

Judgment Sheet
IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

Civil Revision No.60871 of 2023

Asad Mumtaz Warriach

Versus

Ali Mumtaz Warriach

J U D G M E N T

Date of Hearing	26.10.2023
For the petitioner	M/s Hamid Iftikhar Pannu, Saad Hayat Pannu and Muhammad Mansoor Ali Sial, Advocates
For the respondent	Mr. Fazal-Ur-Rehman Butt, Advocate

Raheel Kamran J:- This civil revision under Section 115 of CPC is of the defendant who has challenged the order dated 11.07.2023 passed by the Additional District Judge, Lahore whereby his application under Rule 4 of Order XXXVII CPC for setting aside *ex-parte* judgment and decree dated 02.11.2022 was dismissed.

2. The facts giving rise to this revision are that the respondent instituted a suit for recovery of an amount of 532515/- US Dollars under Order XXXVII CPC against the petitioner who did not appear before the Court, hence, was proceeded against *ex-parte*. The trial Court after recording *ex-parte* evidence of the plaintiff/respondent, decreed the suit vide *ex-parte* judgment and decree dated 02.11.2022. The plaintiff/respondent filed execution petition whereupon the petitioner/defendant moved an application under Rule 4 of Order XXXVII CPC, which was dismissed vide order impugned herein.

3. Learned counsel for the petitioner while referring to the summons issued in the instant case on the address specified therein i.e. House No.75, Street No.26, Block-X, Phase-III, DHA Lahore, contends that neither any such address exists nor does the petitioner reside there. He maintains that there is no signature or thumb impression of the petitioner on the service report submitted by the process server. He adds that it has erroneously been assumed that the petitioner was properly served, hence, the impugned order is unsustainable in law. In support of his contentions, learned counsel for the petitioner has relied on the cases of Abdul Rehman Wahla vs. Dr. Sher Dil Batra (PLD 1986 Supreme Court 234), Amar Jeet Singh vs. Sant Singh (2022 CLC Lahore 6) and Shahzad Akhtar vs. Farukh Jameel (2023 MLD Lahore 1118).

4. Conversely, learned counsel for the respondent while referring to the report of process server contends that a copy of notice was served on the petitioner and another copy of the same was affixed on conspicuous part of his house, therefore, he was duly served on 16.07.2022. He maintains that the petitioner was also served through Pakistan Post and TCS and postal receipts are available on record. He further contends that notice was also published in the newspaper daily 'Dunya' on 03.07.2022 which specified both addresses of the petitioner and such service in terms of the afore-mentioned rule is to be treated as effective as he has been served personally. In support of such plea he has placed reliance on the cases of Cotton Export Corporation of Pakistan (Pvt.) Limited vs. M/s. Saleem Rehman, Model Cotton Ginning & Pressing Factory (Pvt.) Limited and others (1994 CLC 308) and United Bank Ltd. vs. Noor Textile Mills Limited and 7 others (PLD 1995 Karachi 162). He finally contends that *ex-parte* judgment and decree was passed on 02.11.2022 whereas application for setting aside the same was filed on 14.12.2022 i.e. after 41

days, however, limitation for filing such application is 30 days. Reliance in that regard has been placed on the case of Shahid Pervaiz alias Shahid Hameed vs. Muhammad Ahmad Ameen (2006 SCMR 631).

5. Arguments heard. Record perused.

6. It is case of the petitioner that he was not properly served in the suit. Record reflects that the suit under Order XXXVII CPC was instituted on 25.05.2022 on which the summons was ordered to be issued to the defendant/petitioner for 14.06.2022. On the said date it was observed that service upon the defendant was effected, however, summons was again ordered to be issued along with affixation at conspicuous place/address of the defendant. Copies of both the summonses are available on record and though it has been stated in the report of the process server that the defendant had received the same yet his signatures were not obtained in acknowledgement of their receipt. Rule 16 of Order V CPC requires the serving officer/process server to obtain signature of the defendant while delivering him a copy of the summons personally. The said rule is reproduced hereunder: -

“16. Persons served to sign acknowledgement.- Where the serving officer delivers or tenders a copy of the summons to the defendant personally, or to an agent or other person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgement of service endorsed on the original summons.”

The afore-mentioned requirement of law has not been properly adhered to in the instant case inasmuch as signatures or thumb impressions of the petitioner have not been apparently obtained in acknowledgement of receipt of the summonses nor is it stated in the reports of process server that signatures of the petitioner were required upon delivery of the summonses in acknowledgement of service endorsed on the original summonses.

7. Moreover, report of process server on the summons issued to defendant for 18.07.2022 does not reveal that on which part of the house or address of the defendant the copy of summons was affixed. Although the Court is not obligated to order for affixation of summons yet as observed above, the trial Court in this case after perusing the report on the summons issued for 14.06.2022, probably being dissatisfied, had again ordered for issuance of summons along with affixation. Rule 17 of Order V CPC provides the manner in which the affixation is to be made. Said rule is reproduced herein below for ready reference: -

“17. Procedure when defendant refuses to accept service, or cannot be found.-- Whether the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.”

In this case, necessary pre-conditions for invoking such rule i.e. refusal of the petitioner or his agent to sign the acknowledgement or failure of the process server to find the petitioner after using all due and reasonable diligence are clearly missing, therefore, procedure adopted by the process server is clearly not under the said rule. Even otherwise a copy of the summons is not specified to have been affixed on the door or some conspicuous part of premises of the petitioner to satisfy requirement of said rule.

8. There is yet another aspect of the matter which requires consideration. Rule 8, Part B, Chapter 7, Volume IV, of the Rules and Orders of the Lahore High Court, Lahore requires that in case of sending a judicial notice for publication in a newspaper, the manager of the newspaper should send the copy of the paper containing the notice, under postal certificate, to the party for whose perusal it is intended at the address given in the notice. The said rule reads as follows: -

“8.Publication to be arrange through Publication Information Bureau.—In sending a judicial notice for publication in a newspaper, the Court should, in the covering letter, require the manager of the newspaper to send, under postal certificate, the copy of the paper containing the notice to the party for whose perusal it is intended at the address given in the notice, marking the notice in question with red ink; he should also be required, as proof of compliance with this order, to attach the postal certificate to his bill when submitting the letter to the Court of payment.”

It is manifest from the above rule that publication in the newspaper is not sufficient in the absence of sending a copy of the paper to the party concerned and there is nothing available on record to establish such compliance. Additionally, no further inquiry in the matter was carried out under Rule 19 of Order V CPC facilitating examination of the serving officer. In the attending circumstances, service of the defendant/petitioner shown to be effected in the proceedings of the suit does not seem to be proper and in accordance with the law on the subject.

9. Insofar as the argument of learned counsel for the respondent that application for setting aside *ex-parte* proceedings was filed beyond the period of limitation i.e. 30 days provided in the First Schedule to the Limitation Act, 1908 is concerned, the same is misconceived as the said period is to run from the date of knowledge of the decree as summons in this case, as observed *supra*, was not duly served. In the

instant case, the petitioner claims to have acquired knowledge of the *ex-parte* decree on 08.12.2022 when he received notice in the execution proceedings. The case of *Shahid Pervaiz alias Shahid Hameed* (supra) relied upon by the respondent's counsel is quite distinguishable on facts, as in the said case the defendant after appearance had disappeared whereas in this case the defendant has claimed unawareness for not having been properly served.

10. For the foregoing reasons, this civil revision is allowed and the impugned order dated 11.07.2023 is set aside. Resultantly, the application for setting aside *ex-parte* judgment and decree stands accepted, the *ex-parte* judgment & decree dated 02.11.2022 stands set aside and the District Court is directed to decide the petitioner's application for leave to appear and defend the suit instituted by the respondent within one month from the receipt of copy of this Order, without granting any unnecessary adjournment to either side. There shall be no order as to costs.

(RAHEEL KAMRAN)
JUDGE

Announced in open Court on 14.11.2023.

JUDGE

APPROVED FOR REPORTING

JUDGE

Saeed Akhtar