IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Const. Petition No. S- 599 of 2021

Petitioner	Zahid Iqbal Soomro son of Iqbal Ahmed Soomro through Mr. Bharat Kumar Suthar, Advocate.
Respondent No.1	Mst. Sadia Paras d/o Fazal Hussain Soomro through Mr. Zeeshan Ali Memon, Advocate.
Respondents 2 & 3	Civil & Family Judge-VIII, Hyderabad and another through Mr. Allah Bachayo Soomro, Addl. A.G.
Date of hearing	**11.02.2022**
Date of order	**18.02.2022**

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O R D E R

SHAMSUDDIN ABBASI, J:- By means of instant constitution petition filed under Article 199 of the Constitution of Islamic of Pakistan, 1973, the petitioner seeks following reliefs:-

> *(a) "That this Honorable Court may be pleased to set aside the order dated 16.0p8.2021 passed by the learned Civil/Family Judge VIII Hyderabad and judgment and decree dated 13.10.2021 passed by the learned 6th Additional District Judge Hyderabad as the same has been passed without considering the material facts of the case.*
>
> *(b) That this Honorable Court may be pleased to call the record proceedings from the trial Court and after scrutiny any appropriate order may be pass thereby allow the petitioner to appear and proceed with the matter before the learned trial Court accordingly.*
>
> *(c) That this Honorable Court may be pleased to stay the proceeding of the Family Execution Application No.19 of 2021 as the same has been filed on the basis of exparte decree which is not maintainable under the law.*
>
> *(d) Any other relief(s) which this Honourable Court deems fit, just and proper in favour of the petitioner".*

2. Short but relevant facts of the case are that the respondent No.1 was married to the petitioner on 29.07.2018 against dower equivalent to 10 tolas gold, which was not paid by the petitioner inspite of her repeated demands. The rukhsati took place on 08.09.2018. At the time of rukhsati, the respondent No.1 brought dowry articles and gifts worth Rs.11,19,400/-. She

performed her matrimonial obligations towards the petitioner, who after few days of rukhsati changed his attitude and started misbehaving and maltreating the respondent No.1 on petty mattes. The respondent No.1 tolerated all cruelties with hope that the petitioner would mend his ways, but to no avail and finally he drove the respondent No.1 out of his house on 01.04.2018 and since then she is residing with her parents. The petitioner neither contacted her nor provided any maintenance. He is a Government servant and worked as Deputy Director and owned many properties and his monthly income comes to Rs.150,000/-. The respondent No.1, therefore, filed Suit No.353 of 2020 against petitioner for recovery of dower, maintenance and return of dowry articles before family court praying therein as under:-

(a) "This Honorable Court may be pleased to direct the defendant to give 10 tolas gold in lieu of dower on her demand.

(b) This Honorable Court may be pleased to direct the defendant to pay the maintenance to the plaintiff at the rate of Rs.60,000/- per month since April 2019 with 15% incremental increase, till her legal entitlement.

(c) This Honorable Court may be please to direct the defendant to return the dowry articles to the plaintiff as per list and in case of failure to do so pay the price of the same amounting to Rs.11,19,400/-.

(d) This Honorable Court may be pleased to direct the defendant to return the CNIC, educational documents/testimonials etc of the plaintiff.

(e) Cost of the suit be saddled upon the defendant.

(f) Any other relief(s) which this Honorable Court deems fit, just and proper in favour of the plaintiff.

3. Notices were issued to the petitioner through all modes such as registered post AD and TCS, but not returned either served or un-served except sent to him through TCS . The same were, therefore, published in daily newspaper "Ibrat". Despite publication and issuance of process in ordinary modes, the petitioner failed to appear and contest the suit, hence suit was to proceed exparte, directing the respondent No.1 to file her affidavit-in-exparte proof. The respondent No.1 filed her affidavit-in-exparte proof, reiterating the contents of her plaint, which led to passing of a exparte judgment and decree dated 20.11.2020, penned down by the learned Civil

and Family Judge-VIII, Hyderabad. Based on such judgment and decree, the respondent No.1 initiated execution proceedings. During pendency of such proceedings, the petitioner appeared and filed an application under Section 9(5-A) of Family Courts Act, 1964 read with Order IX Rule 13 and Section 151, CPC, for reopening of his side as well as permission to file written statement. The respondent No.1 resisted the application and submitted that ample opportunities were provided to the petitioner to appear and contest the suit, but he deliberately avoided and failed to file a written statement and filing of application is an attempt to defeat the exparte judgment and decree. The learned Executing Court, after hearing the parties' respective counsel, dismissed the application vide order dated 16.08.2021, holding that no reasonable ground was furnished for non-appearance of the petitioner.

4. Feeling aggrieved by the order of Executing Court, the petitioner preferred appeal (Family Appeal No.77 of 2021) mainly agitating that the exparte judgment and decree have been obtained by way of fraud and misrepresentation without affording an opportunity of hearing, hence the same is nullity in the eyes of law. He further submitted that proceedings initiated through suit came to the notice of petitioner first time when the notices of execution proceedings were served and earlier to this he was not in knowledge of the proceedings, hence the impugned judgment and decree are harsh and bad in law.

5. The appeal failed in terms of a judgment dated 13.10.2021, penned down by the learned Model Civil Appellate Court-II/VI, Additional District Judge, Hyderabad, whereby the judgment and decree, passed by the learned trial Court, were maintained, hence necessitated the filing of the listed petition.

6. It is contended on behalf of the petitioner that the impugned judgments and decrees passed by the learned trial Court as well as maintained by the learned appellate Court are bad in law and facts, hence liable to be set-aside. It is next submitted that the petitioner was condemned unheard and no opportunity of hearing was provided to offer his defence. The petitioner mostly remained out of station because of his official assignments and no summon/notice of suit was ever served upon him and he was totally unaware of such proceedings. The delivery report dated

28.02.2020 shows that one Hussain had received summon. It is next submitted that suit proceedings for the first time came to the knowledge of the petitioner when notice of execution application was served upon him. It is also submitted that exparte judgment and decree has been obtained by way of fraud and misrepresentation. Law favours decision on merits rather on technicalities. The learned counsel while summing up his submissions has emphasized that the impugned judgment is against the principle of natural justice and without application of a judicial mind, hence the same is liable to be set-aside and the petitioner deserves to be provided an opportunity to offer his defence and adduce his evidence in accordance with law. He, therefore, prayed that impugned judgments and decrees may be set-aside and the case may be remanded back to the learned trial Court for its disposal on merits. In support of his submission, the learned counsel for the petitioner has relied upon the case of *Maj. Matloob Ali Khan v Additional District Judge, East Karachi and another* (1988 SCMR 747).

7. In contra, the learned counsel for the respondent No.1 has submitted that prior to the filing of the instant suit, the respondent No.1 filed a suit for dissolution of marriage, which was subsequently withdrawn just to maintain better relations between the parties in future. The present suit was filed on 18.02.2020 and after the notices were served on official address of the petitioner through TCS, delivery receipt whereof was placed at record, the notices were published in newspaper and thereafter the learned trial Court held the service as good and decreed the suit on 20.11.2020. It is next submitted that the respondent No.1 filed execution application to satisfy the decree against the petitioner, who was served with the notice and entered his appearance before the learned Executing Court, but failed to file objections to the execution application despite granting ample opportunities on 01.11.2021, 03.11.2021, 09.11.2021, 15.11.2021, 24.12.2021 and 10.01.2022 as reflected from the case diaries, which shows his tendency of lingering on the matter on one ground or the other, hence he does not deserve any leniency.

8. The learned Additional A.G. has supported the arguments advanced by the learned counsel for the respondent No.1 and submitted that judgment through which the execution application was allowed has not been

challenged before any forum and the same has attained finality, hence this petition is not maintainable.

9. I have heard the parties' respective counsel, given my anxious consideration to their submissions, and have scanned the record carefully with their able assistance.

10. The position as emerges from the record is that the respondent No.1 filed a suit against petitioner seeking recovery of dower, maintenance and return of dowry articles on 18.02.2020. The petitioner is stated to be a Deputy Director, Director General Audit, Inland Revenue & Customs (South), Karachi, and has been allotted official accommodation viz Flat No.C/20, Federal Officers Colony, Saddar, Karachi. The learned trial Court issued summons/notices to the petitioner through bailiff, registered post and courier service on his above address as was in the title of plaint, but he failed to appear and contest the suit. Resultantly, the notices were issued through substituted service by way of publication in newspaper. A bare perusal of the case diaries dated 28.02.2020, 13.03.2020, 27.03.2020, 10.04.2020, 29.04.2020, 12.05.2020, 13.08.2020, 28.08.2020 and 14.09.2020 reveals that ample opportunities were provided to the petitioner to appear and file his written statement, but he failed to file a written statement, hence he was debarred from filing written statement and ordered to proceed exparte on 22.09.2020. Process was sent to appellant by all modes, he is government officer, this Court is satisfied that he was in knowledge about the proceedings against him. The respondent No.1 filed her affidavit-in-exparte proof on 06.10.2020, reiterating the contents of her plaint, which led to passing exparte judgment and decree on 20.11.2020. The record is also suggestive of the fact that the respondent No.1 initiated execution proceedings in terms of exparte judgment and decree of the trial Court. The notices were issued to the petitioner on the same address, noted above, and in response thereto he appeared before the learned Executing Court and filed application seeking setting aside exparte judgment and decree as well as permission to file written statement, but failed to file objections to execution application despite granting three adjournment sought on his part. The learned Executing Court, after perusing the record and hearing the parties, dismissed the application under Section 9(5-A) of Family Courts Act, 1964 read with Order IX Rule 13 and Section 151, CPC, vide order dated

16.08.2021, holding that no reasonable ground was furnished for non-appearance of the petitioner. The manner in which the petitioner appeared in execution proceedings highlighted his malafide intention that he was well aware of the suit proceedings and deliberately avoided to appear and contest the suit just to linger on the matter and when execution proceedings take place, he entered his appearance on single notice. **I am also conscious of the fact that order allowing the execution application has not been impugned before any forum and the same has attained finality**.

11. At this juncture, the petitioner cannot plead ignorance and it does not lie in his mouth to say that he was unaware of the suit proceeding. The leaned trial Court has afforded ample opportunities to the petitioner to appear and contest the suit, but he failed to do so. There is no denial of the fact that no specific provision in the West Pakistan Family Court Act, 1964, has been introduced for striking of defence of defendant, however, mentioning of a word "if any" in subsection (2) of Section 10 of the Act, clearly shows the intent of the legislature that the Family Court is neither helpless nor supposed to act as a silent spectator towards the inaction of defendant in filing of written statement or not appearing for trial and if need arises can proceed to strike off the defence of the defendant. Therefore, in my considered view word "if any" empowers the Family Court to strike off the defence of the defendant, if he fails to appear and file a written statement. I am in agreement with the learned counsel for the respondent that there was no ambiguity in the judgment decreeing the suit exparte and the petitioner has failed to establish that he was not properly served as well as failed to point out instance of any fraud and misrepresentation played by the respondent No.1 while obtaining exparte judgment and decree for the reason that he appeared in execution proceedings on a single notice on the same address. It has been observed by learned appellate court that notice / summon issued through T.C.S. has been received by one Hussain on his official residence and such delivery report has been produced by learned counsel for respondent / plaintiff in learned trial court. It is a matter of record that petitioner has not filed any objection on execution application and sought adjournment. I am convinced that both the learned Courts below have acted in accordance with law and scrutinized the evidence available on record in complete adherence to the principles settled by the Hon'ble apex Court in various pronouncements and

have reached a just conclusion. The case law cited by the learned counsel for the petitioner, in support of his submissions, in my considered view, the facts and circumstances of the said case, is distinct and different from the case in hand, therefore, this precedent is not helpful to the petitioner.

12. Besides, there are concurrent findings on the issue of fact against petitioner. Under constitutional jurisdiction re-appraisal of evidence in order to have a different conclusion than already inferred by the learned Courts below has never been considered an option to be upheld. The Court under constitutional jurisdiction has to see whether any illegality has been committed by the forums below or the findings of the fact are based on material extraneous to the pleadings of the parties to justify interference on its part. The two Courts below have concurrently refused to exercise their discretion in favour of the petitioner. The learned counsel for the petitioner too has failed to point out any illegality or irregularity and/or jurisdictional defect in the impugned judgments of two Courts below warranting interference by this Court while exercising extra ordinary constitutional jurisdiction. The impugned judgments of the two Courts below are well reasoned and outcome of a proper application of judicial mind to the facts and circumstances of the case. Thus, this Court is hesitant to interfere. Resultantly, the instant petition is bereft of merit stands dismissed.

JUDGE