

# IN THE HIGH COURT OF SINDH AT KARACHI

## C.P No. S-1353 of 2012

Date of hearing : 27.04.2018

Date of Judgment : 27<sup>th</sup> July, 2018

Appellants : Gulzar Ahmed S/o Muhammad Anwar through Mr. Badar ul Alam, Advocate, for the Petitioner.

Respondent : Mst. Zeenat Ismail D/o Muhammad Ismail and others.

### J U D G M E N T

**Kausar Sultana Hussain, J.**:- Through this Constitution Petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, the appellant has impugned judgment and decree dated: 26.04.2012 passed by the III<sup>rd</sup> Additional District and Sessions Judge Karachi (West) and Judgment/decree dated: 16.10.2012 and dated: 22.10.2012 respectively passed by the VIII<sup>th</sup> Civil Judge & Family Judge Karachi, (West).

2. Brief facts of the present constitution petition are that the Petitioner and Respondent No.1 according to Hanfi Muslim Personal Law contracted marriage on 04.12.2009 at Karachi and lived together at petitioner's house without any complaint of non-providing maintenance to her. Prior to marriage the Respondent No.1 was the sole bread earner of her parent's house, therefore, after, her marriage they being deprived from her earning misguided her and on their ill advice, she left the petitioner's home in the first week of May 2010 in his absence; Petitioner made all efforts to bring the Respondent No.1 back to his marital home and also sent his elders to persuade her parents but all gone in vein; Respondent No.1, on 26.07.2010 filed two Family Suits for recovery of her dowry articles and maintenance bearing Family Suit

No.1038 of 2010 and for Dissolution of her marriage against the Petitioner bearing Family Suit No.1039 of 2010; the Family Suit for Dissolution of Marriage was decreed by way of Khula, however, Court has framed issues in family Suit No.1039/2010. The Respondent No.1 has examined herself as witness but she failed to produce any document in support of her version; the Respondent No.1 was not cross-examined by the Petitioner's counsel due to his illness, therefore his side was closed; learned Family Judge then also without recording evidence of Petitioner/defendant passed the impugned Judgment on 26.04.2012 in favour of the Respondent No.1/Plaintiff; Petitioner/defendant filed an appeal against aforesaid Judgment under Section 14 of the West Pakistan Family Courts Act before the learned District and Sessions Judge Karachi (West), bearing F. Appeal No.32 of 2012 which was dismissed vide Impugned Judgment/Decree dated 16.10.2012 and 22.10.2012 respectively, hence, the instant matter.

3. The learned counsel for the petitioner *inter-alia* contended that impugned Judgments and Decrees dated: 26.04.2012, 16.10.2012 & 22.10.2012 mentioned above are misconceived and untenable in law thus a nullity in the eyes of law, evidence on record does not support the case of the respondent No.1 as she did not bring any document on record in order to prove or establish the value of the alleged dowry articles; findings of the learned trial Court are arbitrary and without any evidence or material on record, due to which petitioner has been seriously prejudiced, the learned trial Court in the interest of Justice ought to have allowed the application of the petitioner dated: 12.03.2012 "for restoration of Petitioner's/defendant's side to cross examine the plaintiff" on the ground that absence of Petitioner's/defendant's counsel on 09.02.2012 and consequently his failure to cross-examine the Respondent No.1 (plaintiff) on such date

was for the reasons beyond his control and the said application is supported by the personal affidavit of the counsel of the defendant namely Mr. Farooq Adil, Advocate; that the learned trial Court has erred in holding that the Family Appeal was time barred by delay of more than 30 days, the said finding is perverse and erroneous and is contrary to the materials on record; that Summer Vacation of learned trial Court started w.e.f 01.06.2012 and ended on 30.06.2012 while on 01.07.2012 it was (Sunday); the Appeal was filed on 03.07.2012 with delay of only one day for which the application under Section 5 of the Limitation Act duly supported by affidavits of the Petitioner and his Advocate, the said delay was already condoned by the learned appellate Court/Respondent No.2 at the time of admission of the appeal by Order dated 03.07.2012; that the impugned judgments passed by the learned trial Court are mainly cursory and not judicial in true sense; suffered from illegality, infirmity, misreading and non-reading of evidence on record and are based on extraneous material, hence, petitioner prayed for setting aside the aforesaid Judgments and Decrees passed by the learned trial Court.

4. On the other hand, Respondent No.1 filed her objections wherein, she stated that facts narrated in the present Constitution Petition are not true and correct, rather misleading, incorrect and false as learned trial and appellate Courts passed the judgments & decrees after appreciating the facts, evidence as well as law involved in the matter which are sustainable under the law; that it is specifically denied that the list of dowry articles was false and fabricated; grounds taken by the petitioner in his Petition for setting aside the impugned judgments are declared false, misconceived, twisted and frivolous for the reasons that the Examinations in Chief of the plaintiff/respondent No.1 was recorded on 29.03.2011 in presence of the counsel for the

defendant/petitioner and the cross examination of the plaintiff/respondent No.1 was reserved on the written request of the petitioner's counsel however, thereafter, number of opportunities were given to the defendant but defendant's counsel avoided to cross-examine her and ultimately, his side was closed on 06.09.2011 and matter was fixed for defendant's evidence on 22.09.2011 but same could not be recorded on the said date and final chance was given on 04.10.2011; that on 17.10.2011 application for recalling and setting-aside the order dated 06.09.2011 was filed by the defendant's counsel on vogue, frivolous, false and fabricated grounds, the counter affidavit to the said application dated 17.10.2011 was filed by the plaintiff/respondent No.1 and after hearing both the parties, the learned Family Judge was pleased to allow the application of the defendant/petitioner dated 17.10.2011 subject to payment of cost Rs.500/- and another last opportunity was provided to the defendant for cross-examination of plaintiff but he again failed to do so; on 16.02.2012 matter was fixed for defendant's evidence, thereafter, number of chances/opportunities were given to the defendant for his evidence but he deliberately and intentionally avoided to appear in the witness box, and after hearing arguments advance by the learned defendants' counsel, the judgment and decree were passed by the learned trial Court.

5. After hearing the arguments and perusal of record, I am of the considered view that the petitioner has mainly emphasized on the ground that the Family Judge did not provide ample opportunities to him to contest his defense while proceedings of the Family Suit No.1038/2010 for maintenance and recovery of dowery articles, filed by the respondent No. 1 against him. The petitioner in his petitioner

mentioned details of the proceeding initiated by the Family Judge for dispensation of the justice in Civil Family suit.

6. Per petitioner on 13.12.2010 issues were framed in Family Suit of Respondent No.1. Thereafter on 29.3.2011 Examination-in-Chief of the Respondent No.1/Plaintiff was recorded but plaintiff's/defendant's counsel did not cross examine her on such date and the matter was adjourned on his request. The matter was adjourned time and again, ultimately the side of the petitioner/defendant was closed for cross examination the respondent/plaintiff vide order dated 6.9.2011 after passing five months and eight days. Subsequently, matter was fixed for petitioner/defendant evidence, but again the defendant instead to lead his evidence chosen to remain absent and after one month and 11 days on 17.10.2011, his learned counsel moved an application for re-opening of his side to cross examine the Respondent/Plaintiff. Although his application for reopening his side was delayed for 11 days, however the learned Family Judge allowed him to cross examine the Respondent/Plaintiff's Suit vide order dated 08.12.2011 and the learned trial Court has also imposed cost of Rs.500/=. This time, the petitioner/defendant instead to avail this opportunity to cross examine the Respondent/Plaintiff once again chosen to remain absent and the Family Judge having no alternative had again ordered to close the side of the Petitioner/Defendant, vide order dated 09.02.2012 while providing two months' time to him.

7. Thereafter, the learned Family judge tried to record evidence of the petitioner/defendant on 16.02.2012, 27.02.2012, 05.03.2012 & 12.03.2012, when the petitioner/defendant remained absent from the court of Learned Family Judge, the learned Court once again closed the side of the petitioner/defendant vide order dated 12.03.2012, after one

month and 3 days during which the petitioner/defendant has availed four opportunities to lead his own evidence.

8. On 05.04.2012, post-trial was held and duly attended by the parties and their respective counsels but could not succeed. On 26.04.2012, after hearing both the sides, the learned Family Judge announced Judgment in Family Suit No.1038/2010. Per record, the learned counsel for the petitioner/defendant repeated his very ordinary attitude towards the Court & after waste of 29 days, he applied for obtaining certified copy of the impugned Judgment dated 26.04.2012, though he knew that after seven days, vacations of the District Courts would be starting. After availing summer vacations the petitioner/defendant filed an appeal against the impugned Judgment with delay of one day. However, it has been held in 1980 SCMR 375, 1975 SCMR482 & 1983 CLC 3126 (DB) Karachi that :-

*"In spite of the notification of the High Court permitting the litigants to file a petition during the summer vacations, the litigants were entitled to the benefit of section 4 of the Limitation Act and could exclude the period of vacation while computing the time of limitation for filing Suit"*

9. Therefore, the appeal filed by the appellant/defendant could not be treated as delayed by more than 30 days, however, delay of one day was already condoned at the time of admission of appeal.

10. Conduct of the appellant/defendant during the entire proceedings of the Family Suit No.1038/2010 is itself showing that he was not interested in disposal of his matter on merits, on the contrary, he was keep on taking benefit of those provisions which are beneficial in Family Laws for those litigants, who due to some cogent grounds or

genuine reasons are unable to bring on record their view points and the Courts while abiding said provisions bound to examine such reasons with due care and caution and consequently pass order to re-start their case from the stage when adverse order was passed. In the instant matter the appellant/defendant since beginning of the case till final disposal before the learned Family Court did not take interest and availed maximum opportunities for defending matter. Per record whenever orders were passed against him, first he availed the provided limit of time to approach the Court then at the culmination of limitation of provided time, he used to approach the Court for redressal of self created problems. The appellant/defendant also avoided to comply the clear and specific directions of courts regarding speedy trial of Family Suits and its prompt disposal. Per record the appellant/defendant upon providing subsequent opportunity to contest the matter again failed to take interest in the proceedings of Family Suit filed against him. After closing his side, he again moved an application for re-opening his side, but this time learned Family Court intended to hear the learned counsel for the appellant/defendant before issuance of notice but the learned counsel for the appellant/defendant again tried to delay the matter and avoided to press his application, even at the time of post-trial he and petitioner/defendant were present but the learned counsel did not press his application before the learned Family Court, although Court fixed the time and date for its hearing repeatedly, thereafter after hearing arguments, the impugned judgment was passed. Since the application filed by the petitioner/defendant before trial Court for re-opening his side was repeatedly fixed for hearing, even time was fixed for hearing, therefore, the said application be treated as disposed of alongwith the Family Suit, as it was not first time when petitioner/defendant side was closed. The petitioner/defendant with intention to keep the respondent/plaintiff engage in Court trials for

years was taking benefit of those provisions meant for those bonafide litigants, who have some genuine grounds. Both the Courts below committed no illegality, misreading, non-reading, misinterpreting and misunderstanding while passing judgments impugned in this petition, I, therefore, dismiss this petition and up held the judgments passed by the learned both courts below.

J U D G E

Faheem/PA



The Registrar,  
High Court of Sind,  
Karachi.

SUBJECT:- REQUEST FOR ONE DAY'S CAUSAL LEAVE.

Respected Sir,

It is respectfully submitted that I have urgent piece of work, therefore, it is requested that one day's causal leave i.e.07.08.2018 may kindly be granted. I shall be highly obliged.

Thanking you,

(SHAIKH SHAHID IMAM)  
P.A. TO HON'BLE JUSTICE  
KAUSAR SULTANA HUSSAIN  
CC#1184