

ORDER SHEET
IN THE HIGH COURT OF SINDH
CIRCUIT COURT HYDERABAD

C.P. No.S-1096 of 2015

DATE	ORDER WITH SIGNATURE OF JUDGE
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For katcha peshi.

20.02.2018

***Mr. Muhammad Sachal R. Awan, advocate for petitioner.
Mr. Imamuddin Otho, advocate for respondent No.3.
Mr. Ghulam Abbas Sangi, Assistant A.G.***

ORDER

AGHA FAISAL, J:

The present petition has been filed against the order of learned 12th Family & Civil Judge Hyderabad (hereinafter referred to as the "Trial Court"), dated 27.10.2015 (hereinafter referred to as the "Impugned Order"), content whereof is reproduced herein below.

"In the light of above discussions, the subsequent applications Under Rule 13 of West Pakistan Family Court Rule 1965 coupled with Application U/S 5 of Limitation Act & application U/S XXI Rule 26 C.P.C are not maintainable; therefore, same applications have been dismissed with no order as to cost."

2. The brief facts of the case are as follows:

(i) The respondent No. 3 filed a suit for maintenance, recovery of dower and dowry articles, being Family Suit No.43/2008, on 28.10.2008 before the Trial Court, seeking following relief:

"(a) *That this Honourable Court may be pleased to direct the defendant to pay the past maintenance from September 2005 till to date and future maintenance till taking her back at the rate of Rs.4000/- per month.*

- (b) *That this Honourable Court may be pleased to direct the defendant to pay the dower amount of Rs.10,000/- to the plaintiff, so also provide built up house of 12 marla a per para-16 of the nikahnama.*
 - (c) *That the defendant may be directed to return the dowry articles and gold ornaments according to the list attached with the plaint and in alternate pay the prevailing price of the same.*
 - (d) *That the defendant may be punished on contracting second marriage without seeking prior permission from the first wife which is offence punishable U/S 494 PPC sand he may be dealt according to law.*
 - (e) *Costs of the suit may be saddled upon the defendant.*
 - (f) *Any other relief which this Honourable Court deems fit, just and proper may also be awarded in the circumstances of the case in favour of plaintiff."*
- (ii) The judgment in the said suit was rendered ex parte on 18.5.2009, wherein *inter alia* it was held as follows:

"As a sequel to the above findings. Nevertheless, I am of the considered opinion that the plaintiff has made out a good case in her favour. Resultantly, convinced with the pleaded facts, I hereby decree the suit of the plaintiff as prayed. As such, plaintiff is entitled for the past maintenance at the rate of Rs.1500/- per month for last three years till date and plaintiff is also entitled for her maintenance till subsistence of marriage at the same rate of Rs.1500/- per month with 15% yearly increase and the defendant is directed to deposit the past maintenance within a period of sixty days and pay or deposit the future maintenance at the same rate on or before 5th day of each calendar month. Moreover the defendant is also directed to return/hand over the dowry articles and ornaments of gold of the plaintiff to the plaintiff as per list attached with the plaint and as exhibit 23 (four in number of pages) to the plaintiff within the period of 60 days hereof. Furthermore in my humble opinion the plaintiff is also entitled for the recovery of dower

amount of Rs.10,000/- and as well as a built house of 12 marla. The defendant is directed to pay the dower amount of Rs.10,000/- (Ten Thousands only) and to give the 12 marla built house to the plaintiff within 60 days. The suit is decreed in terms of above findings with no order as to costs. Let a copy of Decree be sent through registered post A/D alongwith certified copy of judgment be sent to the defendant through registered post A/D under the provisions of sub-section (7) of section 5, Family Courts (Amendment) Ordinance, 2002.”

- (iii) Execution proceedings in respect thereof were duly filed, and transferred to Sargodha (Punjab) where the petitioner was residing, and during course thereof the petitioner was arrested and hence claimed to come to know about the said proceedings for the first time.
- (iv) The petitioner filed an application U/S 12(2) Code of Civil Procedure 1908 before the Trial Court, which was dismissed inter alia on the grounds that the provisions of Code of Civil Procedure 1908 do not apply to the proceedings before the Family Court. Reliance was placed upon section 17 of the West Pakistan Family Court Act 1964, which states as follows:

“Provisions of Evidence Act and Code of Civil Procedure not to apply.—(1) Save as otherwise expressly provided by or under this Act, the provisions of the [Qanun-e-Shahadat, 1984 (P.O. No.10 of 1984)] and the Code of Civil Procedure, 1908 [except sections 10 and 11] shall not apply to proceedings before any Family Court, [in respect of part I of Schedule].

(2)Sections 8 to 11 of the Oaths Act, 1873, shall apply to all proceedings before the Family Courts.”

- (v) The petitioner preferred a revision against the aforesaid order which was dismissed vide order dated 12.02.2015, by the learned 2nd Additional

District Judge Hyderabad (hereinafter referred to as the “Revisional Court”). It is pertinent to reproduce the last paragraph of the aforesaid order passed by the learned Revisional Court.

“In the light of discussion made above and case laws referred to, I am of the humble view that the very application filed by the applicant before the family court was not maintainable as he was having remedy to file application Under Rule 13 of West Pakistan Family Court Rules 1965, as such, the same has rightly been dismissed by the learned Family Judge while holding that the same is not maintainable. Apart from this, the grounds taken in the application were also considered by the learned Family Judge. In the same way, in my humble view the present revision application filed by the applicant U/S 115 Code of Civil Procedure 1908 is also not maintainable as such the instant revision application is dismissed in limini.”

- (vi) The petitioner then filed an application before the Trial Court under Rule 13 of the West Pakistan Family Court Rules 1965. The said rule stipulates as follows:

“Ex parte decree or proceedings may, for sufficient cause shown to be set aside by the Court on application made to it within thirty days of the passing of the decree or decision.”

- (vii) The said application was dismissed by virtue of Impugned Order.

3. The learned counsel for the petitioner contended that a bare perusal of the Impugned Order shows that the contentions of the petitioner have not been considered or deliberated upon and on the contrary a mechanical approach has been adopted resulting in the Impugned Order, which is prima facie unsustainable in law.

4. The learned counsel for the petitioner adverted to the last paragraph of the Impugned Order, with reference to Rule 13 of the West Pakistan Family Court Rules 1965, and then drew the Court's attention to the following passage:

“Further the contention of the applicant/JD is that he has filed these present application as per the direction giving by the Honourable IInd Additional District Judge Hyderabad. I have carefully gone through the order of Honourable IInd Additional District Judge Hyderabad but could not found such direction as contended by the learned Advocate of the JD.”

5. The learned counsel for the petitioner then referred to following paragraph of the Impugned Order dated 27.10.2015, contents of which are reproduced as follows:

“Additionally, mere changing the title of any application which has the same grounds/facts cannot consider again. As such a subsequent application, although the title of the application is different; if raises issues/fact which have already been adjudicated, is barred; as the principle of Resjudicata operates in such like applications. Similarly the facts of the applications have already been decided by the Honourable IInd Additional District Judge in revision application, same cannot be re-agitated before this Court as it will be ultra vires.”

6. The learned counsel for the petitioner stated that the contentions of the petitioner have been disregarded simply because the same are pleaded in an application whereon an inappropriate provision of the law was printed. Further that it was not the contentions of the petitioner on merit which were rejected by the learned Trial Court, and Revisional Court, but the provision of law was found to be untenable under which the petitioner pleaded his grievance.

7. The learned counsel for the petitioner cited case of *MAJ. MATLOOB ALI KHAN VS ADDITIONAL DISTRICT JUDGE, EAST KARACHI* reported as 1988 SCMR 747 and drew the Court's attention to the following passage:

“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 that this 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 was 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 to the learned Judge in the High Court.”

8. The learned counsel for the petitioner also placed reliance on the case of *MUHAMMAD BAKHSH V. V-ADDITIONAL DISTRICT JUDGE AND 2 OTHERS*, reported as 2012 M L D 1990, and sought the court attention to the following passage.

“The learned counsel for respondent No.3 vehemently opposed petition and stated that petitioner was all along aware of the proceedings but did not come forward and wants to delay the matter. It was also mentioned in the application that was filed by the petitioner was beyond the limitation period as per Rule 13 of the West Pakistan Family Court Rules 1965, and that it was delayed by a year and six months. Learned counsel stated that about judgment and decree the petitioner was informed by the mother of respondent No.3 in August 2006 at his residence.

I have looked into the record in detail and have noted that indeed the TCS delivery report upon which two courts below relied upon and came to the conclusion that service was effected on the petitioner was not such, inasmuch as the TCS report clearly shows that consignee was District Judge Bahawalpur and not the petitioner. Coming to the objection of learned counsel for respondent No.3 that the application for setting aside ex parte decree is beyond the limitation period as provided under Rule 13 of the West Pakistan Family Court Rules 1965, suffice to mention that period of limitation started to run upon acquiring knowledge of ex parte judgment and decree which according to the affidavit filed in support of the application was acquired a week before filing such application and petitioner rushed to the Court and made the application which application was therefore within the period of 30 days.

In view of the above stated circumstances it appears that petitioner was not served at all. The judgment and decree passed by the Trial Court and upheld by the appellate court are set aside and the petitioner is entitled to contest the Family Suit, prefer written statement in such family suit. Family Court is directed to have the family case summoned from the record and fix it on 12-1-2012 on which date the petitioner would appear and file written statement and no notice would be required to be issued by such court for service of the Family Suit, whereafter the Family Court shall proceed further into the Family case.”

9. With regard to the office objections raised by learned Additional Registrar with regard to maintainability of petition, the learned counsel drew the court attention to the order dated 6.4.2016 and stated that in view thereof it was clear that the said objections has already been satisfied. The aforementioned order read as follows:

“1.At the very outset, learned counsel for the petitioner while addressing office objection No.1 has relied upon PLD 1995 Lahore 385, wherein it is held that constitutional petition under Article 199 of the Constitution of Pakistan, 1973 against an interim order passed by the Trial Court upon an application under Rule 13 of West Pakistan Family Court Rules, 1965, which was on the face of it illegal, can be interfered with by the High Court under his constitutional jurisdiction under Article 199 of the Constitution of Pakistan, 1973.

In view of the above submission made by learned counsel for the petitioner, the office objection No.1 is over ruled, while office objection No.2 has been complied with by the learned counsel for the petitioner.”

10. In conclusion learned counsel for the petitioner stated that it is evident from the case law cited above that the present petition is maintainable and that the petitioner is entitled to the relief claimed therein.

11. In response the learned counsel for respondent No.3 stated that the respondent No. 3 had served a legal notice upon the petitioner dated 18.06.2008, copy of which is available on record of this Court. The said legal notice had been received by the petitioner and was also replied to by the petitioner vide a letter dated 1.7.2008.

12. The learned counsel for respondent No.3 contended that service was held good upon the petitioner and in support of his contention relied upon the following passage of the judgment dated 18.5.2009.

“Summon was sent against the defendant through bailiff by registered post A/D, TCS courier service and finally

through substitute service by way of publication in daily "NAWA-E-WAQT" Lahore dated 12.02.2009. However, despite adoption of all the possible modes of service, the defendant did not appear before this Court. Consequently, the service was held good on 01.12.2009 and the matter was adjourned for filing of written statement, however, the defendant could not make his appearance before this Court and on his default in making appearance not only he was debarred from filing written statement but was also ordered to be proceeded ex-parte vide order dated 14.3.2009.

13. The learned counsel stated that the judgment was then passed lawfully by the learned Trial Court and execution proceedings in respect thereof are pending.

14. The learned counsel stated that present petition is not maintainable and that the same must be dismissed as it is nothing more than a ploy to deprive the respondent No.3 of that which she is lawfully entitled to.

15. The question of maintainability of the present petition appear to have already been settled by this Court by virtue of order dated 6.4.2016. The only specific objection to maintainability was raised by the learned Additional Registrar, which was addressed as stated above.

16. Other than a general statement of the learned counsel for the respondent No. 3 asserting that the petition is not maintainable, no specific objection was brought on record and no case law has been cited in such regard.

17. It is the view of this Court that an objection as to maintainability of a petition is a serious matter and must be pleaded / argued in detail and corroborated by the applicable law. A mere general allegation is insufficient in such regard, therefore, it is reiterated that present petition is found to be prima facie maintainable.

18. There is no cavil to the proposition that the petitioner's challenge to the ex parte judgment and decree has not been adjudicated upon the merits of the case. The learned trial judge, while passing the Impugned Order, appears to have been erred in observing that no reference to Rule 13 of the West Pakistan Family Court Rules, 1965, was made in the order of the Revisional Court.

19. The said reference is clearly present in the aforesaid order and this fact has also been graciously admitted at the bar by the learned counsel for respondent No. 3.

20. It was the position taken by the learned counsel for respondent No.3 that even though the petitioner was required to pursue his remedy under Rule 13 of the West Pakistan Family Court Rules, 1965, the same would also have been dismissed on merits of the said application.

21. Be that as it may, such a decision could only have been arrived at by the learned Trial Court if it had delved into the merits of the application and not subjected to same to a technical dismissal.

22. The learned Trial Court also appears to have been erred in observing that since the content / grounds of the application under Rule 13 of the West Pakistan Family Court Rules, 1965, is the same as that which was filed under Section 12(2) Code of Civil Procedure 1908 filed before the Trial Court, hence the simple juxtaposition of the applicable provision of law in the title would disentitle the petitioner from relief as the same would be barred under the principles of *res judicata*.

23. There is a plethora of decisions of the superior Courts that appear to take a view contrary to the view taken by the learned Trial Court in this regard.

24. In the case of *PROVINCE OF THE PUNJAB through Collector, Sheikhpura and others V/S. SYED GHAZANFAR ALI SHAH & OTHERS*, reported as 2017 SCMR 172, the august Supreme Court of Pakistan maintained that even a rejection of plaint under Order VII rule 11 Code of Civil Procedure 1908 would not operate as *res judicata* against the plaintiff in a subsequent suit or against a party who was a defendant.

25. In the case of *MUHAMMAD ATEEQ & 05 OTHERS V/S. MUHAMMAD SHAFIQ & 04 OTHERS*, reported as 2017 MLD 1067, a Divisional Bench of this Court maintained that by not remedying an error committed by the trial court, the lower appellate Court has failed in exercising jurisdiction vested by law and therefore such an error required rectification by the High Court.

26. In view of the foregoing it is observed that the order passed by learned Trial Court dated 20.04.2015 and the order of the learned Revisional Court dated 12.05.2015 clearly show that the same were arrived at without adverting to the merits of the petitioner's contentions and that the same were rendered primarily on the basis that the petitioner's application could have not been entertained by the concerned Court by virtue of section 17 of the West Pakistan Family Court Act 1964.

27. It would follow that since the merits have not even been discussed therefore principle of *res judicata* could not be attracted.

28. This is prima facie case where the petitioner claims a remedy before this Court inter alia on the basis of his entitlement pursuant to enshrined principles of natural justice.

29. The question as to whether the application under Rule 13 of the West Pakistan Family Court Rules, 1965, is tenable or not is a question which the learned Trial Court ought to have been determined on the basis of the merits thereof.

30. It is the considered view of this Court that the Impugned Order dated 27.10.2015 is therefore not in consonance with the law, and hence the same is hereby set aside.

31. The matter is remanded back to the learned Trial Court for the purpose of adjudicating the application filed by the petitioner under Rule 13 of the West Pakistan Family Court Rules, 1965. The learned Trial Court is directed to hear the parties and decide the said application within a period of three months from the date of communication of this order thereto.

32. It is specified that no further notice shall be required to be issued to the petitioner and that petitioner shall approach the learned Trial Court either in person or by counsel and shall seek no adjournments while the adjudication of the aforesaid application is underway.

33. In the interest of justice the operation of the judgment and decree and execution proceedings, suspended vide order dated 6.4.2016, shall remain suspended for the period of three months from the date of communication hereof to the learned Trial Court or until the application under Rule 13 of the West Pakistan Family Court Rules, 1965, is decided by the learned Trial Court, whichever is earlier.

34. The office is directed to directly convey a copy of this order to the learned Trial Court for necessary reference and record.

Announced in open Court.

JUDGE

Shahid