there is postal communication between such place and the place where the court is situate.”

9. *A glimpse of record made it abundantly clear that proper procedure was not observed in the course of effecting service of the “respondents”. No active or concrete effort was made for the personal service. The resort to the substituted service in the circumstances was not only highly unwarranted but sketchy. The process of service was thus on the one hand tainted with procedural material irregularities and on the other fraught with illegalities.*

10. *To this effect the case of MEHR DIN through Legal Heirs vs AZIZAN and another (1994 SCMR 1110) is quite relevant wherein the Supreme Court of Pakistan held as under :-*

“The perusal of the application filed by the respondents before the trial Court for setting aside the ex parte decree dated 29-7-1967 would show that the same was filed under Order 9 Rule 13 (wrongly written as rule 2) read with section 12(2) C.P.C. on the grounds that the decree was obtained by fraud, misrepresentation and false statement of which they got the knowledge when the suit for the recovery of produce of the disputed land was filed against Karim Bakhsh who was in cultivating possession thereof as a tenant of the respondent. The sum and substance of the petition is that the decree holder practised fraud in the service of summons and kept the pendency of the suit against the respondents concealed from them by fraud and misrepresentation. The copies of the summons placed on the file reveal that proper procedure was not observed in effecting service upon the respondents who were admittedly Pardanashin ladies and special care had to be taken to inform them of the filing of the suit. The report on the first summons show that the respondents informed the process-server that in the absence of their attorney they cannot sign or thumb-impress the summons while at the time of visit of the process server for the second time for effecting service, the respondents were not present in their house. No effort was made to personally serve the respondents in the presence of their close relatives. The learned High Court has exhaustively incorporated the relevant provisions of C.P.C. pertaining to service on the parties which have not been complied with and the High Court justifiably felt inclined to annul the ex parte decree against the ladies/respondents and ordering de novo trial.”

11. It is thus apparent that on the basis of invalid substituted mode of service the “respondents” were proceeded against ex-parte vide order dated 7th February, 2020. It is also evident from the record that the “respondents” are residing in England since long. The parties are though closely related but the petitioners did not mention the addresses of “respondents” abroad. The “respondents” were, thus, proceeded against ex-parte in an illegal and unlawful manner, which followed the ex-parte decree. On attaining the knowledge, the “respondents” moved a petition under section 12 (2) “CPC” seeking annulment of the ex-parte decree on the ground that it is obtained through misrepresentation. The above are the sufficient grounds to show that ex-parte proceedings order followed by the ex-parte decree was not the outcome of due course of law. This was the reason that the learned Civil Judge, in the first instance, allowed the petition and set aside the ex-parte proceedings order as well as decree, which was further affirmed by the revisional Court and rightly so.

12. The petitioners are seeking writ of certiorari in terms of Article 199 (1)(a)(ii) of the Constitution of the Islamic Republic of Pakistan, 1973, which has a very limited scope. The petitioners, in order to persuade the Court to exercise the extraordinary jurisdiction, have to demonstrate that the order or judgment under assilance is without lawful authority and suffers with material illegalities. The petitioners have failed to point out any perversity or material irregularity, warranting exercise of constitutional jurisdiction by this Court. Reliance in this regard can be placed on AMJAD KHAN v. MUHAMMAD IRSHAD (DECEASED) through LRs (2020 SCMR 2155) and CHIEF EXECUTIVE MEPCO and others v. MUHAMMAD FAZIL and others (2019 SCMR 919).

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13. *For the foregoing reasons, instant petition being bereft of any merits is dismissed in limine.*

(Mirza Viqas Rauf)
JUDGE

Approved for reporting.

JUDGE

Zeeshan