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JUDGMENT SHEET
LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Writ Petition No.16930/2020

Mst. Beenish **Versus** Additional District Judge etc.

JUDGMENT

Date of Hearing:	01.03.2023
Petitioner by:	Ms. Mehreen Akbar Monga, Advocate.
Respondent No.3 by:	Mr. Zulfiqar Ahmed, Advocate.

Anwaar Hussain, J. Through this petition, under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, the petitioner has assailed judgment dated 03.03.2020 passed by the learned Appellate Court below (“**the impugned judgment**”) whereby the appeal of respondent No.3 (“**the respondent**”), against *ex parte* judgment and decree dated 16.01.2019, passed by the learned Trial Court in favour of the petitioner, was accepted and the case was remanded for decision afresh.

2. Learned counsel for the petitioner states that after passing of *ex parte* judgment and decree dated 16.01.2019 by the learned Trial Court, the execution petition was filed in which the respondent was arrested and produced before the learned Executing Court on 24.04.2019, wherein the respondent got recorded his statement and undertook that he was willing to return the dowry articles belonging to the petitioner, hence, the respondent was estopped to lay challenge to the said *ex parte* judgment and the appeal was not maintainable. Further contends that in order to secure the release of the respondent, his father stood surety. Adds that the conduct of the respondent debars him from seeking any relief inasmuch as when the learned Executing Court appointed a bailiff for implementing the process of return of the dowry articles, resistance with

force was shown by father as well as other family members/friends of the respondent and dowry articles could not be lifted. On 03.05.2019, the bailiff submitted report with the request that the learned Executing Court may direct police for provision of assistance for implementation of order dated 24.04.2019 as the respondent had disappeared from the house and his father and brothers present there had locked the main door. In the meanwhile, the appeal was preferred by the respondent on 04.05.2019. Avers that without disclosing the said facts, the respondent preferred the said appeal against *ex parte* judgment and decree dated 16.01.2019, which has been allowed *vide* impugned judgment dated 03.03.2020. Contends that the appeal was barred by 98 days and there was no sufficient reason given by the respondent explaining the delay in the application filed by respondent under Rule 22 of the Family Court Rules, 1965. Places reliance on "Mst. Nadira Shahzad v. Mubashir Ahmad and others" (**1995 SCMR 1419**) in support of her contentions.

3. Conversely, learned counsel for the respondent submits that constitutional petition against a remand order is not maintainable. Adds that the learned Appellate Court below has rightly remanded the matter to the learned Trial Court as sufficient opportunity was not provided to the respondent for production of evidence. Further contends that the law favours adjudication on merit and not on technicalities and this fact has been rightly appreciated by the learned Appellate Court below. When confronted whether the issue of limitation was dealt with by the learned Appellate Court below, submits that since the appeal was admitted for regular hearing, *vide* order dated 04.05.2019, the learned Appellate Court below while passing the final judgment considered it irrelevant to examine question of limitation. Further states that the entire proceedings before the learned Trial Court including the passing of *ex parte* judgment and decree were without appreciating the evidence and hence, the same were void. Concludes that the documentary evidence was tendered by the petitioner side in the statement of lawyer and hence,

could not be taken into account for rendering a decision. Places reliance on cases reported as “Fateh Sher v. Sarfraz and others” (**1986 SCMR 1356**), “Mst. Salim-un-Nisa and 5 other v. Aziz and another” [**2009 CLC 860 (Peshawar)**], Amir Shahzad v. Additional District Judge, Multan and 2 others” [**2015 CLC 632 (Lahore)**] and Mst. Akhtar Sultana v. Major Retd. Muzaffar Khan Malik through his legal heirs and others” (**PLD 2021 SC 715**) in support of his contentions.

4. Arguments heard. Record perused.

5. The facts of the case call upon this Court to render its opinion on the following questions:

- i. Whether the impugned judgment of the learned Appellate Court below suffers from legal infirmity of a nature which is amenable to the constitutional jurisdiction of this Court?
- ii. Whether the appeal of the respondent was maintainable given the delay in filing the said appeal? If so, whether it was justified under the law to remand the matter to the Trial Court for decision afresh?

6. Admittedly, after institution of the suit by the petitioner on 08.11.2014, the respondent submitted his written statement along with list of witnesses on 24.01.2015 when pre-trial reconciliation proceedings were conducted but the same failed. After framing of the issues, the case was fixed for evidence of the petitioner, which was completed on 03.04.2017 whereafter the case was fixed for evidence of the respondent for 12.04.2017, however, after seeking number of adjournments, the respondent introduced new witnesses and tendered their affidavits in evidence. The respondent failed to produce his witnesses for cross-examination despite availing number of opportunities over a period of about 01 year and 06 months and hence, his right to produce evidence was struck off, *vide* order dated 05.11.2018, and affidavits/evidence of

the new witnesses was discarded. It is also admitted feature of the case that the respondent never showed up thereafter and on 16.01.2019, the suit was finally decreed. Furthermore, neither any application nor appeal for setting aside the *ex-parte* proceedings or *ex-parte* judgment was filed by the respondent within time stipulated under the law and, hence, the same was time barred. Moreover, when the execution petition was filed by the petitioner on 05.03.2019, the respondent was arrested and presented before the learned Executing Court on 24.04.2019, he made the following statement:

“Today, the captioned execution petition was fixed for production of judgment debtor through arrest. Judgment debtor has been produced by court bailiff. At this stage, *judgment debtor showed his willingness to return all decreed dowry articles. Hence, on request and in the interest of justice, the Court bailiff is hereby appointed for recovery of dowry articles and is directed to submit his report on 08.05.2019.* At this stage, learned counsel on behalf of judgment debtor has prayed for his release.

2. Hence, in the interest of justice, judgment debtor is hereby released subject to furnishing surety to the tune of decretal amount....”

(Emphasis provided)

Subsequently, the learned Executing Court appointed a bailiff for implementing the process of returning the dowry articles and on 03.05.2019, the bailiff submitted report before the learned Executing Court with the request for provision of police assistance for implementation of the order as the respondent had disappeared from the house and his father and brothers present there had locked the main door of the house. These facts, when confronted, could not be denied by learned counsel for the respondent. At this point, suffice to observe that this Court while exercising constitutional jurisdiction always considers the conduct of the parties as critically relevant factor and the conduct of the respondent cannot be considered appropriate in the instant case. The

above quoted statement of the respondent, dated 24.04.2019, was sufficient to put the matter to an end, however, instead of honouring his undertaking given before the learned Executing Court on said date, he preferred appeal against judgment and decree dated 16.01.2019 that was *prima facie* time barred. The respondent filed application, along with the appeal, for condonation of delay on the grounds that his father suffered arthritis attack and other diseases and that his counsel committed professional misconduct as the latter neither intimated the respondent about the proceedings nor attended his telephone call. As *per* contents of the said application, medical certificate showing illness of father of the respondent was appended with the said application along with application for initiation of proceedings by the respondent against his counsel, before Bar Council concerned, for alleged misconduct of the latter but the impugned judgment passed by the learned Appellate Court below is non speaking as no discussion has been made by the learned Appellate Court below in this regard for condoning delay. When confronted with, learned counsel for the respondent submits that when the appeal was admitted for regular hearing on 04.05.2019, issue of limitation was settled and hence, the learned Appellate Court below has rightly considered the issue of limitation as redundant. The said argument is also misconceived inasmuch as perusal of order dated 04.05.2019 reveals that only preliminary arguments were heard on 04.05.2019 when the petitioner was not in attendance and the appeal was admitted, without discussing the issue of limitation let alone its adjudication and decision in accordance with law. Relevant portion of order dated 04.05.2019 is reproduced below:

“Instant appeal has been filed against impugned judgment and decree dated 16.01.2019 passed by Learned Judge Family Court, Lahore. An application for suspension of operation of impugned judgment and decree and alongwith affidavit has also been filed.

2. Learned counsel for the appellant has contended that impugned judgment and decree has been passed against law and facts without the application of legal principles on the subject matter.

3. Points raised by the appellant needs consideration; hence, instant appeal is admitted for regular hearing. Meanwhile, operation of an impugned judgment and decree dated 16.01.2019 is hereby suspended till next date of hearing i.e. 24.05.2019.

4. Let notice in name of the respondent be issued for 24.05.2019 through ordinary process, registered post AD and courier service, subject to deposit of process fee within three days alongwith registered envelop AD card.”

7. It is now well-settled principle of law that the law of limitation is not a mere technicality, rather it is to be observed and applied in its strict sense. If there is any delay in filing the appeal, each and every day is to be explained for its condonation. Furthermore, filing appeal by the respondent beyond the period of limitation created certain rights in favour of the petitioner more particularly when the respondent recorded a statement before the learned Executing Court, which could not be readily brushed aside unless some sound reason is available to condone the delay and ignore the statement recorded during the course of judicial proceedings, which is conspicuously missing in this case. Though stance of the respondent is belied by the very perusal of order dated 04.05.2019 reproduced above, the argument that the admission of the appeal conclusively settled the issue of limitation even otherwise cannot hold water as mere issuance of notice on admission of appeal does not conclusively decides the said issue. It is pertinent to observe that right of the petitioner had accrued on account of appeal having become barred by time and the same could not have been taken away without hearing the petitioner.

8. As far as question of maintainability of the present petition against a remand order is concerned, needless to mention that the facts of the

instant case are distinguishable from the facts of the cases relied upon by learned counsel for the respondent, more particularly, the fact that the respondent himself recorded statement before the learned Executing Court for returning the dowry articles and then concealed this fact from the learned Appellate Court below and this aspect has also not been dealt with. The cases relied upon by learned counsel for the respondent are settled elucidation of law on the subject but the same are not relevant in peculiar and distinguishable facts of the instant case. As far as objection that the documentary evidence was brought on record by the petitioner/plaintiff in the statement of the lawyer and its effect on the case, more particularly in family matters is concerned, the same can always be examined by the learned Appellate Court below while deciding the issue of limitation, effect of statement of the respondent before the learned Executing Court and the concealment thereof while preferring the appeal.

9. The above discussion propels to conclude that the appeal of the respondent was time barred and, without addressing the question of limitation through cogent reasons so as the effect of statement of the respondent before learned Executing Court, remanding the matter to the learned Trial Court, is an error apparent on the face of record. Constitutional petition against such remand order is maintainable and merits interference by this Court in its supervisory jurisdiction.

10. In the light of the above discussion, this Court is of the opinion that the learned Appellate Court below has not adjudicated the matter/appeal in accordance with law. Therefore, this constitutional petition is **allowed** and the impugned judgment is set aside. As a natural corollary, the appeal of the respondent shall be deemed to be pending before the learned Appellate Court below. Parties are directed to appear on 18.03.2023 before the learned District Judge, Lahore who shall hear the appeal of the respondent himself or entrust it to a court of competent

jurisdiction. The Court so seized with the case, while deciding the merits of appeal of the respondent, shall also address the question of limitation as well as the effect of recording of statement by the respondent before the learned Executing Court that he will return the dowry articles to the petitioner. It is expected that the matter is concluded, strictly in accordance with law, within one month commencing from the said date.

(ANWAAR HUSSAIN)
Judge

Approved for reporting

Judge

Akram