IN THE HIGH COURT OF SINDH AT KARACHI

C.P. No.S-173 of 2022

[Muhammad Irfan ……v…… Mst. Saima & others]

Date of Hearing	:	28.02.2023
Petitioner through	:	Mr. Farooq Rashid, Advocate.
Respondents through	:	*Nemo*

O R D E R

Zulfiqar Ahmad Khan, J:- This petition assails the concurrent findings of the learned trial Court dated 22.01.2020 as well as first Appellate Court dated 13.01.2022.

2. Precisely the facts necessary for the adjudication of instant petition are that the respondent No.1 filed a suit No. 788/2018 for maintenance and dowry articles against the petitioner before the learned Family Court South Karachi/respondent No.2. The petitioner, being the defendant was proceeded ex parte and suit filed by the respondent No.1 was decreed vide Judgment dated 04.09.2018. The Petitioner filed an application under Section 9(6) of the West Pakistan Family Court Act, 1964 ("Act, 1964") which was also dismissed vide by the learned respondent No.2 vide order dated 22.01.202. The petitioner impugned the both findings of the learned respondent No.2 before the Appellate Court by filing Family Appeal No.19/2020 which met the same fate, hence the petitioner is before this Court against the concurrent findings.

3. Learned counsel for the petitioner contended that an ex parte judgment and decree was passed against the petitioner and neither a right of hearing ever afforded to the petitioner nor he was permitted to lead any evidence, therefore, the concurrent findings of the courts

below are against the settled principle of fair play as mandated under Article 10-A of the Constitution, 1973, therefore, the matter be remanded back to the learned trial Court to decide the matter afresh after affording an opportunity of hearing and to lead evidence to the petitioner. Learned counsel lastly contended that the Family Court is not vested with any power under the law to strike off the defence of the petitioner from filing written statement.

4. None present for the respondents. I have heard the learned counsel for the petitioner and examined the available record. It is evident from the order dated 22.01.2020 passed by learned Family Court upon the application filed under Section 9(6) of the Act by the petitioner that all modes of services including publication as well as pasting were effected upon the petitioner residence and as per above order the Bailiff of the Family Court reached at the residence of the petitioner where her mother refused to accept the notice. It is considered illustrative to reproduce the impugned order of the learned Family Court wherein it had highlighted the service upon the summons and notices upon the petitioner which is reproduced hereunder:-

> *"Perusal of file further reflect that service notices were issued against the defendant through ordinary as well as substitute service through daily Express news paper dated 22 May, 2018.* ***In pursuance the Bailiff report dated 30.05.2018, the mother of defendant refused to receive the notice of this Court. Besides this, the report of bailiff dated 30.05.2018 reflected that service measures by way of pasting was also held in presence of two witnesses.*** *It is settled principle of law that ex parte judgment can be set aside merely non-service of summons and sufficient cause for non- appearance.* ***But in hand case the service measures were held on same address which is given by defendant in his affidavit".***

5. It is gleaned from appraisal of the foregoing that the proper service of notice of the suit filed by the respondent No.1 was effected upon the petitioner but her mother refused to accept the notice of the Court. It is conducive to mention here that the learned Family Court also observed that the petitioner in support of the application filed by him under Section 9(6) of the Act, the petitioner in the supporting affidavit of the said application had also given the same address which was also mentioned in the suit. It would be suffice to say that the petitioner was very much in knowledge of the proceedings pending before the learned Family Court. It is observed that in the absence of any evidence on behalf of the petitioner, both the Courts have rightly adjudged the claim of respondent No.1 and rightly decreed the suit. The petitioner himself in my view is responsible for the said outcome as he remained indolent throughout the proceedings before the learned Judge Family Court and he cannot seek equity from this Court in Constitutional jurisdiction. Reliance in this regard can be placed on case of "Raja Khan v. Manager (Operation) Faisalabad Electric Supply Company (WAPDA) and others (2011 SCMR 676), wherein the Hon'ble Supreme Court of Pakistan in somewhat similar circumstances held that:-

> *"9. It is settled principle of law that constitutional jurisdiction under Article 212(3) is discretionary in character. It is settled law that grant of leave to appeal is discretionary. See Ghulam Qadir Khan's case (1986 SCMR 1386). It is also settled law that constitutional jurisdiction against void order may be refused if it was meant to enable petitioner to circumvent provisions of law of limitation or if he was estopped by his conduct from challenging of order. See:--*
> *Muhammad Ismail's case (1983 SCMR 168)*
> *Abdul Rashid's case (1969 SCMR 141)*
> *Wali Muhammad's case (PLD 1974 SC 106)*
> *10. Keeping in view the conduct of the petitioner mentioned herein above in para 10 of the impugned judgment we are not inclined to exercise our*

> *discretion in favour of the petitioner on the well known maxim that he who seeks equity must come with clean hands as law laid down by this Court in Nawab Syed Raunaq Ali's case (PLD 1973 SC 236)"*

5. So far the contention of the learned counsel that the Family Court is not vested with any such authority to either strike off the defence of the petitioner or to close his right of defence, it is pointed out that there is no cavil that though no such express provision exists in the Family Courts Act 1964, which gives authority to the court to close the evidence of a party or to strike off his right of written statement but on the same account there is even no provision to this effect that in case of failure by a party to file the written statement or to lead evidence his right of filing of written statement or evidence could not be closed in any circumstance. As already observed that the petitioner has availed sufficient opportunities to file the written statement but he has failed to submit the same. The Family Court cannot be made helpless in such a situation because it would not be in the interest of justice. Family Courts are established under the Family Courts Act, 1964, which is a special law thus the court can adopt any mode which is not inconsistent to the Family Courts Act 1964 or the Rules framed there under, for the advancement and meeting the ends of justice. The Learned Peshawar High Court in the case of "Shahid Bakhsh v. Mst. Shazia Bibi and another" (2004 CLC 703), wherein while dealing with somewhat similar issue the High Court has held as under:-

> *"3. Mr. Hassan Afridi, Advocate for the petitioner contended with force that the impugned judgment and decree suffers from the vice of gross misreading and non-reading of evidence and that the learned trial Judge was not empowered to close the evidence of the petitioner and deprive him of the right of defence. The submissions of the learned counsel are not tenable. No doubt it is*

true that there is no express provision in West Pakistan Family Courts Act (XXXV of 1964) authorizing a Family Court to close the evidence of a party. There is also no provision to the effect that a party's evidence shall not be closed even if that party fails to produce evidence, without sufficient cause, despite having availed of several opportunities to do so. The Family Court can close the evidence of a party who fails to adduce evidence without sufficient cause as held in Syed Shaukat Abbas v. Mst. Bushra Rani and another PLD 1982 Lah. 281. Provisions of the Act, which is a special law enacted to provide facility to the litigants in family matters. The role of the Family Court is not merely adversely but it is also inquisitorial, therefore, it is within its power to pass any order which may promote the ends of justice, Family Court is empowered to take all steps which it deems necessary to ensure that substantial justice is done. Provisions of C.P.C. are not applicable in stricto sensu by virtue of section 17 of the Act and Judge, Family Court is competent to regulate its own proceedings as the Act does not make provisions for every conceivable eventuality and unforeseen circumstances. In Khalil-ur-Rehman Bhutta v. Razia Naz and another 1984 CLC 890 the following observations were made:--

> *"(6) As regards the contention that the petitioner's defence could not have been struck off, it is to be seen that despite having been given opportunities, he did not file the written statement. It is true, that except sections 10 and 11, C.P.C., which have been made applicable to a Family Court, under section 17 of the Act the rest of the C.P.C. on its own force, does not apply to the proceedings before it. It is, however, to be kept in mind that the Family Courts Act, does not provide for every conceivable eventuality and unforeseen circumstance. Though it is a forum of limited jurisdiction yet it has to regulate its own proceedings. A situation may crop up, before a Family Court that a defendant persistently defaults in submitting his written statement and acts contumaciously, as happened in the instant case. Will the Family Court be powerless to proceed against such a litigant? If the Court is held to be denuded of authority, to pass a punitive order against such a defaulter that would result in paralysing its function. It must be remembered that the Family Courts*

> *Act has been enacted with the object of expeditious disposal of the disputes relating to the family affairs. Thus, for the orderly dispensation of justice under the Act, in the case of a contumacious default of a defendant, to file the written statement, the Family Court will be well within its authority to make an order, in the nature of one envisaged by Order VIII, rule 10, C.P.C. and deprive him of his right to file the written statement. I think that the learned trial Court proceeded against the petitioner on a similar line and by using the expression as to the striking of his defence, it simple meant to take away his right of filing written statement. Anyhow, even if there is some betrayal of over-stopping by the trial Court in view of the conduct of the petitioner I do not feel persuaded in this behalf, to strike down the order dated 28th February, 1983."*

6. In the light of above discussion and the principles laid down in the judgment supra I am of the considered view that the petitioner has failed to point out any illegality or material irregularity in the judgments of both the courts below. It is observed that the petitioner has made all possible efforts to circumvent the process of law and his conduct was contumacious throughout the proceedings. The learned counsel for the petitioner petitioner has failed to point out any extraordinary and exceptional circumstances to interfere with the judgments of both the courts below, even otherwise the Constitutional jurisdiction is discretionary relief which cannot be extended to a party, who himself has placed hurdles in the way of smooth running of the proceedings of the Court. Resultantly the instant petition, being devoid of any merit is dismissed with no order as to costs.

Karachi
Dated: 28.02.2023. JUDGE

Aadil Arab.