IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:
Justice Irfan Saadat Khan
Justice Shahid Bilal Hassan

C.P.L.A.No.625-P of 2024
(Against the judgment dated 03.06.2024 passed by Peshawar High Court, Peshawar in Writ Petition No.1043-P of 2023)

Hashim Khan and others

... Petitioner(s)

Versus

Mst. Musarat Begum and others

... Respondent(s)

For the Petitioner(s):	Mr. Abdul Sattar Khan, ASC
For Respondent:	Mr. Zia Ur Rehman Khan, ASC (Via video link, Peshawar)
Date of Hearing:	16.01.2025

ORDER

SHAHID BILAL HASSAN, J. Dissatisfied with the judgment dated 3rd June, 2024 passed in writ petition No.1043-P of 2023 by the Peshawar High Court, Peshawar, the petitioner has filed the instant petition under Article 185(3) of the Constitution of Islamic Republic of Pakistan, 1973.

2. Tersely, the petitioner's predecessor-in-interest, Mst. Firasat Begum, brought a civil suit bearing No.268/1 against the respondents for declaration to the effect that the suit property, measuring 24-Gerab situated in revenue estate of Bakyana Tehsil & District Mardan (detail whereof was given in the head-note of the plaint) was owned by her father namely Mir Afzal (now deceased), and after his death, his estate devolved upon her and her brother Fazal Akbar, arrayed as defendant No.1 in suit, but, he, purportedly, illegally sold the suit property to the respondents No.2 to 8 through mutations in dispute in excess of his

share, without official partition and without her consent, seeking annulment of the impugned mutations. As a consequential relief, she sought issuance of permanent-cum-mandatory injunction restraining the defendants from alienating the suit property or changing the status or characteristic of the suit property, perpetually. She also sought recovery of possession of the suit property, if dispossessed during pendency of the case.

Record divulges that subsequent to the filing of the suit, the defendant No.1 in suit was personally served whereas the remaining defendants in suit avoided service through the ordinary mode. Therefore, ex parte proceedings were initiated against the defendant No.1 in suit on 15.01.2009 and directed the substituted service through publication in the "*Daily Assas*" as the expedient mode available under Order-V, Rule 20, Code of Civil Procedure, 1908 for procuring service of respondents. Subsequently, ex parte proceedings were initiated against the respondents on 24.01.2009. After recording ex parte evidence, ex parte decree was passed in favour of Mst. Firasat Begum vide judgment and decree dated 28.03.2009. It is pertinent to note here that during the proceedings Mst. Firasat Begum died, so her legal heirs were impleaded.

3. On 19.06.2021, respondents No.1 to 3 filed an application for setting aside the ex parte judgment and decree. The petitioners and respondents No.12 to 19 contested the said application. However, after hearing learned counsel for the parties, the learned trial Court accepted the application and set aside the ex parte decree vide order dated 15.07.2022. The petitioners, being discontented filed revision petition bearing No.31/CR of 2022 before the learned Additional District Judge-VI, Mardan, which was summarily dismissed vide judgment dated 05.01.2023. The petitioners feeling aggrieved filed writ petition No.1043-P of 2023 before the Peshawar High Court, Peshawar, which was partially allowed vide impugned judgment dated 03.06.2024 whereby the observations/findings of the Courts below touching the merits and demerits of the main suit were set aside while the remaining prayer of the petitioners was declined; hence, the instant petition.

4. We have given patient hearing to the learned counsel for the parties and have also gone through the record with their able

assistance. Under Order V of the Code of Civil Procedure, 1908, the service could be affected on the defendant(s) personally, by registered post, through authorized agent or a male member of the family, but nothing is on record to show as such, rather the record goes to evince that the suit was instituted on 11.11.2008 and the summons for appearance of the defendant(s) was issued for 19.11.2008, but the same were returned unserved upon the defendant(s). Thereafter, fresh summons were issued for appearance of the defendant(s) for 04.12.2008; however, again the same were returned unserved by the process serving agency. The learned trial Court repeated the summons for 19.12.2008 but it was returned with the report that respondent No.1 is a *parda* observing lady, and she refused to receive summons, whereas, the remaining respondents (respondent No.2 to 8) were not present in the house. On receiving the said report of the Process Server, the learned trial Court passed an order for service of the said respondents through affixation and the case was adjourned to 15.01.2009, but the order passed on the said date reveals that no affixation was made as directed by the learned trial Court. When the position was as such, the learned trial Court ought to have repeated the said order passed on the preceding date; however, on the application submitted by the petitioners, the learned trial Court passed an order for substituted service as provided under Rule 20 of Order V, Code of Civil Procedure, 1908 through publication in the newspaper. No notice through registered post or urgent mail or public courier was directed to be sent to respondents No.2 to 8. Moreover, the learned trial Court while jumping to substituted service of the respondents/defendants did not record statement of the process server as required under Rule 19, Order V, Code of Civil Procedure, 1908 and without doing so ordered the same. Substituted service can only be effected when ordinary summons cannot be served or defendant deliberately avoids to receive summons of the Court and the Court is satisfied that service could not be effected through ordinary modes of service and that satisfaction can be achieved by recording statement of the process server but as stated above nothing as such was

undergone by the learned trial Court. In Sana Jamali[1] case, this Court held that:

> *'It is a well settled exposition of law that the Court may order substituted service under Order V, Rule 20, C.P.C. where it is satisfied that there is reason to believe that the other side 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. In such a case the Court shall order for service of summons by (a) affixing a copy of the summons at some conspicuous part of 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. The service substituted by order of the Court shall be as effectual as if it had been made on the defendant/other side personally. The legislature in its judiciousness and astuteness has conferred a wide-ranging freedom of choice and options under Order V, Rule 20, C.P.C. as to how the substituted service is to be effected to ensure service quickly and efficiently if the notice/ summons could not be served personally at the given address or at the address which is given or known, but the remedy of substituted service can be resorted to only if the Court is satisfied that there is reason to believe that the other side is keeping out of the way only to avoid service.'*

Keeping in view the above said portrayal of the peculiar facts of the case, the trial Court seized of the matter, while taking up application seeking setting aside ex parte judgment and decree, was right in observing that the process of issuance of proclamation without fulfilling the mandatory requirement is nullity in the eye of law; therefore, the superstructure built thereon would automatically collapse. Even, it is settled principle of law as well as demand and mandate of law that one should not be condemned unheard and every litigant(s) should be provided with fair opportunity to plead and defend his/her case by adhering to the principle of Audi Alteram Partem and technicalities should and ought to be avoided. In the present case, when it is established from the record that the learned trial Court while dealing with the suit did not resort to the mandated procedure of law for procuring the service of the respondents No.2 to 8, the application

[1] Sana Jamali v. Mujeeb Qamar and another (2023 SCMR 316)

seeking in setting aside ex parte judgment and decree was rightly and correctly accepted by the learned Court, seized of the matter and the same has rightly been affirmed by the Revisional Court and the learned High Court. The ratio of the judgment reported as "Syed Muhammad Anwar Advocate vs. Sheikh Abdul Hag" (1985 SCMR 1228) has, on the subject, rightly been appreciated by the learned High Court.

5. Additionally, findings and observation of the High Court as to question of limitation for filing application under Order IX, Rule 13, Code of Civil Procedure, 1908 are based on proper appreciation of law. The High Court, on the subject has rightly observed:

> *'Turning to the provisions of Order-IX Rule13 CPC and the limitation for filing an application for setting aside exparte judgment and decree. A glance over provisions of Order-IX Rule 13 CPC reveals that the remedy for setting aside exparte judgment and decree has been provided under the above-referred Rule, whereunder, the defendant/defendants can file an application for setting aside the exparte decree. Such application must be shielded with sufficient cause to justify non-appearance of the defaulting party on the date the exparte decree was passed, and the said application must be submitted within 30 days under Article 164 of the Limitation Act. The said period starts running from the date of the decree or where summons is not duly served, when the applicant has got knowledge of the decree. In this behalf, reference may be made to the cases reported as "Mst. Afzal Begum and others vs. Y.M.C.A. through its General Secretary" (PLD 1979 SC 18), "Government of Balochistan CWPP&H Department and others vs. Nawabzada Mir Tariq Hussain Khan Magsi and others" (2010 SCMR 115), "Sher Wali Khan vs. Mst. Khosh Begum" (2011 CLC 421) and "Government of Khyber Pakhtunkhwa and others vs. Muhammad Anwar Khan" (2014 YLR 485). The proviso to Rule 13 Order-IX CPC was added by the Law Reforms Ordinance, 1972, which lays down that no decree passed exparte shall be laid to rest merely on the ground of any irregularity in the service of summons, if the Court is satisfied, for the reasons to be recorded, that the defendant/defendants had knowledge of the date of hearing in sufficient time to appear on the date and answer the claim. But under no stretch of imagination, it could be inferred that on the strength of this proviso, even an irregular service of summons is to be treated as "due service" even for the purpose of the Limitation Act. In my view, on the face of it, this proviso deals with the effect of mere an "irregularity" and not an illegality in service of summons. There is nothing on the record to suggest even remotely that respondent No.2 to 8 had any knowledge of the date of hearing when the proceedings were actually ordered exparte against them. In this view of the matter, the learned counsel for the petitioners cannot use the said proviso as a sword against the respondents, from the date when exparte proceedings were actually taken against respondent No.2 to 8.'*

The findings so recorded are affirmed and maintained by reiterating the ratio of judgment[2].

6. In judgment[3] this Court has invariably held that:

> *'Moreover, it is also a well settled elucidation of law that an inadvertent error or lapse on the part of Court may be reviewed in view of the renowned legal maxim "actus curiae neminem gravabit", recognized by both local and foreign jurisdictions which articulates that no man should suffer because of the fault of the Court or that an act of the Court shall prejudice no one. This maxim is rooted in the notion of justice and is a benchmark for the administration of law and justice to ensure that justice has been done with strict adherence to the law and for undoing the wrong so that no injury should be caused by any act or omission of the Court. The proper place of procedure in any system of administration of justice is to help and not to thwart the grant to the people of their rights. All technicalities have to be avoided unless it is essential to comply with them on grounds of public policy [Ref: Imtiaz Ahmad v. Ghulam Ali and others (PLD 1963 SC 382)].*

After above discussion, we are of the considered view that the fora below have rightly and legally adjudicated upon the matter in hand and have not committed any illegality, warranting interference by us at this stage.

7. The compendium of the discussion above is that we do not find it a fit case for grant of leave. Leave is refused, consequent whereof the petition stands dismissed.

Judge

Judge

Islamabad
16.01.2025
'Approved for reporting'
(M.A.Hassan)

[2] Muhammad Sharif v. MCB Bank Limited and others (2021 SCMR 1158)
[3] Faqir Muhammad v. Khursheed Bibi and others (2024 SCMR 107)