

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
C. P. NO. S-859 / 2023

Date Order with signature of Judge

HEARING / PRIORITY.

- 1) For hearing of Misc. No. 6495/2023.
- 2) For orders as to maintainability.

25.10.2023.

Mr. S. Muktiar Hussain Shirazi, Advocate for Petitioner.
Ms. Naushaba Haque Solangi, Assistant Advocate General.
M/s. Fouzia Waheed & Siddiqua Nausheen, Advocate for
Respondent.

Through this Petition, the Petitioner has impugned Judgment dated 23.08.2023 whereby, the VII-Additional District Judge, Karachi East, has dismissed two Family Appeals of the Petitioner without touching merits of the case and on the ground that since after passing of Judgment and Decree dated 24.09.2022 by the family Court, some orders have been passed in Execution proceedings, which according to the Appellate Court were never impugned; hence, the Appeal(s) do not merit any consideration and stands dismissed. The operative part of the Appellate Courts order reads as under:-

9. It is settled principle of law that although the provisions of the Civil Procedure Code, 1908 are not applicable in family matter, but the procedure provided in the CPC to achieve the ends of justice could well be adopted by the courts seized of the matter, as held in 2012 MLD 1795.

10. It has come on record that the plaintiffs filed family suit No. 1773/2020 before the learned trial Court, which was partly decreed and partly dismissed. Accordingly, the plaintiffs, being the decree holder filed execution application bearing No. 5/2023, which was also contested by the parties. And as per the Order dated 8/8/2023, the execution application is allowed as prayed.

It is suffice to say that in the entire matter, now the Order dated 8/8/2023 has surpassed the impugned judgment and decree dated 24/9/2022, which means that the Order dated 8/8/2023 is in force. The parties have not challenged the Order dated 8/8/2023, which is part and parcel of the case. It is settled principle of law that the Court cannot go beyond the scope of decree. ***Since, the Orders of execution of decree is now in force, therefore, this Court has no jurisdiction to go into the pool of the findings/observations challenged by the parties in the impugned judgment and decree.*** It is suffice to say that the learned Counsel for the parties have failed to satisfy this Court with regard the position of case in

present circumstances, therefore, the point No.1 is answered accordingly. Both the appeals are dismissed with no order as to cost.

On perusal of the aforesaid order, on the face of it, it appears that the Appellate Court was misdirected in law by dismissing the Appeal on the sole ground that after passing of the Judgment and Decree, *“since, the Orders of execution of decree is now in force, therefore, this Court has no jurisdiction to go into the pool of the findings/observations challenged by the parties in the impugned judgment and decree”*. This observation was not only unwarranted; but is also not supported by any law or precedent. If that be the case then every Appeal, wherein, the Appellate Court has not passed any interim order staying the Execution proceedings, will be liable to be dismissed if the Executing court has passed any orders pursuant to a judgment and decree. It is shocking and surprising for this Court that the Appellate Court which is the last statutory forum under the Family Court Act, 1964, has recorded these observations in a very cursory manner and without attending to the facts as well as law. This finding does not appear to be in consonance with law inasmuch as the Appeal before the Appellate Court was in respect of the main Judgment and Decree and had nothing to do with the Execution proceedings. If the Petitioner was aggrieved with any such order of the Executing Court, he can challenge the same independently, but cannot be non-suited as to his main Appeal. In fact, if he challenges any such order of the Executing court, he cannot assail the main judgment and decree in that Appeal or Revision. Not only this, the Appellate Court has also answered the point for determination¹ which has been done without discussing any merits of the case. How this could have been done is beyond comprehension; as on the one hand it is being observed that the Court lacks jurisdiction; and on the other, the point for determination is being answered against the Petitioner. Therefore, the order of the Appellate Court as above cannot be sustained under any circumstances and this Court under its Constitutional jurisdiction, being mindful of the dicta laid down by the Apex court time and again and as recent as in in the case of M Hamad Hasan² that interference under the Constitutional jurisdiction in family

¹ Whether learned trial Court committed illegality or material irregularity while passing impugned judgment & decree?

² 2023 SCMR 1434

matters is on limited grounds as an *exception* and not as a rule, finds this case warranting interference being of exceptional nature; hence, feels inclined to invoke its Constitutional jurisdiction. In the given facts as noted above, this Court cannot remain oblivious of such conduct of the last statutory Appellate forum under the family law; failing which irreparable harm would be caused to the Petitioner.

Before parting this Court is compelled to observe that the legal acumen of the presiding officer of the Appellate Court does not appear to be satisfactory and must be taken note of, warranting action against the Appellate Court; however, this Court cannot do so in view of the pronouncement of the Hon'ble Supreme Court in the case of *Miss Nusrat Yasmin*³ and can only send a memorandum to the Hon'ble Chief Justice for appropriate action which is being done separately.

Accordingly, the impugned Judgment of the Appellate Court dated 23.08.2023 is set aside; matter stands remanded and shall be deemed to be pending before the said Court who shall decide the Appeal(s) on merits strictly in accordance with law. Since the Appeal is in respect of a family dispute warranting disposal on priority, the Appellate Court shall decide it preferably within 60 days from the date of this order. Office shall send a copy of this order forthwith to the said Court for compliance.

J U D G E

Arshad/

³ Miss Nusrat Yasmin v Registrar Peshawar High Court (PLD 2019 SC 719)