

ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

J.M. No.77 of 2014

DATE

ORDER WITH SIGNATURE OF JUDGE

1. For hearing of CMA No.17881/15 (U/O 21 Rule 26 CPC)
2. For hearing of Main Application (U/S 12(2) CPC)

10.03.2016.

Mr. Adeel Awan, Advocate for the Plaintiff.

Mr. M. Shahzad Ashraf, Advocate for the defendant.

Muhammad Junaid Ghaffar J.- Through this Application / J.M. under Section 12(2) C.P.C., the Applicant has impugned Judgment dated 26.11.2012 passed in Suit No. 1743 of 2009, whereby, the summary Suit of Respondent under Order 37 CPC has been decreed Ex-parte.

2. Counsel for the Applicant submits that the Applicant was not served with summons or notices in the Suit and therefore could not come up for their defence. He further submits that it only came into the knowledge of the Applicant when, Execution Application was filed pursuant to the aforesaid judgment and decree for satisfaction. In the circumstances, he has prayed that judgment and decree be set-aside and applicant may be allowed to contest the same.

3. On the other hand, Counsel for the Respondent submits that the Applicant had purposely avoided appearance in the matter as they were properly served through publication vide Order dated 13.5.2010 and service was held good by the Additional Registrar, whereafter, on 10.11.2010, the Applicant was declared Ex-parte. He further submits that the Respondent had also initiated winding up proceedings against the Applicant in the Lahore High Court vide C.O No.32 of 2011, wherein, the Applicant is on notice and a proper disclosure in respect of

instant proceedings was made in the winding up petition at para-12 and therefore, the Applicant cannot plead any ignorance. He further submits that even otherwise the Applicant had been in negotiation with the Respondent to settle the account but has failed to do so and therefore, the present Application under Section 12(2) CPC is misconceived.

4. I have heard both the Counsel and perused the record. At the very outset, the Counsel for the Applicant was confronted as to how instant Application under Section 12(2) CPC is maintainable, merely on the ground that an Ex-parte Judgment has been passed against the Applicant to which the Counsel could not satisfactorily respond. Perusal of the record reflects that summons were sent to be served on the Applicant through District Judge, Lahore, whereas, the Bailiff's Report reflects that the person available at the given address had refused to receive the notice on the ground that the Managing Director of the Applicant is out of Station, however, the said person assured the Bailiff that on his return, he will be informed in respect of the notice and fixation of the case. Moreover, Court had also ordered publication, which was properly given in Daily Urdu "**JANG**" Lahore on 27.03.2010 but none affected appearance on behalf of the Applicant, whereafter, the service was held good by the Additional Registrar on the applicant on 13.05.2010. In the circumstances, it appears that insofar as the question of any fraud and misrepresentation is concerned, the same is neither alleged nor the Applicant has been able to make out such case to entertain the Application under Section 12(2) CPC. It is not that each and every case where an Ex-parte Judgment has been passed, an Application under Section 12(2) CPC would not be maintainable, even though no case of misrepresentation or fraud is made out. Notwithstanding, the proper remedy as provided in law is by way of filing an application under Order 9 Rule 13 CPC, for recalling of the Ex-

parte judgment and decree if a proper cause is made out by the defendant / applicant that they were not properly served or were prevented by sufficient cause from appearing in the Suit. Moreover, even otherwise, the Suit filed by the respondent was a summary Suit under Order 37 Rule 1 & 2 CPC on the basis of dishonoured cheques issued by the Applicant, therefore, it cannot be presumed that the Applicant had no knowledge in respect of such cheques, whereas, the Applicant was also required to convince the Court to grant leave to defend as required in summary Suits under Order 37 CPC. It is not that the Applicant could have been permitted to defend the case without first convincing the Court to allow leave to defend.

5. In view of hereinabove facts and circumstances of the case, I am of the view that the Application under Section 12(2) C.P.C. is misconceived, whereas, nothing specifically has been alleged by the Applicant as to what fraud and misrepresentation has been caused to the Applicant, and further, the Applicant has also failed to disclose even the date on which it came into the knowledge of the Applicant that the Judgment and Decree has been passed. Accordingly, the main Application (J.M.) under Section 12(2) C.P.C. along with pending application is hereby dismissed.

J U D G E

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