**2014 C L C 914**

**[High Court (AJ&K)]**

**Before Munir Ahmed Chaudhary, J**

**MUHAMMAD YOUNAS----Appellant**

**Versus**

**UMAR HAYAT and another----Respondents**

Civil Appeal No.110 of 2012, decided on 20th December, 2013.

**Civil Procedure Code (V of 1908)---**

----S. 12(2) & O. IX, R. 13---Ex parte decree, setting aside of---Treating application filed under S.12(2), C.P.C. as an application under O.IX, R.13, C.P.C. by the court on its own motion---Scope---Application for setting aside ex parte decree was moved under S.12(2), C.P.C. whereas provision of O.IX, R.13, C.P.C. had been provided for the same---Trial Court had treated the said petition as under O.IX, R.13, C.P.C. on its own motion which was moved under S.12(2), C.P.C.---Provisions under S.12(2), C.P.C. were not intended to be a duplication of proceedings provided in O.IX, R.13, C.P.C.---Applicants did not file petition under O.IX, R.13, C.P.C. for setting aside of ex parte decree and Trial Court was not competent to treat the same as moved under O.IX, R.13, C.P.C.---Petition for setting aside ex parte decree was not moved in accordance with law and same was not maintainable---Impugned order of Trial Court was set aside---Appeal was accepted in circumstances.

1987 SCMR 1300, 1987 SCMR 1440; 2001 CLC 1100 and 2001 CLC 194 ref.

Mehr Din v. Tassadaq Hussain and others1987 SCMR 1300 rel.

Rafi Ullah Sultani for Appellant.

Sardar Mansha Jamal for Respondents.

**ORDER**

**MUNIR AHMED CHAUDHARY, J.**--- This appeal has been directed against the judgment and order of Additional District Judge Kotli dated 30-6-2012, through which an application filed under section 12(2), C.P.C. was treated as under Order IX, Rule 13 of C.P.C. and an ex parte decree dated 30-6-2009 passed in favour of the present appellant was set aside.

2. Brief facts giving rise to the present appeal are that the present appellant Muhammad Younas filed a suit for recovery of an amount of Rs.9,66,433/- against the present respondents in the court of District Judge Kotli, which was made over to the learned Additional District Judge Sehnsa Camp Kotli for disposal under law. The respondents/ defendants were summoned but they did not appear before the Court and ex parte proceedings were ordered against them. As a result, an ex parte decree regarding recovery of an amount of Rs.9,66,433/- was issued in favour of the present appellant/plaintiff on 30-6-2009. Later on, the respondents/ defendants Umar Hayat and others filed an application under section 12(2) of C.P.C. before the learned Additional District Judge Sehnsa Camp Kotli on 22-3-2011 stating therein that the respondents/applicants were residing in Pakistan and working for their livelihoods there. In their absence, the present appellant/respondent filed a suit and got issued an ex parte judgment and decree in his favour secretly. The respondents/applicants were not served properly and on a fictitious report, a proclamation was published in the newspaper. Later on, ex parte proceedings were ordered against the respondents/ applicants. The same was done fraudulently, malafidely and secretly. The respondents/applicants filed an application under section 12(2) of C.P.C. when they came to know about the judgment and decree. So, the application has been filed within time from the date of knowledge. It was prayed to set aside the ex parte decree passed against them. A separate application was submitted for condonation of delay under section 5 of Limitation Act.

3. Objections were submitted by the present appellants/respondents stating therein that the applicants/present respondents were summoned through Senior Civil Judge Rawalakot but they did not appear before the Court. Ultimately, a proclamation was published in the newspaper and the present respondents/applicants did not appear before the Court despite publication of proclamation. So, ex parte proceedings were ordered and ex parte evidence was produced by the present appellant and ex parte judgment and decree was passed in favour of the present appellant. It was also stated that the application under section 12(2) of C.P.C. was hopelessly time-barred and was not maintainable. It was prayed to dismiss the said application. The learned Additional District Judge Sehnsa Camp Kotli accepted the application treating the same as filed under Order IX, Rule 13 of C.P.C. and set aside the ex parte judgment and decree passed in favour of the present appellant. Hence, the instant appeal.

Arguments were advanced by the learned counsel for the parties. Mr. Rafiullah Sultani Advocate, the learned counsel for the appellant, argued that the application for cancellation of ex parte decree could be filed under Order IX, Rule 13 of C.P.C. but the application was filed under section 12(2) of C.P.C. The said application was hopelessly time-barred. The respondents could not produce any reliable evidence because the evidence placed on record was not in accordance with the pleadings. The respondents are residents of Tehsil and District Rawalakot and they have misled the Court that they are residing in Pakistan. The respondents did not appear before the Court intentionally. The proceedings were carried out in accordance with the provisions of law and ultimately an ex parte decree was issued in favour of the present appellant. The learned counsel requested to accept the appeal and to set aside the judgment and order of the learned Additional District Judge Kotli. The learned counsel referred the following precedents in support of his arguments:---

(1) 1987 SCMR 1300-1440, (2) 2001 CLC 1100-1194.

4. While controverting the learned counsel for the appellant, Sardar Mansha Jamal Advocate, the learned counsel for the respondents, contended that the respondents had no knowledge of the suit filed against them because they were residing at Rawalpindi. The proceedings of the suit were completed fraudulently and secretly. Even the statement of the process server was not recorded. The suit is subjudice before the learned Additional District Judge Kotli and the present appellant is pursuing the said suit before the Court. The application for cancellation of ex parte decree was filed within time from the date of knowledge. The learned counsel requested to dismiss the appeal and referred an unreported case decided by the High Court of Azad Jammu and Kashmir titled as "Mehr Din v. Tassadaq Hussain Shah and others" (Civil Appeal No.63 of 2013) decided on 28-9-2013.

5. After hearing the arguments advanced by the learned counsel for the parties, I have gone through the evidence placed on record and perused the precedents referred by the learned counsel for the parties carefully and minutely. It is an admitted fact that the application for setting aside the ex parte decree was filed under section 12(2) of C.P.C. by the present respondents in the Court of Additional District Judge Kotli. The expressed provision has been provided through Order IX, Rule 13 of C.P.C. for filing an application to set aside an ex parte decree. The learned Additional District Judge Kotli has treated the said application as filed under Order IX, Rule 13 of C.P.C., whereas the same was filed under section 12(2) of C.P.C. It is an admitted principle of law that the provisions under section 12(2) of C.P.C. are not intended to be a duplication of proceedings provided in Order IX, Rule 13 of C.P.C. This principle has been laid down in the precedents 1987 SCMR 1300 and 1440.

The learned Additional District Judge Kotli treated the application under section 12(2) of C.P.C. as under Order IX, Rule 13 of C.P.C. on its own motion. The respondents did not apply for the same as well. So, in the light of the principle laid down in the above mentioned precedents, the learned Additional District Judge Kotli had no powers to treat the said application as filed under Order IX, Rule 13 of C.P.C.

6. It is just and proper that without going into details of other points raised by both the learned counsel for the parties, to hold that the application for setting aside an ex parte decree was not filed in accordance with provisions of law and it was not maintainable. The learned Additional District Judge was not empowered to treat the said application as filed under Order IX, Rule 13 of C.P.C. The prayer was made to set aside an ex parte decree under section 12(2) of C.P.C., while the learned Additional District Judge Kotli passed his order setting aside the ex parte decree under Order IX, Rule 13 of C.P.C.

Having in view the above mentioned circumstances, the instant appeal is accepted and the judgment and order of the learned Additional District Judge Sehnsa Camp Kotli dated 30-6-2012 is hereby set aside. No order as to costs.

AG/29/HC(AJ&K) Appeal allowed.