Order Sheet
IN THE HIGH COURT OF SINDH KARACHI
Constitution Petition No. S-193 of 2020

Date	Order with Signature of Judge

For hearing of case on Priority.
1. For Order on office Objections
2. For Order on CMA No. 5074 of 2021
3. For Orders on CMA No. 865 of 2020
4. For Hearing of the Main Case

Date of hearing	:	23 May 2023.
Petitioner	:	Shafqat Ali through Mr. Shahenshah Hussain, Advocate.
Respondent No. 1	:	Mst. Imtiaz through Muhammad Iqbal Chaudhary Advocate
Respondent No.2	:	Mst. Ali Shiba through Muhammad Iqbal Chaudary Advocate

ORDER

MOHAMMAD ABDUR RAHMAN, J. This is a Petition that has been maintained by the Petitioner under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 impugning a Judgement dated 11 January 2020 passed by the 11th Additional District Judge Karachi in Family Appeal No. 167 of 2019 dismissing an appeal maintained by the Appellant challenging an order dated 28 September 2010 passed by the VIII Family Judge Karachi (South) in Execution No. 1 of 2018 emanating from Family Suit No. 77 of 2007.

2. It is common ground as between the Petitioner and the Respondent No. 1 that they were married on 24 February 2021 against a dower amount of Rs. 50,000 and that from their wedlock the Respondent No. 2 was born on 18 December 2001. The marriage was not a happy marriage and resulted in the

Respondent No. 1 separating from the Petitioner and moving to Karachi with the Respondent No. 2 and where she purportedly resides with her brother. The Petitioner finally realising that their separation was permanent divorced the Petitioner on 3 May 2005 by sending her a talkanama. It is not known as to whether a certificate of effectiveness of Divorce has been obtained by the Petitioner as mandated by Section 7 of the Muslim Family Law Ordinance, 1961.

3. The Respondent No. 1 and the Respondent No. 2 filed Family Suit No. 77 of 2007 before the court of the VIIIth Civil and Family Judge Karachi (South) on 3 February 2007 praying therein for:

(i) Rs. 50,000 for her dower;

(ii) Rs. 20,000 per month for her maintenance from January 2002,

(iii) Rs. 15,000 per month for the maintenance of the Respondent No. 2.

4. The Petitioner alleges that the Respondent No. 1 and the Respondent No. 2 deliberately misrepresented the Petitioners address in the Petition and stated it as:

B-49, Naseem Deluxe Bungalows,
Qasimabad,
Hyderabad

but which the Respondent No. 1 represented in Family Suit No. 77 of 2007 as:

B-49, Naseem Nagar
Hyderabad.

5. On account of the discrepancy in the address of the Petitioner, service of a summons, the Petitioner alleges, could not be affected on him in Family Suit No. 77 of 2007 through the Bailiff or by post and which led to service of the summons

being ordered through publication and which was made in the Daily Pakistan. Thereafter the Petitioner was declared ex-parte in Family Suit No. 77 of 2007 on 13 September 2007 and whereafter Judgment and Decree was passed by VIIIth Civil and Family Judge Karachi (South) on 13 September 2007 in Family Suit No. 77 of 2007 in favour of the Respondent No. 1 and the Respondent No. 2 directing the Petitioner to pay:

(i) a sum of Rs. 15,000 per month with effect from 2002 to the Respondent No. 1 as maintenance, and

(ii) a sum of Rs. 15,000 per month with effect from 2 September 2002 to the Respondent No. 2 as maintenance.

6. The Respondent No. 1 and the Respondent No. 2 did not file an Execution Application until 2016 and which was dismissed on 28 September 2016 by the VIIIth Civil/ Family Judge Karachi (South) as being barred under Article 181 of the First Schedule read with Section 3 of the Limitation Act, 1908. It is pertinent to note that notice was not issued to the Petitioner on the Execution Application filed in 2016 by the Respondent No. 1 and the Respondent No. 2.

7. The Respondent No. 1 and the Respondent No. 2 preferred a Family Appeal before the XIIth Additional District Judge Karachi (South) bearing Family Appeal No. 83 of 2016 and which was also dismissed on 3 October 2017 as being barred under Article 181 of the First Schedule read with Section 3 of the Limitation Act, 1908. The Respondent No. 1 and the Respondent No. 2 persisted and filed Constitution Petition No. S-2303 of 2017 before this Court and which was also dismissed on 31 October 2017. There efforts were finally rewarded and in CP No. 42-K of 2018, the Supreme Court of Pakistan on 5 September 2018 held that the Decree for maintenance in a family suit amounted to a “continuous and recurring cause of action” and allowed the appeal remanding the matter to the

VIIIth Civil/ Family Judge Karachi (South) for implementing the execution of the Decree dated 13 September 2007 passed in Family Suit No. 77of 2007.

8. That on 10 November 2018, the Appellant preferred to file an Application under Sub-Section (2) of Section 12 of the Code of Civil Procedure, 1908 alleging that he had on account of the discrepancy of his address had only got notice of these proceedings when a postman informed him about a notice that had been issued to him by the XIIth Additional District Judge Karachi (South) bearing Family Appeal No. 83 of 2016. He submits that he approached that court and on discovering that Family Appeal No. 83 of 2016 had been dismissed he pursued the matter before the Supreme Court of Pakistan where for the first time his address was corrected. He states that after the restoration of the Execution Application, he has maintained an application under Sub-Section (2) of Section 12 of the Code of Civil Procedure, 1908 to set aside the Judgment and Decree passed by VIIIth Civil and Family Judge Karachi (South) on 13 September 2007 in Family Suit No. 77 of 2007.

9. The matter was heard by the VIIIth Civil and Family Judge Karachi (South) who on 28 September 2019 was pleased to dismiss the application under Sub-Section (2) of Section 12 of the Code of Civil Procedure, 1908 that had been maintained by the Petitioner on the grounds that:

(i) an application under Sub-Section (2) of Section 12 of the Code of Civil Procedure, 1908 had to be maintained within a period of 30 days as specified in Sub-Section (6) of Section 9 of the Family Courts Act, 1964;

(ii) that the application was barred under Rule 13 of the Family Court Rules, 1965 as an application for setting aside an ex-parte decree has to be preferred within 30 days

(iii) that notwithstanding the above the provisions of Sub-Section (2) of Section 12 of the Code of Civil Procedure, 1908 could not be pressed into service in the family jurisdiction as under Section 17 of the Family Courts Act, 1964 , aside from Section 10 and Section 11, the provisions of the Code of Civil Procedure, 1909 were not applicable in the jurisdiction constituted under that statute,

(iv) that on merits as well, the Petitioner having obtained knowledge about the pendency of Family Suit No. 77 of 2007 when he received notice of Family Appeal No. 83 of 2016 before the XIIth Additional District Judge Karachi (South) should have forthwith maintained an application to set aside the Decree dated 13 September 2007 passed in Family Suit No. 77 of 2007.

10. The Petitioner preferred Family Appeal No. 167 of 2019 before 11th Additional District Judge Karachi who by a Judgement dated 11 January 2020 was pleased to dismiss the appeal holding that:

(i) an Application under Sub-Section (2) of Section 12 of the Code of Civil Procedure, 1908 could not be pressed into service in the family jurisdiction as under Section 17 of the Family Courts Act, 1964, aside from Section 10 and Section 11, the provisions of the Code of Civil Procedure, 1909 were not applicable in the jurisdiction constituted under that statute;

(ii) notice of Family Suit No. 77 of 2007 had not been properly served on the Petitioner, and

(iii) the Petitioner had 30 day's time from the issuance of a notice under Sub-Section (7) of Section 9 of the Family Courts Act, 1964 which was never issued by the Family Court and in the absence of such a notice being issued the time granted to present an application to set aside an ex-parte Decree would be 30 days from the date of the **Petitioners knowledge** of the proceedings which admittedly was in January 2017.

11. Being aggrieved and dissatisfied by the order Judgement dated 11 January 2020 passed by the 11th Additional District Judge Karachi in Family Appeal No. 167 of 2019 the Petitioner has maintained this Petition. Mr. Shahenshah Hussain, appeared on behalf of the Petitioner and submitted that:

(i) the address of the Petitioner as indicated in Suit Family Suit No. 77 of 2007 that had been instituted by the Respondent No. 1 and the Respondent No. 2 as against the Petitioner was incorrect and as such he never received notice of Family Suit No. 77 of 2007;

(ii) the Petitioner only discovered of the existence of Family Suit No. 77 of 2007 when a postman who was known to the Petitioner recognised the name of the Petitioner and served a copy of the notice issued by the XIIth Additional District Judge Karachi (South) in Family Appeal No. 83 of 2016 in January 2017;

(iii) that as Family Appeal No. 83 of 2016 had held that the Decree dated 13 September 2007 passed by the VIIIth Civil and Family

Judge Karachi (South) in Family Suit No. 77 of 2007 was not executable as being barred under the provisions of the Limitation Act, 1908, the Petitioner elected not to pursue setting aside the Decree dated 13 September 2007 at that time;

(iv) that he appeared before the Supreme Court of Pakistan in CP No. 42-K of 2018, on 5 September 2018 and when the Decree dated 13 September 2007 passed by the VIIIth Civil and Family Judge Karachi (South) in Family Suit No. 77 of 2007 was held therein to be executable he maintained the application under Sub-Section (2) of Section 12 of the Code of Civil Procedure, 1908;

(v) he conceded that as the provisions of the Code of Civil Procedure, 1908 would not apply to proceedings under the Family Courts Act, 1964 his application under Sub-Section (2) of Section 12 of the Code of Civil Procedure, 1908 would not be maintainable;

(vi) he contended that as per Sub-Section (6) of Section 9 of the Family Courts Act, 1964 he had a period of "thirty days" from the date "of the service of notice under subsection (7) of the passing of the decree" to make an application for setting aside the Decree dated 13 September 2007 passed by the VIIIth Civil and Family Judge Karachi (South) in Family Suit No. 77 of 2007 on the grounds that he was not duly served or that was prevented by any sufficient cause from appearing;

(vii) that as noted by the Judgement dated 11 January 2020 passed by the 11th Additional District Judge Karachi in Family Appeal No. 167

of 2019 a notice under Sub-Section (7) of Section 9 of the Family Courts Act, 1964 had never been issued; and

(viii) that the Judgement dated 11 January 2020 passed by the 11th Additional District Judge Karachi in Family Appeal No. 167 of 2019 was incorrect as it stated that the time for filing of the application for setting aside the decree would start from the date of **knowledge** of the Decree dated 13 September 2007 passed by the VIIIth Civil and Family Judge Karachi (South) in Family Suit No. 77 of 2007 and not from the date of **service of the notice under Sub-Section (7) of Section 9 of the Family Courts, Act 1964**. In this regard he relied on the settled proposition of law that if something is to be done in a certain manner, it should be done in the prescribed manner or not at all and as the Family Court had failed to issue a notice under Sub-Section (7) of Section 9 of the Family Courts Act, 1964 after the passing of the Decree the time limit for him to maintain an application to set aside the decree under Sub-Section (6) of Section 9 of the Family Courts Act, 1964 has not yet started.

He relied on the decisions reported as ***Kaneez Fatima vs. Mumtaz Khan***[1] and ***Muhammad Nabi vs. Bibi Malika***[2] to advance the proposition that under the Family Courts Act, 1964 where service of a summons was affected through substituted service without going through the process of direct service on the defendant the same was irregular. He then relied on a decision reported as ***Mansab Ali vs. Amir and 3 others*** [3] ***Rahim Bux vs. Gul Muhammad and 2 others***[4] and stated that as the provisions of Sub-Section (7) of Section 9 of the

[1] 1983 PSC1194
[2] 2021 CLC 1189
[3] PLD 1971 SC 124
[4] PLD 1971 Lhr 746

Family Courts Act, 1964 had not been complied with the Execution proceedings instituted were void and relied on this decision to advance the proposition that no limitation would lie as against a void order. He stated that as reported in ***Muhammad Swaleh vs. Messrs United Grain & Fodder Agencies***[5] this Court had the duty to revise a judgement where it was found that sufficient grounds existed to set aside a judgment on a mistaken view of law.

12. Mr. Muhammad Iqbal Chaudhary appeared on behalf of the Respondent No. 1 and the Respondent No. 2 and contended that the Decree dated 13 September 2007 passed by the VIIIth Civil and Family Judge Karachi (South) in Family Suit No. 77 of 2007 having been held to be executable, this Petition was simply a measure to delay the enforcement of that decree by this Court. He submitted that the Petitioner having knowledge of the Decree dated 13 September 2007 passed by the VIIIth Civil and Family Judge Karachi (South) in Family Suit No. 77 of 2007 in January 2018 could not resort to what are obviously technicalities to defeat the execution of the Decree dated 13 September 2007 passed by the VIIIth Civil and Family Judge Karachi (South) in Family Suit No. 77 of 2007. He relied on the decision of the Supreme Court of Pakistan reported as ***Muhammad Iqbal vs. Additional District Judge, Bahawalpur*** [6] to advance the proposition that an assumption as to the status of a suit having being dismissed would not amount to "sufficient cause" for maintaining an application to set aside an ex-parte decree within the meaning given to that expression in Sub-Section (6) of Section 9 of the Family Courts Act, 1964.

13. I have heard the Counsel for the Petitioner and the Counsel for the Respondent and have perused the record. This Petition raises a technical but relevant issue regarding the manner of the functioning of the Family Courts under

[5] PLD 1964 SC 97

[6] 2004 SCMR 1574

the Family Courts Act, 1964 and the ability of a litigant to set aside an Ex-Parte Decree that has been passed as against him by that Court. This issue has some history and was initially addressed by the Supreme Court of Pakistan in the decision reported as ***Matloob Ali Khan vs. Additional District Judge, East Karachi.*** [7] it seems that Sub-Section (6) of Section 9 of the Family Courts Act, 1964 as originally framed read as under:

> " … *In any case in which a decree is passed ex parte against a defendant under this Act, he may apply within **reasonable time of the passing thereof to the Family Court by which the decree was passed for an order to set it aside**, and if he satisfies the Family Court that he was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was heard or called for hearing, the Family Court shall, after service of notice on the plaintiff, on such terms as to cost as it deems fit, make an order for setting aside the decree as against him, and shall appoint a day for proceeding with the suit; provided that where the decree is of such a nature that it cannot be set aside as against such defendant only, it may be set aside against all or any of the other defendants also."*

(Emphasis is added)

Rule 13 of the Family Court Rules, 1965 that were notified under the Family Courts Act, 1964 stipulated that:

> " … *Ex parte decree or proceedings may, for sufficient cause shown, be set aside by the Court on application made to it within 30 days of the passing of the decree or decision.*"

The position that came to be advanced before the Supreme Court of Pakistan therefore was that as the Family Courts Act, 1965 did not prescribe any time limit for filing an application to set aside an ex-parte decree and instead prescribed a "reasonable time" for filing such an application, could Rule 13 of the Family Court Rules, 1965, being in the nature of delegated legislation, stipulate a fixed period of 30 days for filling such an application or would such a rule be ultra vires of Sub-

[7] 1988 SCMR 747

Section (6) of Section 9 of the Family Courts Act, 1964. The Supreme Court of Pakistan answered the query and held that:

> " … *The plain reading of the aforesaid provisions makes it clear that the statute provided no time limitation for making application for setting aside an ex parte decree passed by a Family Court. The point to be noted is thatthis is not a case where the statute is silent with regard to the period of limitation for making an application of this nature, but a positive provision has been made permitting the making of such application "within reasonable time of the passing" of the ex parte decree. The question is whether in the face of such statutory provisions, the rule making authority could frame a rule in any way limiting the period of limitation to a fixed period. The rule making power has been vested in the Government under section 26 of the Family Courts Act for making rules to carry into effect the provisions of the Act. When the Act itself provides for making the application within reasonable time, apparently fixing a period of limitation for general application to all cases cannot be in consonance with the provisions of the Act and cannot be said to carry into effect the provisions of the Act. See Ch. Altaf Hussain v. The Chief Settlement Commissioner and others P L D 1965 S C 68. The reason is that the question of what constitutes reasonable time would obviously depend upon the facts of each particular case and it will not be possible to lay down a rule of thumb that in all cases the fixed period of 30 days would be reasonable time. Subsection (2) of section 26 clearly expresses the legislative intent that the rules made thereunder shall not be inconsistent with the provisions of the Act.* ***It is well-established that the subordinate power of framing rules granted by the statute cannot be exercised to override the express provisions of the statute****. Clearly, therefore, rule 13 is ultra vires the power of the rule-making authority. The learned additional District Judge and the High Court did not examine the plea of the appellant on merits and disposed of the case on the ground that his application was barred by limitation, which vas clearly against the express provisions of the statute. The order of the Additional District Judge was, therefore, passed in excess of jurisdiction and without lawful authority and was, therefore, liable to be declared as such. It seems that this aspect of the matter was not brought to notice of the, learned Judge in the High Court."*

(Emphasis is added)

As is apparent Rule 13 of the Family Court Rules, 1965 having been held to be ultra vires of the Family Courts Act, 1964 was not followed.

14. It is apparent that the decision of the Supreme Court of Pakistan resulted in legislative intervention and by which the following amendment was made to Section 9 of the Family Courts Act, 1964

> " … *(6) In any case in which a decree is passed ex parte against a defendant under this Act, he may apply* ***within thirty days of the service of***

> ***notice under sub-section (7) of the passing of the decree to the Family Court by which the decree was passed*** *for an order to set it aside, and if he satisfies the Family Court that he was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was heard or called for hearing, the Family Court shall, after service of notice on the plaintiff, and on such terms as to costs as it deems fit, make an order for setting aside the decree as against him, and shall appoint a day for proceeding with the suit; provided that where the decree is of such a nature that it cannot be set aside as against such defendant only, it may be set aside against all or any of the other defendants also.*
>
> *(7)* ***The notice of passing of the ex-parte decree referred to in sub-section (6) shall be sent to the defendant by the Family Court together with a certified copy of the decree within three days of the passing of the decree, through process server or by registered post, acknowledgement due, or through courier service or any other mode or manner as it may deem fit****.*
>
> *(8) Service of notice and its accompaniment in the manner provided in sub-section (7) shall be deemed to be due service of the notice and decree on the defendant."*

(Emphasis is added)

Apparently, no parallel amendment was made in Rule 13 of the Family Court Rules 1965 and which still reads as under:

> " … *Ex parte decree or proceedings may, for sufficient cause shown, be set aside by the Court on application made to it within 30 days of the passing of the decree or decision."*

I have no doubt that the expression "within 30 days of the passing of the decree or decision" contained in Rule 13 of the Family Court Rules, 1965 is ultra vires of the amendment made to Sub-Section (6) and (7) of Section 9 of the Family Courts Act, 1964 as the thirty day time period prescribed therein states that it should be "***within thirty days of the service of notice under sub-section (7) of the passing of the decree to the Family Court by which the decree was passed".*** Rule 13 of the Family Court Rules, 1965 being delegated legislation, as held by the Supreme Court of Pakistan in ***Matloob Ali Khan vs. Additional District Judge, East Karachi***[8] "cannot be exercised to override the express provisions of the statute." Keeping in mind that Rule 13 of the Family Courts Act, 1965 are ultra vires, clearly

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[8] 1988 SCMR 747

the time period for maintaining an application to set aside an ex-parte Decree issued by the Family Court should be governed by Sub-Section (6) and (7) of Section 9 of the Family Courts Act, 1964 and which prescribes that the time period of 30 days to file an application to set aside the ex-parte decree passed by the Family Court would start from the date of the service of notice of the passing of the decree under sub-section (7) of Section 9 of the Family Courts Act, 1964.

15. In Family Suit No. 77 of 2007 this was admittedly not done. In the Judgement dated 11 January 2020 passed by the 11th Additional District Judge Karachi in Family Appeal No. 167 of 2019 instead the time period for maintaining an application to set aside an ex-parte Decree issued by the Family Court was to be taken to have commenced from the date of knowledge of the Decree. The finding of the 11th Additional District Judge Karachi in the Judgement dated 11 January 2020 passed in Family Appeal No. 167 of 2019 is clearly incorrect as, however equitable it might be, nowhere in Sub-Section (6) of Section 9 of the Family Courts Act, 1964 has it been prescribed that the 30 day period for filing an application for setting aside an ex-parte decree would commence from the date of the Applicants knowledge of the Decree. The 11th Additional District Judge Karachi in the Judgement dated 11 January 2020 passed in Family Appeal No. 167 of 2019 has clearly attempted to fill in a *casus omissus* in Sub-Section (6) of Section 9 of the Family Courts Act, 1964 and which cannot be filled as it is a matter which should have been, but had not been provided for in a statute. Such an interpretation as cast by the 11th Additional District Judge Karachi in the Judgement dated 11 January 2020 passed in Family Appeal No. 167 of 2019 could not be supplied by that court, as by doing so the 11th Additional District Judge Karachi has in fact legislated and not interpreted a legislation and which is clearly outside the constitutional domain of that court and which cannot be sustained.

16. Clearly when examining the right of a person to set aside an ex-parte decree under the Family Courts Act, 1964, recourse cannot be made to Sub-Section (2) of Section 12 of the Code of Civil Procedure, 1908 as the provisions of the Code of Civil Procedure, 1908, aside from Section 10 and 11, have by virtue of Section 17 of the Family Courts Act, 1965 specifically been excluded from their application to the procedure to regulate the Family Courts. The only recourse for a person to set aside an ex-parte decree would therefore be to maintain an application under Sub-Section (6) of Section 9 of the Family Courts Act, 1964 within "***within thirty days of the service of notice under sub-section (7) of the passing of the decree to the Family Court by which the decree was passed***" against the criteria mentioned in that Sub-Section. This would to my mind also make the issuance of a notice under Sub-Section (7) of Section 9 of the Family Courts Act, 1964 mandatory and ***once served*** in the manner prescribed would as per Sub-Section (8) of Section 9 of the Family Courts Act, 1964 be conclusive as to notice being served on the Defendant. In respect of the subject Petition, it is admitted that the VIIIth Civil and Family Judge Karachi (South) in Family Suit No. 77 of 2007 has, to date, never issued a notice under Sub-Section (7) of Section 9 of the Family Courts Act, 1964 informing the Petitioner of the passing of the ex-parte Decree dated 13 September 2007 passed by the VIIIth Civil and Family Judge Karachi (South) in Family Suit No. 77 of 2007. Therefore, technically, despite the Petitioner admittedly having knowledge of the Decree dated 13 September 2007 passed by the VIIIth Civil and Family Judge Karachi (South) in Family Suit No. 77 of 2007, the time for him to apply to set aside the Decree has as of yet, as per the statute, not yet commenced!

17. I have no doubt that the interpretation that I have given above to the provisions of Sub-Section (6) of Section 9 of the Family Courts Act,1964 when considered as against the facts can be considered to be inequitable. The Petitioner having full knowledge of the Decree can in effect prevent the execution of the Decree on account of an obvious error on the part of the Court on its failure to issue a notice under Sub-Section (7) of Section 9 of the Family Courts Act, 1964. To deal with such an inequity, I even considered an interpretation that the action of filing the application under Sub-Section (2) of Section 12 of the Code of Civil Procedure, 1908 could be construed to be an act by which notice of Sub-Section (7) of Section 9 of the Family Courts Act, 1964 would be deemed waived. However, I am minded that as the provisions of Sub-Sections (6) and (7) of Section 9 of the Family Courts Act, 1965 would be equally applicable to all the matters listed in the Schedule of the Family Courts Act, 1964 including, but not limited to, issues of custody of minors; I could foresee a situation where an ex-parte decree is obtained for the custody of a minor and thereafter an Execution Application is filed to enforce such a decree and for the person who has custody of the minor to be faced with a bailiff arriving at their doorstep to enforce the Execution Application to take the custody of their child from them all ***without a court notice for summons having ever been properly affected on the defendant***. I can only understand the intention of the legislature in basing the application under Sub-Section (6) of Section 9 of the Family Courts Act, 1964 on the ***issuance and service*** of notice under Sub-Section (7) of Section 9 to give the defendant proper notice prior to the enforcement of the Decree and thereafter to give them an opportunity to set aside as the Decree against the criteria mentioned in that Sub-Section.

18. I have considered the contentions of Mr. Muhammad Iqbal Chaudhary on behalf of the Respondent No. 1 and the Respondent No. 2 and as much sympathy as I have for the factual circumstances of the Respondents, I cannot

accept his contentions that the circumstances of this case warrant the Petition to be dismissed. There are clear errors of law made in the Judgement dated 11 January 2020 passed by the 11th Additional District Judge Karachi in Family Appeal No. 167 of 2019 while interpreting Sub-Sections (6) and (7) of Section 9 of the Family Courts Act, 1964 and the judgement relied upon by him and which is reported as ***Muhammad Iqbal vs. Additional District Judge, Bahawalpur,*** [9] which would clearly have relevance to consider the merits of the application under the head of "sufficient cause," would not be applicable here keeping in mind that the Petitioner is relying on the head of having not been properly served and not as against the head of "Sufficient Cause". Clearly, the Petitioners application would have to be assessed as against that yardstick and if found that he was not properly served, the ex-parte Decree must be set aside and he must be given a proper opportunity to defend his claim .

19. On merits as well, the order dated 28 September 2010 passed by the VIII Family Judge Karachi (South) in Execution No. 1 of 2018 emanating from Family Suit No. 77 of 2007 has some fallacies. Where such factual contentions are being raised as have been done by the Petitioner, it is incumbent on the Family Court to have framed an issue and to have allowed the Petitioner to adduce evidence on the issue of having not been served and not have decided the matter on affidavits.

20. In the circumstances I am of the opinion that the Judgement dated 11 January 2020 passed by the 11th Additional District Judge Karachi in Family Appeal No. 167 of 2019 and the order dated 28 September 2010 passed by the VIII Family Judge Karachi (South) in Execution No. 1 of 2018 emanating from Family Suit No. 77 of 2007 cannot be sustained and are set aside and the application that has been filed by the Petitioner under Sub-Section (2) of Section 12 of the Code of Civil Procedure, 1908 should be deemed pending adjudication

[9] 2004 SCMR 1574

and should be treated as an application under Sub-Section (6) of Section 9 of the Family Courts Act, 1964. The matter is remanded to the VIIIth Family Judge Karachi (South) to forthwith issue a notice under Sub-Section (7) of Section 9 of the Family Courts Act, 1964 in the manner prescribed in that Sub-Section to the Petitioner whereafter the application filed by the Petitioner under Sub-Section (2) of Section 12 of the Code of Civil Procedure, 1908 and which it has ordered is to be treated as an application under Sub-Section (6) of Section 9 of the Family Courts Act, 1964 should be decided within a period of one month from the date of this Order. The Petition therefore is allowed in the above terms with no order as to costs.

J U D G E

Karachi dated 22 August 2023

Nasir/PS