

**IN THE HIGH COURT OF SINDH CIRCUIT COURT,
LARKANA**

C.P No. S- 196/2023 : Ali Dost vs. Mst. Sadaf Shaheen.
For the Petitioner : Mr. Ali Madad Arijo, Advocate.
For the Respondent : Mr. Sajjad Ali Jamarani, Advocate.
Mr. Abdul Waris Bhutto, Asstt. A.G.
Date of hearing : 30.11.2023.
Date of Judgment : 30.11.2023.

Judgment

Khadim Hussain Soomro, J.- Through this Constitution Petition, the petitioner has impugned the judgment dated 26-05-2023 and decree dated 31.05.2023 passed by the Vth Additional District Judge, Larkana, in family appeal No 12 of 2023 whereby the judgment and decree dated 14-01-2023, passed in family suit no 570 of 2022 was modified.

2. The facts leading to file the instant petition are that respondent Mst. Sadaf Shaheen (the petitioner's wife) filed a family suit No.570 of 2022 for recovery of dowry articles and maintenance allowance against the petitioner, in the Court of Family Judge, Larkana. It was averred by the respondent/plaintiff in her suit that she married the defendant/petitioner on 21.12.2021 against a dower amount of five tola gold, and her parents had given her dowry articles, which are lying in possession of the defendant. It was further stated that the defendant/petitioner maltreated her and never paid maintenance and household expenses. Ultimately, he expelled her from his house, clad in only three articles of clothing, and subsequently, she sought refuge at her parent's home.

3. A perusal of the record shows that in the wake of the institution of the plaint, the learned trial/family Court issued notices to the defendant/petitioner and on 08.11.2022, Mr Mazhar Ali Mangan, Advocate, filed Vakalatnama and adjournment applications on behalf of the defendant/ petitioner that was allowed. However, till 04.01.2023, the defendant/petitioner failed to file his written statement, leading to his defence being

struck off pursuant to order dated 04.01.2023, and the suit was ordered to be proceeded ex-parte. Consequently, the plaintiff filed an affidavit-in-ex-parte proof along with original receipts of the dower articles; eventually, the suit was partially decreed vide judgment dated 14.01.2023 to the extent of maintenance and recovery of dowry articles except gold ornaments.

4. The respondent/plaintiff, being disagreed and dissatisfied filed Family Appeal No. 12 of 2023 against the judgment passed by the learned Family Court, Larkana, which was contested by the defendant/petitioner. Resultantly, the appeal was allowed vide judgment dated 26.5.2023, by learned Vth-Additional District Judge, Larkana, but with modification in the impugned judgment to the extent that the respondent/plaintiff is entitled to recovery of her dowry articles, including gold ornaments. Consequently, the plaintiff/respondent, filed Execution Application No. 31 of 2023, which was allowed vide order dated 12.06.2023.

5. The learned counsel for the petitioner argued that the right of a fair trial, as guaranteed by Article 10-A of the Constitution of the Islamic Republic of Pakistan 1973, was severely infringed, and the petitioner was not provided with an opportunity to file written statement and contest the matter in accordance with the law. He further submitted that a receipt of gold ornaments produced by the respondent violates the Bridal Gifts Ordinance's provisions. He added that before the respondent/plaintiff filed the suit, the petitioner had pronounced three irrevocable divorces to the respondent in the presence of witnesses and such divorced certificate was issued by the NADRA. Learned counsel further added that the respondent committed fraud with the petitioner by posing herself to be a virgin and unmarried. However, before marrying the petitioner, she was already married to someone and obtained "khula" from the court of law by filing a suit in the Court of Family Judge Malir (Karachi). This fact was not disclosed by the respondent to the petitioner.

6. Conversely, the learned counsel for the respondent submits that notice of the suit was properly served upon the petitioner, who engaged a counsel, namely, Mr. Mazhar Ali Mangan, who filed his statement before the learned trial Court along with adjournment application for filing written statement on his behalf. However, later on, he did not turn to file his written statement within the stipulated time, as enunciated in the West Pakistan Family Court Act 1964; therefore, the learned trial Court rightly struck off the defence of the petitioner vide order dated 04.01.2023. Learned counsel further contended that the petitioner neither filed an application for setting aside the aforesaid order nor, after passing the decree, filed an application for setting aside of the same. He

next submitted that the petitioner is serving in NADRA as Assistant Director, and by taking advantage of his position, he has manipulated the divorce certificate. Learned counsel for the respondent prayed for maintaining the impugned order.

7. I have heard the learned counsels for the parties and peruse the material available on the record.

8. The first contention raised by the learned counsel for the petitioner is that the right of a fair trial as guaranteed by the article 10-A of the Constitution Islamic Republic of Pakistan, 1973 was severely infringed. In this regard, it is worth noting that the petitioner, engaged a counsel on 08.11.2022, namely Mr. Mazhar Ali Mangan, Advocate, who filed Vakalatnama and adjournment applications on behalf of the defendant/petitioner, which was allowed. However, till 04.01.2023, the defendant/petitioner failed to file his written statement, and ultimately, the learned trial court was left with no other option except to strike off his defence vide order dated 04.01.2023. It is a matter of fact and record that the defendant/ petitioner did not file an application for reopening his side of the defence during the trial as well as after passing the judgment by the learned trial court. The petitioner was under statutory obligation to file a written statement within the stipulated period provided under section 9 of the West Pakistan Family Court Act, 1964; it would be conducive to reproduce it as under:

"Section 9. Written statement.– [(1) On the date fixed under section 8, the defendant shall appear before the Family Court and file the written statement, a list of witnesses and gist of evidence, and in case the written statement is not filed on that date, the Family Court may, for any sufficient reasons which prevented the defendant from submitting the written statement, allow the defendant to submit the written statement and other documents on the next date which shall not exceed fifteen days from that date.[underlying for emphasis].

9. The veracity of the situation and the documented evidence affirms that the petitioner also instituted Family Appeal No. 28 of 2023 against the judgment of the learned trial Court dated 14.01.2023, which was dismissed vide judgment dated 09.5.2023 passed by learned 1st Additional District Judge, Larkana. Nevertheless, the petitioner has conspicuously omitted this pertinent information in the present petition. In light of the foregoing circumstances, it is discerned that the petitioner had recourse to the available legal remedy up to the appellate court, thereby precluding any contention regarding the infringement of the right to a fair trial.

10. The second contention raised by the learned counsel for the petitioner is that the petitioner has pronounced divorce to the respondent in the presence of witnesses. The divorce deed dated 12.2.2022 was brought on record of this court through a statement dated 30.10.2023, which prima-facie reflects that the same was prepared on 12.2.2022,

whereas the respondent filed suit on 27.10.2022. The petitioner failed to produce a divorce deed during the trial before the learned trial Court. However, the divorce entry dated 11.11.2022, prima facie, reflects that the petitioner may manipulate the same as he is said to be Assistant Director in NADRA. Moreover, it will be relevant to note that sub-section (1) of Section 7 of the Muslim Family Laws Ordinance, 1961, provides a mechanism that when a man wishes to divorce his wife, he is required to send such divorce deed to the Chairman of the concerned union council. In case of failure to comply with sub-clause (1) of Section 7 (ibid), the law provides punishment/imprisonment to the extent of one year or a fine or both; the relevant section is reproduced below:

"7. Talaq. (1) Any man who wishes to divorce his wife shall, as soon as may be after pronouncement of talaq in any form whatsoever, give the chairman notice in writing of his having done so, and shall supply a copy thereof to the wife. (2) whoever, contravenes the provision of sub-section (1) shall be punishable with simple imprisonment for a term which may extend to one year or with fine which may extend to five thousand rupees, or with both"

In the entire record of proceedings, which started from learned Courts below up to this court, nothing is brought on the record to show that the divorce deed was submitted in either of the Courts to establish that the petitioner has pronounced divorce to the respondent, even the contents of the petition is silent in this regard.

11. Be that as it may, the petitioner has invoked the constitutional jurisdiction of this court under a writ of certiorari, which has very limited scope. However, any illegality or irregularity available on the record is to be rectified through the writ of this court under Article 199 of the Constitution. It is important to note that the scope of a constitutional petition and an appeal are distinct and separate from each other.

12. The constitutional jurisdiction vested in the High Court, delineated by Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, is explicitly defined, and its exercise is limited to challenging appellate court judgments. The applicability of this jurisdiction has been examined by the apex Court of the country in its various judgments. This court is solely concerned with determining whether the lower Courts exercised their powers within their jurisdiction. If a Court is vested with authority to adjudicate a matter, it is deemed competent to render a decision, regardless of its correctness or lack thereof. Even if the decision is believed to be erroneous, it does not condense its lack of legal authority. In such circumstances, the scope of judicial review

under Article 199 of the Constitution was confined to cases concerning the misreading or non-reading of evidence or when the determination was made in the absence of any evidence, resulting in a miscarriage of justice. In exercising its constitutional jurisdiction, this court cannot disturb factual findings through a reassessment of evidence or employing the jurisdiction as an ancillary for revision or appeal. Any interference with the factual determinations made by lower courts was deemed to exceed jurisdiction within the purview defined under Article 199 of the Constitution. The reliance in this regard can be placed on the recent judgment of the apex Court of the country in the case of *Mst. Tayyeba Ambareen and another v. Shafqat Ali Kiyani and another* reported in **2023 SCMR 246**, wherein it was held as under:-

"8. The object of exercising jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution") is to foster justice, preserve rights and to right the wrong. The appraisal of evidence is primarily the function of the Trial Court and, in this case, the Family Court which has been vested with exclusive jurisdiction. In constitutional jurisdiction when the findings are based on mis-reading or non-reading of evidence, and in case the order of the lower fora is found to be arbitrary, perverse, or in violation of law or evidence, the High Court can exercise its jurisdiction as a corrective measure. If the error is so glaring and patent that it may not be acceptable, then in such an eventuality the High Court can interfere when the finding is based on insufficient evidence, mis-reading of evidence, non-consideration of material evidence, erroneous assumption of fact, patent errors of law, consideration of inadmissible evidence, excess or abuse of jurisdiction, arbitrary exercise of power and where an unreasonable view on evidence has been taken."

13. The legislative intent was to conclusively stop family litigation following its adjudication by the appellate court. The apex Court, in the case of *Arif Fareed v. Bibi Sara and others*, **2023 SCMR 413**, observed that High Courts usually invoke their extraordinary jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, as an alternative to the appellate or revisionary jurisdiction. Subsequently, the intended objective of the statute, with regard to the prompt disposal of the cases, is often undermined and disregarded. The relevant portion of the judgment is reproduced as under:-

"7. ... The legislature intended to place a full stop on the family litigation after it was decided by the appellate court. However, we regretfully observe that the High Courts routinely exercise their extraordinary jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 as a substitute of

appeal or revision and more often the purpose of the statute i.e., expeditious disposal of the cases is compromised and defied. No doubt, there may be certain cases where the intervention could be justified but a great number falls outside this exception. Therefore, it would be high time that the High Courts prioritise the disposal of family cases by constituting special family benches for this purpose."

14. The aims and objectives of Article 199 of the Constitution are to promote justice, safeguard rights, rectify any injustices or excessive exercise of jurisdiction by lower Courts, and correct procedural illegality or irregularity that might have adversely affected a case. None of the ingredients exists in the present petition.

For the foregoing reasons, the present constitution petition, having no substance and devoid of merits, is hereby dismissed.

Judge

Ansari