

ORDER SHEET
THE HIGH COURT OF SINDH, KARACHI
R. A. No.169 of 2021

Dated: Order with signature of Judge(s)

1. For Hearing of Ma No. 5848 of 2021.
2. For hearing of Main Case.

Dated of Hearing : 18 May 2023 and 23 May 2023

Petitioner : Sheikh Sultan Ahmed through Mr. Naveed Mushtaq, Advocate

Respondent : Iftikharuddin Paracha through Mr. Zafar Iqbal Dutt, Advocate

ORDER

MOHAMMAD ABDUR RAHMAN, J. This is an application that has been maintained by the Applicant under Section 115 of the Code of Civil Procedure, 1908 seeking to revise the Judgement dated 1 October 2021 passed by the VIIth Additional District Judge Karachi (South) in Civil Misc Appeal No. 34 of 2021 which had upheld an order dated 22 October 2022 passed by the IVth Senior Civil Judge Karachi South dismissing an application maintained by the Applicant order IX Rule 13 of the Code of Civil Procedure, 1908 seeking to set aside an ex-parte Judgment dated 14 March 2019 and Decree dated 16 March 2019 passed by the IVth Senior Civil Judge Karachi South in Suit No. 1264 of 2018.

2. The Applicant was a tenant of the Respondent in respect of an immovable property bearing Shop No. 8, Uzma Arcade, Plot No. DC-8, Block 7, Kehkashan, Karachi Development Authority Scheme No. 5, Karachi (hereinafter referred to as the "Said Tenement").

3. There was litigation before the Rent Controller as between the parties being Rent Case No. 490 of 2011 for fixation of fair rent under

Section 8 of the Sindh Rented Premises Ordinance, 1979 and for eviction under Section 15 of the Sindh Rented Premises Ordinance, 1979. The rent of the Said Tenement was fixed by the Rent Controller at the rate of Rs. 270 per square foot retrospectively from the date of the filing of the case which resulted in substantial arrears being due and payable by the Applicant to the Respondent. The Applicant preferred FRA No. 187 of 2014 before the Appellate Court which was dismissed on 20 March 2017 maintaining the order passed by the Rent Controller. The Applicant thereafter preferred a Constitutional Petition before this Court bearing CP No.S-1123 of 2017 which was disposed of on 30 April 2018 by modifying the order passed by the Rent Controller and fixing the rent at Rs. 230 per square foot retrospectively from the date of the filing of the case. After making adjustments against the amounts that had been deposited or paid by the Applicant on the basis of rent fixed arrears of amounting to Rs. 11,504,630 (Rupees Eleven Million Five Hundred and Four Thousand Six Hundred and Thirty) were due and payable by the Applicant to the Respondent and to recover the same the Respondent instituted Suit No. 1264 of 2018 before the IVth Senior Civil Judge Karachi (South).

4. Suit No. 1264 of 2018 was instituted by the Respondent as against the Applicant on 3 November 2018 before the IInd Senior Civil Judge Karachi (South) and notices were issued to the Applicant initially through the Bailiff and when the service was not affected on 24 November 2018 notice was on 4 December 2019 served by the pasting of the court notice on the address of the Applicant. When the Applicant still did not appear, notice was ordered through publication and which having been made was confirmed on 14 January 2019. The matter was thereafter transferred to the Court of the IVth Senior Civil Judge Karachi (South) on 28 February 2019 and the Applicant was thereafter declared ex-parte on the same date i.e. 28 February 2019. On 14 March 2019, the Respondent filed his Affidavit

in Ex-parte proof and the court proceeded to pass a judgment on the same date. It is apparent that on the same date an advocate entered appearance on behalf of the Defendant and thereafter on 12 April 2019 maintained an application under Order IX Rule 13 of the Code of Civil Procedure, 1908 to set aside the ex-parte Judgment dated 14 March 2019 and Decree dated 16 March 2019.

5. The Application was heard by the by the IVth Senior Civil Judge Karachi South and who on 22 October 2022 was pleased to dismiss the application under Order IX Rule 13 of the Code of Civil Procedure, 1908 that had been filed by the Applicant stating that no grounds for setting aside the Judgment dated 14 March 2019 and the Decree dated 16 March 2019 existed as:

- (i) the parties were in litigation for numerous years before the courts and were well versed with the proceedings of this Court;
- (ii) that service had been affected properly as the addressed in Suit No.1264 of 2018 were the same as indicated in the various rent proceedings,
- (iii) that notice has clearly been properly served through pasting and proper service having been made it was incumbent on the Applicant to have attended the proceedings on time.

6. Being aggrieved and dissatisfied by the Order dated 22 October 2022 passed by the IVth Senior Civil Judge Karachi South on the application under Order IX Rule 13 of the Code of Civil Procedure, 1908,

the Applicant preferred Civil Appeal No. 34 of 2020 before the VIIth Additional District Judge Karachi (MCAC) (South) who on 1 October 2021 was pleased to dismiss Civil Appeal No. 34 of 2020 holding that:

- (i) Suit No. 1264 of 2018 was instituted in the Court of the IInd Rent Controller Karachi (South) and which was the same court in which an application under the Sindh Rented Premises Ordinance, 1979 bearing Rent Case No. 582 of 2018 was filed and wherein disclosure of Suit No. 1264 of 2018 was made through Counter Affidavits by the Respondent on or immediately after 15 November 2018.
- (ii) that as the Applicant deliberately and willfully choose not to appear in Suit No. 1264 of 2018 was clearly grounds to hold that the application under Order IX Rule 13 of the Code of Civil Procedure, 1908 was not maintainable and should be dismissed; and
- (iii) the contention on the part of the Applicant that a court motion notice should have been issued after the transfer of the case from the Court of the the IInd Rent Controller Karachi (South) to the Court of the IVth Senior Civil Judge Karachi South was contrary to a decision of the Supreme Court of Pakistan reported as **Irshad Hussain vs. Azizullah Khan**¹ wherein it was held that no such notice was required to be issued by the Court.

7. Being aggrieved by the order passed by order dated 1 October 2021 passed by the VIIth Additional District Judge Karachi (MCAC) (South) in

¹ 1987 SCMR 150

Civil Appeal No. 34 of 2020 the Applicants have maintained this Application under Section 115 of the Code of Civil Procedure, 1908 calling on this Court to revise the order dated 1 October 2021. Mr. Naveed Mushtaq, Advocate appeared on behalf of the Applicants and contented that:

- (i) once Suit No, 1264 of 2018 was on 28 February 2019 transferred from the court of the IInd Senior Civil Judge Karachi (South) to the Court of the IVth Senior Civil Judge Karachi (South) it was incumbent on that court to have issued a court motion notice intimating the Applicant of the transfer of the *lis* to that Court. In this regard he relied on a decision of this Court reported as **Azhar Hussain Shah vs. Harat Management (Pvt) Ltd.**² wherein it was held that after the transfer of a *lis* to a new court it was necessary to issue a court motion notice to the Defendants.

- (ii) As notice had not been affected on a proper address of the Applicant the Ex-parte order should be recalled. In this regard he relied on the decision of the Supreme Court of Pakistan reported as **Saifullah Siddiqui vs. Karachi Electricity Supply Corporation Limited**³ to advance the proposition that while the court had the power to overlook an irregularity in the service of summons it could do so when it was clear that the Defendant was deliberately evading service and that in the event that service was not affected at the proper address of the defendant this would necessitate a recall of the ex-parte order.

² PLD 2009 Khi 148

³ 1997 SCMR 926

8. Mr. Zafar Iqbal Dutt, who appeared for the Respondent contended that this Revision Application was only filed to delay the proceedings and that the Applicant was fully aware of the proceedings in Suit No. 1264 of 2018. He relied on the decision of the Supreme Court of Pakistan reported as **S. Irshad Hussain vs. Azizullah Khan**⁴ wherein it was held that under Sub-Section (2) of Section 24 A of the Code of Civil Procedure, 1908 on the transfer of a case on administrative grounds it is incumbent on the parties to inform themselves of the transfer and no duty is cast on the court in this regard to inform the parties to the *lis*.

9. I have heard the Counsel for the Applicant and the Counsel for the Respondent and have perused the record. Prima facie after perusing the record, I have no doubt that the Applicant was fully aware of the proceedings of Civil Suit No. 1264 of 2018 before the IInd Senior Civil Judge Karachi (South) as a rent case bearing Rent Case No. 583 of 2018 was pending as between the same parties before the same Court. Prima facie, I also do not have any doubt that the Applicant was properly served and was evading service so as to delay the proceedings in Civil Suit No. 1264 of 2018. Finally, and as correctly stated by the VIIth Additional District Judge Karachi (South) in Civil Misc. Appeal No. 34 of 2021, the pendency of the suit was actually informed by the Respondent through pleadings in Rent Case No. 583 of 2018. This being the case I have no doubt that the court had good cause to declare the Applicant as *exparte*.

10. The sole question to my mind in this Application is as to whether it was incumbent on the IVth Senior Civil Judge Karachi (South) to issue a court motion notice to the Applicant when Suit No. 1264 of 2018 was transferred to that Court from the Court of the IInd Senior Civil Judge Karachi (South) on 28 February 2019. It is to be noted that the matter was

⁴ 1987 SCMR 150

fixed on that date before the court not for a report on the service of summons but for ex-parte orders and it needs to be considered that on the transfer of Suit No. 1264 of 2018 from the Court of the IInd Senior Civil Judge Karachi (South) to the Court of the IVth Senior Civil Judge Karachi (South) whether the law mandates the issuance of a Court motion notice. In this regard the provisions of Section 24 A of the Code of Civil Procedure, 1908 are material and state that:

“ ... 24-A.-

(1) Where any suit is transferred under section 22, or any suit, appeal or other proceeding is transferred or withdrawn under subsection (1) of section 24 on the application of a party, the Court ordering the transfer or withdrawal shall fix a date for the appearance of the parties before itself, if the., suit, appeal or other proceeding is to be tried or disposed of by itself, or before the Court to which the case is so transferred.

(2) Where any suit, appeal or other proceeding is transferred from one Court to another, otherwise than on the' application of a party, the parties thereto shall appear before the Court from which the suit, appeal or other proceeding is to be transferred, on the day already fixed for their appearance before that Court, and such Court shall then communicate the order of transfer to such parties and direct them to appear before the Court to which the suit, appeal or other proceeding is to be transferred, either on the same day, or on such earliest day as may be reasonable having regard to the distance at which the other Court is located

(Emphasis is added)

The decision as correctly relied on by VIIth Additional District Judge Karachi (South) in Civil Misc Appeal No. 34 of 2021 has clarified that:

“ ... *The introduction of Section 24-A in the Civil Procedure Code has a background and a purpose behind it. The background is to be found in the report of the Law Reforms Commission 1958-59 page 65 in the following words:*

“ In the event of transfer of cases from one Court to another also, occasionally the parties have to be summoned afresh by the transferee court for a fresh date. This materially obstructs the progress of the case.... Transfer of cases may take place in two ways. A transfer may be ordered by a higher Court on a petition. In that event, the transferring Court should itself fix a date for the appearance of the parties only, before the date. The parties would then appear before the transferee Court and take the actual date for which it would be convenient for that Court to take up the case. Where the transfer of a case is ordered for administrative reasons, the parties may not be present when the order is passed. In such a case, again, the parties should be placed under a legal obligation to appear in the Court in which

the case was pending, on the date already fixed there. That Court would have been informed of the administrative order transferring the case to another Court... The original Court should, therefore keep a note of the particulars of the case and of the transferee Court, so that when the parties appear, they should be intimated of the order of transfer. This Court should direct the parties to appear before the transferee Court, either the same say, if it is situated elsewhere. These consideration would also be germane to work in criminal Court's and may well apply to them."

*The Language of Section 24 A, subsection (2) in fact reflects the purpose and seeks to achieve it by making it obligatory on the parties to get themselves informed of the future date of hearing and the Court where the case has been transferred. **The only duty placed on the Court is to inform them so when they approach it for that purpose.** There was no indication on the record that any of defaulting defendant had approached any of the Courts for that purpose."*

(Emphasis is added)

As held by the Supreme Court of Pakistan, there is no duty cast on a court to issue a court motion notice when a case is transferred to that Court, rather the duty lies on the litigants to inform themselves of the transfer. There being no obligation on the court to do so I would therefore consider that the VIIth Additional District Judge Karachi (South) in its order dated 1 October 2021 passed in Civil Misc. Appeal No. 34 of 2021 did not commit any irregularity or illegality in holding that there was no obligation on a court to issue a court motion notice when a case is transferred to it and nor had the IVth Senior Civil Judge Karachi (South) in Civil Suit No. 1264 of 2018 committed any irregularity or illegality in not issuing a court motion notice when Civil Suit No. 1264 of 2018 was transferred to it from the Court of the IIInd Senior Civil Judge Karachi (South). The Applicant was correctly declared ex-parte by the court after complying the process of service and cannot in any manner be considered to have acted illegally or irregularly necessitating intervention from this Court under Section 115 of the Code of Civil Procedure, 1908.

12. For the foregoing reasons I am of the opinion that there is no material irregularity or illegality in either the Judgement dated 1 October 2021

passed by the VIIth Additional District Judge Karachi (South) in Civil Misc Appeal No. 34 of 2021 or in the order dated 22 October 2022 passed by the IVth Senior Civil Judge Karachi (South) dismissing an application maintained by the Applicant order IX Rule 13 of the Code of Civil Procedure, 1908 seeking to set aside an ex-parte Judgement dated 14 March 2019 and Decree dated 16 March 2019 passed by that Court in Suit No. 1264 of 2018. The Application being misconceived is therefore dismissed with no order as to costs. The Office is directed to return the Record and Proceedings of Suit No. 1264 of 2018 to the Court of the IVth Senior Civil Judge Karachi (South) forthwith.

JUDGE

Karachi dated 22 August 2023