

**Judgment Sheet**

**IN THE LAHORE HIGH COURT,**  
**LAHORE**

**(JUDICIAL DEPARTMENT)**

**Writ Petition No.70519/2022**

**Rehan Iqbal                      Vs.                      Abdul Haq,etc.**

**JUDGMENT**

<b>Date of Hearing</b>	<b>22.06.2023</b>
<b>Petitioner by:</b>	<b>Mr.Moiz Tariq, Advocate.</b>
<b>Respondents by:</b>	<b>Syed Muhammad Shah, Advocate.</b>

**MUHAMMAD RAZA QURESHI, J.** Through this Writ Petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, the Petitioner has called into question the legality and validity of Order dated 26.08.2022 passed by the learned Revisional Court, whereby the Revision Petition of the Respondents was allowed and Order dated 09.12.2021 passed by the learned Civil Judge allowing the application for setting aside *ex-parte* Judgment and Decree dated 19.10.2019 was set aside.

2.                      Learned counsel for the Petitioner submits that the Impugned Order is illegal and unlawful. According to learned counsel, no notice was ever served upon the Petitioner, who is resident of Tehsil Gojra District Toba Tek Singh, whereas, the suit was filed by the Respondents in Tehsil Samundari, District Faisalabad. Learned counsel for the Petitioner submits that the mandate of provisions of Order V of the Code of Civil Procedure, 1908 ( the “CPC”) was not

followed by the learned Trial Court, therefore, the substituted service through newspaper remained ineffective in terms of law. Contends that neither the acknowledgement due (“A.D.”) was received nor report on summons was submitted before the learned Trial Court and consequently the Order for *ex-parte* proceedings merging into *ex-parte* Judgment and Decree was passed with undue haste and the same is nullity in the eye of law. Adds that the learned Civil Judge lawfully appreciated the legal position and allowed the application filed by the Petitioner, whereas through the Impugned Order by reversing the said Order, the learned Revisional Court has committed material irregularity and the same is liable to be set aside.

3. Conversely, learned counsel for the Respondents submits that the suit was filed at correct address of the Petitioner i.e. Street No.1, Mohallah Gulshan Colony, Tehsil Gojra, District Toba Tek Singh, therefore, the Petitioner cannot claim that the notices were not issued upon him. Learned counsel also submits that application for seeking condonation of delay along with application for setting aside of *ex-parte* Judgment and Decree failed to substantiate a sufficient cause justifying its delayed institution. Further submits that the Impugned Order passed by the learned Revisional Court is in accordance with law and since the Petitioner defaulted in appearance before the learned Trial Court, it had no other option but to pass *ex-parte* Judgment and Decree. Learned counsel concludes that the instant Petition is liable to be dismissed.

4. The arguments of learned counsel for the parties have been heard and record has been perused with their able assistance, which reflects that on 10.05.2018 the Respondents/Plaintiffs filed a suit against the Petitioner seeking cancellation of agreement to sell dated 19.12.2017 along with permanent injunction. As per contents of the plaint, the Respondents averred that they were owners in possession of suit property situated in Chak No.47-GB Tehsil Samundari District Faisalabad, which they agreed to sell to the Petitioner/Defendant. The total sale consideration mentioned in the subject agreement to sell was Rs.23,000,000/- and earnest money received by the Respondents was in the sum of Rs.2,500,000/-, whereas the remaining sale consideration in the amount of Rs.20,500,000/- was liable to be paid on 30.04.2018. On account of failure of the Petitioner to pay the balance sale consideration on the due date, the Respondents were constrained to institute the suit, which was filed in Tehsil Samundari District Faisalabad.

5. Upon institution of suit, through order dated 10.05.2018 summons/notices were issued to the Defendant, who is Petitioner before this Court at address of Street No.1, Gulshan Colony Gojra, Tehsil Gojra District Toba Tek Singh, through registered A.D. and process fee was directed to be deposited. On 23.05.2018 the summons through registered post A.D. were repeated as the Respondents had failed to deposit process fee in time. On 04.06.2018 notices through mode prescribed earlier were repeated as according to report of *Ahlmad* on the order sheet, the summons had not returned nor receipt

of register A.D. was produced. On 26.06.2018 which is crucial date, only receipt of registered post A.D. was filed by the Respondents/Plaintiffs and the learned Trial Court passed an order that the Petitioner/Defendant could not be served through summons, therefore, he be served through substituted service by way of publication in the daily newspaper 'Asas'. Upon the publication in the newspaper, nobody entered appearance on behalf of the Petitioner, therefore, on 11.07.2018 the Petitioner was proceeded *ex-parte*. Thereafter, case kept adjourning on one pretext or the other and finally after recording oral as well as documentary evidence of the Respondents/Plaintiffs the learned Trial Court passed *ex-parte* Judgment and Decree dated 19.10.2019.

6. As per contents of the Application filed by the Petitioner a legal notice was sent to the Respondents on 22.12.2020 contending that under the subject matter agreement to sell the Respondents had defaulted. In reply to the said legal notice sent by the Respondents on 12.02.2021, it was disclosed that the subject matter agreement to sell was no more in the field pursuant to Judgment and Decree dated 19.10.2019. Thereafter on 27.02.2021 the Petitioner filed an application seeking setting aside *ex-parte* Judgment and Decree along with an application seeking condonation of delay under Section 5 of the Limitation Act, 1908. The said application was allowed by the learned Trial Court through Order dated 09.12.2021. The Respondents challenged the said Order before the learned Revisional Court, who

upheld the *ex-parte* Judgment and Decree by reversing the Order dated 09.12.2021 passed by the learned Civil Judge.

7. The contentious issue seeking resolution is whether the Petitioner was ever served in accordance with law. Admittedly, in the instant case, the summons issued to the Petitioner was never returned with any report, whereas, though receipts of registered post A.D. were presented but the learned Trial Court never received back the card of A.D., therefore, the Order dated 26.06.2018 that Petitioner could not be served through summons appears to have been passed in betrayal of mandate of law and it seems that the learned Trial Court failed to exercise its jurisdiction in accordance with law.

8. The first obligation of the learned Trial Court was that if it had noticed that the Petitioner was resident of another District, the safest mode should have been to follow the provisions of Order V rules 21 and 23 of the CPC, which provides that if Defendant resides within the jurisdiction of another Court, the summons shall be sent by the Court by which it is issued either by one of its officers or by post to any Court having jurisdiction in the place where the defendant resides. Under rule 23 of Order V of the CPC, the Court to which summons are sent under rule 21 shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court of issue, together with the record of its proceedings with regard thereto.

9. The Order dated 26.06.2018 has been analyzed in the light of said provisions of law and it is observed that while issuing the

summons to the Petitioner/Defendant, those provisions were overlooked by the learned Trial Court, which upon non-return of summons sent by the issuing Court and non-receipt of A.D. was *sine qua non* for the service of Petitioner/Defendant. Failure of the Trial Court to follow the mandate contained in provisions of Order V rules 21 and 23 of the CPC had serious consequence and order for issuing substituted service through publication was nullity in the eyes of law. Reliance in this regard is placed upon the judgment reported as Rana Jahangir Khan vs. Manzoor Ahmad (PLD 2012 Lahore 204).

10. The provisions of rules 16, 17 and 18 of Order V of the CPC were also ignored by the learned Trial Court as the said provisions are not illusory and it was bounden duty of the Court to ensure substantial compliance of these provisions before directing substituted service as unless provisions contained in rules 16, 17, 18, 21 and 23 are not satisfied, the order for substituted service under Order V rule 20 of the CPC is nullity in the eyes of law as the Court for the said purpose has to satisfy itself that all the efforts to affect service in the ordinary mode have failed. Non-adherence to the mandatory provisions renders the process of service through publication invalid and edifice built automatically falls down. Reliance in this regard is placed upon the judgment reported as Yaqoob Ali through L.Rs. and others vs. Muhammad Ayub and others (PLD 2021 Lahore 678).

11. Adherence and observance to these provisions is mandatory as due service is the first fundamental right of every

litigant, who is to defend his cause before the court of law. Therefore, it is not only a formality but a matter of importance that these provisions are duly complied with. According to law laid down by the Supreme Court of Pakistan in judgment reported as Mrs. Nargis Latif vs. Mrs. Feroz Afaq Ahmed Khan (2001 SCMR 99) “*unless all efforts to effect service in the ordinary manner are verified to have failed, substituted service cannot be resorted to.*”

12. There is no cudgel to the conclusion derived by the learned Revisional Court in the Impugned Order that the substituted service is as effective as personal service and the court may on the failure of defendant to appear when the suit is called for hearing, proceed with the hearing of the suit *ex-parte* as substituted service has always been equated with that of due service. But the learned Revisional Court failed to advert that the said effectiveness can only be presumed authentic if either record or order reflects that the provisions of Order V in relation to service of summons or through registered A.D. have been duly complied with. As the remedy of substituted service can be resorted to only if the court is satisfied that there is a reason to believe that the other side is shying out only to avoid the service. Reliance in this respect is placed on the judgment reported as Sana Jamali vs. Mujeeb Qamar and another (2023 SCMR 316).

13. Now adverting to the question whether the application filed by the Petitioner was barred by time or not, suffice is to observe that under Article 164 of the Limitation Act, 1908, a defendant may

seek setting aside of *ex-parte* decree within a period of thirty days and Column No.III of the said Article provides that these thirty days are to be computed from the date of decree or where the summons were not duly served when the applicant had knowledge of the decree.

14. In the instant case, it has already been discussed above that Order of *ex-parte* proceedings was passed without following the mandate of Order V and without satisfying itself that why the summons could not be served and consequently, the Petitioner was never served in accordance with law. Therefore, obviously the limitation of thirty days cannot commence from the date of decree as it can only commence from attaining the knowledge of the *ex-parte* Judgment and Decree. In the instant case, the Petitioner attained the knowledge on 12.02.2021 when Respondents replied to his legal notice and informed him about the *ex-parte* Judgment and Decree. Thereafter, the application was filed on 27.02.2021 i.e. within a period of limitation.

15. In the facts and circumstances of the case, it is disappointing for this Court that failure to adhere to the mandatory provisions with respect to service on the Petitioner through ordinary modes has caused colossal loss to both the parties as the Petitioner is entangled to litigation since the passing of Order of *ex-parte* proceedings, whereas, the Respondents are suffering on account of mistake committed by the learned Trial Court.

16. The Revisional Court by reversing the Order passed by the Civil Court committed material irregularity as it failed to analyze



the legal position that on account of non-adherence to the mandatory provisions of Order V of the CPC in relation to service through ordinary modes, the service upon the Petitioner through substituted mode was inconsequential.

17. As a consequence of the above discussion, this Writ Petition is **allowed** and Impugned Order dated 26.08.2022 passed by the learned Revisional Court is set aside and as a result thereof the Order dated 09.12.2021 passed by the learned Civil Judge pursuant whereto the *ex-parte* Judgment and Decree was set aside, is upheld.

18. The parties are directed to appear before the learned District Judge, Faisalabad on 04.09.2023, who is directed to assign the matter to the Court of competent jurisdiction.

**(MUHAMMAD RAZA QURESHI)**  
**JUDGE**

*\*Syed Zameer\**