

THE HIGH COURT OF SINDH, KARACHI

J.M. No. 49 of 2018

[Iftikhar Ahmed Qureshi versus Muhammad Abrar Ahmed Qureshi and another]

Applicant : Iftikhar Ahmed Qureshi through M/s. Muhammad Mushtaque & Naseem Akhtar, Advocates.

Respondent 1 : Muhammad Abrar Ahmed Qureshi through Mr. Shahenshah Husain Advocate.

J.M. No. 74 of 2015

[Maula Bukhsh versus Muhammad Abrar Ahmed Qureshi and another]

Applicant : Maula Bukhsh through Mr. Hyder Raza Arain, Advocate.

Respondent 1 : Muhammad Abrar Ahmed Qureshi through Mr. Farhan Zia Abrar Advocate.

Date of hearing : 15-01-2020.

Date of decision : 02-03-2020.

ORDER

Adnan Iqbal Chaudhry J. - Both the Judicial Miscellaneous Applications (JMs) are under section 12(2) CPC for setting aside the *ex-parte* judgment and decree dated 09-10-2015 passed in Suit No. 136/2012 whereby the Plaintiff's (buyer's) prayer for specific performance of an agreement to transfer immovable property was decreed. The Applicant of J.M. No. 49/2018, namely Iftikhar Qureshi (owner), was Defendant in the suit. The Respondent No.1 in both JMs, namely Abrar Qureshi, was the Plaintiff of the suit. The Applicant of J.M. No. 74/2015, namely Maula Bukhsh, claims a subsequent sale agreement of the same property with the owner, Iftikhar Qureshi.

Though the decree was drawn-up on 07-12-2015, it was not placed by the office before the learned Judge for signature until that aspect came to light during these proceedings. The decree was eventually signed on 10-05-2019.

2. Iftikhar and Abrar are brothers residing in the USA. Iftikhar is the owner of Plot No. 99, measuring 2000 square yards, Khayaban-e-Babar, DHA Phase VIII, Karachi (the 'Suit Plot'), which is held by him on a Transfer Order from the DHA. In the suit, it was the case of Abrar (Plaintiff) that Iftikhar (Defendant) had received the entire sale consideration of USD 320,000/- at USA and had executed documents dated 23-07-2007 at USA, duly notarized at USA and attested at the Pakistan Consulate at Chicago, for transferring the Suit Plot to Abrar; that subsequently Iftikhar reneged and refused to come to Karachi to appear before the DHA to effect the transfer of the Suit Plot to Abrar; hence the suit for specific performance by Abrar. Initially, five persons were arrayed as Defendants. Iftikhar was Defendant No.5. Subsequently all Defendants except Iftikhar were struck off, but then vide order dated 01-10-2015 the DHA was added back as a Defendant.

3. Iftikhar did not enter appearance in the suit. Vide order dated 26-05-2014 the Court observed that Iftikhar stood served by way of publication made at Chicago. Vide order dated 04-08-2014 he was debarred from filing written statement, and by the impugned judgment dated 09-10-2015 the suit was decreed *ex-parte* against Iftikhar. However, the decree was conditioned on the deposit of a sum equivalent to USD 320,000 (the sale consideration) to be retained as security by the Nazir of the Court for a period of 1 year.

4. Though the aforesaid security was deposited by Abrar, the Suit Plot was not transferred to Abrar as in the meantime the Nazir reported that another Suit No. 1163/2013 was pending with regards to the same Suit Plot. That Suit No. 1163/2013 had been filed by Maula Bukhsh (Applicant of J.M. No. 74/2015) for specific performance of his sale agreement dated 10-12-2011 with Iftikhar, and by an interim order dated 23-10-2014, Iftikhar had been restrained from creating third party interest in the Suit Plot. Suit No. 1163/2013 is still pending.

5. In J.M. No. 49/2018 the grounds taken by Iftikhar under section 12(2) CPC for setting aside the *ex parte* judgment and decree are: (i) that the said judgment and decree were obtained by misrepresenting to the Court that Iftikhar had been served with summons and notice in the suit when he had not been so served; (ii) that the documents of transfer of the Suit Plot had been signed by Iftikhar in blank so as to enable his brother Abrar to sell the Suit Plot at Karachi for a reasonable price, but Abrar manipulated the documents to transfer the Suit Plot to himself; (iii) that Abrar had never paid any sale consideration to Iftikhar for the Suit Plot and no such payment was proved. M/s Muhammad Mushtaque and Naseem Akhtar, learned counsel for Iftikhar further submitted that Iftikhar had sent letters dated 08-12-2007 and 07-10-2012 to the DHA informing them that he has revoked the transfer documents, but such letters had been suppressed by the DHA from the Court. Learned counsel submitted that the reliance placed by Abrar on service by way of publication was of no avail when Iftikhar was never served by ordinary modes, and in support of that learned counsel cited *Nargis Latif v. Feroz Afaq Ahmed Khan* (2001 SCMR 99); and *Sea Breeze Ltd. v. Padma Ramesh* (2012 MLD 39).

6. It is the case of Maula Bukhsh (Applicant of J.M. No. 74/2015) that the ex-parte judgment and decree was a fraud played upon the Court by Abrar (Plaintiff) in collusion with Iftikhar (Defendant) so as to frustrate his (Maula Bukhsh's) sale agreement; and that he (Maula Bukhsh) was a bonafide purchaser of the Suit Plot who did not have notice of the alleged sale agreement between Abrar and Iftikhar. Mr. Hyder Raza Arain, learned counsel for Maula Bukhsh adopted the arguments of Iftikhar's counsel in J.M. No. 49/2018.

7. Mr. Shahenshah Hussain, learned counsel for Abrar (Respondent in both JMs) highlighted that Iftikhar did not dispute his signatures on the transfer documents of the Suit Plot. He submitted that the argument that the transfer documents were signed in blank is belied by those very documents which show that those were made-out with Abrar's name in print and only the date was filled latter on

as the documents were prepared at Karachi and executed at Chicago; that the Notary Public and the officials at the Pakistan Consulate at Chicago would not have attested blank documents; that it was on the request of Iftikhar that the entire sale consideration was paid to him in cash at USA for which he issued a receipt; and thus the allegation of fraud is an afterthought. As regards service of summons of the suit on Iftikhar, learned counsel submitted that summons had been sent to Iftikhar at Chicago via courier directly to Iftikhar and through the Ministry of Foreign Affairs; that since it is not alleged that summons had been sent at a wrong address, the question of committing fraud or misrepresentation does not arise; that in any case Iftikhar had been served by way of publication, and it has been held in *Nargis Latif v. Feroz Afaq Ahmed Khan* (2001 SCMR 99) that service by way of publication was as effective. Learned counsel added that allegations of fraud are vague and do not fulfill the requirements of Order VI Rule 4 CPC and the law laid down in *Dadabhoy Cement Industries Ltd. v. NDFC* (PLD 2002 SC 500).

8. Mr. Farhan Zia, learned counsel for Abrar in J.M. No. 74/2015 adopted the arguments of Mr. Shahenshah Hussain Advocate and added that Maula Bukhsh does not have *locus standi* under section 12(2) CPC to challenge the impugned judgment and decree when he was not party to the suit.

9. Heard the learned counsel and perused the record of the suit. I take up first J.M. No. 49/2018 filed by Iftikhar who was the Defendant in the suit and against whom the impugned judgment and decree has been passed, and of the grounds urged therein, I take up first the ground of non-service of summons and notice in the suit.

10. Suit No. 136/2012 was filed by Abrar on 03-02-2012 arraying Iftikhar as Defendant No.5 and giving his address as "6828-Filedstone Drive, Burr Ridge 60527, USA." On 07-02-2012, the Additional Registrar ordered that summons be issued to the Defendants for 01-05-2012. Though summons were first prepared by the office on 09-02-2012, the record does not show that the summons dated 09-02-2012

was ever dispatched to Iftikhar either by post or by courier service. There is no postal receipt nor courier receipt.

11. On 05-11-2012, the suit was fixed in Court for orders on certain miscellaneous applications (CMAs) moved by Abrar (Plaintiff) when the Court ordered that:

“Notice be issued to the Defendant No.5 through Pakistan Embassy as well as directly after the Plaintiff provides full address of Defendant No.5. To come up on 03-12-2012.”

The above order was passed when the Court noticed that Iftikhar’s address (Defendant No.5) as mentioned in the plaint was incomplete, presumably because the name of the State of USA was not mentioned. Iftikhar’s complete address was then filed by Abrar’s counsel vide statement dated 08-11-2012 to read *“6828-Filedstone Drive Burr Ridge, Illinois, Zip Code 60527, USA.”* Thereafter, notice of the CMAs and summons of the suit were prepared by the office on 12-11-2012 for 03-12-2012 and 27-11-2012 respectively along with a cover letter to the Secretary Ministry of Foreign Affairs, Islamabad, to forward the notice and summons to the Pakistan Embassy at USA for service on Iftikhar.

12. On 05-12-2012, Abrar’s counsel filed a statement that notice of the CMAs and summons of the suit had been dispatched via courier directly to Iftikhar and to the Secretary Ministry of Foreign Affairs, Islamabad, for onward delivery. Though courier receipts were filed but delivery reports of the courier were not filed, nor was any report received from the Pakistan Embassy at USA. The process was not pursued by Abrar for an entire year. Therefore, on 15-05-2014 the Additional Registrar ordered that since report of service was still awaited, repeat summons for 25-09-2014.

13. However, in the meantime, on 06-02-2014, when the suit had come up for hearing of the CMAs, the Court had proceeded to order that Iftikhar be served in the USA by way of publication. Abrar caused a publication to be made in the Chicago Sun-Times on 21-02-2014. On 26-05-2014 the Court observed that Iftikhar had been served

by way of publication, and on 04-08-2014 the Court debarred Iftikhar from filing written statement. As regards the order dated 15-05-2014 that had been passed earlier by the Additional Registrar for repeating summons to Iftikhar, the Additional Registrar's diary dated 25-09-2014 shows that Abrar did not pay the cost for issuing that summons, presumably because by then the Court had already ordered service by way of publication.

14. Substituted service by way of publication is only presumed to be personal service by virtue of Rule 20(2) of Order V CPC. Such presumption is of course rebuttable. Therefore, where service by publication is challenged, the first test is to see whether the conditions of Order V Rule 20 CPC had been met, viz., that the publication was resorted to after the Court was satisfied that the defendant was avoiding service, or there was some other reason to believe that summons could not be served in the ordinary manner; in other words, whether the ordinary modes of service available had been exhausted. Reliance for that can be placed on *Muhammad Anwar v. Abdul Haq* (1985 SCMR 1228); *Haji Akbar v. Gul Baran* (1996 SCMR 1703); and *Nargis Latif v. Feroz Afaq Ahmed Khan* (2001 SCMR 99). In the latter case, which had been cited by both sides, the Supreme Court reiterated that unless all efforts to effect service in the ordinary manner are verified to have failed, substituted service cannot be resorted to.

15. Iftikhar, the Defendant, resided abroad. Before publication, the mode in which summons of the suit is said to have been sent was by way of private courier service to Iftikhar's address and to the Ministry of Foreign Affairs, Islamabad, for onward delivery to Iftikhar through the Pakistan Embassy at USA. The record does not show that summons had ever been sent abroad by way of post as required of Order V Rule 25 CPC. There was no report by the Ministry of Foreign Affairs that summons had been forwarded to the Pakistan Embassy at USA, nor any report by the latter. While a courier's receipt was filed to show that summons had been dispatched to Iftikhar on 12-11-2012, there was no report of delivery by the courier to show that summons

so dispatched were 'delivered' or 'tendered' within the meaning of Order V Rule 10 CPC. It is to be noted that so far there is no statute that attaches a presumption of service to summons sent by a private courier service (as opposed to a public courier service). That much was also observed in *Inayatullah v. Syed Khursheed Ahmed Shah* (2014 SCMR 1477). Thus, with regards to service on Iftikhar, it can be safely said that prior to publication neither the available modes of service were exhausted nor was there a verification that the modes of service so used had failed. There is nothing to show that Iftikhar was otherwise aware of the suit. But then, this is an application under section 12(2) CPC, and from a perusal of the order dated 06-02-2014 it is cannot be said that the order of publication was passed on a fraud or misrepresentation committed by Abrar/his counsel. However, as discussed *infra* the publication that subsequently followed is an entirely different matter.

16. The publication that was made by Abrar in the Chicago Sun-Times to serve Iftikhar reads as follows:

"Iftikhar Ahmed Qureshi (son of Mukhtar Ahmed Qureshi) resident of Burr ridge IL, you are hereby required by the High Court of Sindh at Karachi to appear in the court in person or by a pleader instructed on 3rd day of March 2014 at 08:15 am, to show cause against the application (suit # 136 of 2012), failing which the said application will be heard and determined ex parte". (underlining supplied for emphasis)

The above publication manifests that it was not a publication of summons of the suit. It did not state that it was a 'summons'; the text was not of a summons in the form prescribed by Appendix-B, CPC; nor did it reflect that it was being published under the authority of the High Court of Sindh. In fact, the record of the suit shows that on 14-02-2014 the office had prepared/issued only the 'notice' of the pending CMAs for 03-03-2014 (the date mentioned in the publication) and summons of the suit had never been issued by the office for 03-03-2014. Therefore, even ignoring that the publication was not in the prescribed form, it was at best publication of the 'notice' of the pending CMAs and there was no publication made of the 'summons' of the suit. On the other hand, by way of statements filed in the suit

enclosing the said publication, Abrar lead the Court to believe that Iftikhar had been served with summons of the suit by way of that publication. That act of Abrar, in my view, constitutes 'misrepresentation' within the meaning of section 12(2) CPC, sufficient to set-aside the resulting order debarring Iftikhar from filing written statement and the *ex parte* judgment and decree against him. Having concluded so, I do not discuss the other grounds urged in this JM lest an observation on those grounds is construed to prejudice the case of either party on the merits.

I note here that having been satisfied otherwise, as discussed in para 15 above, that Iftikhar was never served with summons of the suit, had it not been a case attracting section 12(2) CPC, the *ex parte* judgment and decree could nonetheless be set-aside under Order IX Rule 13 CPC. In that eventuality, since the decree was not signed until 10-05-2019 i.e., after the filing of J.M. No. 49/2018, limitation would not be in issue.

17. Therefore, for the reasons discussed above, J.M. No. 49/2018 is allowed; the order dated 04-08-2014 whereby Iftikhar was debarred from filing written statement, and the *ex-parte* judgment and decree dated 09-10-2015 passed in Suit No. 136/2012 are set-aside to restore the said suit to the position it stood before the order dated 04-08-2014. In this view of the matter, I need not separately consider J.M. No. 74/2015 which is disposed of as infructuous.

JUDGE

Karachi
Dated: 02-03-2020