JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Writ Petition No.3903 of 2020
M/s Telematics Master Private Limited
Versus
M/s Pak Welcom Trade Private Limited

Petitioner by: Ch. Muhammad Kashif Gujjar, Advocate
Respondent by: Syed Kazim Raza Naqvi, Advocate
Date of Decision: **14.03.2022**

SARDAR EJAZ ISHAQ KHAN, J:- In January 2015 Telematics Master (Private) Limited and Pak Welcome Trade (Private) Limited, both with offices only a sector apart in Islamabad, entered into an agreement to sell and purchase vehicle tracking software. In November 2015, Pak Welcome filed a suit for recovery against Telematics for failure to perform the agreement. The **chronology table** below narrates what transpired thereafter until the instant writ petition was filed.

06.11.2015	Suit filed
11.04.2018	Ex parte judgment and decree passed for Rs. 8 lacs. The judgment notes that the summons was served[1]. Plaintiff's evidence with documentary proof was led.
17.07.2018	Execution filed
02.11.2018	Section 12(2) CPC ('§12(2)') application filed to set aside the decree, on the grounds of fraud and misrepresentation in the service of summons. The application was without sufficient particulars of fraud and misrepresentation.
05.11.2018	Ex parte judgment and decree suspended on receipt of §12(2) application
24.04.2019	§ 12(2) application dismissed for non-prosecution
03.12.2019	§ 12(2) application restored

[1] The judgment also notes that substituted service was also effected, but this was an accidental slip for the record shows actual service.

05.03.2020	§12(2) application dismissed, disbelieving that summons was not served till October 2018, i.e., when the process in execution was received by the defendant, because (i) the summons in the suit was served at the same address at which the process in execution was served, and (ii) the defendant in its §12(2) application had given the same address at which the summons in the suit was served two years earlier.
04.09.2020	Bailable warrants of judgment debtor issued.
25.09.2020	Application of judgment debtor under Order 21 Rule 26 dismissed. The ground in the application was that the judgment debtor could not ascertain the order passed on its § 12(2) application (passed on 05.03.2020) due to courts' closure during the Covid epidemic, and he could not obtain the certified copies of the order to file a revision or appeal. Rejecting, the trial Court stated that the Courts were functioning until 25.03.2020 (20 days), that a duty judge was always present, and that the Courts resumed routine work hours from 01.09.2020 (further 20 days), even if the duty judge's presence from April to August 2020 was discounted.
01.10.2020	Application under Order 9 Rule 13 to set aside the ex parte judgment and decree filed
02.10.2020	O9 R13 application dismissed, for the grounds being the same as in the dismissed § 12(2) application, that the doctrine of election of remedies applied, and that the issue of no service had become res judicata
17.12.2020	Instant writ petition against impugned order dated 02.10.2020, the §12(2) dismissal order dated 05.03.2020 and the O21 R26 dismissal order dated 25.09.2020 filed. The grounds taken reiterate fraud, without specifying the particulars other than the summons in the suit not being served.

Res ipsa loquitor! [2]

2 This should have been an appeal under Order 43 Rule 1(d) against the order dated 02.10.2020. But then the petitioner would not have been able to challenge the earlier orders dismissing its applications under § 12(2) and Order 21 Rule 26. So the petitioner found it convenient to drive a horse and cart through all norms of due process and lumped all the orders passed against it under challenge in this writ petition. Rather than give the petitioner an escape route by engaging in the sterile debate (in the context of this petition only) of whether this should have been an appeal, I decide this petition taking the widest view possible. If the petitioner says it made a mistake and should have filed an appeal, let it say so. If it insists that this

[2] Though used primarily in the law of tort, the literal meaning is "the thing speaks for itself."

writ petition is proper, let it say so. It makes no difference, for in either case it has no case.

3 The trial Court's reasoning in dismissing the petitioner's application under § 12(2) is unexceptionable. The dismissal order notes that the process in execution was served at the same address at which the summons in the suit was served. The summons in the suit was returned with proof of service in the form of signature of one Arsalan at the same address with the statement on oath of the process server. The learned counsel for the petitioner attempted to argue before this Court that the trial Court should have framed an issue whether the recipient of the summons in the suit, Arsalan, was the petitioner's employee or not. But its application under § 12(2) only made vague allegations of fraud and misrepresentation without specific denial that Arsalan was ever its employee. An allegation of fraud has to be pleaded with sufficient particulars[3]. A party alleging fraud in the service of summons would be expected to inspect the trial Court's record of service and only then plead fraud with particulars ascertained on inspection; in the absence of such particulars in its application taking such plea during arguments only does not lend credence to a plea of fraud. He cites *2011 CLD 1569 [Supreme Court], PLD 2006 Supreme Court 773, 2004 SCMR 843, 2018 CLC 40 (HC-AJK), 2019 CLC 2016, 2016 YLR 1191* and *PLD 2010 Karachi 400* to assert that the issue on service should have been framed, but the same citations also hold that it is not mandatory for the Court to frame issues in each application under §12(2) and that the Court has to make a judgment call 'as the circumstances may require'[4]. On a balance of probabilities, the trial Court in my view made the correct judgment call where the defendant took a contradictory stance that the summons in the suit were not served when the process in execution was served at the same address and made the defendant turn up.

4 A further attenuating circumstance is the petitioner's indolence in appealing from the order dismissing its § 12(2) application on the flimsy ground of the Courts remaining closed during the Covid epidemic rendering

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[3] Pleas of fraud and misrepresentation, without mentioning ingredients thereof – evidence cannot be lead into such pleas – 2009 SCMR 598

[4] 1993 SCMR 662, cited in PLD 2006 Supreme Court 773

it unable to obtain attested copies to file an appeal. This plea was rejected by the trial Court for good reason – see the fourth row from the bottom up in the chronology table.

5 That brings us to the dismissal of the petitioner's application under Order 9 Rule 13. An application under Order 9 Rule 13 must be made within thirty days of the date of knowledge of the decree[5]. The petitioner filed this application two years after the date of its knowledge, if the date of § 12(2) application is for the sake of argument to be taken to have been the date of knowledge. The learned trial court held correctly that the petitioner had elected its remedy under § 12(2) and it could not be allowed to turn around much later and pursue an alternative remedy after being unsuccessful with the first one.[6]

6 The findings are as follows:

a) an allegation of fraud and misrepresentation has to be pleaded with sufficient particulars;

b) a party applying to set aside an *ex parte* order for fraud and misrepresentation in the service of summons would be expected to inspect the trial Court's record of service and only then plead fraud in its application with sufficient particulars;

c) exercising a best judgment call in the circumstances of a given case, a Court may but is not necessarily required to frame an issue on the question of actual service raised in an application under section 12(2) CPC; and

d) the doctrine of election of remedies precludes a party to seek another remedy after availing without success one amongst several alternative remedies as the issue becomes *res judicata*[7].

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[5] Article 164 of the Limitation Act 1908
[6] 2019 CLC 640
[7] 2003 CLC 189 – res judicata applies also to successive stages of the same litigation.

7 The petition is **dismissed**.

8 The **award of costs** is to follow the event: it is in favour of the respondent. If the respondent wishes to recover its costs in this petition, it may file a statement of costs signed and sworn before an oath commissioner as to its truth and accuracy. The sworn statement of costs is to be deposited with the Deputy Registrar (Judicial) and put up before the Court in chambers for assessment and award. The respondent has sixty days to do so.

(SARDAR EJAZ ISHAQ KHAN)
JUDGE

Imran

Approved for reporting