JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

F.A.O.No.46 of 2016
Islah-ud-Din Chaudhry and another
Versus
Muhammad Zahid Abbasi

Date of Hearing: 06.07.2017
Appellants by: Mr. Gul Hussain Jadoon, Advocate.
Respondent by: Mr. Muhammad Iqbal Ramay, Advocate.

MIANGUL HASSAN AURANGZEB, J:- Through F.A.O.No.46/2016, the appellants, impugn (i) the order dated 10.09.2014 passed by the Court of the learned Additional District Judge, Islamabad, (whereby the appellants were proceeded against *ex-parte*) (ii) order dated 14.04.2016, (whereby the appellants' application for setting aside *ex-parte* judgment and decree dated 25.05.2015, was dismissed), and (iii) *ex-parte* judgment and decree dated 25.05.2015. Through the said *ex-parte* judgment and decree, the Court of the learned Additional District Judge, decreed Civil Suit No.53/2014, instituted under Order XXXVII of the Code of Civil Procedure, 1908 ("C.P.C.") by the respondent (Muhammad Zahid Abbasi) against the appellants for the recovery of Rs.25,000,000/- (Rupees twenty five million) before the Court of the learned Additional District Judge, Islamabad.

2. Mr. Gul Hussain Jadoon, Advocate, learned counsel for the appellants submitted that the respondent is the brother of appellant No.2's brother-in-law *(Behnoi)*; that the appellants reside in the United States, and visit Pakistan from time to time; that whenever the appellants' visit Pakistan they reside at appellant No.2's sister's house i.e. House No.10, Street No.41, F-8/1, Islamabad; that appellant No.2's sister, (Saeeda) died on 21.02.2014; that after Saeeda's demise, the relations between the appellants and the respondent's brother turned sour; that since Saeeda was issueless, the respondent's brother was not her sole legal heir; that appellant No.2 also had a share in Saeeda's property; and that the respondent's brother tried to transfer

Saeeda's immoveable properties in his own name without appellant No.2's consent.

3. It was further submitted that prior to Saeeda's demise, appellant No.2, in pure good faith, had given her cheques for Rs.3 Million and Rs.2.5 Million so that the amount could be utilized for development of the plots purchased by the appellants in Pakistan; that the respondent or his brother were not supposed to use the said cheques without appellant No.2's permission; and that the respondent and his brother had instituted civil suits to harass and pressurize the appellants so that appellant No.2 relinquishes her inheritance rights in her sister's property.

4. Furthermore, it was submitted that the respondent was well aware that the appellants reside in the United States; that when summons were said to have been served on the appellants, the appellants were in the United States; that the essential prerequisites for affixation of summons were not satisfied in this case; that the appellants came to know about the civil suit and about the *ex-parte* judgment and decree when their bank accounts were attached during the execution proceedings; that soon after gaining knowledge of the said *ex-parte* judgment and decree, the appellants filed the application for setting the same aside; that the process server's report dated 17.07.2014 shows that the process server intended to serve the respondent instead of the appellants; that process server's reports dated 06.05.2015 and 13.05.2015, do not show that the appellants had been served; that the appellants could not be held to have been served through a guard; and that the appellants could not be held to have been served by affixation of summons at the above-mentioned address between 11.05.2015 and 13.05.2015, because during that period, the appellants were in the United States. The learned counsel for the appellants prayed for the appeal to be allowed, and for the orders dated 10.09.2014, 14.04.2016, and *ex-parte* judgment and decree dated 25.05.2015, to be set aside.

5. On the other hand, Mr. Muhammad Iqbal Ramay, Advocate, learned counsel for the respondent submitted that as per the appellants' identity cards, their address is the same as the one

given in the suit; that the appellants do not reside in the United States, but at the address given in the suit; that the appellants had been duly served with summons, but they deliberately stayed away from the Court; that even if it is assumed that the process server did not hand over the summons to the appellants, they are presumed to have been served through the affixation of the summons at their address; that the appellants claimed to be the co-owners of the house where they were served with the summons; that execution of the cheques in question has been admitted; and that under Section 118 of the Negotiable Instruments Act, 1881, the cheques issued by the appellants are presumed to be for consideration. Learned counsel for the respondent submitted that even if the *ex-parte* judgment and decree dated 25.05.2015, was considered to have been passed in violation of the natural justice, since the appellants were subsequently heard, they cannot be held to have been prejudiced by the original non-hearing. Learned counsel for the respondent prayed for the appeal to be dismissed.

6. I have heard the contentions of the learned counsel for the parties and have perused the record with their able assistance.

7. In F.A.O. No.46/2016, appellant No.1 (Islah-ud-Din Chaudhry) is the husband of appellant No.2 (Khaleeda Chaudhry). Appellant No.2's sister (Saeeda, who breathed her last on 21.02.2014) was married to the respondent's brother (Sardar Muhammad Naseer Abbasi). The respondent is the brother of appellant No.2's brother-in-law *(Behnoi)*. Saeeda was issueless. On 10.07.2014, the respondent instituted a civil suit under Order XXXVII C.P.C. for the recovery of Rs.25,000,000/- against the appellants before the Court of the learned Additional District Judge, Islamabad.

8. For the disposal of this appeal, I feel that there is no reason to go into the merits of the case between the appellants and the respondents. The vital question that needs to be determined is whether given the facts and circumstances of the case, it was lawful for the learned trial Court to (i) proceed *ex-parte* against the appellants, (ii) pass an *ex-parte* judgment and decree against the appellants, and (iii) dismiss the appellants' application for the setting aside of the *ex-parte* judgment and decree.

9. Perusal of the order sheet reveals that on 10.07.2014, summons were issued to the appellants. The report of the process server recorded on 17.07.2014, on the back of the summons is as follows:-

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10. As per the said report, the process server had inquired as to the whereabouts of the respondent/plaintiff instead of the appellants/defendants for service of summons. Furthermore, the service was said to have been affected through the respondent's nephew. This cannot, by any stretch of imagination, be considered as valid service on the appellants. It can also not even be considered as an attempt to serve the appellants. However, on 25.07.2014, the learned trial Court order for summons to be issued to the appellants through courier/Speedex. The learned trial Court had found the report of the process server to be incorrect. Surprisingly, on the very next day i.e. 10.09.2014, the appellants were proceeded against *ex-parte*. This the learned trial Court did without satisfying itself whether the appellants had been served or not. The matter was adjourned to 15.09.2014, for the respondent's *ex-parte* evidence. The respondent entered the witness box as PW-1 and his *ex-parte* evidence was recorded on 30.09.2014. Since the process server's report dated 17.07.2014, shows that an attempt was made to serve the respondent/plaintiff instead of the appellants/defendants, service cannot be held to have been affected on the appellants. Consequently, the order dated 10.09.2014 to proceed *ex-parte* against the appellants was unlawful, and therefore, not sustainable.

11. On 17.03.2015, the learned trial Court order that summons be issued to the appellants in accordance with the earlier order dated 25.07.2014. It appears that the order to proceed *ex-parte* against the appellants passed on 10.09.2014 was recalled. On 30.03.2015 the learned trial Court again directed summons to be issued to the

appellants through courier as well as through the process server. It is noted on the order sheet that the process fee was not deposited. Therefore, vide order dated 07.04.2015, the learned trial Court again directed summons to be issued to the appellants. On 22.04.2015, it was recorded that summons had not been issued to the appellants. Hence, yet again summons were directed to be issued to the appellants. The learned trial Court in the order dated 07.05.2015, recorded that service of summons had been affected on the appellants through a servant. It is noted on the order sheet that summons could not be issued to defendant No.1, whereas the summons regarding defendant No.2 were not complete. On 11.05.2015, it was recorded that summons could not be issued. Furthermore, it was ordered that service be affected by affixation of summons. On 19.05.2015, it was recorded that service on the appellants had been "held good" through the affixation of summons on 13.05.2015. After holding so, the learned trial Court did not pass an order to proceed *ex-parte* against the appellant. On 25.05.2015, the learned trial Court recorded the statement of the learned counsel for the respondent that the respondent's *ex-parte* evidence recorded on 30.09.2014 should be treated as the respondent's evidence. Consequently, on the same very day, i.e. 25.05.2015, the learned trial Court passed an *ex-parte* judgment and decree, whereby the respondent's suit was decreed on the basis of *inter alia* the respondent's evidence which had been recorded on 30.09.2014. Perusal of the said *ex-parte* judgment and decree dated 25.05.2015 shows that after recording the respondent's evidence, the case was again brought to the stage of service of summons. This, according to learned trial Court, was *"due to some inadvertence".* The appellants were held to have been served through the affixation of summons *"at the address"*.

12. On 06.06.2015, the respondent filed a petition for the execution of the *ex-parte* judgment and decree dated 25.05.2015. The respondent also filed an application for the attachment of the appellants' bank accounts. After their bank accounts were attached, they claim to have gained knowledge of the civil suit and the *ex-parte* judgment and decree against them. On 20.11.2015, the

appellants filed an application under Order XXXVII, Rule 4 C.P.C. for setting aside the *ex-parte* judgment and decree. Furthermore, on 04.12.2015, the appellants filed an objection petition to the execution proceedings. The respondent contested the said application and the objection petition by filing written replies. Vide order dated 14.04.2016, the learned trial Court dismissed the appellants' application under Order XXXVII, Rule 4 C.P.C. for setting aside the *ex-parte* judgment and decree dated 25.05.2015.

13. The appellants, in their application under Order XXXVII, Rule 4 C.P.C. had specifically pleaded that the appellants reside in the United States. It was also pleaded that the respondent was well aware of the fact that the appellants reside in the United States, but in order to get an *ex-parte* decree, he suppressed this fact from the Court. The appellants do not deny residing at House No.10, Street No.41, F-8/1, Islamabad, whenever they visit Pakistan. Perusal of the order dated 14.04.2016, shows that no effort worth the name was made to determine as to whether the appellants were residing at the said address in Islamabad (or even in Pakistan) when the affixation of summons were said to have been made. The appellants have filed copies of their passports issued by the Government of United States of America. The appellants come to Pakistan after visas are issued to them by the Embassy of Pakistan at Washington D.C. The entry and exit stamps on the appellants' passports show that on 17.07.2014, 06.05.2015 and 13.05.2015, when they are alleged to have been served with summons regarding the suit, the appellants were not in Pakistan. As per the stamps on the passports, appellant No.1 did not come to Pakistan in the year 2014, whereas, appellant No.2 entered Pakistan on 22.02.2014 and exited on 11.03.2014. In the year 2015, both the appellants entered Pakistan on 19.05.2015 and exited on 05.06.2015. The learned trial Court should have taken this crucial aspect of the case into consideration while deciding the appellants' application for the setting aside of the *ex-parte* judgment and decree. The pages of the appellants' passports are annexed at pages 67 to 77 of FAO No.46/2016, and the learned counsel for the respondent could not state anything to doubt the correctness and authenticity of the

entry and exit stamps on the passports. Therefore, the said order dated 14.04.2016, passed by the learned trial Court is not sustainable.

14. Under Order V, Rule 17 C.P.C., it is only when the defendant refuses to accept service or where the defendant cannot be found despite all due and reasonable diligence to find the defendant service that the Process Server can affix a copy of the summons on the outer door or some conspicuous part of the house in which the defendant ordinarily resides or carries on business. For the Process Server to serve the summons on the defendant through affixation pursuant to Order V, Rule 17 C.P.C., an order of Court to that effect is not necessary. In the case at hand, the learned trial Court had ordered for the summons to be affixed at the appellant's address given in the plaint by the respondent. Such an order is passed by the Court under Order V, Rule 20 (1) (a) C.P.C., which is reproduced herein 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 grain;"*

15. Affixing the summons at the house of the defendant is one of the forms of substituted service under Order V, Rule 20 C.P.C. Such substituted service cannot be ordered unless 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 for any other reason the summons cannot be served in the ordinary way. It is well settled that personal service is a rule and substituted service is an exception which may be resorted to in unusual circumstances. Law primarily requires personal service to be the best mode of bringing notice to the knowledge of the defendant. In the case at hand, the order sheet as well as the impugned judgment and decree do not reveal the satisfaction of the learned trial Court to the effect that there was reason to believe that the appellants were keeping away in order to avoid service or that there was reason to believe that summons could not be served in the ordinary

way, before substituted service was resorted to. In fact, the order sheet of Civil Suit No.53/2014 contains order for the issuance of summons to the appellants, but it is also recorded that summons had not been issued, as mentioned above. There is also no report of the process server to the effect that it was not reasonably practicable for him to serve the summons on the appellants. The process server's report dated 06.05.2015 simply states that the Guard (Mumtaz Gul) at the house informed him that the appellants were not present at the house at that time and that he would give the summons to the appellants. The learned trial Court does not seem to have been satisfied with the service of summons by the process server on 06.05.2015, since it was ordered on 07.05.2015 that the appellants be served by affixation of summons at the said address. The said order dated 07.05.2015, is reproduced herein below:-

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16. The order for substituted service was made without satisfying the essential prerequisites for such an order set out in Order V, Rule 20 (1) C.P.C. It was not recorded that the appellants were avoiding service or that all efforts to serve the appellants in the ordinary course had failed. As a matter of fact, there is only one attempt (i.e. on 06.05.2015) by the Process Server to serve the appellants with summons. Hence, I do not find the order for substituted service to be sustainable. In the case of Bangul Vs. Noor Muhammad (1998 CLC 6577) it was *inter alia* held by the Balochistan High Court that substituted service (culminating in an *ex-parte* decree) by affixation of notice under Order V, Rule 20 C.P.C., could only be directed when in the ordinary course summons could not be served on the defendant or he was deliberately avoiding to receive the summons. Again, in the case of Abdullah Jan Vs. Bibi Almas Bano (2016 CLC 1465) it was *inter alia* held by the Hon'ble Balochistan High Court that substituted service could only be adopted when all efforts to effect service upon the

defendants in the ordinary course were made but failed. In the case of Khan Khel Vs. Haji Nasir (2007 YLR 1827), it was held by the Hon'ble Peshawar High Court, as follows:-

> *"Where the defendant evades service or cannot be served in the ordinary way or refuses to accept service, or has not been heard of for a long time and the service cannot be effected in the ordinary manner, the Court if it is satisfied of the same can order substituted service under rule 20. It can only be ordered when conditions warranting it exist and the provisions of rule 20 are strictly complied with. Irregularities in this behalf will be of no consequence when the defendant waives proper notice. Unless all efforts to effect service in the ordinary manner are verified to have failed, substituted service cannot be resorted to. Where the circumstances in which the substituted service was effected are demonstrably false, the service will be void."*

17. On 19.05.2015, the learned trial Court ordered that service on the appellant through affixation of summons, was "held good". Thereafter, the learned trial Court did not pass an order to proceed *ex-parte* against the appellants, but nonetheless decided the suit *ex-parte*. Since the earlier order dated 10.09.2014 to proceed *ex-parte* against the appellant was not lawful, the learned trial Court should have passed a fresh order to proceed *ex-parte* against the appellant before hearing the *ex-parte* arguments of the learned counsel for the respondent/plaintiff.

18. In view of the above, the instant appeal is allowed. Consequently, the order dated 10.09.2014 (whereby the appellants were proceeded against *ex-parte*), the judgment and decree dated 25.05.2015 (whereby the respondent's suit for recovery of Rs.25,000,000/- was decreed), and the order dated 14.04.2016 (whereby the appellants' application for setting aside *ex-parte* judgment and decree dated 25.05.2015, was dismissed), passed by the learned trial Court are set aside, and the matter is remanded to the learned Trial Court. I have refrained from delving into the merits of the dispute (i.e. the subject matter of Civil Suit No.53/2014). The parties are directed to appear before the learned trial Court on 17.07.2017, on which date, the appellants may file application for leave to appear and defend the suit. Since the learned Presiding Officer/Additional District Judge, who passed the judgment and decree dated 25.05.2015, has already expressed his views regarding the merits of the case, it would be appropriate if another

learned Additional District Judge, Islamabad hears and decides the case. Office is directed to forthwith remit this judgment to the District Judge, Islamabad (West), for appropriate orders. There shall be no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2017

(JUDGE)

Qamar Khan*

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