

JUDGMENT SHEET.
ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT.

F.A.O. No.05/2016

Mst. Parveen Akhtar	Versus	Subash Chandar, etc.
Appellant by:		Raja M. Aleem Khan Abbasi, Advocate.
Respondent No.1 by:		Mr. Muhammad Saliheen Mughal, Advocate.
Respondent No.2 by:		Malik Talat Hussain, Advocate.
Respondent No.3:		Ex-parte.
Respondent No.4 by:		Malik Javed Iqbal Wains, Advocate.
Respondent No.5 by:		Mr. Musharraf Khan, Advocate.
Respondent No.6 by:		Mian Abdul Razzaq, Advocate.
Date of hearing:		30-05-2016.

JUDGMENT

MOHSIN AKHTAR KAYANI, J. Through the instant First Appeal against Order, the appellant has assailed the order dated 05.06.2015 passed by the learned Additional District Judge (West) Islamabad, whereby the petition filed by the appellant U/O 41 Rule 21 CPC has been dismissed.

2. Brief facts leading to the instant appeal are that appellant Mst. Parveen Akhtar entered into an agreement to sell with respondent No.2 Zain-ul-Abedin Awan who was allottee of plot No.738, Street No.75, Sector I-8/3 Islamabad measuring 311.11 Sq. Yds. against the total sale consideration of Rs.1,400,000/- vide agreement to sell dated 25.05.1991. Out of the said sale consideration the appellant has paid Rs.517,200/- to respondent No.4/the Federal Government Employees Housing Foundation but at the same time the policy was changed and allottees were allowed to raise construction on the plot at their own, therefore, respondent No.2 has received Rs.882,800/- and the appellant was allowed to raise construction on the suit plot at her own. It is important to mention here that the subject plot was transferable only after the construction has been completed, therefore, it was settled between the parties that respondent No.2 the allottee will execute the power of

attorney alongwith other documents in favour of the appellant thereafter, the prices were raised in the market and respondent No.2 has revoked the general power of attorney vide revocation deed dated 30.05.1995 and he tried to sell the plot in the open market whereas respondent No.2 has already received the total sale consideration of the suit plot and nothing was left as balance. Due to said dispute appellant filed a suit for specific performance of agreement to sell dated 25.05.1991 with a direction to respondent No.5 to deliver the possession of plot and a direction to respondent No.4 Housing Foundation not to issue NOC to anyone else except the appellant.

3. Respondent No.1 has also filed a suit titled as "*Subash Chandar versus Zain-ul-Abideen, etc*" regarding the same property whereas the 3rd suit titled "*Abdul Rasheed versus Zain-ul-Abideen, etc*" was also filed claiming the specific performance of their sale agreements dated 23.08.1993 & 27.06.1996 , respectively however, during the pendency of the civil suits all three suits were consolidated and consolidated issues were framed.

4. After recording of evidence of the parties the suit titled "*Mst. Parveen Akhtar versus Zain-ul-Abideen, etc*" filed by the appellant was decreed vide judgment and decree dated 21.03.2001 and the other two suits were dismissed.

5. Respondent No.1 has filed the RFA No.110/2001 and Abdul Rasheed respondent No.3 has filed the RFA No.115/2001 before the Hon'ble Lahore High Court, Rawalpindi Bench however, due to enhancement of pecuniary jurisdiction of District Courts the appeals were sent back to District Court Islamabad which were re-marked as RFA No.08/2008 and RFA No.07/2008, respectively.

6. Learned Additional District Judge Islamabad vide consolidated judgment dated 28.10.2010 accepted the appeal titled "*Subash Chandar versus Zain-ul-Abideen*" and set aside the judgment & decree dated 21.03.2001 passed in favour of appellant whereas the learned Additional District Judge Islamabad has dismissed the appeal titled as "*Abdul Rasheed versus Zain-ul-Abideen, etc*".

7. The appellant was proceeded against ex-parte in the appeal filed by respondent No.1 as no summon or notice was issued to the appellant. The appellant at the very initial level has transferred the suit plot to subsequent vendee however no notice was served upon the appellant and she was proceeded against ex-parte as a result whereof the RFA filed by respondent No.1 was allowed and judgment & decree in favour of appellant was set-aside.

8. The appellant when came to know about the ex-parte decree & judgment passed by the learned first appellate Court, has filed an application U/O 41 Rule 21 CPC (inadvertently mentioned Order 9 Rule 13 read with section 151 CPC) for setting aside the judgment & decree dated 28.10.2010, the said application has been dismissed vide impugned order dated 05.06.2015, hence the instant appeal.

9. Learned counsel for appellant contends that the learned Additional District Judge without considering the service modes on record passed the impugned order and deprived the appellant from his valuable rights. Learned counsel further contends that she has left the address House No.DD-65, Shamsabad Petrol Pump, Rawalpindi since long however, the said petrol pump is no more in existence even the record of Hon'ble Lahore High Court, Rawalpindi Bench confirms the said stance as notice alongwith its report of Process Server is available on record which reflects that the petrol pump is no more in existence, therefore, no question left to issue any notice on the similar address again and again. Learned counsel further contends that the Process Server who reported the whereabouts of the said House No.DD-65, Shamsabad Petrol Pump, Rawalpindi has not been examined by the learned Additional District Judge. Learned counsel further contends that there is no report on record through which the Court can presume the service of the appellant.

10. Learned counsel for appellant further contends that the question of setting aside of judgment passed by learned first appellate Court can only be ascertained after recording of evidence on the application of appellant in terms of Order 41 Rule 21 CPC and the said issue can only be resolved after framing of issues and through recording of evidence, whereas, learned first appellate Court straight away dismissed the application without giving any right of hearing to the appellant. Learned counsel for appellant also contends that appellant has changed her address from Rawalpindi to Islamabad and even the decree sheet/judgment dated 21.03.2001 filed before the First Appellate Court reflects the appellant's fresh address i.e., H.25, Street No.63, Sector F-10/3 Islamabad. Entire record is silent regarding due service and learned first appellate Court has allowed the substituted service without satisfying its legal requirement. He has relied upon 2002 SCMR 664, PLD 1998 [Lahore] 118, 1994 CLC 391, 2003 CLC 737, 1989 SCMR 1998.

11. Learned counsel for respondent No.1 has contested the instant appeal on the ground that after issuance of notice from the Hon'ble Lahore High Court, Rawalpindi Bench in the appeal, the appellant has intentionally avoided the service and remained on watching brief.

12. Learned Counsel of other respondents has not raised any specific objection against the acceptance of instant appeal.

13. I have heard the arguments and gone through the record.

14. From the perusal of record, it is evident that three different suits for specific performance titled as *Mst. Perveen Akhtar vs Zain-ul-Abideen, etc* filed on 04.07.1995 for specific performance of agreement to sell dated 25.05.1991, *Subash Chandar vs Zain-ul-Abideen, etc* filed on 25.06.1995 for specific performance of agreement to sell dated 23.08.1993 and *Abdul Rasheed vs Zain-ul-Abideen, etc* filed on 23.06.1999 for specific performance of agreement to sell dated 27.06.1996. All the three suits are relating to plot No.738, St.No.75 measuring 311.11 sq yds in Sector I-8/3, Islamabad, which was allotted to respondent No.2/Zain-ul-Abideen vide allotment letter dated 24.02.1991 by respondent No.4/FEGHF. All the three suits were consolidated and consolidated issues were framed. After recording of the evidence suit titled *Mst. Perveen Akhtar vs Zain-ul-Abideen, etc* was decreed, whereas the other two suits were dismissed vide consolidated judgment and decree dated 21.03.2001 passed by Senior Civil Judge, Islamabad. Respondent No.1/Subash Chandar, etc filed R.F.A No.110/2001 and Abdul Rashid respondent No.3 also filed R.F.A No.115/2001 before Hon'ble Lahore High Court, Rawalpindi Bench Rawalpindi, the same were admitted and notices were issued to the respondents and subsequent to the said notice, the R.F.As were sent back to District Courts Islamabad due to enhancement of pecuniary jurisdiction of District Court. Both these R.F.As remained pending before the Court of Additional District Judge, Islamabad, wherein the appellant was proceeded against ex-parte on 11.06.2008 whereas appeal titled Subash Chandar Versus Zain-ul-Abideen was ex-parte decree on 28.10.2010. The appellant after having knowledge of the ex-parte decree filed an application U/O 41 Rule 21, CPC. The said application was dismissed vide impugned order dated 05.06.2015 and the judgment and decree of the Trial Court in favour of respondent No.1 was up held.

15. The Core question before the Appellate Court was to decide the question of service of summon as the appellant raised the question that she was not served by any mode nor any

report is available on record, through which the Court could assume that notice has been served upon the appellant. Perusal of the record further reveals that the R.F.A filed by respondent No.1 before Lahore High Court, Rawalpindi Bench was admitted on 18.06.2001 and no status quo order was passed, however, notice was issued. As per record the only notice available on record which was issued by Lahore High Court, Rawalpindi Bench is dated 14.06.2002, which contains report dated 21.06.2002:-

گزارش ہے کہ فدوی برائے تعمیل مقدمہ پٹرول پمپ پر آیا جہاں پر بعد از دریافت معلوم ہوا کہ مذکورہ پٹرول پمپ عرصہ دراز سے ختم ہو چکا ہے۔ مسماۃ پروین اختر دختر محمد اعظم کچھ پتہ نہ چل سکا۔ کہ اب وہ کہاں رہائش پذیر ہے بدیں وجہ تعمیل نہ ہو سکے۔ رپورٹ عرض ہے۔

From the above report, it is apparent that the address given by the respondent No. 1 (Subash Chandar) at the time of filing of the RFA is House No.DD-65, Shamsabad Petrol Pump, Rawalpindi and the said petrol pump had already been removed/dismantled, therefore, it is not possible to consider the open space as an address for the purpose of service and the said report was given by the Process Server before the Lahore High Court, Rawalpindi Bench in R.F.A No.110/2001. The present appellant had also filed an application U/O 1 Rule 10, CPC before the learned Trial Court in one of the suits for impleadment as party/defendant. In the said application, the appellant has mentioned her address as House No.25, Street No.63, Sector F-10/3, Islamabad, subsequently the said address was also mentioned in the suit titled *Malik Abdul Rashid Vs. Zain-ul-Abideen, etc*, in which the appellant has been arrayed as defendant No.3. Even the said new address was mentioned by learned Senior Civil Judge in the consolidated judgment dated 21.03.2001, wherein the column of description of the parties, the address of appellant was mentioned as House No.DD-65, Shamsabad Petrol Pump, Rawalpindi in two suits titled as *Mst. Perveen Akhtar Vs. Zain-ul-Abideen, etc* and *Subash Chandar Vs. Zain-ul-Abideen, etc*, whereas the third suit contain new address of appellant Mst. Perveen Akhtar i.e. House No. 25, Street No. 63, F-10/3, Islamabad.

16. The appellant after obtaining judgment and decree dated 21.03.2001 in her favour managed the transfer of suit plot in her name from the office of CDA, which was confirmed through letter of transfer of allotment of Plot No.738, I-8/3, Islamabad, dated 13.07.2001, in which the address of appellant has been mentioned as House No.25, F-10/3, Islamabad.

17. From the perusal of complete record of the appeals, it reveals that only one receipt of Speed-Ex Courier Service dated 03.05.2005 was available on record, where fresh address of

the appellant is mentioned. The said notice was issued by learned Additional District Judge, Islamabad but there is no report, which would confirm the delivery of notice on the said address although the record further reflects that another report dated 10.03.2008 of Speed Ex Courier vide consignment No.21416634127 issued by learned Additional District Judge, Islamabad has been received by one Rizwan at the address referred as DD-65 Shamsabad Pump, whereas it is not possible when the Petrol Pump is not in existence, such report has no evidentiary value to confirm the service of summon. The entire order sheets are silent as to whether any service has been affected upon the appellant till passing of judgment by the Appellate Court i.e. 28.10.2010. The concept of service of summon or the proof of service of summon has been referred in order V rule 9 and rule 10-A, CPC, wherein the prima facie proof of summon has to be acknowledged in terms of order V rule 10-A(2), which is reproduced as under:-

[10-A. Service by post.—(1)

(2) An acknowledgement purporting to be signed by the defendant of the receipt of the registered communication or an endorsement by a postal employee that the defendant refused to take delivery of the same shall be deemed by the Court issuing the summons to be prima facie proof of service of summons.]

Hence, from the above mentioned provision, it is clear that summon should be served upon the defendant or upon the party through;

(a) Registered post, and

(b) Has to be confirmed through Acknowledgement Due signed by the defendant has to be considered as the proof of service.

Similarly, order V rule 16 CPC imposes a duty upon the Serving Officer to get the signature on the original summon for the purpose of acknowledgment of service and when the said summon has been refused by the defendant or his agent during the course of service proceedings and the Serving Officer has made all due and reasonable diligence could not find the defendant, the Serving Officer shall affix copy of the same on the outer door or on some other conspicuous part of the house, in which the defendant ordinarily resides. However, the said procedure has not been adopted in the present case as the address House No.DD-65 Shamsabad Petrol Pump Rawalpindi as per report of Process Server submitted before Lahore High Court, Rawalpindi Bench on 19.06.2002 was no more in existence.

18. In view of above mentioned modes of service, in the instant case there is no acknowledgement, service report or any affixation available on record in terms of order V rule 17, CPC. As per procedure provided U/O V, CPC, the Court is under obligation to verify the report of Serving Officer in terms of order V rule 19, CPC, which is reproduced as under:-

“19. Examination of serving officer.—Where a summons is returned under rule 17, the Court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.”

Hence, learned Trial Court has ignored the mandatory procedure of order V rule 19 as the serving officer has not been examined by the Court nor any affidavit has been obtained on the basis of which Court could concluded that normal mode of service is not possible and finally the order for substituted service has been passed by the Appellate Court in terms of order 5 Rule 20, CPC. Although the notice has been published in the newspaper but the procedure provided U/O V CPC has not been applied in its legal perspective, even the question of service in terms of order 41 rule 21, CPC has to be considered in accordance with law only when the Court feels satisfied as the valuable rights of the parties are involved and question of due service is in issue, the Appellate Court has to decide the factual controversy as to whether the service has been effected or not in terms of order 5, CPC. For that procedural application, the Appellate Court has to frame issue and record evidence due to the peculiar circumstances of the case, when the consolidated judgment and decree dated 21.03.2001 has been assailed by respondent No.1 in R.F.A before the Lahore High Court, Rawalpindi Bench on 18.06.2001, which remained pending till its acceptance by learned Additional District Judge, Islamabad vide judgment and decree dated 28.10.2010. The appeals remained pending for nine long years but the entire record of nine years does not reflect or demonstrate the due service in any manner.

19. In such like situation, when the defendant did not reside on the address given in the plaint, or the party is avoiding the service willfully or to prove the concept of acknowledgment of service, the Court has to frame issue and record evidence to decide the application U/O 41 Rule 21, CPC, which imposes the duty upon the Court to verify the fact

as to whether the service has been duly effected or the applicant is not appearing for any sufficient cause. In this regard, I am fortified with the view taken in **1994 CLC 391 [Lahore]** (**Shama (Shamsuddin) Vs. Muhammad Hussain and 9 others**) wherein it was held that:-

“Application for rehearing of appeal allowed ex parte could not be summarily rejected without holding of inquiry into question of due service of notice and also sufficiency of cause given for condoning default in appearance”

PLD 1998 Lahore 118 (Sikander Mahmood and 9 others Vs. Saeed Hassan and 17 others)

wherein it was held that:-

Appellate Court had not come to definite conclusion that plaintiffs (respondents) were avoiding service wilfully---Substituted service having been effected by publication of notice in local newspapers, without first satisfying that personal service of plaintiffs was not possible, could not be deemed valid service particularly in absence of any evidence on record to show that plaintiffs were keeping out of way for purpose of avoiding service---Record must show that efforts made for securing personal service did not succeed due to fault of person to be served---In absence of such efforts having been made, citation in newspaper would not be sustainable---For substituted service, efforts should have been first made to get the service effected by affixing copy of summons/notice on notice board of Court house and another copy on outer door of house where respondents were known to have last resided and simultaneously therewith citation could also be ordered-

2003 CLC 737 (WAPDA through Chairman, Lahore Vs. Muhammad Sanaullah Khan)

wherein it was held that:-

“Question raised by respondent in his application for setting aside ex parte order/decreed could be determined after framing of issues and recording of evidence---Such course having not been adopted order, dismissing application of respondent suffered from material irregularity”.

1989 SCMR 1998 (Muhammad Yousaf and 7 others Vs. Muhammad Azim and 2 others)

wherein it was held that:-

The respondents' application for setting aside the ex parte decree was dismissed by the trial Court. The appeal filed against the order of the trial Court was also dismissed. Their Revision, however, was allowed by the High Court; mainly, on the ground that there was dispute on the question of personal service on the respondents' side by the process server. He was not examined by the petitioner's side as a witness despite deposition on Oath made on respondent side with regard to non-service. They thus tried to rebut the presumption in favour of service. It was also held by the High Court that the deposition on Oath by respondents' side remained uncontroverted from the petitioners' side. In the circumstances of this case, therefore, it was held that in so far as the appreciation of evidence was concerned the onus of service having, during the trial, shifted on the petitioners' side, remained undischarged.

2002 SCMR 664 (SC) (Ahmed Khan Vs. Haji Muhammad Qassim and others) wherein it was held that:-

“Defendant did not reside at the address given in the plaint when the summons were issued and that there was no proof of the fact that the Trial Court took serious steps to effect personal service of the defendant before order for publication of notice in press was passed.”

Hence, I am of the view that:-

- (a) Notice was issued on incorrect address House No.DD-65 Shamsabad Petrol Pump Rawalpindi, which was not in existence as per report of the Process Server.
- (b) No service report exists on record as token of proof that notice was served upon appellant on House No.25 St. No.63, F-10/3, Islamabad.
- (c) No statement of Process Server was recorded by the Appellate Court.
- (d) No reason was given as to under what circumstances the Court has adopted mode of substituted service.
- (e) No reason has been reflected from the record as to why a notice was not issued at House No.25, Street No.63 F-10/3, Islamabad, when the said address is available in the judgment and decree dated 21.03.2001, in one of the suits titled as Malik Abdul Rashid Vs. Zain-ul-Abideen, etc.
- (f) Disputed fact has been decided without holding an inquiry i.e. framing of issues and recording of evidence.

Therefore, it has been observed that when disputed facts were alleged by the parties which cannot be resolved without giving opportunity to the alleging party to prove their contention through production of evidence, any opinion, order or judgment and such disputed facts would be considered illegal and passed in violation of Article 10-A of Constitution of Pakistan.

20. In view of above, it has been observed that learned Appellate Court has decided the application for setting aside ex-parte judgment and decree without observing the legal requirements. Even an incorrect fact has been mentioned in Para No.4 of the impugned judgment, wherein it is stated that respondents No.1 to 5 kept on appearing from 24.11.2005, however, there is no evidence on entire record, which confirm the said fact of appearance before the Appellate Court by the appellant.

21. In view of above mentioned grounds and decisions of the Hon'ble Courts, I am of the view that the impugned order is not sustainable and the same is hereby set aside. The matter

is remanded to Appellate Court with the direction to frame issue on the question of due service of appellant and after recording the pro and contra evidence of the parties decide the application U/O 41, rule 21, CPC.

22. The impugned order was passed by Mr. Wajid Ali, learned Additional District Judge (West) Islamabad and it is appropriate that the subject matter be entrusted to some other Court as the Learned Additional District Judge, Islamabad has already expressed his opinion, therefore, learned District Judge (West) Islamabad is directed to entrust the lis to any other Court.

23. The litigation between the parties is pending since 1991, the learned Court to whom the matter would be entrusted is directed to decide the application U/O 41 Rule 21 CPC filed by appellant within a period of 03 months, positively under intimation to this Court.

(MOHSIN AKHTAR KAYANI)
JUDGE

Approved for reporting.

JUDGE

Irfan Ali

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