Form No: HCJD/C-121

ORDER SHEET

IN THE LAHORE HIGH COURT, BAHAWALPUR BENCH, BAHAWALPUR

JUDICIAL DEPARTMENT

Case No. W.P. No.5938/2016

Muhammad Sharif **Versus** Addl. District Judge, etc.

S.No. of order/ proceeding	Date of order/ proceeding	Order with signature of Judge, and that of parties of counsel, where necessary
	13.10.2016	Malik Taj Muhammad Dhku, Advocate for petitioner. Mr. Abdul Jalil Khan, Advocate for respondent No.3.

Through this constitutional petition filed under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner has assailed the validity and legality of order dated 07.12.2015 passed by learned Civil Judge, Bahawalpur whereby he accepted the application for setting aside the ex parte judgment and decree dated 24.09.2012 and order dated 02.05.2016 passed by learned Additional District Judge, Bahawalpur whereby he dismissed the revision petition of the petitioner.

2. Briefly stated the facts necessary for disposal of this constitutional petition are that the petitioner filed a suit for specific performance of contract against respondent No.3. In the said suit, respondent No.3 was summoned who failed to appear and consequently he was proceeded against ex-parte by the learned trial court. Resultantly, after recording ex-parte evidence, the petitioner's suit was decreed ex-parte vide judgment and decree dated 24.09.2012. Respondent No.3 on 02.12.2014 filed an

application under Order IX Rule 13 read with Section 151 CPC for setting aside of ex-parte judgment and decree dated 24.09.2012 which was accepted subject to payment of costs of Rs.2000/- vide impugned order dated 07.12.2015. The petitioner being aggrieved of the said order assailed the same through revision petition under Section 115 CPC before learned Additional District Judge, Bahawalpur, which was dismissed vide impugned order dated 02.05.2016. Hence, the present constitutional petition.

3. Learned counsel for petitioner contends that the application of respondent No.3 for setting aside of ex-parte judgment and decree dated 24.09.2012 was hopelessly barred by time as in the present facts and circumstances of the case the application should have been filed within 30-days as prescribed under Article 164 of the Limitation Act, 1908. Learned counsel further contends that in the application for setting aside of ex-parte judgment and decree, respondent No.3 has not mentioned any date of his knowledge about ex-parte judgment and decree.

4. Conversely, learned counsel for respondent No.3 contends that in the given situation when the ex-parte judgment and decree is against the mandatory provision of Order V Rule 17 to 20 C.P.C, then, the application for setting aside of ex-parte judgment and decree will be governed by Article 181 of the Limitation Act, 1908 for which the prescribed period of limitation is 03-years when the right to file such application is accrued. Learned counsel for respondent No.3 further contends that substituted service through

publication of proclamation in newspaper daily "Aftab", Multan cannot be said to be an effective service as the said publication was issued in the name of Muhammad Sharif instead of Muhammad Siddique, therefore, the same is defective in the eye of law.

5. I have heard learned counsel for the parties and gone through the record with their able assistance.

6. It is discernible from the record that summons were issued to respondent No.3 to procure his attendance but the service could not be effected upon him due to his incomplete address. Thereafter, the learned trial court in order to procure the attendance of respondent No.3 issued a proclamation through publication in newspaper daily "Aftab", Multan. In order to resolve the controversy whether ex-parte judgment and decree dated 24.09.2012 was validly and lawfully passed, it will be appropriate to reproduce herein below the relevant rule i.e Rule 17 of Order V, C.P.C:-

> *"**17. Procedure when defendant refuses to accept service, or cannot be found.-** Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant and there is no agent empowered to accept service of the summons on his behalf nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy,*

> *the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed."*

7. The above quoted rule assumes expressly the system of effecting service on defendant. It provides that where the defendant or his agent or other person, namely adult male member of his family refuses to sign the acknowledgment or where the serving officer after using all due and reasonable diligence, is unable to find the defendant or his agent or male member of his family, the serving officer is enjoined to affix copy of the summons in the outer door or some other conspicuous part of the house where the defendant ordinarily resides or carries on business or personally works for gain. On doing so, the serving officer is required to return the original to the Court who issued the summons, with a report endorsed thereon showing circumstances under which the service was effected, carrying name and address of the person by whom the house of the defendant was identified and in whose presence copy of the summons was affixed thereupon.

8. The plain reading of Order V, Rule 19 of the C.P.C indicates that when a summon is returned under Rule 17, the Court is to examine the serving officer on oath touching his proceedings and after holding a further inquiry, if necessary, is to pass an order as to whether summons have been duly served or has to direct fresh service.

9. While proceedings under Rule 20 before passing of an order of substituted service, the

Court is bound to record its satisfaction to the effect that there was a reason to believe that the defendant was keeping out of the way for the purpose of avoiding service and thereafter the Court has to order the service of summons through affixture in terms of Order V, Rule 20, C.P.C.

10. Admittedly in this case neither the provision of Rule 17 nor Rule 19 has been complied with, therefore, resorting to substituted service by the learned trial court under Order V Rule 20 CPC is nullity in the eye of law. It is not discernible from the available record that the Process Server has been examined as per Order V, Rule 19 of C.P.C. It is also not discernible from the available record that Serving Officer has affixed a copy of summon on the outer door of house or some other conspicuous part of house in which the defendant ordinarily resides or carries on business.

11. Now it has to be seen whether the learned trial court has rightly invoked the provision of Order V Rule 20 CPC to effect the service of respondent No.3 through substituted service. For ready reference Rule 20 of Order V, CPC, is reproduced here in below:-

> *"**20. Substituted service.—[(1)** where the Court is 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—*
>
> *(a) 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

(b) any electronic device of communication which may include telegram, phonogram, telex, fax, radio and television; or

(c) urgent mail service or public courier service; 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 simultaneously.]"

12. Order V, Rule 20 C.P.C empowers the learned trial court to effect the service of respondent No.3/defendant through substituted means subject to the condition that Court should have satisfied itself that defendant was keeping out of way to avoid service or that his service could not be effected in an ordinary way. The available record did not demonstrate that the learned trial court made its satisfaction that respondent No.3/defendant had been avoiding service. This provision of law also equipped the trial Court to adopt other substituted modes of service including affixation of a copy of the summons at some conspicuous part of the house of the defendant or at the beat of drum in the locality where he resided but the court overthrowing these powers jumped to publication in newspaper with the name of "Aftab", Multan. No doubt it is daily newspaper but it has a little circulation as compared to other newspapers like "Jang", "Nawa-i-Waqt" and

"Express". There is no proof on the file whether the said newspaper carrying citation for appearance of respondent No.3/defendant before the learned trial court on 01.06.2012 was dispatched through post to him or not.

13. The publication clearly demonstrates that it has been issued in the name of Muhammad Sharif instead of Muhammad Siddique (respondent No.3), so the said publication in wrong name cannot be said to be a valid publication and in no way can be relied on for the purpose of proceeding ex-parte against respondent No.3.

14. So far as the question of limitation for filing an application under Order IX Rule 13 read with Section 151 C.P.C. is concerned, it is a settled proposition of law that if service of respondent No.3/defendant has been effected in accordance with law then the application should have been filed within a period of limitation provided under Article 164 of Limitation Act, 1908 which is 30-days from the date of decree whereas if the respondent No.3/defendant is not personally served and his service is not effected according to law the limitation will be governed by Article 181 of the Limitation Act, 1908. In this case respondent No.3/defendant has not been served personally, he has been proceeded against ex-parte against mandatory rules stated above and his service through citation in the newspaper was defective, therefore, the limitation for filing of application would be governed by Article 181 of the Limitation Act, 1908.

15. In the present set of facts and circumstances narrated above it is clear that Article 181 of the Limitation Act, 1908 will apply for setting aside the ex-parte judgment and decree dated 24.09.2012. Reference may be made to a celebrated judgment reported as *Messrs Rehman Weaving Factory (Regd.), Bahawalnagar V. Industrial Development Bank of Pakistan* (**PLD 1981 S C 21)**. Relevant portion of above referred judgment is reproduced as under:-

> *"The next question arises as to what would be the period of limitation for an application for setting aside an ex parte decree, not covered by Article 164. That application may or may not be under section 151. It could still be under the second part of rule 13 of Order IX, though in some cases section 151 might also apply. When defendant makes an application under Order IX, rule 13 in connection with an ex parte decree, which is not passed under, rule 6 of Order IX (on the first hearing), it would not be governed by Article 164. But that would not necessarily mean that there is no period of limitation for such an application. It is not essential here to examine the effect of "null and void order" on the question of limitation is simple that where the defendant makes an application for setting aside an ex parte decree, which is not covered by Article 164, it would be governed by residuary Article 181 and the period of limitation would be three years from the accrual of the right to apply. Undoubtedly this period of limitation would be more than necessary in some of these application, but so would be the case in several other applications covered by Article 181. It is for the Legislature to do the exercise of rationalisation, in the light of experience gained during three quarters of a country".*

Admittedly respondent No.3 has applied for setting aside of ex-parte judgment and decree dated 24.09.2012 within a period of three years, therefore applying the aforesaid principle laid

down in the above referred judgment the application of respondent No.3 was within time.

16. As far as the contention of learned counsel for petitioner, that in the application for setting aside of ex-parte judgment and decree respondent No.3 has not disclosed date of his knowledge about the ex-parte judgment and decree, is concerned, the same has lost its importance keeping in view the above discussion as the application for setting aside of ex-parte judgment and decree was filed within a period of three years from passing of ex-parte judgment and decree under Article 181 of Limitation Act, 1908.

17. Even otherwise the law favours adjudication of cases on merits rather than on technicalities. The learned trial court has rightly invoked the provision of Order IX Rule 13 CPC for setting aside of ex-parte judgment and decree subject to payment of costs. The provision of Rule 13 of Order IX, CPC, clearly demonstrates that the Court has the power to set aside the ex-parte judgment and decree subject to payment of cost. The learned trial court has set aside the ex-parte judgment and decree subject to payment of costs of Rs.2000/- which is in accordance with the provision of Rule 13 Order IX, CPC.

18. The two courts below have exercised their discretion in accordance with principle governing exercise of such discretion which cannot be disturbed while exercising constitutional jurisdiction under Article 199 of

the Constitution of Islamic Republic of Pakistan, 1973.

19. In view of the above discussion, this writ petition is devoid of any force, therefore, the same is dismissed with no order as to costs and the impugned orders dated 07.12.2015 and 02.05.2016 passed by the two courts below are upheld.

(SHAHID MUBEEN)
JUDGE

APPROVED FOR REPORTING.

(SHAHID MUBEEN)
JUDGE

*Imran/**