

**JUDGMENT SHEET**  
**IN THE ISLAMABAD HIGH COURT,**  
**ISLAMABAD**

Civil Revision No.503/2019  
PTV and others  
Versus  
Abdul Sattar

Petitioners by: Mr. Muhammad Nazir Jawad, learned ASC,  
Respondent by: Mr. Babar Saeed Butt, Advocate,  
Date of Decision: 23.06.2020.

**FIAZ AHMAD ANJUM JANDRAN, J.-** Through the instant Civil Revision Petition, petitioners have impugned the Order dated 14.11.2019 passed by the learned Civil Judge 1<sup>st</sup> Class Islamabad-West, whereby their application under Section 12(2) read with Order IX Rule 13 of the Civil Procedure Code (“**the Code**”) was dismissed. Through the said application, petitioners had challenged the *ex-parte* judgment and decree dated 26.07.2018, passed by the learned Civil Judge.

2. Precisely, facts relevant for the disposal of instant civil revision petition are that the respondent filed a suit for recovery of Rs.30 Million (*Rs.10 Million each paid in terms of cash security, earnest amount and damages for breach of agreement*). The petitioners contested the suit through a counsel and at the inception, filed an application under Section 34 of the Arbitration Act, 1940 (“**Act of 1940**”) for stay of the proceedings, inter-alia, on account of having arbitration clause in the agreement entered into between the parties. On 21.05.2018, said application was dismissed for non-prosecution and the respondent was directed to produce *ex-parte* evidence. After the recording of *ex-parte* evidence, the suit of the respondent was decreed *ex-parte* to the tune of Rs.20 Million while claim of Rs.10 Million in terms of damages was dismissed. On receipt of notice in execution proceedings, the petitioners contacted their counsel, who during the pendency of the suit disjoined the proceedings and not even informed them regarding the

status of the suit. The petitioners left with no option but to file a complaint against their counsel on the stated misconduct before the respective Bar Council and an application under Section 12(2) read with Order IX Rule 13 of the Code for setting aside *ex-parte* judgment and decree which has been rejected vide order dated 14.11.2019, impugned herein.

3. Learned counsel for the petitioners contends that a fraud has been committed with the petitioners by the respondent in connivance with their counsel; that they have taken over the briefs of other cases from the said counsel as well, issued a notice and have filed a complaint regarding the fraud/misconduct before the concerned bar council i.e. Punjab Bar Council which is still pending. Learned counsel further contends that the learned Trial Court was required to record evidence after framing of issues on the application under Section 12(2) of the Code filed by the petitioners while the same had been dismissed summarily. The learned counsel in support of his submissions placed reliance upon the case law referred at the time of preliminary hearing and noted in the order dated 14.01.2020.

4. On the other hand, learned counsel for the respondent contends that the suit was filed on 17.01.2012 while memo of appearance from the petitioners' side was filed on 21.02.2012 and the power of attorney on 04.07.2012. On 14.10.2014, *ex-parte* proceedings were initiated against the petitioners which were subsequently *set aside* and again on 25.05.2015, *ex-parte* proceedings were set-aside second time by the learned Trial Court. According to the learned counsel, if at the verge of 2020, suit filed in the year 2012 is allowed to be restored, a lengthy exercise would be waiting for the respondent for the redressal of his grievance and that mere negligence of the counsel is not a sufficient ground as law favours the

vigilant and not the indolent. Learned counsel fortified his submissions by placing reliance upon case law reported as 2012 SCMR 540, 2000 SCMR 296, 1995 CLC 946, 2008 YLR 119, 2019 YLR 427, 2015 YLR 1051, 1999 SCMR 1696 and 2000 SCMR 667.

5. Heard the learned counsel for the parties and perused the record with their able assistance.

6. Record appended with the instant civil revision petition shows that the issue between the parties is regarding sale and purchase of land for which the petitioners have entered into an agreement with the respondent, whereby the latter had to provide certain piece of land for the construction of a housing colony, setup for the welfare of the employees of the petitioners/ PTV. Pursuant to arbitration clause of the said agreement, petitioners filed an application under Section 34 of the Act of 1940 which was dismissed due to non-appearance and the case was fixed for recording of *ex-parte* evidence of the respondent. Ultimately, *ex-parte* judgment and decree for the recovery of Rs.20 Million was passed against the petitioners. The petitioners filed an application under Section 12(2) of the Code and also a complaint against their counsel under the Legal Practitioners and Bar Council Act, 1973 before the Punjab Bar Council.

7. In order to appreciate as to whether the case of the petitioners warrant due process that includes framing of issues and recording of evidence of the parties, it is imperative to go through Section 12(2) of the Code which reads as under:-

*“Where a person challenges the validity of a judgment, decree or order on plea of fraud, misrepresentation or want of jurisdiction, he shall seek his remedy by making an application to the Court which passed the final judgment, decree or order and not by a separate Suit.”*  
[emphasis added]

8. If the provisions of Section 12(2) of the Code are construed in the light of its plain meaning then it reveals

that the scope of application under said provisions is very vast and on big canvas unlike the provision of Order IX Rule 13 of the Code, where the petitioner has to prove sufficient cause for non-appearance. In the former case, the petitioner has to explore element of fraud, misrepresentation or want of jurisdiction and is restricted to file an application instead of separate suit as the restriction has expressly been incorporated in the Section by using the words “not by a separate suit”.

9. This Court is of the opinion that since the provision of Section 12(2) of the Code is substitution of the suit unlike any other provision in the Code for setting aside *ex-parte* judgment and decree, therefore, in a case where material alleged and produced by the applicant in support of allegations of fraud, misrepresentation and negligence is specific, it would be safe to record evidence for just adjudication of the application under Section 12(2) of the Code. When it is a substitution of regular suit then obviously the procedure to be observed while dealing with a suit, is required to be followed that includes amongst others the framing of issue and the recording of evidence. Hence, the analogy can safely be drawn that an application under Section 12 (2) of the Code is required to be decided after the framing of issues and providing chance to the respective parties to lead their evidence.

10. The principle *ibid* is not required to be followed in each and every case wherein application under section 12 (2) of the Code is preferred. In fact, it depends upon the nature of the assertions made in the application and the material annexed therewith to substantiate the said assertions. If it is felt that the grounds so agitated coupled with the material could not be assessed or adjudicated upon judiciously in affirmative or otherwise, then it is mandatory to allow the parties to produce their respective evidence and then to decide the application. The principle

of recording of evidence thus depends upon the facts of each case and the material to be evaluated on the touchstone of the provisions of Qanun-e-Shahadat Order, 1984 (“Order of 1984”).

11. Although the application of the petitioners before the learned Trial Court was not only under the provisions of Section 12(2) but side by side under the provisions of Order IX Rule 13 of the Code. When the provisions of Order IX Rule 13 of the Code are examined then it transpires that said provision could be availed of simultaneously to challenge the *ex-parte* judgment and decree under Section 96 of the Code but in case of Section 12(2) of the Code, the remedy is only one and exclusive of the other remedies. So, the concept and sphere of this provision is vast and comprehensive as compared to any other provision of the Code in respect of ex-parte judgment and decree. This Court being constitutional Court has to seek guidance from the principle of interpretation of statutes, wherein the intention of the legislature and plain meanings of the statutory provisions are of material importance.

12. When the above said principle is applied to the case at hand then it demonstrates that petitioners issued two notices to the Advocate, who had been their counsel. On failure to respond to their notice, petitioners also filed a complaint against the said Advocate under the Legal Practitioners and Bar Council Act, 1974 and the Rules made there-under before the Punjab Bar Council, which was pending at the time of filing of the instant application. Along with the application, the petitioners have annexed some material to show that they have withdrawn other cases from the said counsel due to alleged negligent and fraudulent act. The petitioners, as mentioned above, have leveled allegation of fraud and misrepresentation, statedly committed by the respondent in-league with their counsel, therefore, the oral assertion and the documents being

relied upon are required to be evaluated on the touchstone of the principles of evaluation of evidence contained in the Order of 1984 and that could only be decided after the framing of issues and recording of evidence of the parties. Although in each and every case, this rule could not be applied as a rule of thumb but the material which a party alleges and presented in support of his assertions in application under Section 12(2) of the Code is required to be decided by following due procedure i.e. framing of issues and recording of respective evidence of the parties. In this respect, guidance is taken from the law laid down in 2006 MLD 1451, 2014 CLD Lahore 390, PLD 2008 SC 591, 2008 SCMR 236, PLD 2006 SC 226 and 2010 SCMR 1097.

13. As this Court has come to the conclusion that in the present case, in order to settle the controversy, recording of the evidence after framing of issues is essential, therefore, the case law relied upon by learned counsel for the respondent is not relevant to decide the controversy.

14. In the light of what has been discussed above, the instant civil revision petition is allowed, impugned Order dated 14.11.2019 is set aside. The application filed by the petitioners under Section 12(2) of the Code shall be deemed pending which shall be decided after framing of issues and recording evidence of the parties. As the matter pertains to the year 2012, same cannot be kept pending for indefinite period, therefore, the learned Trial Court is directed to decide the application within a period of one month of assuming the work on regular basis after the pandemic of Covid-19. The respondent is compensated with cost of Rs.10,000/-, to be paid by the petitioners.

**(FIAZ AHMAD ANJUM JANDRAN)**  
**JUDGE**

Imran

Approved for reporting.