

**2003 Y L R 2084**

**[Peshawar]**

**Before Shah Jahan Khan and Shahzad Akbar Khan, JJ**

**FIDA MUHAMMAD KHAN---Appellant**

**Versus**

**FAZLE RABBI and another---Respondents**

First Appeal from Order No. 12 of 1999, decided on 12th December, 2002.

**Civil Procedure Code (V of 1908)---**

---O.IX, R.13---Ex parte decree, setting aside of---Defendants' counsel abandoned case, over which Trial Court directed to issue notice to them, but no such notice was issued or served upon them---Trial Court passed ex parte decree due to absence of defendants and their counsel, but set aside same on application of other defendant and decreed suit later on---Defendant-appellant's application for setting aside such decree was dismissed---Validity---Trial Court while passing ex parte decree had overlooked its earlier order directing issuance of notice to defendants and their counsel, which had neither been issued nor served upon them--Ex parte decree once set aside unconditionally on application of other defendant would be deemed to have been set aside in toto and against all defendants--Trial Court after setting aside ex parte decree had neither issued summons to defendant-appellant nor proceeded ex parte against him, which was, an irregularity causing grave miscarriage of justice to him---Ex parte decree passed without notice to defendant-appellant and without directing ex parte proceedings against him, was nullity in eyes of law---High Court accepted appeal and set aside impugned order and ex parte decree being without jurisdiction and against mandatory provisions of C. P. C.

Haidar Zaman Khan and Muhammad Younis Khan for Appellant.

Khalid Rehman Qureshi for Respondents.

Date of hearing: 12th December, 2002.

## **JUDGMENT**

**SHAH JAHAN KHAN, J.**---This F.A.O. is preferred against the order of Senior Civil Judge, Haripur dated 13-10-1999 whereby application of the appellant for setting aside the ex parte decree dated 1-6-1999 was dismissed.

Respondent No. 1 tiled the suit against the respondent No.2 and the petitioner as defendants Nos. 1 and 2 respectively. The suit was contested by the defendants and both of them were

represented by a joint counsel namely. Fazal Karim. He conducted the case from 5-7-1997 to 27-7-1998 and thereafter he did not appear as counsel for the defendants. On 3-9-1998 the trial Court noticed that neither the defendants nor their counsel has put their appearance and it was in the presence of the counsel for plaintiff/respondent No.1 directed that notice be served on the defendants for the next date. The following day, the case was adjourned on reader note as the Presiding Officer was on casual leave. On the adjourned date 11-1-1999, the trial Court decreed the suit ex parte due to absence of both the defendants and their counsel. The defendant-respondent No.2 applied for setting aside the ex parte decree which was accepted on 15-2-1999. On 5-5-1999, the counsel for defendant-respondent No.2 namely Iqbal Ahsan, Advocate made a statement not to produce any evidence in defence. The trial Court on 1-6-1999, once again decreed the suit against petitioner to the extent of Rs. 4 lacs as damages to the vehicle and Rs.20,000 per month payable to the plaintiff from 30-9-1996 till payment. The appellant filed the application for setting aside ex parte decree on 16-6-1999 i.e. after 15 days of the decree. The application was dismissed after contest through the impugned order.

We heard the learned counsel for the appellant who contended that the trial Court while passing the ex parte decree on 11-1-1999 overlooked the order sheets dated 3-9-1998 whereby it was directed that notice be issued to the defendants and their counsel for the following day i.e. 23-11-1998. It is undisputed fact that no notice was either issued or served upon the defendants or their counsel. Once ex parte decree was set aside on 15-2-1999, it was required for the trial Court to summon the appellant as defendant in the suit but without summoning him, the Court proceeded with the matter which was terminated in the decree dated 1-9-1999. The learned counsel for appellant took us to the order sheets after and the dates subsequent to the setting aside ex parte decree and pointed out that neither the appellant was summoned nor he was proceeded ex parte. Once a decree was set aside unconditionally it was set aside against appellant as well. He submitted that the appellant has been condemned unheard and gross irregularities were committed by the trial Court in passing the impugned ex parte decree against the appellant.

The learned counsel representing the plaintiff-respondents contended that the appellant was proceeded ex parte when ex parte decree was passed against him on 11-1-1999. The application for setting aside ex parte decree was filed by the defendant-respondent No. 2 only and the appellant could not get the benefit of order dated 15-2-1999 whereby ex parte decree was set aside. In fact, ex parte decree was set aside against defendant-respondent No.2 only. The application for setting aside the ex parte decree by the appellant on 16-6-1999 would be considered an application against the ex parte decree passed earlier on 11-1-1999 which was hopelessly barred by time.

Undisputedly, the first lawyer of defendants namely Fatal Karim abandoned the case on 27-7-1998 and the trial Court was pleased to direct to issue notice to the defendants and their counsel but no notice was either issued or served. The ex parte decree once set aside unconditionally on the application of defendant-respondent No.2 it was set aside in toto and against all defendants. The learned counsel for the plaintiff-respondent No. 1 has misconceived in saying that ex parte decree passed on 11-1-1999 was still intact against appellant. After setting aside the ex parte decree dated 11-1-1999, the trial Court was legally under obligation to issue process against the defendants and had there been any default from any of the defendants, the Court should have proceeded against defaulting defendants for ex parte proceedings. But in the present case,

admittedly neither any notice was issued and served on appellant nor he was proceeded ex parte, which is an irregularity causing miscarriage of justice to appellant.

In these circumstances of the case, we found the impugned order dated 13-10-1999 without jurisdiction and against the mandatory provision of C.P.C., which is hereby set aside. Since the ex parte decree dated 1-6-1999 was passed against the appellant without issuing process against him and without directing ex parte proceedings against him is nullity in the eyes of law.

Consequently, the said ex parte decree dated 1-6-1999 would also fall on the ground.

The conclusion of the above discussion is that we accept this appeal, set aside the impugned order dated 13-10-1999 and the ex parte decree dated 1-6-1999 in Suit No.220/1 of 1999, with no orders as to costs.

S.A.K./812/P

Appeal accepted.