IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Constitutional Petition No.S-643 of 2022
[Niaz Ali Lashari Vs. Mst. Fiza & others]

Petitioner:	Through Mr. Mangal Menghwar, advocate.
Respondent:	Mr. Allah Bachayo Soomro, Additional Advocate General, Sindh.

Date of hearing & order: 11.11.2022.

O R D E R

ADNAN-UL-KARIM MEMON, J. Through instant constitutional petition, the petitioner challenges the legality of impugned Judgment dated 10.08.2022 whereby the learned VIth Additional District Judge, Hyderabad upheld the order dated 19.03.2020 passed by learned VIIIth Family Judge, Hyderabad in Family Suit No.1211 of 2019 dismissing his application filed under Section 9(6) of Family Courts Act, 1964 for setting-aside ex-parte Judgment and Decree against him, inter-alia on the ground that he was not served with notice as per the mode of service.

2. Brief facts of the case are that respondent Ms. Fiza was divorced from her first husband to whom she had two children, however, on proposal received by her parents she was married to petitioner on 07.11.2002 against dower of one Flat bearing No.D-22 situated at Agricultural Complex Thandi Sarak Hyderabad as well as cash of Rs.50,000/- both payable on demand; however dispute arose between the spouses as petitioner failed to maintain the children of respondent No.1 from her first husband so it was burdened to her mother Mst. Ashraf Khatoon and some expenses were borne by the actual father of children but the moment respondent No.1 acquired knowledge of petitioner having contracted six marriages with different ladies including her wherein she has got three children namely Sheeraz Ali, Sania, and Maria, and she was shifted with kids in Flat No.8, 2nd Floor Unique Cottages, Phase-II Hussainabad Hyderabad since 2018. It is averred by respondent No.1 that since 2016 the payment in respect of maintenance of herself and her children was stopped by the petitioner though he was Executive Engineer in Irrigation Department having got property of billions of rupees maintained himself and in the name of her first wife and sons; however, on her demand of possession of flat with cash of Rs.500,000/- against her dower petitioner disclosed that she would be the owner in exchange of Cottage No.8, 2nd Floor Unique Cottage No.II situated at Mir Hussinabad Hyderabad as he already stood transferred flat but

he cheated with her by previous flat No. D-20 of Agriculture Complex in dower as the same was not in his ownership at the time of marriage as he wants to transfer cottage No.8 2nd Floor Unique Cottages Phase-II Mir Hussainabad Hyderabad from his son of first wife which is already given to her instead of dower, hence she is entitled to the relief claimed.

3. After admission of Suit, petitioner was summoned through all modes including publication, but he did not turn up; hence his defense was struck off by observing procedure thereafter suit of the respondent was decreed ex-party by learned Family Judge-VIII Hyderabad vide order dated 19.03.2022, which was challenged by the petitioner before learned Appellate Court through Family Appeal No.38 of 2022 which was also dismissed, hence the instant petition.

4. I have heard learned counsel for the petitioner as well as learned Additional Advocate General, Sindh having also gone through the record as well as the impugned order and judgment.

5. It appears from the record that respondent No.1 filed Suit No. 1211 of 2019 for dower and maintenance for herself as well as for her minor children before learned Family Judge Hyderabad; however, the matter was not contested by the petitioner, as such, he was declared ex-parte in terms of evidence of respondent No.1 vide deposition dated 14.01.2020. In the meanwhile, petitioner approached the Trial Court by filing an application under Order 9(6) of the Family Courts Act, 1964 for setting-aside ex-parte Judgment and decree dated 02.11.2020 which application was dismissed vide order dated 19.03.2022 on the ground that the petitioner was served with all modes but he failed to put his appearance. The petitioner being aggrieved by and dissatisfied with the decision dated 19.03.2020 preferred Family Appeal No.38 of 2022; however, the said appeal met with the same fate vide Judgment dated 10.08.2022 on the same analogy.

6. I asked learned counsel as to how this constitutional petition is maintainable against the concurrent findings of two Courts below on the point of service held good upon him by the Trial Court. Learned counsel submitted that the petitioner was not served properly and service through publication could not be considered as held good as no one could be condemned unheard despite the fact that the petitioner approached the Trial Court by applying to recall the ex-parte order and fully placed the details of non-service of summons; however, learned Trial Court in hasty manner without going through the record passed the order, as such, the ex-parte orders needs to be setaside and an opportunity of hearing should be provided to the petitioner for the

reason that he was unaware about pendency of such suits and when he came to know he immediately approached the Trial Court; however, his genuine request was turned down by both the Courts below which is apathy on their part. He prayed for setting aside both the orders and judgments of two Courts below. In support of his case, learned counsel relied upon the case of Saeed Ahmed Khan v. VIIth Additional Sessions Judge, Hyderabad and 2 others (2019 CLC 643).

7. Regarding the contention of learned counsel that the petitioner was condemned unheard by the family court, it may be observed that the principle of '*audi alteram partem*' is attracted only in a case where the opportunity of hearing is not afforded by the Court to a party to the proceedings although the party was present before the Court or was absent but was not properly served under the law. The principle shall not apply in a case where the party, despite proper service of notice and opportunity granted by the Court, chooses to remain absent or appears either personally or through counsel and then deliberately abstains from participating the proceedings. In the instant case, the petitioner was well aware of the proceedings though he provided the address of village Lal Bux Lund near D.C Office Naushahro Feroze without the number of House compelling the Court to issue substitute service by way of publication and the petitioner also filed an application for recalling ex-parte order under Section 9(6) of the Family Courts Act, 1964 for setting aside ex-parte judgment and decree dated 02.11.2020 which was dismissed.

8. The conduct of petitioner prima-facie shows that he deliberately neglected to put his appearance as he was well aware of the proceedings and then approached the Family Court but the time was running short for him and he could not convince the Family Court for recalling the ex-parte Judgment and Decree. The Appellate Court also concurred with the view of Family Court on the same analogy and now the petitioner in his abortive attempt has tried to convince that the principle of maxim '*audi alteram partem*' is applicable in his case, I am not convinced with the assertion so made for the simple reason that, it does not lie in his mouth to plead at this belated stage that he was condemned unheard. The course adopted by the family court debarring him from filing written statement and proceeding against him ex-parte was the only course available and permissible under the law.

9. It is now well established that Article 199 of the Constitution casts an obligation on the High Court to act in the aid of law and protects the rights within the framework of Constitution, and if there is any error on the point of law committed by the courts below or the tribunal or their decision takes no

notice of any pertinent provision of law, then obviously this Court may exercise constitutional jurisdiction subject to non-availability of any alternate remedy under the law. This extraordinary jurisdiction of High Court may be invoked to encounter and collide with an extraordinary situation. This Constitutional jurisdiction is limited to the exercise of powers in the aid of curing or making correction and rectification in the order of courts or tribunals below passed in violation of any provision of law or as a result of exceeding their authority and jurisdiction or due to exercising jurisdiction not vested in them or non-exercise of jurisdiction vested in them. The jurisdiction conferred under Article 199 of the Constitution is discretionary with the objects to foster justice in aid of justice and not to perpetuate injustice. However, if it is found that substantial justice has been done between the parties then this discretion may not be exercised. So far as the exercise of discretionary powers in upsetting the order passed by the court below is concerned, this court has to comprehend what illegality or irregularity and/or violation of law has been committed by the courts below which caused miscarriage of justice which is not the case in hand as such his case does not fall within the aforesaid exception.

10. Besides I have been informed that the petitioner has already contracted six marriages and the Suit for dower and maintenance is the right of wife during subsistence of marriage under the law and the petitioner is bound to maintain his children under the law. I note that the petitioner, instead of paying maintenance and giving dower to the respondent No.1 willingly and graciously, has been evading his legal as well as moral obligation on one or the other pretext. He has by his conduct forced his wife to fight for her right to receive her maintenance and dower. Prima facie his above conduct is highly deplorable. The Honourable Supreme Court in *Farah Naz v. Judge Family Court* **PLD 2006 SC 457** reiterated the significance of maintenance to be provided by the husband to his wife in the following terms:--

> "On the merits of the case, we find that the appellant having been lawfully wedded to the respondent in the absence of any proof of dissolution of a marital tie, it was his legal, moral as well as social duty under the Islamic Principles to provide adequate maintenance for her respectable living as in law he could not neglect to maintain her during the subsistence of the marriage tie."

11. It has by now been settled that when a wife demands her dower from the husband, the refusal or delay in payment thereof entitles the wife to seek maintenance from the husband till the payment thereof. In this regard. I have noted that Section 284 of the Muhammadan Law by Mulla clarifies the matter even further and states that:-

> "The wife may refuse to live with her husband and admit him to sexual intercourse so long as the prompt dower is not paid. If the husband sues her for restitution of conjugal rights before sexual intercourse takes place, non-payment of the dower is a complete defense to the suit, and the suit will be dismissed. If the suit is brought after sexual intercourse has taken place with her free consent the proper decree to pass is not a decree of dismissal, but a decree for restitution conditional on payment of prompt dower."

12. Thus the right of wife to demand and be paid maintenance, in case the husband refuses to pay her prompt dower is well-established in Islam. The maintenance is neither a "gift" nor a "grace" given by the husband to wife but in fact, it is inalienable legal obligation of the husband to maintain his wife under the dictates of Islam.

13. Petitioner's attempt to get the matter remitted to Trial Court is a futile exercise on his part thus no further indulgence of this Court is required in the matter in terms of Article 199 of the Constitution. The case law relied upon by the counsel for the petitioner is not helpful to the petitioner as the same was to the extent of recovery of dowry articles whereas the present case pertains to maintenance of respondent No.1 as well as her minor children as well as the dower which is the right of respondent No.1, thus this petition is wholly misconceived and is dismissed with no order as to costs.

14. Foregoing are the reasons for my short order dated 11.11.2022 whereby this petition along with stay application was dismissed with no order as to costs.

JUDGE

Karar_Hussain/PS*