**IN THE HIGH COURT OF SINDH CIRCUIT COURT LARKANA**

**Civil Revision No.S-145 of 2022**

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| Applicants | : | (1) | Liaquat Ali s/o Moula Bakhsh Khoso |
| | | (2) | Shahid Ali s/o Moula Bakhsh Khoso |
| | | | Through Mr.Riaz Hussain Khoso, Advocate |
| Respondents | : | (1) | Haq Nawaz s/o Muhammad Salah |
| | | (2) | Wali Muhammad s/o Muhammad Salah |
| | | (3) | Mst.Naimat d/o Muhammad Salah |
| | | (4) | Mst.Rehmat Bibi wd/o Muhammad Salah |
| | | | Through Mr.Abdul Rehman Mughal |
| | | (5) | Mukhtiarkar (Rev.) Taluka Thul |
| | | (6) | Deputy Commissioner, Jacobabad |
| | | | Through Mr.Abdul Hamid Bhurgri, A.A.G |

Date of hearing : **15.5.2023**

Date of Decision : **06.6.2023**

**J U D G M E N T**

**ARBAB ALI HAKRO, J.-** Through this Revision Application u/Section 115, the Civil Procedure Code 1908 ("**the Code**"), the applicants have called in question the Order dated 14.11.2022, passed by the Court of District Judge(MCAC), Jacobabad ("**the appellate Court**") whereby, a Civil Misc: AppealNo.03 of 2022 preferred by the applicants was **dismissed**, consequently the Order dated 23.4.2022, passed in F.C Suit No.41/2019 by Senior Civil Judge-II, Jacobabad (" **the trial Court")** dismissing the application u/Order IX Rule 13 of the Code was maintained.

2. The brief facts as narrated in the case are that the respondent No.1 to 4, filed suit for Declaration, Possession, Mesne Profit, Mandatory and Permanent Injunction before the trial Court, claiming themselves as owners of agricultural land bearing Survey No.382 (7-25Acres), 575 (1-21 Acres), situated in Deh & Tapo

Garhi Hassan, Taluka Thul, District Jacobabad, which they inherited from their deceased father Muhammad Salah. It is further averred that the above land has illegally been occupied by the defendants/applicants and their two other brothers and constructed shops thereon, for which they are collecting rent.

3. The record reveals Mr. Zafar Khalil, Advocate appeared before the trial Court, submitted his Vakalatnama on behalf of defendants No. 1 and 3 in the suit. Later on; due to their failure to file written statement, they were debarred on 10-10-2020. Subsequently, the service upon the applicants/defendant No.2 & 4 was held good on 22.6.2021, through substituted service by way of publication in newspaper. Ultimately the suit was decreed ex-parte vide Judgment dated 26-10-2021 followed by Decree dated 26-10-2021.

4. From the pleadings it appears that the applicants/ defendants Nos.2 and 3 moved an application u/Order IX Rule 13 of the Code, for setting aside the *ex-parte* judgment and decree. In the application, they stated that they came to know about passing of the ex-parte judgment and decree, when the respondents/ plaintiffs filed an execution application. After hearing the learned counsel for the parties, the application u/Order IX Rule 13 of the Code was dismissed by the trial Court vide Order dated 23.4.2022. Therefore, the said Order was assailed through the Civil Misc: Appeal No.03 of 2022, which also met with same fate. Hence, the applicants have filed the instant Revision.

5. Primary contention put forth by the learned counsel representing the applicants pertains to the *ex parte* decree secured in the trial court without serving summons to the applicants. Additionally, the counsel argues that the respondents/plaintiffs provided an inadequate address of the applicants, and the trial

court did not follow proper procedure for service as provided U/Order V of the Code. Further, it is asserted that the applicants were not served with any summon personally.

6. On the other hand, the learned counsel for the respondent No.1 to 4, argued that application u/Order IX Rule 13 of the Code, filed by applicants in order to set aside the ex parte decree passed against them, was hopelessly time barred in view of Article 164 of the Limitation Act, as the applicants themselves asserted in the application that they came to know about passing of the *ex parte* decree after filling of the execution application by the respondents/plaintiffs. He further urged that the **"Execution Application"** was filed on 11.12.2021, whereas the application u/Order IX Rule 13 of the Code was filed on 24.02.2022, as such same is filed after delay of about 02 months and 13-days. He further argued that the summons duly served upon applicant No.1 through his Clerk, so also the same were sent to him on his WhatsApp number, but he did not appear before the trial Court. He also urged that the case diary dated 26.9.2020, reflect that Mr.Zafar Khalil, Advocate appeared before trial Court and filed his Vakalatnama on behalf of defendants No.1 & 3, who are real brothers of the applicants', thus; they had knowledge about pendency of suit and they deliberately did not attend. He finally submitted that both the Courts below had not committed any illegality while passing the impugned Orders and the instant Revision application is liable to be dismissed. In support of his contents, he relied upon the case law **2022 YLR 2332 S.C (AJ&K)** *(Commissioner Relief and Rehabilitation Azad Jammu and Kashmir and 2 others vs. Syed Masood Hamdani and 79 others).*

7. I have attentively considered the arguments presented by the learned counsel for the parties and meticulously examined

the record and proceedings of the case. In the instant Revision two important propositions have been raised by the parties that are to be ascertained: -

i. Whether due service was effected on the applicants or not; and

ii. Whether the application filed within limitation period as provided under Article 164 of the Limitation Act?

8. Careful examination of record and relevant provision of law would reveal that there are three modes of service of summons are provided Firstly, through personnel service, secondly by affixation/pasting of summon at noticeable part of the place, thirdly, substituted way of service i.e Publication. Whereas, service by affixation of summons to be resorted to when personal service was not possible and substituted way of the service upon the defendant should be made as a last resort and not bypassing the first two modes service i.e personal cum direct and affixation/pasting. Substituted service was to be made where the Court become satisfied and there are reasons to believe that a defendant is keeping out of the way for the purpose of avoiding service or for any other reasons the summons could not be served in the ordinary way. The procedural guidelines pertaining to the service of summons are encompassed within the ambit of Order V, Rules 12, 17, 19, and 20 of the Code. It would be advantageous to reproduce the aforementioned rules as follows: -

> *"**12. Service to be on defendant in person when practicable or on his agent**. Wherever it is practicable, service shall be made on the defendant in person, unless*

*he has an agent empowered to accept service, in which case service on such agent shall be sufficient.*

***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.*

***19.Examination of serving officer.*** *Where a summons is returned under rule 17, the Court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.*

***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, 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 manner or mode as it may think fit:*

9. The Rule 12 stipulates, to the extent that it is feasible, delivery of summon shall occur through personal service to the defendant, unless he has appointed a representative authorized to acknowledge service on his behalf. In the event of such circumstances, service upon the agent shall be deemed appropriate.

10. Spirit of Order V of the Code is that before resorting to the manner of service provided under Rule 17, the Court would observe the requirements regarding the personal service of the defendant, failing which rest of the exercise in that respect would not be considered as lawful.

11. According to Rule 17, in the event that the defendant, their agent, or any other authorized person refuses to acknowledge service, or if the serving officer is unable to locate the defendant after exercising reasonable diligence and there is no authorized agent available to accept service, it is the responsibility of the serving officer to attach a copy of the summons to the exterior door

of the defendant's place of residence or another prominent location within the defendant's inhabitant place of business or gainful employment. The summons was to be returned to the Court with a report endorsed thereupon, containing the circumstances of his report. The report was required to encompass the specific details pertaining to the individual who identified the abode of the defendant and was present during the attachment of the summons.

12. Rule 19 exhibits a significant correlation with Rule 17. Pursuant to this regulation, it was mandated that the Court conduct an examination of the serving officer under oath upon return of the summons, in accordance with the guidelines set forth in Rule 17. This examination was to serve as confirmation of the information recorded on the summons report.

13. The most recent form of service has been termed as the scheme postulated under Rule 20 of Order V of the Code. It provides that where the Court is satisfied and there is reason to believe that the defendant is keeping himself away 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 the summons to be served by affixing a copy thereof at some conspicuous place in the Court-house and also upon some noticeable part of the house in which the defendant is known to have lastly resided or carried on business or personally worked for gain, or in such other manner as the Court may think fit. Sub-rule (2) was incorporated as approval of mode of service. According to the stipulations set out, the service that has been supplanted by the directive of the Court must hold the same level of efficacy as if it had been executed upon the defendant in person.

14. Upon examination of the record presented in the present revision, it is evident that according to case diary dated 05.1212020, the counsel representing the plaintiffs/respondents No. 1 to 4 was instructed to provide fresh address of the applicants. This directive was complied with on 04.5.2021, through a statement submitted by the aforementioned counsel, upon which the trial court subsequently issued an order that *"issue summons on the fresh given address"*. Subsequently, a process was initiated for the fresh address, and it was duly served upon applicant No. 1 through his Clerk on 28.5.2021. However, the trial court expressed dissatisfaction with the aforementioned mode of service and directed for a repeat of the process and adjourned the matter to 09.6.2021. On that date, process issued against the applicants returned with the endorsement that applicant No.1 is avoiding to attend the call and summons were sent to him through WhatsApp, as well as copy of the summon given to clerk of his department. On the specified date, the legal representative for the respondent filed an application u/Order V Rule 20 of the Code, seeking substituted service upon the applicants through publication. The trial court granted said application, and ultimately, on 22.6.2021, the service of process upon the applicants was deemed valid, based on the publication made in the Kawish daily newspaper dated 12.6.2021. However, the trial court failed to adhere the *requirements* stipulated in Rules 17 and 19 ibid of the Code, following the fresh address of the applicants. Additionally, the court in question neglected to issue summons through alternative means of service viz: by way of registered post A.D and affixation of summons on the outer door or some other conspicuous part of the place in which applicants ordinarily resides or carries on business or personally work for gain. Notwithstanding the endorsement provided by the Bailiff suggesting that the applicant No.1has been evasive in responding

to calls and a summon sent to him via WhatsApp number, along with the provision of a copy of the summon to the clerk of their department, the trial court failed to investigate the serving officer's aforementioned endorsement in compliance with provisions of Rule 19 *ibid*. Henceforth, it cannot be justified that the provision of service was carried out in a duly manner towards the applicants, with regards to the aforementioned legal regulations.

15. To date, the dissemination of summons through alternative modes of service, as outlined in Rule 20, must be performed only upon the court's confirmation that the applicants are intentionally avoiding service or if there is a compelling reason to believe that the summons cannot be properly served through conventional methods. While resorting the provisions of Rule 20 of Order V of the Code, the Court ought to keep in view that substitute service has to be done as the last resort, when the defendant cannot be served in the ordinary way of service and the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for purpose of avoiding service or that for any other reasons the summons cannot be served in the ordinary way. It is apparent that the implementation of substituted service is necessary once the ordinary mode(s)of service has been depleted and failure to comply with anyone of requirement would nullity whole proceedings. Under such circumstances, it is difficult to fathom that the applicants had prior knowledge of the hearing dates, notably on 28.5.2021 and 09.6.2021 respectively. It was held in the case of **Malik Muhammad Nazir v. Mian Abdul Raheem and another** (PLD 1968 Lahore 792) that "*where there was no sufficient material on record to show that a defendant is either avoiding service or refusing to accept the service, the order for substituted service could*

*not have been passed nor can ex-parte proceedings be ordered on the basis of such service*."

16. Nonetheless, both the Courts below, while dismissing the application u/Order IX Rule 13 of the Code as well as appeal held that one Mr. Zafar Khalil, Advocate submitted his Vakalatnama on behalf of defendants No. 1 and 3 in the suit and as the applicants are actual siblings of defendants No. 1 and 3, thereby possessing a mutual interest in the suit property, service rendered against them was deemed valid in terms of Rule 17 of the Order V of the Code. Such observation of both the Courts below is not as per Judicial record of the suit. Besides, a question arises, if the trial Court was satisfied on effectuation of service upon the applicants, while the defendant No.1 & 3 being siblings of the applicant served through a counsel, then for what reasons the matter has been proceeded for service upon the applicant from 25.01.2020 to 09.6.2021 and such order should have been passed for holding service good in terms of Rule 15, at the time when trial Court become satisfied regarding the service upon the defendants No.1 & 3. Rule 15 lays down that where the defendant cannot be found and he has no agent to accept service, in that position, service may be made on any adult male member of his family who resided with him. Nothing is available on record to show that the applicants were not found and they had no agent to accept service and then the notice was served upon an adult male member of their family, in such a situation the service cannot be held good in terms of Rule 15. Keeping in view the above situation, I find above observation of both the Courts below regarding effectuation of service upon the applicants, while deciding application u/Order IX Rule 13 of the Code is not tenable at law.

17. Secondly, the question of limitation is raised by the learned counsel for the respondents No.1 to 4, is concerned. In this regard the limitation for filing of application for setting-aside ex parte decree has been prescribed in Article 164 of the Limitation Act, 1908 under which the period of 30 days starts from the date of decree where due service has been made. In case law reported as **Fazal Karim Vs Hussain Din (2019 MLD 1082)**, it has been observed by the Peshawar High Court that "*limitation for filing application seeking setting aside of ex parte decree is 30 days but only for those cases where personal service has been effectuated otherwise it has to be reckoned from knowledge of a applicant.* In the case where due service is not proved to have been made upon the defendant, the limitation starts from the date of knowledge of the defendant. For the ease of convenience, Article 164 of the Limitation Act is reproduced as under:-

| **Description of application** | **Period of limitation.** | **Time from which period beings to run.** |
|---|---|---|
| 164.— By a defendant, for anorder to set aside a decree passed ex parte. | 2[Thirty days] | The date of the decree or **where the summons was not duly served**, when the applicant has knowledge of the decree. |

18. In the present case, it is already held that the summons has not been duly served on the applicants. Therefore, the limitation of 30 days would not commence from the date of decree, but it would commenced from the date of knowledge. During course of arguments, the learned counsel for respondents contended that the applicants in their application stated that they came to know about passing of *ex parte* decree after filling of execution application, which was filed on 11.12.2021, whereas the application u/Order IX Rule 13 of the Code was filed on 24.02.2022, as such same was filed after delay of about 02 months

and 13-days. However, perusal of contents of application u/Order IX Rule 13 of the Code shows that the applicants have clearly stated that on 03.02.2022, attorney of plaintiffs/respondents came on spot (suit property) and narrated to some tenants that the Court has decreed the suit and execution application has been filed. On next date i.e 04.02.2022, the applicants appeared before the trial Court and filed the application u/Order IX Rule 13 of the Code on 24.02.2022. Therefore, the limitation of 30 days would not commence from the date of filing of Execution Application i.e11.12.2021, but it would start running from the date of knowledge viz: 03.02.2022, thus I am of the considered view that application was filed within time. Moreover, the Constitution of the Islamic Republic of Pakistan of 1973 stipulates in Article 10-A that every individual is unequivocally entitled to a just and fair trial along with proper due process. For ease and clarity, the exact text of Article 10-A is presented below: -

> *"10-A Right to fair trial. For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process."*

19. The foregoing article elucidates the explicit protection of an individual's right to a fair trial in both civil and criminal proceedings as enshrined in the Constitution of the Islamic Republic of Pakistan of 1973.

20. Additionally, it is worth noting that both the Courts below had disregarded the widely accepted tenets of justice administration, which assert that disputes between parties should generally be resolved on their merits in the absence of extenuating circumstances, and that the punitive provisions of the law should be adhered to with strict adherence.

21. In the landmark judgment reported in **PLD 1963 SC 382** ***(Imtiaz Ahmed v. Ghulam Ali and others)***, the Apex Court held that "*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 be essential to comply with them on grounds of public policy. The English system of administration of justice on which our own is based may be to certain extent technical but we are not to take from that system its detects. Any system, which by giving effect to the form and not to the substance defeats substantive rights, is defective to that extent. The ideal must always be a system that gives to every person what is his.*

22. For the above reasons, the Revision is accepted and the impugned ex-parte judgment & decree dated 26.10.2021 and order dated 23.4.2022, passed by the trial Court and Order dated 14.11.2022, passed by the appellate Court are set aside and without touching the merit of the case, the matter is remanded to the trial Court with directions to proceed with the case and to provide full and fair opportunity to the applicants only to file written statement, thereafter decide the case in accordance with law within a period of six months, positively.

**J U D G E**