

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

CIVIL REVISION NO.53 OF 2016.

Ch. Din Muhammad
VS.
Javed Iqbal Saif and others

CIVIL REVISION NO.152 OF 2015.

Javed Iqbal Saif and another
VS.
A.S.J. East Islamabad and others

WRIT PETITION NO.2864 OF 2015.

Javed Iqbal Saif and another
VS.
A.S.J. East Islamabad and others

Petitioners by : **Mian Tahir Iqbal, Advocate.**
(In C.R.No.53/2016 & W.P No.2864/2015)
Mr. Sohail Akbar Chaudhry, Advocate.
(In C.R.No. 152/2015)

Respondents by : **Mian Tahir Iqbal, Advocate.**
(For Respondent No. 2 in C.R.No.152/2015)
Mr. Sohail Akbar Chaudhry, Advocate.
(For Respondents No.1 & 2 in C.R No.53/2016 & W.P No.2864/2015.)

Date of hearing : **16.03.2022.**

SAMAN RAFAT IMTIAZ, J. Through the instant judgment, I propose to decide the two above titled Civil Revision Petitions and the Writ Petition as they involve the same parties and similar questions of law and fact.

Case History

2. In C.R. No.53/2016, the Petitioner [Ch. Din Muhammad] has assailed the Order dated 09.12.2014 (“**Impugned Order I**”) passed by the learned Civil Judge 1st Class (East) Islamabad (“**Trial Court**”), whereby Petitioner’s application under Order IX, Rule 13, C.P.C., was dismissed. The Petitioner has also assailed the Judgment dated 09.03.2015 (“**Impugned Judgment**”

II”) passed by the learned Additional District Judge (East), Islamabad (“**Appellate Court**”) whereby appeal filed by the Petitioner against the Impugned Order I of the learned Trial Court was allowed but the matter was remanded to the learned Trial Court with direction to frame issue, record evidence and decide the application under Order IX, Rule 13, C.P.C., afresh. The Petitioner has prayed that the instant Revision petition may kindly be accepted and the Impugned Order I and Impugned Judgment II be set aside and that the application under Order IX, Rule 13, C.P.C., filed by the Petitioner be accepted unconditionally in the interest of justice.

3. In C.R. No.152/2015, the Petitioners [Javed Iqbal Saif and Ch. Muzammal Hussain] have assailed the Impugned Judgment II dated 09.03.2015 passed by the learned Appellate Court, whereby appeal filed by Respondent No.2 [Ch. Din Muhammad] against the Impugned Order I dated 09.12.2014 of learned Trial Court was allowed and the matter was remanded to decide his application under Order IX Rule 13 C.P.C., afresh after framing of issue and recording of evidence. The Petitioners have prayed that this Revision petition may kindly be accepted and Impugned Judgment II be set aside to meet the ends of justice.

4. Through the Writ Petition No.2864/2015, the Petitioner [Ch. Din Muhammad] has assailed the Impugned Order I dated 09.12.2014 passed by the learned Trial Court, whereby the Petitioner’s application under Section 12(2), C.P.C., was dismissed. The Petitioner has also assailed the Judgment dated 09.03.2015 (“**Impugned Judgment III**”), whereby Revision Petition filed by the Petitioner against the Impugned Order I to the extent of the Petitioner’s application under Section 12(2) C.P.C., was dismissed.

Facts

5. Brief facts are that on 22.05.2010, Javed Iqbal Saif and Ch. Muzammal Hussain (Respondents No.1 & 2 in C.R No.53/2016 & W.P No.2664/2015) filed a Suit for Specific Performance and Permanent Injunction against Ch. Din Muhammad (Petitioner in C.R No.53/2016 & W.P. 2864/2015) (herein after referred to as the “**Petitioner**”) alleging that Javed Iqbal Saif and Ch. Muzammal Hussain (herein after referred to as the “**Respondents No.1 & 2**”), in the presence of witnesses, entered into an agreement dated 10.06.2008 (“**Agreement**”) with the Petitioner, who is

owner of suit plot No.506, situated at PWD Housing Society (“**Society**”), Korang Town, Islamabad (“**Suit Plot**”). That according to the Agreement the Petitioner received an amount of Rs.300,000/- from the Respondent No.1 and Rs.450,000/- from the Respondent No.2 as sale consideration between 2004 and 2008. According to the Agreement, the Petitioner was strictly liable to hand over the title documents of the Suit Plot along with membership of the Society. Further, that when the Respondents No.1 & 2 contacted the Petitioner for completion of his part of the obligations under the said Agreement, he flatly refused and delayed the matter on one pretext or the other.

6. After filing of the Suit, despite issuance of summons/notice and proclamation, the Petitioner did not turn up therefore the matter proceeded against him ex-parte on 19.07.2010. After recording of ex-parte evidence, suit of the Respondents No.1 & 2 was decreed vide ex-parte Judgment & Decree dated 11.01.2012 (“**Ex-Parte Judgment & Decree**”).

7. Thereafter the Respondents No.1 & 2 filed Execution Petition. During the execution proceedings, the Petitioner filed applications under Section 12(2), C.P.C., and Order IX, Rule 13, C.P.C. Subsequently, however, the Petitioner sought withdrawal of the said applications with permission to file afresh and thereafter filed another application under Section 12(2), C.P.C. However, both applications were dismissed as withdrawn by the learned Trial Court without permission to file afresh vide Order dated 23.09.2013. The Petitioner filed an appeal against such order, which was allowed vide judgment dated 27.11.2013 whereby the applications under Order IX, Rule 13, C.P.C., and under Section 12(2) C.P.C., were held deemed to be pending.

8. After hearing the arguments, the learned Trial Court dismissed the Petitioner’s applications under Section 12(2) C.P.C., as well as under Order IX, Rule 13, C.P.C., vide the Impugned Order I. The Petitioner, therefore, filed an appeal wherein the learned Appellate Court vide Impugned Judgment II set aside the Impugned Order I to the extent of the Petitioner’s application under Order IX, Rule 13, C.P.C., with direction to frame issue, record evidence and decide afresh. Whereas against dismissal of application under Section 12(2) C.P.C., the Petitioner filed Civil Revision Petition

before the Appellate Court, which was dismissed vide Impugned Judgment III.

Arguments

9. The learned counsel for the Petitioner with regard to application under Order IX, Rule 13, C.P.C., *inter alia*, contended that Impugned Order I of the learned Trial Court and Impugned Judgment II of the learned Appellate Court are very harsh and against the spirit of natural justice; that both the Courts below did not apply their judicial mind while passing the Impugned Order I and Impugned Judgment II; that Impugned Order I and Impugned Judgment II have resulted in miscarriage of justice; that the Petitioner never received any summons through his son and that he has no son named Hamza who allegedly received the summons; that learned Trial Court while passing the order for substituted service did not follow the relevant provisions of C.P.C. Learned counsel with regard to the application under Section 12(2) C.P.C., *inter alia*, contended that the Impugned Judgment III is a nullity in the eyes of the law as the Ex-parte Judgment and Decree passed by the learned Civil Judge (West) Islamabad was *coram non judice*; that Respondents No.1 & 2 were fully aware of the fact that the suit plot is situated within the territorial jurisdiction of the East Division and the matter could only be adjudicated by the learned Civil Judge East; that the Ex-Parte Judgment & Decree was obtained by the Respondents No.1 & 2 through fraud and misrepresentation; that the learned Trial Court as well as the learned Appellate Court failed to follow the law and dictums laid down by the superior Courts; that both the Courts below have exercised illegal jurisdiction and committed material irregularities. He relied on *Mst. Zohran Bibi Vs. Ghulam Qadir*, 2022 MLD 250.

10. The learned counsel for the Respondents No.1 & 2 has controverted the arguments of advanced in C.R No.53/2016 and W.P No.2864/2015. In C.R No.152/2016 by the learned counsel for the Petitioner. He contended that the Impugned Judgment II of the learned Appellate Court is against the law and facts of the case; that the learned Appellate Court while deciding the appeal entirely ignored the facts recorded by learned Trial Court in its order sheet; that the learned Appellate Court acted in exercise of illegal jurisdiction and committed material irregularities; and that Impugned

Judgment II has been passed by the learned Appellate Court without applying judicial mind.

11. I have heard learned counsel for the parties and perused the record with the able assistance of learned counsel for the parties.

C.R No.53/2016 and C.R No.152/2015

12. In a nutshell the Petitioner in C.R. No.53/2016 has prayed for the unconditional acceptance of his application under Order IX, Rule 13, C.P.C., whereas the Respondents No. 1 and 2 have prayed for the dismissal thereof.

13. The learned counsel for the Respondents No. 1 and 2 argued that as per the Petitioner's own admission in his first application under Section 12(2), C.P.C., he came to know of the Ex-parte Judgment & Decree on 19.03.2013, therefore, any subsequent application under Order IX, Rule 13, C.P.C., was time barred. First of all, the record does not contain any subsequent application under Order IX, Rule 13, C.P.C. Secondly, this line of argument does not take into account Order dated 27.11.2013, whereby the Order dated 23.09.2013 allowing the Petitioner to withdraw the Petitioner's applications under Order IX, Rule 13, C.P.C., and under Section 12(2), C.P.C., without permission to file afresh was set aside and the Petitioner's applications under Order IX, Rule 13, C.P.C., and under Section 12(2), C.P.C., were deemed pending. There is nothing on record to show that said Order dated 27.11.2013 was challenged in which case it has attained finality. Even otherwise, the said order has not been assailed before this Court in the instant proceedings.

14. Next the learned counsel for the Respondents No. 1 and 2 argued that the record reflects that the Petitioner's son received summons on 07.06.2010, thereafter, service was made by way of publication on 19.07.2010 and as such the Ex-parte Impugned Judgment and Decree was passed after following the proper course of action. Therefore, according to the learned counsel for the Respondents No. 1 and 2, the learned Trial Court correctly dismissed the Petitioner's application under Order IX, Rule 13, C.P.C., and the Impugned Judgment II passed by the learned Appellate Court is liable to be dismissed.

15. On the other hand, the learned counsel for the Petitioner drew the attention of this Court to the fact that the service report dated 07.06.2010 purportedly showing receipt of summons by one named Hamza allegedly the son of the Petitioner does not contain any name or ID of the recipient. The Petitioner has denied that he has any son named Hamza. Moreover, the diary sheet dated 18.06.2010 states that summons were "un-served" yet substituted service was allowed to be made by way of publication. He, therefore, argued that substitute service under such circumstances by way of publication was not warranted and was not in accordance with Order V, Rules 19 and 20, C.P.C., which allows publication only in the event of refusal of service by the defendant.

16. Examination of the relevant provisions of Order V, C.P.C., shows that under Rule 15 thereof, where the defendant cannot be found, the scheme of law allows service to be made on an adult male member of the defendant's family who is residing with him. However, in the instant case there is nothing on record to show that the defendant could not be found as the process server's report dated 07-06-2010 simply states that upon inquiring about the Petitioner, the process server met the Petitioner's son. Moreover, there is also nothing on the record to controvert the Petitioner's denial that he does not have a son named Hamza nor that the person who allegedly received the summons at the Petitioner's house was an adult.

17. In this regard I would like to quote the following passage from the case of *Yaqoob Ali Vs. Muhammad Ayub*, PLD 2021 Lahore 678:

17. Order V "C.P.C." relates to issue and service of summons. Ex-parte proceedings were ordered against the "respondents" while resorting to the mode of substituted service through publication in newspaper. Order V Rule 20 "C.P.C." prescribes the mode of substituted service, which is reproduced below for ready reference and convenience:-

"20. Substituted service.---(1) 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.

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 ensure the compliance of Rules 16, 18 and 19 of Order ibid.

18. 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 "C.P.C.". 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 down. Reliance in this respect can be placed on Mrs. Nargis Latif v. Mrs. Feroz Afaq Ahmed Khan (2001 SCMR 99), Mubarak Ali v. First Prudential Modaraba (2009 CLD 849), Haji Akbar and others v. Gul Baran and 7 others (1996 SCMR 1703) and Fazal Hussain v. Mst. Husna Bano (1995 MLD 170)." [Emphasis added].

18. Similarly in the case of *Islah-ud-Din Chaudhry Vs. Sardar Muhammad Naseem Abbasi*, PLD 2017 Islamabad 356, this Court held as follows:

"14. ...Under Order V, Rule 17 C.P.C., it is only when the defendant refuses to accept service or where the defendant cannot be found despite all due and reasonable diligence to find the defendant service that the Process Server can affix a copy of the summons on the outer door or some conspicuous part of the house in which the defendant ordinarily resides or carries on business. For the Process Server to serve the summons on the defendant through affixation pursuant to Order V, Rule 17 C.P.C., an order of Court to that effect is not necessary. In the case at hand, the learned Trial Court had ordered for the summons to be affixed at the appellant's address given in the plaint by the

respondent. Such an order is passed by the Court under Order V, Rule 20 (1) (a) C.P.C., which is reproduced herein below:--

"20. ...

15. Affixing the summons at the house of the defendant is one of the forms of substituted service under Order V, Rule 20 C.P.C. Such substituted service cannot be ordered unless 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 for any other reason the summons cannot be served in the ordinary way. It is well settled that personal service is a rule and substituted service is an exception which may be resorted to in unusual circumstances. Law primarily requires personal service to be the best mode of bringing notice to the knowledge of the defendant. In the case at hand, the order sheet as well as the impugned judgment and decree do not reveal the satisfaction of the learned Trial Court to the effect that there was reason to believe that the appellants were keeping away in order to avoid service or that there was reason to believe that summons could not be served in the ordinary way, before substituted service was resorted to."
[Emphasis added].

19. Applying the said principles to the instant case, it appears that the pre-requisites of substitute service were not met. It is reiterated that the circumstances in which service may be made on an adult male member of defendant's family who is residing with him were not met as there is nothing to establish that the defendant could not be found. Moreover, the service report dated 07.06.2010 does not contain the signature of the alleged Hamza who received the summons/notices. The Order dated 18.06.2010 records that summons were returned "un-served", which indicates that service allegedly made on Hamza was not held good service upon the Petitioner. It does not state that the Petitioner was refusing to accept service or avoiding it. Yet the said order directed service to be made by publication without recording any circumstances justifying substitute service.

20. It appears that the learned Appellate Court, vide the Impugned Judgment II, has remanded the matter to the learned Trial Court with direction to frame issue, record evidence and decide the application under Order IX, Rule 13, C.P.C., afresh to resolve the controversy as to whether or not the Petitioner has a son named Hamza. However, as discussed herein above, even if the Petitioner has a son named Hamza who was an adult at the relevant time, it would not make the service in accordance with Order V, Rule 15, C.P.C., as nothing on the record suggests that the Petitioner could not be found. As such, in my opinion, summons were not duly served and no

fruitful purpose will be served by remanding the matter to the Trial Court as directed by the Appellate Court vide the Impugned Judgment II. The afore-stated reasons are sufficient grounds for interference in revision. The Petitioner has made out a case for allowing of his application under Order IX, Rule 13, C.P.C.

Writ Petition No.2864/2015

21. In the instant Petition, the Petitioner prayed for setting aside of Impugned Order I dated 09.12.2014 and Impugned Judgment III dated 09.03.2015 and for the application under Section 12(2) C.P.C., to be accepted.

22. The learned Trial Court vide the Impugned Order I observed that the Petitioner filed the application under Section 12(2), C.P.C., mainly on the ground that there is no Agreement between the parties for sale of plot and that there is only a statement written by one of the witnesses in which two sentences have been added by forgery and cheating, hence fraud has been played upon the Court. The Petitioner failed to point out any non-reading or misreading on the part of the learned Trial Court in this regard. Indeed, a bare perusal of the Petitioner's application under Section 12(2), C.P.C., reveals that no ground was agitated other than allegations of fraud and cheating with regard to the alleged sale agreement for which specific performance was sought by the Respondents No. 1 and 2. In such circumstances, the learned Trial Court rightly concluded that the Petitioner has not challenged the validity of the Ex-parte Judgment & Decree on the plea of fraud, misrepresentation or want of jurisdiction as allegations of the agreement in question being based on fraud and cheating do not fall within the ambit of the provision of Section 12(2), C.P.C.

23. The learned Appellate Court elaborated vide the Impugned Judgment III that fraud and misrepresentation under Section 12(2), C.P.C., must be committed by the party with the Court or during the proceedings in Court. Whereas the Petitioner has not alleged any fraud or misrepresentation played upon the Court.

24. I fully agree with the concurrent findings and conclusions reached by both the Courts below. It is a matter of settled law that provision of Section

12(2), C.P.C., would be attracted only when fraud and misrepresentation is alleged in connection with the proceedings of the Court and not prior to the initiation of proceedings in Court. Reliance is placed on *Miss. Shazia Ashraf vs. Municipal Committee, Sahiwal through Administrator*, 2006 CLC 1018 and *Muhammad Younus vs. Venue Guards Advani*, 2015 CLD 390. In this case, the Petitioner failed to highlight any act of fraud or misrepresentation on the part of the Respondents No. 1 and 2 that was allegedly played upon the Court and the all the allegations regarding fraud and cheating pertained to instances prior to the institution of proceedings in Court.

25. Coming to the allegation regarding lack of territorial jurisdiction, it is firstly noted that no such plea was taken by the Petitioner in his application under Section 12(2), C.P.C. Under Section 21, C.P.C., the objection regarding jurisdiction is to be taken in the Court of first instance at the earliest possible opportunity. Even otherwise, the question of jurisdiction has been ably dealt with by the learned Appellate Court as follows:

“The counsel for appellant has mainly emphasized that the matter in hand pertains to District Division East, Islamabad and the ex-parte judgment and decree was passed by learned Civil Judge West, Islamabad. Thus the ex-parte judgment and decree is void being without jurisdiction and whole series of orders passed thereafter together with super structure of rights and obligations of the parties built upon them would fall to the ground.

The pivotal question for this Court is to be determined whether the ex-parte judgment and decree in question were passed by the Court without being clothed with territorial jurisdiction. To recapitulate it may be noted that by virtue of Notification 14(1) Admin/2011 dated 24.05.2011, the Chief Commissioner Islamabad Capital Territory divided the area of Islamabad Capital Territory into two Districts and Sessions Divisions i.e. Islamabad West and Islamabad East. But till 28/02/2012, there were no separate Civil Court of East Division. The Civil Judge Islamabad was vested with the territorial jurisdiction regarding the both the said divisions. Thereafter, on 09.04.2012, the Hon'ble Islamabad High Court, Islamabad pleased to order for transfer of cases to the East Division which was pending in the West Division. The judgment and decree in question having been passed on 11.01.2012, was thus not passed without territorial jurisdiction. However, after 28.02.2012 all the proceedings conducted, during the pendency of execution petition, by the learned Civil Judge West, Islamabad, were without authority, till its transfer to the District Division East.”

26. The crux of the matter being that despite division of the Islamabad Capital Territory into two districts by virtue of Notification No.14(1)Admin/2011 dated 24.05.2011, till 28.02.2012 there were no separate Civil Courts for the newly formed East Division and it was not until 09-04-2012 that this Court ordered the transfer of cases to the East Division from the West Division. As such, the Impugned Judgment & Decree passed on 11-01-2012 was not without jurisdiction. The aforesaid factual position

has not been controverted by the learned counsel for the Petitioner. Both the Courts below have reached a finding against the Petitioner after scanning the relevant facts and applicable law and such concurrent findings cannot be interfered with in the exercise of Constitutional jurisdiction in the absence of any legal infirmity which the learned counsel for the Petitioner has failed to do. Therefore, I find that the Petitioner's application under Section 12(2), C.P.C., was correctly dismissed vide the Impugned Order I and Impugned Judgment III.

27. In view of the foregoing, C.R No.152/2015, and Writ Petition No.2864/2015 are **dismissed** as being devoid of merit and as such the Impugned Order I (to the extent of Petitioner's application under Section 12(2), C.P.C.,) and Impugned Judgment III are upheld.

28. Whereas C.R No.53/2016 and the Petitioner's application under Order IX, Rule 13, C.P.C., are allowed with the result that the Impugned Order I dated 09.12.2014 (to the extent of Petitioner's application under Order IX, Rule 13, C.P.C.) and Judgment II dated 09.03.2015 as well as the Ex-parte Judgment and Decree dated 11-01-2012 are hereby set aside and the learned Trial Court is directed to hear and decide the suit on merits.

(SAMAN RAFAT IMTIAZ)
JUDGE

Announced in the open Court on 26th of May, 2022.

JUDGE