

JUDGMENT SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Constitutional Petition No.S-841 of 2014

DATE	ORDER WITH SIGNATURE OF JUDGE
-------------	--------------------------------------

Date of hearing: 18.10.2016.

Date of judgment: 28 .10.2016.

*Mr. Muhammad Asadullah Khan, Advocate for petitioner.
Mr. Aqeel Ahmed Siddiqui, Advocate for respondent No.1.
Mr. Ali Abbas Memon, State Counsel.*

J U D G M E N T

MUHAMMAD FAISAL KAMAL ALAM, J:- Through instant Constitutional Petition, the petitioner has sought that the order dated 09.09.2014 of the learned Appellate Court, whereby the Application of Petitioner to restore/re-admit his Family Appeal No.63 of 2013, has been dismissed, be set-aside. The prayer clause of the petition is reproduced here-in-below:-

- a) *To set-aside the impugned order dated 09.09.2014 and restore or re-admit the Family Appeal No.63 of 2013 its original stage.*
- b) *To stay the Execution proceeding which is pending in the Hon'ble Vth Civil and Family Judge, Hyderabad till the disposal of this petition.*
- c) *Any other better relief and reliefs, which this Hon'ble Court may deem fit and proper, may please also be granted.*
- d) *Cost of the petition may please be awarded to the respondent No.1."*

2. Relevant facts leading to the filing of present petition are that petitioner was married to respondent No.1 (Mst.Nighat) on 08.03.2010 against dower amount of Rs.50,000/- and from the wedlock

a minor daughter Hania was born on 26.01.2011. Both the petitioner and respondent No.1 were residing at the former's (Petitioner's) residence at Karachi. It so happened that due to some matrimonial dispute, the respondent No.1 left the house of petitioner and started living with her parents at Hyderabad. Subsequently, respondent No.1 has filed a Family Suit No.367/2012 for maintenance, dower and recovery of dowry articles, which was contested by the present petitioner in the learned Court of Civil and Family Judge-V, Hyderabad. In the above said Family Suit, evidence was led by both the parties; petitioner and respondent No.1, and eventually the judgment dated 30.09.2013 (followed by the decree dated 08.10.2013) was pronounced, which was challenged in Family Appeal No.63 of 2013 on 31.01.2014, which was dismissed for non-prosecution, *inter-alia*, on account of non-payment of process fee as well as absence of the present petitioner and his Counsel. Subsequently, the petitioner filed an application for Restoration and Re-admission of his said Family Appeal, but on 06.05.2014, that is almost after 95 days instead of 30 days, admittedly without filing any application for condonation of delay. The said restoration application of the petitioner was heard and decided by the impugned order dated 09.09.2014.

3. In the intervening period, the petitioner has also obtained an ex parte decree against respondent No.1 for restitution of conjugal rights from the learned Court of VIIIth Civil and Family Judge, Karachi West in Family Suit No.607 of 2012.

4. The learned Counsel for the petitioner vehemently argued that a fair opportunity should be given to the petitioner to contest the said Family Appeal, wherein the petitioner has impugned the judgment and decree of the learned Family Judge (Respondent No.3), whereunder, the petitioner is liable to pay (i) a dower amount of Rs.50,000/- (ii) either to return the dowry articles or pay its equivalent value of Rs.400,000/- (iii) to pay maintenance of respondent No.1, his wife as well as minor daughter at the rate of Rs.2000/- only per month and (iv) to pay Rs.30,000/- (Rupees thirty thousand only) towards the delivery charges incurred by respondent No.1, when minor daughter (Hania) was born. As per the learned Counsel representing the petitioner, the learned Appellate Court (Respondent No.2) has not decided his Family Appeal on merits. It was further contended by Mr. Muhammad Asadullah Khan, Advocate, that even the Family Suit filed by respondent No.1 was defective as it was instituted by her through her father being the attorney of respondent No.1, which is not permissible.

5. The arguments of petitioner were controverted by learned Counsel for respondent No.1, who firstly refers to Section 18 of West Pakistan Family Court Act, 1964, whereunder a family suit of the nature can be filed through an agent. As per Mr. Aqeel Ahmed Siddiqui, the learned Counsel for respondent No.1 that since his client (Mst.Nighat-respondent No.1) was/is seriously ill, therefore, her father pursued the family case on her behalf. Learned Counsel for respondent No.1 further argues that ample opportunity was given to the petitioner side to prove his case but the petitioner could not shake

the stance/testimony of respondent No.1, therefore, the judgment was pronounced partly in her favour, as her claim of Rs.800,000/- (Rupees Eight Lacs Only) towards medical expenses and hospitalization charges was rejected.

6. The arguments of learned Counsel appearing for contesting parties have been heard and with their able assistance the record of the above proceedings has been taken into account. It is an undeniable fact that neither with the present petition nor with his restoration application, the petitioner has produced any medical certificate in order to show that on 31.01.2014 when his Family Appeal was dismissed, the latter (petitioner) was hospitalized for his kidney treatment, as pleaded in his above Restoration Application. His second plea about his erstwhile Advocate has also been aptly dealt with in the impugned order passed on 09.09.2014, that the new Counsel was engaged three months after dismissal of Family Appeal. Record of the case further discloses the fact that present petitioner engaged Mr. Iqtidar Hussain Jafri, Advocate in the referred Family Appeal and against whom the petitioner is attributing negligence, but interestingly, he is the same Advocate, who represented the petitioner in his afore referred Suit for restoration of conjugal rights and obtained an ex parte decree. The Application for Restoration\Re-admission of Family Appeal was also time barred, as instead of preferring the same within 30[thirty] days from the date of dismissal of Family Appeal, the said Application was filed on 06-05-2014, that is after three months. In addition to the above, the petitioner till date has neither paid nor deposited any amount even towards partial satisfaction of the Decree or at least

maintenance of his child, in order to show his **bona fide**. Since last three years, that is, from the time of decision given by the learned Family Court, the petitioner has merely taken undue advantage of the judicial proceedings to the utmost detriment of Respondent No.1, an ailing lady and the minor daughter.

7. In order to do complete justice in a constitutional jurisdiction, I have given an anxious consideration to the contents of the above Family Appeal No.63 of 2013 (available as Annexure "C") with present petition, and it appears that the petitioner has not seriously disputed that dowry articles are there in his house. The petitioner has further admitted that he has not paid the dower amount of Rs.50,000/-, while acknowledging that his wife, the respondent No.1, is suffering from brain tumor. However, the petitioner has refuted the claim with regard to the gold ornaments. Similarly, the petitioner has taken a stance in his above Family Appeal that he earns a meager amount from his Zari work, therefore, he could not afford payment of maintenance of his minor daughter Hania to the extent of Rs.2000/- per month as determined by the learned Family Court. However, the petitioner did not dispute that till date he has not paid any maintenance either to his wife or minor daughter. Rule laid down in a judgment reported as *2010 MLD 554 (Mst. Halima Tahir V/s. Mst. Naheed Ejaz)* by the learned Division Bench of this Court is fully applicable to the present case; that the application for Restoration/Re-Admission of Appeal should have been filed by the present petitioner within 30 days of its dismissal as provided by Article 168 of the Limitation Act, 1908. Similarly, another judgment of the learned Division Bench reported as

PLD 2014 Sindh Page-70 (Mst. Muhammad Feroze Punjani V/s. Syed Badshah Hussain) is also relevant, *inter-alia*, that the appellant, in the instant case, the petitioner has to justify the delay of each day, which admittedly the petitioner could not justify in the present case. The petitioner has also not filed any application under Section 5 of the Limitation Act, 1908 for condonation of delay. Another reported judgment, *2015 YLR Page-89 (Qadir Bakhsh V/s. Saeed Ahmed Qureshi)* is also relevant as the facts of that case are quite similar to the present one.

8. The present petition is in the nature of *certiorari* and the petitioner has failed to point out either any illegality in the impugned order of the learned Appellate Court or that the jurisdiction vested in the Court was not properly exercised, hence the present petition being devoid of merits is consequently dismissed. Parties are left to bear their own costs.

JUDGE

