

Stereo.HCJDA-38
JUDGMENT SHEET
IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

C.R. No.29162 of 2019

Muhammad Yaqoob
v.
Muhammad Ashiq

J U D G M E N T

Date of hearing	21.4.2022
Petitioner by	Rai Imran Khan, Advocate.
Respondent by	Rao Hamid Hussain Khan, Advocate.

Rasaal Hasan Syed, J.: Petitioner in instant civil revision has called into question order dated 11.4.2019 in terms whereof the order of the learned Civil Judge declining the application under Order IX, Rule 13, C.P.C. was set aside, the appeal was allowed and, in result, the ex parte proceedings order as also the ex parte decree were set aside and the Trial Court was directed to decide the suit afresh after recording evidence of parties.

2. For the disposal of this petition material facts are that the petitioner instituted a suit for recovery of Rs.500,000/- on the basis of an alleged promissory note which was decreed on 30.8.2016. The judgment and decree was challenged in appeal through RFA No.1130/2016 titled “Muhammad Ashiq v. Muhammad Yaqoob” which was allowed by learned Single Judge of this Court, as he then was, vide judgment dated 25.10.2017. In result the decree was set aside and the case was sent to the Senior Civil Judge (Administration), Okara for appearance on 14.11.2017 with the direction that the said Senior Civil Judge shall either

himself hear the case or entrust the same to any other court of competent jurisdiction. In post-remand proceedings the file was put up before the learned Senior Civil Judge on 14.11.2017 when Muhammad Yaqoob the petitioner/plaintiff appeared in person but no one appeared on behalf of the defendant/respondent whereupon the learned Senior Civil Judge, Okara entrusted the case to Mr. Asif Nawaz, Civil Judge, 2nd Class, Okara where the parties were directed to appear on 15.11.2017. The respondent appeared before Transferee Court on 15.11.2017 when order for issuance of notice pervi to the respondent/defendant was passed. Respondent was never served personally by any process but on assumption that the notice was allegedly received by respondent's brother, the court proceeded against him ex parte vide order dated 19.12.2017; ex parte evidence was recorded whereafter the suit was decreed on 22.1.2018. During the pendency of execution proceedings an application under Order IX, Rule 13, C.P.C. for setting aside of ex parte decree as also a miscellaneous application for stay of execution proceedings were filed by respondent. Reply to the applications was received and case was adjourned for arguments on the miscellaneous application for stay of execution proceedings. The learned Civil Judge dismissed both the applications vide order dated 24.11.2018 which order was challenged in appeal that was allowed by learned Addl. District Judge, Okara vide impugned order dated 11.4.2019 in terms whereof order dated 24.11.2018 was set aside, application under Order IX, Rule 13, C.P.C. was allowed, ex parte judgment and decree dated 22.1.2018 was set aside subject to payment of costs of Rs.7,000/- and the case was sent back to the Trial Court for decision of suit

afresh after recording evidence of parties. Against order dated 11.4.2019 of learned Addl. District Judge, the instant revision has been filed.

3. Learned counsel for the petitioner submits that the respondent was well aware of the order of remand passed by this Court in RFA No. 1130/2016 and that despite knowledge he did not appear before the Senior Civil Judge concerned on fixed date and that notice pervi issued to the respondent/defendant was served upon his brother Zakir Ali and, therefore, the application filed on 30.7.2018 for setting aside of ex parte decree was not within time and that the limitation in this case was thirty days which was incorrectly assumed to be three years under Article 181 of the Limitation Act, 1908 and that the Appellate Court did not correctly construe the real issue nor properly analyzed the facts involved in the case and ignored that the petitioner was unjustifiably kept engaged in prolonged litigation and that there was no sufficient reason for setting aside of the ex parte decree.

4. Contrarily, the learned counsel for the respondent submitted that the judgment and order passed by the Appellate Court was well reasoned, the appeal was within time, there were sufficient reasons for setting aside ex parte decree and that the order of the Trial Court was not only violative of the remand order of this Court but was also against the provisions of law and rule of justice.

5. From the record of case, copy whereof has been appended with this petition, it is discernible that initially a suit for recovery of Rs.500,000/- on the basis of a promissory note was instituted under Order XXXVII of C.P.C. which was decreed by the learned Addl. District

Judge/Trial Court on 30.8.2016. Respondent filed an appeal bearing RFA No. 1130/2016 which was accepted by a learned Single Judge of this Court vide judgment dated 25.10.2017. In result the judgment and decree dated 30.8.2016 of the learned Addl. District Judge/Trial Court was set aside and the case was remanded for re-trial by the Civil Court by taking the view that the promissory note, which was the basis of suit, was not a negotiable instrument as it was witnessed by two persons and was to be termed as a bond and, therefore, the summary suit under Order XXXVII of C.P.C. could not be filed and that it could be adjudicated as a regular suit by the court of plenary jurisdiction. In terms of the remand order the parties were directed to appear before the learned Senior Civil Judge (Administration), Okara on 14.11.2017 who was given the option either to try the suit himself or to entrust the same to any other court of competent jurisdiction. It is evident from the order-sheet that on 14.11.2017 only the petitioner/plaintiff appeared in person before the learned Senior Civil Judge concerned who after reproducing the operative part of the Order of this Court sent the suit to the court of Mr. Asif Nawaz, learned Civil Judge, 2nd Class, Okara before whom the petitioner/plaintiff, who was present in court, was directed to appear. On the adjourned date i.e. 15.11.2017 the petitioner/plaintiff only appeared with his counsel who filed fresh wakalatnama whereafter an order for issuance of notice pervi to the respondent/defendant and his counsel was passed and case was adjourned to 25.11.2017. The learned Presiding Officer being on leave on the next date the case was further adjourned for 04.12.2017 after repeating notice pervi. On

the adjourned date the notices having not been received back it was ordered that the notice be repeated for the service of respondent and his counsel. On 19.12.2017 the learned Civil Judge proceeded ex parte against the respondent/defendant observing that Rana Fida Mohyuddin, Advocate had not received the notice as the counsel had been changed and that the notice pervi issued to Muhammad Ashiq defendant/respondent was allegedly received as per report of service by his brother Zakir Ali. The respondent was accordingly proceeded against ex parte and, thereafter, ex parte decree was passed on 22.1.2018. During the execution proceedings, at a stage when the property of the respondent was attached, an application under Order IX, Rule 13, C.P.C. for setting aside of the ex parte decree was moved. Another miscellaneous application for stay of execution proceedings was also filed. Explanation and reason for non-appearance given was that the respondent got the impression as if his RFA had been accepted, suit of the petitioner was dismissed and that at a stage when he was informed that his agricultural property had been attached in execution of a decree, he inquired into the matter and moved application under Order IX, Rule 13, C.P.C. on 30.7.2018. The application was contested and, thereafter, dismissed by the learned Civil Judge vide order dated 24.11.2018. Appeal thereagainst was accepted by the learned Addl. District Judge and after setting aside the ex parte decree the case was remanded for decision afresh.

6. On due consideration of the submissions made by the learned counsel for the parties and deeper examination of the file, it is observed that the order of the learned Civil Judge dismissing the application under Order IX, Rule 13,

C.P.C. was on the face of it legally untenable inasmuch as without framing any issue, recording any evidence or adopting proper procedure the application was straight away dismissed; little appreciating that in the application serious factual controversy was raised as to the service of notice as according to the respondent he was never served by any process by the Transferee Court and that the ex parte proceedings order was legally unsustainable. The learned Civil Judge on assumption that Zakir Ali was the brother of respondent and the notice having been allegedly served upon him was sufficient. As a matter of fact under Order V, Rule 15, C.P.C. the notice shall be served upon the party personally and acknowledgement of receipt shall be obtained by the process server who shall record in his report the name of the person who identified the recipient of the notice, the residence of the defendant and the witnesses in whose presence the notice was delivered or served and that in case the personal service is not possible, the notice could be delivered on a male member of the family living in the house of defendant in the suit permanently. In the instant case there was no material on record to prove that Zakir Ali was real brother of the defendant or that he was living in the same house with the defendant or could be treated to be one of the inhabitants of the house. It is a settled rule that where the service is disputed the person claiming service needs to prove the same through affirmative evidence; more particularly by producing the process server which exercise was never done. The order-sheet also indicated that the ordinary requirements of law and the procedure prescribed in Rules 16 to 19 of Order V, C.P.C. were never strictly followed.

So much so the learned Civil Judge did not record any statement of the process server to satisfy as to how and in what manner the service was effected, upon whom the service was made and as to whether there was any plausible reason for the process server to deliver a notice to a third person instead of the party itself; rather than making repeated efforts by visiting the house of defendant to procure his personal service and whether in the given circumstances it could be considered to be a case of due diligence on the part of process server as required in law. Reference in this context may be made to “Siraj Din v. Mst. Iqbal Begum” (PLD 1968 Lah. 639). The requirements of the legal procedure prescribed by Rules 16 to 19 of Order V, C.P.C. having not been followed, on the face of it, it was not a case of any lawful service of the defendant. Rather it was no service in the eye of law.

7. The learned Civil Judge incorrectly assumed knowledge of service by the alleged delivery of notice upon one Zakir Ali, in the absence of any evidence to prove that he had any relationship with the respondent or that he was a living in the same house where the respondent was residing. Obviously being not a son or a descendant of the defendant, he could not be deemed to be a family member of the respondent and, therefore, it was necessary for the process server to have made reasonable attempts to deliver the notice personally. This having been not done nor any declaration of due service under Rule 19 of Order V, C.P.C. recorded, the order of ex parte proceedings was illegal and without jurisdiction.

8. As to the argument that the respondent did not appear before the Senior Civil Judge, Okara on 14.11.2017 though

so directed in the Order in the RFA, suffice it to observe that the presence of the respondent at the time of order was not marked in the final Order passed in the appeal nor was there any other material to assume that he had any source of knowledge about the next date in the Trial Court. Be that as it may, the learned Senior Civil Judge, Okara on receiving the file after remand did not proceed against him ex parte in the matter. Instead, the learned Senior Civil Judge entrusted the case to the court of Mr. Asif Nawaz, learned Civil Judge; and that too without passing any order of ex parte proceedings and being so, the learned Transferee Court was justified in passing an order for issuing notice pervi on 15.11.2017. In this situation the petitioner could not gain any benefit due to the non-appearance of the respondent on 14.11.2017 as no adverse order was passed against him. The real issue started when the process of notice pervi commenced as in the order of proceeding ex parte, the Transferee Court assumed the alleged delivery of notice to one Zakir Ali as sufficient for passing ex parte proceedings order against the respondent which in circumstances noted above, hardly justified to penalize the respondent or to proceed against him ex parte. The learned Addl. District Judge, therefore, rightly concluded that the basic ex parte proceedings order was illegal and, therefore, the ex parte decree passed in result thereof could not stand.

9. Another reason for which the order of learned Civil Judge could not sustain and was rightly set aside by the Appellate Court was that as per order-sheet the learned Civil Judge had fixed the case for arguments on the application for stay of the execution and for this purpose

the case was adjourned from 12.10.2018 to 26.10.2018, 22.11.2018 and 24.11.2018; on which date instead of confining his order to the stay matter the learned Civil Judge firstly dismissed the main application under Order IX, Rule 13, C.P.C. and, thereafter, dismissed the stay application with the observation that it could not proceed because of the dismissal of main application. The main application having not been fixed for arguments nor any evidence recorded, the learned Civil Judge committed a serious error of jurisdiction in law in dismissing the same.

10. It is also observed that the respondent had asserted his knowledge of proceedings in execution from the attachment of his property. The petitioner in paragraph “9” of the reply to the application did not dispute that the agricultural property of respondent was attached in execution. Order dated 30.6.2018 in the execution proceedings shows that the case was adjourned for the report of court auctioneer while the proclamation for auction of the property was to be made on 10.7.2018 and affixation of proclamation in the court was required to be made on 17.7.2018 and auction of property was fixed for 26.7.2018. When the plea of the respondent is examined in this backdrop it is obvious that his explanation was just and fair and when he acquired knowledge of the attachment of property, he immediately moved the application for setting of ex parte decree, which was within time from the date of knowledge. Learned Civil Judge illegally assumed the delivery of notice to Zakir Ali as a source of knowledge for the petitioner without appreciating that there was no evidence to prove that he was a member of the family or was a resident of the house where the respondent was living and, therefore, in the

absence of statement of the process server who was not produced no inference could be safely drawn to posit legal or proper service. Being so the proviso to Rule 13 of Order IX, C.P.C. was not attracted in view of the rule laid down in the case of “Syed Muhammad Anwar Advocate v. Sh. Abdul Haq” (1985 SCMR 1228). In the given circumstances the view taken by learned Addl. District Judge was correct that the application was within time and that there were sufficient reasons for decision of suit on merits and that technicalities ought not be allowed to prevent the courts from doing justice by giving fair and proper opportunity of evidence to the parties.

11. For the reasons supra, the order passed by the learned Addl. District Judge being in accordance with law does not call for any interference. Resultantly, the instant petition being without substance is **dismissed**. The learned Civil Judge seized of the matter shall ensure final disposal of the suit within **three months**.

(RASAAL HASAN SYED)
JUDGE

APPROVED FOR REPORTING

JUDGE