

HIGH COURT OF AZAD JAMMU & KASHMIR

Civ. Appeal No. No.79/2020.

Date of institution 08.04.2020.

Date of decision 05.05.2025.

Mst. Shamim Abbasi *alias* Shamim Akhtar, D/o Muhammad Hussain,
W/o Muhammad Tofeeq Abbasi, caste Abbasi, Muzaffarabad Colony
Landhi Karachi, Pakistan.

...Appellant

VERSUS

1. Department of Post Office, through Divisional Superintendent
Post offices, Muzaffarabad Division, Azad Kashmir.
2. Post Master, Post Office Kharral Abbasian, Tehsil & District
Bagh.

...Real-Respondents

3. Abdul Rehman S/o Muhammad Hussain.
4. Mst. Naseem Akhtar.
5. Yasmeen.
6. Mariam.
7. Tahira daughters of Muhammad Hussain, caste Abbasi, R/o
Pakistan.

...Proforma-respondents

CIVIL APPEAL

Before:- **Justice Syed Shahid Bahar, J.**

In the presence of:

Muhammad Rafique Awan, Advocate for the appellant.

Shah-Jahan Qureshi, Advocate for real-respondents.

Judgment:

The civil appeal at hand has been directed against the
judgment and decree dated 09.01.2020 passed by District Judge
Bagh, whereby the application, filed by the appellant under Section
12(2) CPC for cancellation of ex-parte decreed dated 25.09.2012, was
dismissed.

Fact in brevity

2. Summarized facts of the case at hand are that appellant Mst. Shamim Abbasi, filed an application under Section 12(2) CPC for cancellation of ex-parte decree dated 25.09.2012 before District Judge, Bagh, against the respondents-Post Office department alleging therein that she and proforma-respondents were not summoned properly and advertisement through newspaper was published in a local newspaper. Appellant (applicant) contended that she got knowledge about the ex-parte decree on 18.06.2019 when she came to her native village Kharra Abbasian on the said date. She obtained a copy of decrees. Appellant averred that the respondents have got decree in a fraudulent manner, without knowledge of appellant, hence, an ex-parte decree is liable to be reversed. She alleged that the respondents No.1 and 2 after obtaining secret and fraudulent ex-parte decree, started the execution proceedings by the court below and permanent warrant of arrest were issued against the appellant as well as proforma-respondents vide order dated 13.04.2018 by the executing court. The appellant prayed that by accepting the aforesaid application, ex-parte decree dated 25.09.2012 passed on the back of the appellant in a fraudulent manner, may be set-aside.

3. On filing of the aforesaid application, the respondents were summoned by the court below. The representative from post office department appeared before the court below and submitted his objections, thereafter, they engaged their counsel, who submitted objections on 16.12.2019. The learned court below i.e.

District Judge, Bagh, after hearing arguments of the parties dismissed the application of the appellant/applicant vide impugned judgment dated 09.01.2020, hence, instant appeal.

Version of the appellant

4. Muhammad Rafique Awan, the learned counsel for appellant contended that the impugned judgment is against the law and facts, hence, liable to be set-aside. He argued that during proceedings in the case/suit for recovery of Rs.2,20,500/-, neither the service of the appellant as well as proforma-respondents were made through process server nor the advertisement were issued in a national newspaper by the learned court below, despite the fact that the defendants were living in Karachi Pakistan, thus, the ex-parte judgment and decree dated 25.09.2012 was passed in an arbitrary manner, hence, same is liable to be set-aside. He vehemently contended that the learned court below also fell in grave error while passing the impugned decision dated 09.01.2020, whereby the application filed under Section 12(2) CPC was dismissed. Counsel for the appellant staunchly contended that the impugned judgment is the result of mis-reading and non-reading of evidence and has been passed in a hasty manner, thus, same may be struck down. The learned counsel prayed that by accepting instant appeal, the impugned judgment dated 09.01.2020 alongwith an ex-parte judgment and decree dated 25.09.2012 may be cancelled and appellant and proforma-respondents in the interest of justice, may be given an opportunity of hearing.

Version of the respondents

5. In reply, Shah-Jahan Qureshi, the learned counsel appearing on behalf of real-respondents contended that the impugned judgment as well as ex-parte decree has been passed in accordance with law and procedure, hence, same is liable to be maintained. The learned counsel defended the impugned judgment on all counts and prayed for dismissal of the appeal with costs.

6. I have heard the learned for the parties and gone through the record of the case with due care.

Crux of the proposition

7. A perusal of record it reflects that that the Post Office department/real-respondents filed a suit for recovery of Rs.2,20,500/- against descendants of deceased Muhammad Hussain Khan who was previous employee of post office as extra departmental sub-post master at Post Office Kharra Abbasian district Bagh. The plaintiff/respondents alleged that deceased Muhammad Hussain Khan misappropriated the amount of Rs.50,000/-, vide Defence Saving Certificate (DSC) No. J-368965 on 14.06.2006 and did not deposit the amount in Post Office Bagh. After maturity of DSC the purchaser approached the General Post Office Bagh and after inquiry, it came into the knowledge of respondents that the deceased Muhammad Hussain committed fraud and misappropriated. They reported the occurrence to police on 23.03.2006 and FIR No.54/06 was lodged on the same date at Police Station Bagh. Accused Muhammad Hussain (deceased) was arrested and amount was not

recovered from his and during trial he passed away, thus, criminal case was closed. During proceedings in a suit, ex-parte proceedings was initiated against the defendant/appellant and learned District Judge, vide judgment and decree dated 25.09.2012 recorded ex-parte decree in favour of respondents, against the appellant and proforma-respondents, herein.

8. Appellant claimed that she got knowledge about an ex-parte decree dated 25.09.2012 when she came in her native village Kharraal Abbasian to attend a wedding ceremony in June, 2019; she alleged that in guise of aforesaid ex-parte decree, the respondents are bent upon to attach/sale the property of the appellant. Feeling aggrieved, appellant filed an application under Section 12(2) CPC for cancellation of the aforesaid decree. Appellant alleged that an ex-parte decree was obtained in a secret and fraudulent manner as she was living in Karachi (Pakistan) while the advertisement to summon her and other defendants was made in a local newspaper which are not circulated in Karachi, hence, service of the appellant etc. was defective, thus, an ex-parte decree was passed in an arbitrary and illegal manner, which was liable to be set aside but the learned court below has not considered this aspect of the case and dismissed the application of the appellant in a hasty manner, without considering the point that the appellant was not heard and judgment and decree was passed at his back without giving her opportunities of hearing, thus, doctrine of audi alteram partem has been violated. Law is settled that no one can be condemned unheard. Be that as it may

basic purpose of notice to other side is to inform about proceedings likely to be initiated against him, which is basically derived and breath from universally accepted golden principle of law i.e. Audi Alteram partem.

9. It may be mentioned here that application under this Section would be governed by Article 181 of the Limitation Act, 1908, unless Section 18 and Article 95 of the Limitation Act, 1908 are attracted, Limitation shall be 3 years from the date of knowledge of fraud or misrepresentation and delay may be condoned under Section 5 of Limitation Act, 1908. Limitation does not run against a void order.¹

10. Seemingly the Court of 1st Instance dealt with the proceeding of summoning without resorting to and complying with the codal scheme of Order 5 CPC and circumventing and switching over the mode of ordinary service opted for substituted service in view of Order 5 Rule 20, CPC, that too in deviation of the said rule as well.

11. Trite that substituted service should be resorted to, when Court is satisfied that there is reason to believe that defendant is keeping out of the way for purpose of avoiding service or that for any other reasons, summons cannot be served in ordinary way.

12. Summon is a mandate of the Court for the purpose of intimating the rival party regarding the institution of case in order to appear, defend and furnish his written stance before this Court.

¹. 2013 SCMR 587; 2001 CLC 1187.

13. Substituted service in view of Order 5 Rule 20 CPC is a last resort attempt. Substituted service in furtherance of Rule 20 ibid can only be regarded a due service, when all efforts have made qua service through other modes provided in the Order 5 CPC. Unless all efforts to affect the service in the ordinary manner are verified to have been failed, substituted service cannot be resorted to.²

14. Ordinary substituted process is in the nature of proceeding of last resort and would not be opted for except when all procedural requirement have been met and the un-served party is shown to be avoiding service and no other means subsisted to bring the lis to its notice.³

Dicta

15. **Appellant as per record was residing at Karachi and substituted service was ordered, resultantly notice was published in a local newspaper i.e (کشمیر ایکسپریس) having regional and limited circulation, substantial compliance with all the mandatory provisions of Order V Rule 20, CPC is lacking. Newspaper ibid has no circulation in Pakistan, at all. Substituted service affected on the defendant is bad in law, such like substituted service is no service in the eye of law.**

16. Complete mechanism has been provided in Order V CPC qua issuance of service of summons consisting upon 30 rule and at the outset, strictly requiring efficacious service of summons

². 2001 SCMR 99.

³. 1995 MLD 170.

in order to enable the defendant to put his appearance and make his defence and ultimately requires under Rule 19, that if summons are returned, the Court should examine the service officer on oath in respect of his proceedings. It is observed that provision of O-V, R-19 CPC is not being adhered to and complied with by the trial Courts while concluding the summoning process. In the case at hand, procedure incorporated in Rules 17 and 19 of Order V CPC have not been complied with, thus order for “substituted service” under Rule 20 was contra-jus to say bad in law.

17. Substituted service can only be regarded as due service when the prescribed method & procedure provided in O-V Rule 20 CPC read with others enabling rules has been adopted. Criteria is satisfaction of the Court qua conclusion that ordinary mode regarding service could not be result oriented and conclusion should be speaking and based upon cogent reasons and material on record particularly, compliance of O-V-R-19 CPC, report and statement of process server is sine quo non prior to circumventing/switching over for substituted service.

(Underlining for emphases)

18. Thus, it can safely be held that neither any notice was published in the newspaper, nor it could be regarded as service affected. Publication in local newspaper to invite a party to defend himself from a remote place where such newspaper is not in access of the party is nullity in the eye of law and cannot be endorsed.

19. The very purpose and intent of Notices provided in law is to inform, invite and provide opportunity of hearing to the rival party/ defendant in order to make his defence, which rationally and logically breath from the right of audience having direct nexus with the right to fair trial. Defective and irregular summoning is bad in law, and receives no recognition in the realm of law.

(Underlining for emphases)

20. Sequel of the above discussion is that impugned judgment and decree dated 25.09.2012 and judgment dated 09.01.2020 are set-aside. Application filed by the appellant under Section 12(2) CPC is allowed, suit filed by the respondents shall be deemed to be pending before the trial Court for denovo proceeding in accordance with law.

The appeal stand accepted in the above indicated manner. File shall be kept in archive.

Muzaffarabad,
05.05.2025.

JUDGE

Approved for reporting

JUDGE