

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

**Writ Petition No. 456 of 2020**

Dr. Anwar Hussain Siddiqui

Versus

Additional District Judge, Islamabad-West, etc.

Petitioner by: Syed Shahzad Mashhadi,  
Advocate,  
Respondents 3 to 5 by: Mr. Muhammad Siddiq Awan,  
Advocate,  
Nemo for respondent No.6.  
Date of Hearing: 10.11.2020.

**FIAZ AHMAD ANJUM JANDRAN, J.-** Through instant writ petition, petitioner questions order dated 09.07.2019 & 30.10.2019 passed by the learned Civil Judge 1<sup>st</sup> Class and learned Additional District Judge-I/Judge (MCAC), Islamabad-East respectively, whereby his application under Section 12(2) of the Code of Civil Procedure, 1908 ("*the Code*") to countermand *ex-parte* judgment & decree dated 15.06.2013, was dismissed.

2. Relevant facts for the adjudication of instant writ petition, are that on 25.09.2012, respondents 3 to 5 (**respondents**) filed a suit for possession, cancellation of documents and damages against the petitioner and respondent No.6. The petitioner and respondent No.6 were proceeded against *ex-parte*, after publication in the newspaper vide order dated 18.05.2013. After the recording of *ex-parte* evidence, the suit was decreed vide *ex-parte* judgment and decree dated 15.06.2013. In execution proceedings, the petitioner entered his appearance and filed application under Section 12(2) of the Code. The said

application was contested by the respondents through written replies and the learned trial Court after framing issues, recording of evidence qua the issues and hearing the parties dismissed the said application vide order dated 09.07.2019. The petitioner, then preferred revision petition against the said order but the same was also dismissed vide order dated 30.10.2019.

3. Learned counsel for the petitioner contended that it is the substance/material and not the form that matters, therefore, application under Section 12(2) of the Code could not have been held to be not maintainable; that the respondents by playing fraud on the basis of distorted facts, obtained *ex-parte* decree as not only incorrect address of the petitioner had been mentioned in the plaint but also the due procedure for proceeding against him *ex-parte* was not followed, therefore, impugned orders are liable to be set-aside.

4. On the other hand, learned counsel for the respondents argued that the petitioner was well aware of the proceedings of the suit, his address mentioned in the application under Section 12(2) of the Code and in the suit is one and the same and that petitioner has not been able to substantiate any fraud or misrepresentation on the part of the respondents, therefore, petition is liable to be dismissed.

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

6. The judicial evaluation of the material available on record reveals that both the witnesses namely Abdul Majeed and Muhammad Zia ul Haq were consistent on the point

that the petitioner had no knowledge about the pendency of the suit. I have carefully scanned the entire statements of the said two witnesses. None of them was cross-examined in this respect, therefore, the said fact went un-rebutted, same cannot be brushed aside.

7. There is another important aspect of the matter that the petitioner in his application under Section 12(2) C.P.C, has specifically asserted that he was not properly served and no proper procedure was adopted for his service before resorting publication in the newspaper. The court did not record the statement of process server and also did not direct the respondents/plaintiffs to file complete/correct address of the petitioner or an affidavit in this respect to facilitate the process serving agency for affecting service. Besides this it was also asserted by the petitioner/defendant that the respondents/plaintiffs by committing fraud and misrepresentation intend to get execute ex-parte decree just to usurp his property. There are specific grounds to this effect which are "b to d" of the application respectively. The learned courts below failed to consider that whether the proper procedure was followed by the court for proceeding against the petitioner *ex-parte*. This conclusion, on the face of it, is contrary to record as mentioned above, whereby the petitioner had specifically asserted under para "d" that decree holders/respondents intend to usurp his property under the garb of ex-parte decree.

8. When examined the application for setting aside the ex-parte judgment and decree and its reply filed by the respondents, wherein most of the paras are replied in an evasive manner and there is no reply that whether petitioner was with knowledge that a suit was pending

against him and he willfully did not participate in that. There is nothing available on record which could demonstrate that any summons/notice was served upon the petitioner and thereafter, he willfully abstained himself from participating in the said proceedings. In substance, application amounts to an application under Order IX Rule 13 of the Code. Therefore, this Court is going to decide the same in that context.

9. There was no bar against the Court to treat an application under Order IX Rule 13 instead of Section 12(2) of the Code when grounds agitated are mixed either of fraud and non-service of summons as per law.

10. For doing substantial justice, Court was required to examine the contents of the application carefully including reply thereon and most particularly when evidence was produced in line with the contents of the application, then what prevented the Court to decide the matter in the light of said substance i.e. contents of application along with the evidence produced.

11. The relevant provision of service upon the defendant is Order V Rule 17 of the Code which for ease of reference is reproduced hereunder:-

*"17. Where 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."* [Emphasis added]

The entire record has been examined and Court fails to find out whether any such pain/effort or exercise was conducted by the Process Server to find out/locate the whereabouts of the petitioner/defendant. There is also nothing on record that, whether statement of the Process Server was recorded on oath. There is also another important fact that the respondents/plaintiffs mentioned the address of the petitioner/defendant in the suit as Khasra No.1303 while petitioner/defendant in his application for setting aside ex-parte decree mentioned the same as Khasra No.1300 which is distinct. All these facts suggest that the provision ibid has not been complied with by the Process Server and even the duty required to be performed by the Court, in this regard has not been performed with.

12. There is nothing available on record which could suggest that either the petitioner was served and he opted to refrain from participating in the proceedings, or he refused to receive the summons of the Court and in that way was in conscious knowledge of the pending proceedings and absented himself from participating in the proceedings. When nothing like that is available and even it is not the case of the respondents then merely on the hyper technical reasons to non-suit the petitioner was against the dictates of justice. In this respect guidance is sought from the case law referred as "**Syed Mazhar Ali Shah v. Shah**

***Muhammad'*** (1990 MLD Karachi 1070), wherein it was held that:-

***"The plain reading of the above provision would show that the decree would not be set aside if there was any irregularity in service and also that Court has to record the reasons for its satisfaction that the defendant had the knowledge of the date of hearing whereas in the present case the learned counsel could not point out any such reasons recorded by the Court."***

Likewise, in case law reported as "***Muhammad Ibrahim v. Mst. Mehmooda'***" (1987 CLC Karachi 1994) it was held that:-

***"The duty of the court is to administer justice in accordance with law. The Court ought not to exercise a punitive jurisdiction by declaring the defendant ex parte, Courts would ordinarily be inclined to set aside ex parte decree unless there has been gross negligence on the part of the party because the courts are there only for the advancement of justice and ordinarily would not be inclined to deprive a litigant of his right."***

13. It is safe to hold, within four corners of law that petitioner had been non-suited in absence of any fault on his part. He was not duly served as per the provisions of the Code and no effort was made on the part of the Court to serve him duly. It is held that inclination of the Court should be to decide the matter after hearing the parties instead of passing the orders ex-parte and without hearing them, particularly when the record is silent that petitioner intentionally avoided the proceedings.

14. In line with above discussion/findings, it is held that Process Server did not comply with the provisions of the

Code regarding service of the petitioner/defendant, he did not make any endeavor to trace the petitioner/defendant, he did not conduct exercise to trace whereabouts of the petitioner/defendant and locate him, any effort, pain, diligence as required by the Rule 17 of the Order V of the Code are non-existent, statement of Process Server was not recorded on oath and court passed the order in a mechanical manner by merely relying upon the statement of Process Server. Address of the petitioner/defendant is of Khasra No.1300 instead of Khasra No.1303 as mentioned by the respondents/plaintiffs, trial Court did not requisition affidavit from respondents/ plaintiffs qua correct address of the petitioner/defendant, no iota of evidence is available which could, even slightestly suggest that petitioner/defendant was with conscious knowledge of the proceedings pending against him and willfully absented himself to join the proceedings, stance contained in his application remained unshaken despite cross examination by the respondents/plaintiffs and on material points he was not questioned/cross-examined, petitioner has successfully proved that he had been non-suited having no fault on his part.

15. Both the learned courts below failed to appreciate the controversy in its true perspective, whereby it was incumbent to decide the controversy in the light of facts/law mentioned in preceding paras.

16. In view of above, the impugned orders are not sustainable in the eye of law. Consequently, the instant writ petition is **allowed**, impugned orders dated 09.07.2019 & 30.10.2019 are set-aside, application under section 12(2) of the Code, filed by the petitioner/defendant is allowed and in

consequence thereof, ex-parte judgment and decree dated 15.06.2013 is set aside. The learned Trial Court shall now decide the suit after affording due opportunity to the petitioner/defendant to contest and advance his version. The suit pertains to the year 2012, therefore, it is expected that the learned Trial Court shall make every endeavor to decide the same preferably within a period of six months.

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

Imran

Announced in open Court on **18.12.2020**

**JUDGE**

Approved for reporting.