IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Mr. Justice Muhammad Ali Mazhar
Mr. Justice Irfan Saadat Khan

Civil Petitions No.1032-K to 1053-K & 1062-K/2023
Against the judgment dated 23.05.2023 passed by High Court of Sindh, Karachi in R.A. Nos. 95 to 100, 102 to 105, 108 to 110, 112, 115, 116, 118 to 119, 101, 111, 113,114 and 109 of 2021

Muhammad Yousuf Bhindi	(CPs 1032-K to 1034-K/23)
Fida Hussain	(CPs 1035-K to 1036-K/23)
Mubarak Ahmed Khan	(CP 1037-K/23)
Raja Ghulam Mustafa	(CP 1038-K/23)
Mairaj Alam	(CP 1039-K/23)
Muhammad Sharif	(CP 1040-K/23)
Syed Sumaira Zaidi	(CP 1041-K/23)
Shahnaz Akhtar	(CP 1042-K/23)
Mrs. Khursheed Begum	(CP 1043-K/23)
Riaz Ahmed	(CP 1044-K/23)
Muhammad Arif	(CP 1045-K/23)
Muhammad Safeer Ahmed	(CP 1046-K/23)
Muhammad Bashir	(CP 1047-K/23)
Muhammad Altaf Khan	(CP 1048-K/23)
Malik Muhammad Hussain	(CP 1049-K/23)
Mrs. Shafia Rani	(CP 1050-K/23)
Waqar Ali	(CP 1051-K/23)
Khalid Zaman Kayani	(CP 1052-K & 1053-K/23)
Saima Tabbasum	(CP 1062-K/23)

...Petitioners

Versus

M/s. A.G.E. & Sons (Pvt) Ltd. & others.	(CPs 1032-K to 1036-K & 1038-K to 1053-K & 1062-K/23)
Muhammad Amir Yousuf & others	(CP 1037-K/23)

...Respondents

For the Petitioner:	Mr. Muhammad Arif, ASC Mr. Mazhar Ali B. Chohan, AOR
(CP 1050-K to 1053-K/23):	Dr. Raana Khan, AOR
For the Respondents:	Syed Ahsan Imam, AHC. (with special permission)
Date of Hearing:	08.04.2024

JUDGMENT

Muhammad Ali Mazhar, J.- These Civil Petitions for leave to appeal are directed against the common judgment dated 23.05.2023 passed by the High Court of Sindh, Karachi in R.A. Nos. 95 to 100, 102 to

105, 108 to 110, 112, 115, 116, 118 to 119, 101, 111, 113, 114 and 109 of 2021, whereby the Civil Revision Applications were allowed and the orders passed by the XIIth Additional District & Sessions Judge, Karachi (South), were set aside.

2. The compendious of facts encompassed in the aforesaid civil petitions are that the respondent No.1, being a builder and developer, announced its project "*Aashiana Building*" for construction at Plot No. G-21, Block 9, KDA Scheme No. 5, Clifton, Karachi, in the year 2001, comprising shops at ground floor and mezzanine floor and residential apartments up to 11th floor and started to book shops and apartments according to a schedule of payment. The petitioners alleged that after receiving the entire payment, the respondent No.1 handed over the physical possession of the allocated unit/shops, but the execution of sub-leases was kept pending for want of approval of completion certificate. On the contrary, the respondent No.1 filed Civil Suits for declaration and possession against the petitioners with the allegations that they have encroached upon the shops without any title or right and never handed over the possession of the booked/allocated units in the building. According to the petitioners, the respondent No.1 mentioned incorrect address for service and without service of notice or summons, they were declared *ex parte* and subsequently, *ex parte* judgments and decrees were passed against them. On knowing the factum of *ex parte* orders as well as *ex parte* judgments and decrees, the petitioners filed their respective applications for setting aside such orders, judgments and decrees but their applications were dismissed by the Trial Court. The petitioners filed appeals before the District & Sessions Judge, Karachi (South), which were transferred for disposal to the Court of XIIth Additional District Judge, Karachi (South). The appeals were allowed and the orders, judgments and decrees passed by the Trial Court were set aside. Being aggrieved, the respondent No.1 filed Civil Revisions in the Sindh High Court which were allowed *vide* consolidated judgment dated 23.05.2023, consequently, the orders passed by the learned XIIth Additional District Judge, Karachi (South), were set aside and *ex parte* orders, judgments and decrees passed by the learned Trial Court were affirmed.

3. The learned counsel for the petitioners argued that the *ex parte* orders, judgments and decrees were obtained without service of summons which was evident from the bailiff report and the registered

AD but this material aspect was ignored by the learned High Court. He further contended that the *ex parte* judgments were secured through fraud and misrepresentation and the petitioners were intentionally kept in the dark. He further averred that the petitioners came to know about the *ex parte* proceedings through another allottee who had filed Civil Suits in respect of an adjoining shop and upon inquiry, it was revealed that the respondent No.1 has obtained *ex parte* judgments and decrees, hence applications were filed by all the petitioners in the respective civil suits within the period of limitation from the date of knowledge. It was further contended that the respondent No. 1 intentionally avoided to mention the address of the suit shops for service through bailiff, courier or any other mode of service, and on the basis of wrong address, obtained *ex parte* judgments and decrees which were rightly set aside by the learned XIIth Additional District Judge, Karachi (South). He further argued that on 10.03.2023, when the matter was fixed in the High Court, the counsel for the petitioners was preoccupied somewhere else and a junior associate held the brief but the judgment was reserved on 10.03.2023 and was announced on 23.05.2023 without providing any opportunity of hearing and no lawful justification or reason has been assigned in the impugned judgment in the revisional jurisdiction as to what illegality or material irregularity was committed by the appellate court which may warrant an interference by the High Court.

4. Syed Ahsan Imam, Advocate High Court, filed CMA No.260-K/24 through Syed Mehmood Abbas, AOR, for seeking permission to appear and argue the case on behalf of A.G.E. & Sons (Pvt) Ltd. & others (Respondent No.1) on the ground that he was representing the respondent in the High Court and was fully conversant with the facts of the case, therefore, for the reasons mentioned in the application, he is allowed to argue the case. The learned counsel, on special permission, while supporting the impugned judgment of the High Court, argued that the learned XIIth Additional District & Sessions Judge, Karachi (South), failed to appreciate that the petitioners were duly served on the same address through which they filed the appeal. It was further contended that the learned Appellate Court failed to appreciate that the petitioners could not meet the mandatory requirements as envisaged under Order IX Rule 13 of the Code of Civil Procedure, 1908 (**"CPC"**). It was further argued that there was no need of service on the subject property which was vacant, hence the service

was not possible. It was further averred that the learned Trial Court, after exhausting all modes of service, declared the petitioners *ex parte* and the judgments and decrees were rightly passed in accordance with the law.

5. Heard the arguments. The prologue of the impugned judgment of the High Court depicts that by means of a consolidated judgment, the High Court took into consideration, in one go, separate orders passed by the Appellate Court in 11 out of 25 appeals, whereby the petitioners had challenged the order passed by the Trial Court on the applications moved under Order IX Rule 9, CPC ("Set No.1") and the separate orders passed by the Appellate Court in 14 out of the said 25 appeals preferred by some of the petitioners against the dismissal of applications moved in the Trial Court under Order IX Rule 13, CPC ("Set No.2"). It is also manifesting from the consolidated impugned judgment of the High Court that 11 Civil Revision Applications were filed with regard to the judgment passed by the Appellate Court *vis-à-vis* the 1st Set, whereas 14 Civil Revision Applications were preferred to assail the findings recorded in the appellate judgment in respect of the 2nd Set. According to the impugned judgment, proper service was effected on the petitioners but they deliberately and willfully avoided the appearance, hence *ex parte* proceedings were rightly initiated against them by the Trial Court. The findings of the learned High Court is based on the Diary Sheets of the Trial Court in Suit No. 387/2019 which were attached with R.A. No.98 of 2021, to show that on 01.07.2020, counsel for both the parties were present but work was suspended due to a strike; the Diary Sheet of 12.08.2020 shows that that the counsel for the defendant filed power of attorney on behalf of the defendant, and the third Dairy Sheet dated 10.11.2020 demonstrates that counsel for both parties were present and the matter was adjourned for filing written statement.

6. In fact, on the basis of the Diary Sheet recorded by the Trial Court in one suit, the fate of all other suits on the same Diary Sheet could not be sufficient, rather it should have been difficult to decide and determine whether proper service was effected on the defendants, in other civil suits, who were arrayed individually in separate suits and not in one single suit, but the learned High Court went on to hold, in all suits, that the service was properly effected. In two sets of separate orders, passed by the Additional District and Sessions Judge in the

appeals which were filed to challenge the order dated 04.03.21 passed by the 2nd Senior Civil Judge, Karachi (South), the learned Appellate Court, after considering and discussing all material facts, allowed the application on the ground that no notice was served on the defendant, and without making attempt of service the mode of substituted service was adopted. Whereas in another set, the learned Appellate Court adverted to the orders dated 15.03.21 passed by the Trial Court whereby the applications moved under Order IX Rule 13, CPC, were dismissed. In this set too, the learned Appellate Court, in depth, considered all the relevant factors and reached the conclusion that proper service was not effected and no notice was served upon the shops in possession of the petitioners, despite the plaintiff/respondent No. 1 being aware of this fact, and ultimately the Appellate Court set aside the *ex parte* judgments and decrees. In both scenarios, it is clear beyond any shadow of doubt that while allowing the appeals of the petitioners, the learned Appellate Court had thoroughly considered all relevant facts and did not pass the orders mechanically or in a slipshod manner.

7. The findings of the learned High Court rendered in paragraph 14 of the impugned judgment is quite relevant in order to resolve the present controversy. For ease of convenience, Paragraph 14 of the judgment is reproduced as under:-

> "14. The vital question that needs to be answered is whether respondent's application dated 10.02.2021 for the setting aside of the order dated 07.01.2021 whereby respondents were debarred from filing written statement was barred by limitation, Article 163 provides a limitation period of thirty days for an application by a defendant/respondent in this respect. In the case at hand, the respondents/defendants filed an application for recalling of the order dated 07.01.2021 whereby, the respondents/defendants were debarred from filing written statement of 10.02.2021 after the delay of three days and this aspect was also discussed by the learned trial Court".

8. At this juncture, we feel it expedient to deal with and discuss relevant provisions of the CPC regarding the consequences and repercussions of non-appearance of plaintiff and non-appearance of defendant. Let us first take up the niceties of Order IX Rule 6, CPC, which relates to the procedure when only the plaintiff appears and the defendant does not appear when the suit is called on for hearing, and if it is proved that the summons was duly served, the Court may

proceed *ex parte* and pass decree without recording evidence; when, if it is not proved that the summons was duly served, the Court shall direct a second summons to be issued and served on the defendant, and when 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 date to be fixed by the Court, and shall direct notice of such day to be given to the defendant. While Order IX Rule 7, CPC, is germane to the procedure 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 nonappearance, 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. While Order IX Rule 8, CPC, encapsulates that where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed. The learned High Court has put much emphasis on Order IX Rule 9, CPC, and also read it with Article 163 of the Limitation Act, 1908, therefore, this provision also has much significance which accentuates how the decree against a plaintiff by default bars a fresh suit and explicates that where a suit is wholly or partly dismissed under Order IX Rule 8, CPC, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action but he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit. Finally, Order IX Rule 13, CPC, is concomitant and systematized to the case in which a decree is passed *ex parte* against a defendant; he may apply to the Court and if the Court is satisfied that the summons was not duly served, or that the defendant was prevented by any sufficient cause, the Court shall make an order setting aside the decree upon such terms as to costs, payment into Court or otherwise as it thinks fit.

9. Much emphasis was made on the substituted service envisaged under Order V Rule 20, CPC, but for all practical purposes, this provision does not come into effect automatically, but before ordering the substituted service, it is imperative for the Court to first be satisfied that there is reason to believe that the defendant 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, the Court shall order for service of summons by affixing a copy of the summons at some conspicuous part of the house, if any, in which the defendant is known to have last resided or carried on business or personally worked for gain or any electronic device of communication which may include telegram, telephone, phonogram, telex, fax, radio and television or urgent mail service or public courier services or beat of drum in the locality where the defendant resides or publication in press or any other manner or mode as it may think fit.

10. Indeed, for setting aside an *ex parte* order, the relevant provision is Order IX Rule 7, CPC, but it appears to us that while filing the application for setting aside *ex parte* order, the defendants before the Trial Court mentioned the wrong provision on their application, and instead of Order IX Rule 7, CPC, they mentioned Order IX Rule 9 which error was neither noted by the Appellate Court nor the High Court but in the pith and substance the relief was claimed with clarity for setting aside the *ex parte* order with the permission to file written statement and contest the suit on merits. Though the citing of wrong nomenclature of section was not noted, but in our view, it does not change the complexion of the application or the relief claimed in such application if it is clear otherwise from the contents of the application what the applicant actually claimed and prayed for. The Court has to see the pith and substance rather than the nomenclature, and if the court perceives any such irregularity, it may in the interest of justice, call upon the applicant to correct and rectify such error of nomenclature, which may be a typing error or may have been caused due to some misunderstanding, but on the notion or mention of a wrong section, an adverse order cannot be passed without adverting to the substance of such application.

11. Furthermore, the High Court has also relied on Article 163 of the Limitation Act and held that the application moved was time barred. In the revision application, virtually, there was no issue raised for entreating the applicability of Article 163 of the Limitation Act but it was set into motion by the High Court for setting aside the appellate orders in the revisional jurisdiction. In fact, according to Article 163 of the Limitation Act, the plaintiff may apply within 30 days from the date of dismissal for setting aside dismissal for default of appearance

or for failure to pay costs of service of process or to furnish security for costs. It is clear that this Article does not relate to any right to apply by the defendant, but the plaintiff alone, so under the guise of this provision, the petitioners who were the defendants in the Trial Court, and not the plaintiff, could not be penalized. However, for the defendants, Article 164 of the Limitation Act is applicable, in which the defendant may apply within 30 days from the date of the decree or where the summons was not duly served, when the applicant has knowledge of the decree, for setting aside a decree passed *ex parte*; but there is no specific Article or limitation is provided in the Limitation Act meant for making any application for setting aside an *ex parte* order under Order IX Rule 7, CPC, therefore, for all intents and purposes, Article 181 of the Limitation Act would apply wherein to meet such eventualities, three years' limitation period is provided when the right to apply accrues. It is also well settled that even if the proceedings are ordered *ex parte* the defendant may join proceedings at any subsequent stage and file an appropriate application for setting aside ex-parte order with good cause. A person nevertheless declared *ex parte,* continues as party to the proceedings and even can cross-examine the witnesses. If good cause is shown to the satisfaction of the Court to justify his previous absenteeism, the *ex parte* proceedings may be set aside by the Court and the defendant may then be restored to the position he held on the date when he was proceeded against *ex parte*. This rule invests the court with the wide-ranging potential discretion to allow the application if the defendant who was declared *ex parte* assigns good cause for previous absence.

12. The impugned judgment is somewhat imprecise and loses thread. The Appellate Court took into the consideration, individually and separately, the grounds raised for setting aside the *ex parte* orders and *ex parte* judgments and decrees but in the consolidated judgment, the nitty-gritties of both orders were not discussed separately to find out whether the orders passed by the Appellate Court were in accordance with law or committed any illegality or perversity. On the contrary, the impugned judgment is solely based on the Dairy Sheets of an individual suit but as a matter of propriety and to avoid any flaws, the effect or fate of service of summons in each individual suit was required to be revisited to examine whether the Trial Court has rightly nonsuited the petitioners and/or the Appellate Court has wrongly set aside the *ex parte* orders and *ex parte* judgments and decrees. In our

view, no doubt, a bunch of two sets of different orders passed by the lower courts could be decided by means of a consolidated judgment, but their precise verities should have been mentioned disjointedly and distinctly so that both the impugned orders in the two sets could have been emulated and distinguished without any overriding or overlapping effect of findings. At this moment in time, after discovering the shortcomings and defects in service of summons on account of non-providing the business address and/or exercise of powers conferred under Order V Rule 20, CPC, for substituted service without ensuring and attempting proper service in other modes on correct address, the Appellate Court allowed the petitioners to file written statements so that the matter may be decided on merits rather than nonsuiting the petitioners on technical grounds. The most crucial aspect is whether the petitioners were served or not in their respective suits, which is still a mystery that was overlooked by the High Court and remains undecided and there was also no justification as to how Article 163 of the Limitation Act was applicable to resolve the bone of contention.

13. It is well settled that under Section 115, C.P.C, the revisional court has to ruminate the jurisdictional error of the Court below; if it acted in exercise of its jurisdiction illegally or with material irregularity or committed some error of procedure which affected the ultimate decision. In fact, this jurisdiction is corrective and supervisory in nature to ensure safe administration of justice and in a fit case, the Court in the same provision can exercise *suo motu* jurisdiction to advance the cause of justice to satisfy and reassure that the order is within its jurisdiction; the case is not one in which the Court ought to exercise jurisdiction and, in abstaining from exercising jurisdiction, the Court has not acted illegally or in breach of some provision of law or with material irregularity or by committing some error of procedure in the course of the trial which affected the ultimate decision.

14. In the wake of the above discussion, the aforesaid civil petitions are converted into appeals and allowed. As a consequence thereof, the impugned judgment passed by the High Court is set aside and the matter is remanded back for deciding the revision applications afresh, strictly in accordance with law, preferably within a period of two months from the date of receipt of this judgment.

Judge

Judge

KARACHI
8th April, 2024
Mudassar/*
Approved for reporting