

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Justice Amin-Ud-Din Khan
Justice Shahid Bilal Hassan

CPLA No.3824 of 2023 & C.M.A.No.8489 of 2023

(Against the order dated 18.09.2023 passed in W.P.No.2874 of 2022 by Islamabad High Court, Islamabad & stay application)

M/s Mobiserve Pakistan (Pvt.) Limited

... *Petitioner(s)*

Versus

M/s V-Tech & others

... *Respondent(s)*

For the Petitioner(s): Mr. Imran Muhammad Sarwar, ASC
(via video-link from Lahore)

For Respondent No.2: Mr. Hasan Rashid Qamar, ASC

Date of Hearing: 29.07.2025

ORDER

SHAHID BILAL HASSAN, J.

C.M.A.Nos.89 of 2024 & 1253 of 2024

Through these application (CMA No.89/2024 on behalf of respondent No.1 and CMA No.1253/2024 by petitioner), the applicant(s) intend to bring on record certain documents. Relying on the contents of the application(s) supported by affidavit(s), the same are allowed subject to all just and legal exceptions.

Main Petition

This petition under Article 185(3) of the Constitution of Islamic Republic of Pakistan, 1973 has been filed against order dated 18.09.2023 passed by learned Single Judge, Islamabad High Court, Islamabad, whereby W.P.No.2874 of 2022 filed by the present petitioner(s), against the order dated 14.07.2022 passed by learned trial Court dismissing application under section 12(2) Code of Civil Procedure, 1908, has been dismissed.

2. Succinctly, the respondents No.1 and 2 instituted a suit for recovery against the petitioner, wherein, to procure the attendance of the petitioner, summons were issued but due to non-appearance, despite affixation of Court notice, the petitioner was proceeded against ex parte and after recording ex parte evidence, the suit was decreed ex parte vide

judgment and decree dated 18.09.2013. An application under section 12(2), Code of Civil Procedure, 1908 was filed by the present petitioner on 22.11.2014, which was dismissed by the trial Court on 14.07.2022. The petitioner being aggrieved filed constitution petition referred to above, which was dismissed vide impugned order dated 18.09.2023 by the High Court, against which the instant petition for leave to appeal has been brought.

3. Heard.

4. Considering the arguments and going through the record, it is observed that on 19.02.2013, no order for affixation of court summons on the conspicuous place of the business of the petitioner was passed by the trial Court rather it was ordered that '*defendant be summoned through registered post AD/TCS for 28.02.2013*'; however, on 28.02.2013, the trial Court without taking into account the preceding order and without recording statement of the process server as to purported affixation of the court summons as required under Rule 19, Order V, Code of Civil Procedure, 1908, as to his satisfaction for reasons to believe that the petitioner/defendant was keeping out of the way for the purpose of avoiding service or for any other reason the summons cannot be served in the ordinary way, especially when no order for affixation was passed by him on the preceding date and without adhering to the provided procedure as per mandate of law, resorted to substituted service of the petitioner through publication of court notice in the newspaper. It is observed that 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 Jamali¹ 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

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

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 exposition of the peculiar facts of the case in hand, it is held that the process of issuance of proclamation for the service of the petitioner without fulfilling the mandatory requirement was nothing but nullity in the eye of law; therefore, the superstructure built thereon would automatically collapse. Even, it is a 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 petitioner, the application seeking setting aside ex parte judgment and decree ought to have been accepted².

In judgment³ 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 neminemgravabit", 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)].

5. Apart from the above, in the present case, a question arose as to whether, in the circumstances as in the instant case, the application

² Syed Muhammad Anwar Advocate vs. Sheikh Abdul Haq (1985 SCMR 1228), Muhammad Sharif v. MCB Bank Limited and others (2021 SCMR 1158)

³ Faqir Muhammad v. Khursheed Bibi and others (2024 SCMR 107)

under Section 12(2), Code of Civil Procedure, 1908 (hereinafter CPC) or under Order IX Rule 13, CPC would arise; therefore, we would like to extend our hands in elaborating the legal question that as to when an application under Section 12(2) of the CPC lies and when an application under Order IX Rule 13 CPC lies, with illustrative instances to clarify their respective scopes. Sub-section (2) of Section 12 CPC reads:

'Where a person challenges the validity of a judgment, decree or order on the plea of fraud, mis-representation 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.'

This provision of law provides a remedy to challenge a judgment, decree, or order obtained by: i). fraud, ii). misrepresentation, or iii). want of jurisdiction⁴. However, mere use of these terms is not sufficient, rather specific particulars must be provided as required by Rule 4 of Order VI, CPC⁵. It allows **any person**⁶ affected by such a decree or order to apply to the court that passed it, seeking to set it aside. This provision is not limited to parties to the suit but extends to any person aggrieved by the decree or order. It means an application under Section 12(2) CPC is maintainable when the decree or order was obtained by deliberate deception or suppression of material facts from the Court⁷. However, the judgment⁸ supports a broader reading that includes fraud between the parties affecting the decree. For instance, if a plaintiff fabricates documents or misleads the court to secure a favorable judgment, the affected party can invoke Section 12(2) CPC; when the decree results from unintentional but material misstatement of facts by a party, leading the court to pass an erroneous order. For example, if a party misrepresents the ownership of property in a suit, the aggrieved party may apply under this section; and when the court lacked inherent jurisdiction to pass the decree or order. For instance, if a court passes a decree in a matter outside its territorial or pecuniary jurisdiction, an application under Section 12(2) can be filed. Additionally, a person not a party to the suit but affected by the decree e.g., a third party whose property is wrongly included in a decree, may apply under this section.

The application must be filed in the same court that passed the decree or order. The applicant must prove fraud, misrepresentation, or

⁴*Pakistan Railways through Chairman Pakistan Railways, Islamabad and another v. Muhammad Amin (2025 SCMR 646)/(2025 PLC (CS) 699-Supreme Court)*

⁵*In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items necessary) shall be stated in the pleadings.'*

⁶*Boldness for emphasis.*

⁷*Sheikh Muhammad Iftikhar Ahmad and others v. Faiz Ahmad and others (2023 SCMR 2158)*

⁸*Muhammad Aslam and others v. Mst. Kundan Mai and others (2004 SCMR 843)*

lack of jurisdiction with cogent evidence. The scope of application under Section 12(2) CPC is broader than Order IX Rule 13, CPC, as it is not limited to ex-parte decrees and can be invoked by non-parties⁹.

6. As against the above, Rule 13 of Order IX, CPC reads:

'13. Setting aside decree ex parte against defendant. (1) In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also;

Provided further that no decree passed ex parte shall be set aside merely on the ground of any irregularity in the service of summons, if the Court is satisfied, for reason to be recorded, that the defendant had knowledge of the date of hearing in sufficient time to appear on that date and answer the claim.

(2) The Provisions of section 5 of the Limitation Act, 1908 (IX of 1908), shall apply to applications under sub-rule (1).

This provision of law provides a remedy to set aside an ex-parte decree passed against a defendant who was unable to appear when the suit was called for hearing. It applies only to defendants and is limited to ex-parte decrees. An application under Order IX Rule 13 CPC is maintainable when: the defendant(s) was not duly served with the summons, or the service was defective, preventing their appearance; the defendant(s) was prevented from appearing due to sufficient cause, such as illness, accident, or other unavoidable circumstances; the decree was passed ex-parte, i.e., in the absence of the defendant, without hearing their defense. The application must be filed by the defendant in the court that passed the ex-parte decree. The defendant must demonstrate that they were not served or had sufficient cause for non-appearance. The court may set aside the decree in terms (e.g., costs) and allow the defendant to contest the suit. Unlike Section 12(2) CPC, this provision-Order IX, Rule 13, CPC is limited to ex-parte decrees and does not cover fraud or jurisdiction issues unless they relate to service or non-appearance. Key Distinctions between the applications under section 12(2) and IX(13), CPC are that Section 12(2), CPC addresses fraud, misrepresentation or lack of jurisdiction and applies to any decree or order, while Order IX Rule 13, CPC is restricted to ex-parte decrees; Section 12(2), CPC can be invoked by any aggrieved person, including non-parties, while Order IX Rule 13,

⁹ *Hafiz Malik Kamran Akbar and others v. Muhammad Shafi (deceased) through L.Rs. and others (PLD 2024 Supreme Court 262)*

CPC is available only to defendants; Section 12(2) CPC focuses on substantive defects (fraud, misrepresentation, jurisdiction), while Order IX Rule 13 CPC addresses procedural issues (non-service, sufficient cause); Section 12(2) CPC seeks to set aside the decree or order entirely, while Order IX Rule 13 CPC seeks to restore the suit for hearing on merits. In light of the above, an application under Section 12(2) CPC lies when a decree or order is tainted by fraud, misrepresentation, or lack of jurisdiction, as seen in cases like fabrication of documents or jurisdictional overreach. Conversely, an application under Order IX Rule 13 CPC lies when an ex-parte decree is passed due to non-service of summons or sufficient cause for the defendant's non-appearance, such as illness or defective service. The court must assess the facts and evidence to determine the appropriate remedy under each provision.

7. Ancillary Provisions for Section 12(2) CPC can be summarized as such that Section 47 CPC¹⁰ deals with questions arising between parties to a suit (or their representatives) regarding the execution, discharge, or satisfaction of a decree. Meaning thereby, if a decree is challenged under Section 12(2) CPC on the basis of fraud or lack of jurisdiction, issues related to its execution (e.g., whether the decree is enforceable) may be addressed under Section 47 CPC during execution proceedings. For instance, if a decree obtained by fraud is sought to be executed, the aggrieved party may raise objections under Section 47 CPC, alongside or instead of a separate application under Section 12(2) CPC, depending on the stage of proceedings; Section 151 CPC¹¹ empowers courts to pass orders necessary to meet the ends of justice or prevent abuse of the process of the court. It is notable fact that if an application under Section 12(2) CPC does not fully address procedural gaps (e.g. interim relief to stay execution of a fraudulent decree), the court may invoke its inherent powers under Section 151 CPC. For example, if a decree is challenged for fraud under Section 12(2) CPC, the Court may use Section 151 CPC to stay execution proceedings pending the adjudication of the application.

¹⁰47. *Questions to be determined by the Court executing decree. (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.*

(2) *The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional Court-fees.*

(3) *Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section be determined by the Court.*

Explanation. For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed, are parties to the suit.

¹¹151. *Saving of inherent powers of Court [to be exercised after recording reasons in writing]. Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.*

Further, provisions under Order XXI (e.g. Rules 26¹², 29¹³, 90¹⁴, 99–101) govern the execution of decrees. If a decree is challenged under Section 12(2) CPC for fraud or lack of jurisdiction, ancillary issues like staying execution (Order XXI Rule 26, CPC) or setting aside a sale in execution due to fraud (Order XXI Rule 90, CPC) may arise; if a property is sold in execution of a decree obtained by misrepresentation, the affected party may seek to set aside the sale under Order XXI Rule 90 CPC, in conjunction with an application under Section 12(2) CPC; Section 9 CPC establishes that civil courts have jurisdiction to try all suits of a civil nature unless barred. When an application under Section 12(2) CPC is filed alleging want of jurisdiction, Section 9 CPC¹⁵ provides the foundational principle for determining whether the court had the authority to pass the decree. For instance, if a decree is challenged under Section 12(2) CPC for being passed by a court lacking territorial jurisdiction, Section 9 CPC guides the inquiry into the court's competence.

8. However, ancillary Provisions for Order IX Rule 13 CPC can be summarized as such: Order V (Rules 1–30) CPC governs the issuance and service of summons. Since an application under Order IX Rule 13 CPC often hinges on non-service or defective service of summons, Order V CPC provisions are critical to determining whether the service was proper. For example, if a defendant claims non-service under Order IX Rule 13, CPC because the summons were not served as per Order V Rule 15 CPC (service on an adult member of the family)¹⁶, the court will

¹²26. *When Court may stay execution. (1) The Court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time, to enable the judgment-debtor to apply to the Court by which the decree was passed, or to any Court having appellate jurisdiction in respect of the decree or, the execution thereof, for an order to stay execution, or for any order relating to the decree or execution which might have been made by such Court for first instance or appellate Court if execution had been issued thereby, or if application for execution had been made thereto.*

(2) *Where the property or person to the judgment-debtor has been seized under an execution the Court which issued the execution may order the restitution of such property or the discharge of such person pending the result of the application.*

¹³*Stay of execution pending suit between decree holder and judgment-debtor. Where a suit is pending in any Court against the holder of a decree of such Court, on the part of the person against whom the decree was passed, the Court may, on such terms as to security or otherwise, as it thinks fit stay execution until the pending suit has been decided.'*

¹⁴90. *Application to set aside sale on ground of irregularity or fraud. Where any immovable property has been sold in execution of a decree, the decree-holder, or any person entitled to share in a ratable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting:*

Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury; by reason to such irregularity or fraud;

Provided further that no such application shall be entertained unless the applicant deposits such amount not exceeding fifty per cent of the sum realized at the sale, or furnishes such security, as the Court may direct.

Provided further that no such sale be set aside on any ground which the applicant could have put forward before the sale was conducted.

¹⁵9. *Court to try all civil suits unless barred. The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly, or implied barred or for which a general or a special law is in force.*

Explanation. A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

¹⁶*Where service may be on male member of defendant's family. Where in any suit the defendant cannot be found or is absent from his residence and has no agent empowered to accept service of the summons on his*

examine compliance with Order V, CPC; Order IX Rule 6 CPC¹⁷ outlines the procedure when the defendant does not appear, leading to an ex-parte decree. This provision sets the stage for an application under Order IX Rule 13 CPC, as it defines the circumstances under which an ex-parte decree is passed; if a court proceeds ex-parte under Order IX Rule 6 CPC due to the defendant's absence, the defendant may apply under Order IX Rule 13 CPC to set aside the decree, citing non-service or sufficient cause; if the suit is at the hearing stage and has not yet resulted in a decree, Order IX Rule 7 CPC¹⁸ allows the defendant to apply to set aside the ex-parte proceedings and join the hearing. This is a precursor to Order IX Rule 13 CPC, applicable when the case is still ongoing. For instance, if defendant(s) learns of the ex-parte proceedings before the decree is passed, he may apply under Order IX Rule 7 instead of waiting to file under Order IX Rule 13, CPC; Order IX Rule 14 CPC¹⁹ mandates that no ex-parte decree shall be set aside under Order IX Rule 13 CPC without giving notice to the opposite party (plaintiff). It ensures procedural fairness in applications under Order IX Rule 13, CPC. When a defendant files an application under Order IX Rule 13 CPC, the court must issue notice to the plaintiff under Order IX Rule 14 CPC before deciding the application. In addition to the above, if an ex-parte decree is set aside under Order IX Rule 13 CPC, Section 144 CPC²⁰ allows the court to order restitution to restore the parties to their original position (e.g. refund of money paid under the decree or restoration of property).

behalf, service may be made on any adult male member of the family of the defendant who is residing with him.

Explanation. A servant is not a member of the family within the meaning of this rule.

¹⁷6.(1) *Procedure when only plaintiff appears. Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then:*

(a) When summons duly served. If it is proved that the summons was duly served the Court may proceed ex parte, and pass decree without recording evidence;

(b) When summons not duly served. If it is not proved that the summons was not duly served, the Court shall direct a second summons to be issued and served on the defendant;

(c) When summons served, but not in due time. If it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to a future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant.

(2) Where it is owing to the plaintiff's default and that the summons was not duly served or was not served in sufficient time, the Court shall order the plaintiff to pay the costs occasioned by the postponement.

¹⁸*Procedure where a defendant appears on day of adjourned hearing and assigns good cause of previous non-appearance. Where the Court has adjourned the hearing of the suit ex parte, and the defendant, at or before such hearing appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.*

¹⁹*No decree to be set aside without notice to opposite party. No decree shall be set aside on any such application as aforesaid unless notice thereof has been served on the opposite-party.*

²⁰*Application for restitution. (1) Where and insofar as a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed; and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.*

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1).

Moreover, if a defendant's property was sold in execution of an ex-parte decree that is later on set aside, Section 144 CPC may be invoked to restore the property to the defendant. Similar to its role in Section 12(2) CPC, Section 151 CPC can be used to address procedural gaps in Order IX Rule 13 CPC applications, such as granting interim relief to stay execution of an ex-parte decree pending the application's adjudication. Furthermore, provisions like Order XXI Rule 26(stay of execution) and Rule 29 CPC (stay of suit when execution is pending), are ancillary to Order IX Rule 13 CPC, as they allow the court to manage execution proceedings while the application to set aside the ex-parte decree is pending. If a defendant files an application under Order IX Rule 13 CPC and the decree is being executed, they may seek a stay under Order XXI Rule 26, CPC.

9. The ancillary provisions ensure procedural fairness, provide mechanisms for execution or stay, and allow appeals or restitution, complementing the primary remedies under Section 12(2) and Order IX Rule 13, CPC. Provisions like Section 151 and Order XXI, CPC grant courts flexibility to address case-specific issues, ensuring justice is not defeated by procedural technicalities. Both Section 12(2) and Order IX Rule 13, CPC applications require compliance with procedural rules [e.g., notice under Order IX Rule 14 CPC or evidence of fraud under Section 12(2) CPC], and ancillary provisions like Order V or Section 47, CPC guide these requirements.

10. For the foregoing reasons and discussion, the petition in hand is converted into appeal while granting leave and the same is allowed, impugned order dated 18.09.2023 passed by High Court and order dated 14.07.2022 delivered by trial Court, are set aside, consequent whereof the application filed by the petitioner, treating the same as filed under Order IX, Rule 13, Code of Civil Procedure, 1908, is accepted, the ex parte judgment and decree dated 18.09.2013 is set aside and case is remanded to the trial Court for decision afresh, obviously after obtaining written statement of the petitioner, framing issues and recording evidence of the parties. CMA 8489 of 2023 stands disposed of, as well.

JUDGE

JUDGE

Islamabad:
29th July, 2025
'Approved for reporting'
(M.A.Hassan)