

ORDER SHEET
THE HIGH COURT OF SINDH AT KARACHI

C.P No.S-199 of 2021.

Date: Order with signature(s) of the Judge(s)

Hearing of Case [Priority].

1. For Orders on Office Objections as at 'A'
2. For Hearing of Main Case.
3. For Hearing of CMA No.1340/2021.

11th February, 2022.

Mr. Shahzad Afzal advocate for the petitioners.
Mr. Abdul Ghaffar Khan advocate for respondent No.1.

Heard learned counsel for the respective parties. Being relevant last two paras of impugned order are reproduced as under:

"I have gone through the entire material available on record. The appellant has challenged impugned order dated 30.09.2020 on the ground that the application for recalling/setting aside the ex-parte order was time barred. Said application was, as per record, filed on 02.12.2019 through which order dated 29.08.2018 was challenged. As per learned counsel for appellant, the limitation period for filing application for setting aside ex-parte order is thirty days by virtue of Section 9 (6) of West Pakistan Family Court Act, 1964 read with Rule 13 of West Pakistan Family Courts Rules, 1965, as such, said application, as per learned counsel for appellant, was barred by more than thirty days i.e. two months and four days. Learned counsel for appellant also pointed out that in Para-13 of said application respondent No.1 admitted that after lodging complaint on 16.10.2019 he came to know about the order dated 29.08.2019. The said admission reveals that respondent No.1 was already aware about the order of Family Court dated 29.08.2019. Be that as it may, Section 9 (6) of Family Court Act was amended through Ordinance LV of 2002 dated 01.10.2002 whereby in case of Ex-party decree, the application for setting it aside was required by the law to be moved within thirty days after service of notice under Section 9(7) of West Pakistan Family Courts Act, 1964. Previously before said amendment it was required to be filed within reasonable time of passing of the decree, and due to said reason the Hon'ble Supreme Court of Pakistan in the case of the case of Matloob Ali Khan [1988 SCMR 747] declared the direction of Rule 13 of Family Court Rules 1965 as ultra-virus being not in

consonance within provisions of Section 9(6) of the Act. The said amendment in Section 9 of the Act of 1964 provides that limitation for such application starts from the service of notice under Section 9(7) of West Pakistan Family Court Act, 1964. The said provision reads as under:

"(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".

The record reveals that said notice was never issued or served upon the respondent No.1 after passing the order dated 29.08.2018 or before filing of application dated 02.12.2019, therefore, question of limitation does not arise in this case, and application for setting aside of order in given circumstances would be deemed to be filed within period of limitation. Although view of learned trial court regarding applicability of Article 181 of Limitation Act was not correct, yet decision for setting aside exparte order is in consonance with legal principles and norms, whereby father of minors was allowed to contest the proceeding so that matter could be disposed of on merits. The impugned order therefore, does not require interference. The appeal is not maintainable accordingly it is dismissed".

Since custody of two minors is with maternal grandparents and father is contesting to receive the custody, hence, no father can be denied to claim his right on account of limitation; hence, impugned order is in accordance with law. Accordingly, instant petition is dismissed.

JUDGE