

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, **ISLAMABAD**

W.P. NO.1753 OF 2019

MUHAMMAD WAHEED MUSHTAQ
Vs.
MST. TALIHA MAQSOOD, ETC.

Petitioner by : Mr. Ahmad ud Din, Advocate.

Respondents by : Respondent No. 3& 4 Ex-parte.

Date of hearing : 18.02.2020

LUBNA SALEEM PERVEZ, J. Through instant writ petition the Petitioner has assailed orders dated 02.02.2019, whereby the learned Additional District Judge-II, East, Islamabad dismissed his appeal for non-prosecution and order dated 10.04.2019, whereby, his application for restoration of appeal was also dismissed by learned Additional District Judge-East, Islamabad, respectively.

2. Notice of the Writ Petition was initially issued to the Respondent Nos. 1 & 2 on 06.05.2019 but on the next date of hearing (09.10.2019) no one was in attendance on their behalf despite service of notice, therefore, office was directed to repeat notice to the said Respondents with the direction to file a specific report in this regard and as per office report notices were served upon the Respondents on 24.10.2019, but still on 18.11.2019, no one appeared on behalf of the Respondents when the case was called for hearing, hence, notices were ordered to be repeated and office was again directed to submit report regarding service of notice. As per office report, notices re-issued to the Respondents through Senior Civil Judge on 23.11.2019 were also served upon Respondent No.1 through her mother and on Respondent No.2 through her grandmother, on 10.12.2019. However, when case was fixed for hearing on 18.02.2020, no one appeared on behalf of Respondent Nos. 1 & 2. As the said notices are received by mother of Respondent No.1 and grandmother of Respondent No.2 thus the service is held to be good and the Petition is being decided ex-parte on the basis of available record after hearing the arguments of learned Counsel for the Petitioner.

3. Learned Counsel for the Petitioner argued that suit for dissolution of marriage on the basis of Khula as well as recovery of maintenance was filed by Respondents Nos. 1 and 2, before the learned Judge Family Court, East-Islamabad, which was partially decreed, vide judgment and decree dated 31.03.2018, by fixing maintenance of Plaintiff/Respondent No.1 at Rs.15,000/- for *iddat* period that became total Rs. 45,000/- and Rs. 10,000/- per month for minor child/Respondent No.2, from the date of institution of suit along with 10% annual increase. This judgment and decree was challenged by the Petitioner before the Additional District Judge, East-Islamabad, by way of Appeal under section 14 of the West Pakistan Family Courts Act, 1964, wherein he prayed for suspension of operation of impugned order, and the learned Judge, vide order dated 26.04.2018, suspended the operation of judgment and decree dated 31.03.2018 and fixed the interim maintenance at Rs.5,000/- per month for the minor. However, on 02.02.2019, as no one was in attendance on behalf of present Petitioner, therefore, his appeal was dismissed for non-prosecution. Learned Counsel submitted that he filed restoration application before the Court on 28.02.2019, but same was dismissed by the learned Additional District Judge East-Islamabad, on the ground that no sufficient cause is shown by the Petitioner for his non-appearance. Hence present petition.

4. Learned Counsel for the Petitioner contended that he kept on appearing on each and every date of hearing to pursue his case while Respondents Nos. 1 and 2, despite service of notice remained absent during the proceedings before the learned Additional District Judge, however, on the single default of appearance on 02.02.2019, his appeal was dismissed for non-prosecution. Learned counsel submitted that he filed restoration application before the Court on 28.02.2019, contending therein that due to misunderstanding regarding lawyer's strike, he could not put appearance on the due date. The learned Additional District Judge East-Islamabad, however, dismissed the application on the ground that the Petitioner has failed to annex copy of notice of strike of Bar in support of his contentions, therefore, no sufficient cause is shown by the Petitioner for his non-appearance. Learned counsel reiterated the contentions raised in the application for restoration of appeal and submitted that Petitioner will suffer irreparable loss if the appeal is not restored and decided on merits as

the question of maintenance of the minor is involved which is to be decided on the basis of his financial position.

5. Arguments advanced by the learned Counsel for the Petitioner have been heard and relevant record including the impugned orders have also been perused with his able assistance.

6. While arguing his case Learned Counsel for Petitioner submitted that he was under the impression of lawyer's strike on 02.02.2019, therefore, non-appearance on the said date of hearing was not willful, whereas, he was regularly appearing during the case proceedings without any default. Learned Counsel has also referred the order sheets reflecting his attendance on the dates of hearing. In the circumstances, I am of the view that the cases having substantial issues such as in the present case should not be dismissed for non-prosecution and one chance should be granted in the interest of justice and fair play at least to the counsel who are regularly attending the proceedings. The practice of dismissing the cases on technicalities without considering the merits has not been approved by the superior courts and same is the position with dismissal of cases for non-prosecution and the denial to its restoration in a mechanical manner is also declared to be arbitrary, unreasonable and legally not justified. The learned Counsel for the Petitioner relied on the judgment in the case titled **Abdul Ghafoor & Another Vs. Mir Maqbool and 11 others** reported as **(2009 MLD 1015 (Karachi))**, wherein the Hon'ble Court has held as under.:

"It is now well-settled principle of law that technicalities in dispensation of justice should be avoided and as far as practicable the cases are to be decided on merits. The Court would be justified to dismiss a case for non-prosecution if it is satisfied that the defaulting party is trying to linger on the proceedings. In case when on at least 2 or three dates the defaulting party avoids to appear and proceed with the case the Court would be justified to dismiss the case in non-prosecution. However, dismissing an appeal for one day's absence of the party of the appellants and refused to readmit appeal is bit harsh. The Court has to strike a balance between the two extremes i.e. neither it should allow endless chances to a party to proceed with a case and thus delay the justice nor a party is to be dealt with in such a harsh way by penalizing it for one day's absence."

Another case cited by learned counsel for the Petitioner is **Anayat Masih & others v. Munshi Masih and others** reported as **(2001 CLC 591)** wherein the Court has observed that cases are to be heard and decided on merits. Furthermore, the Hon'ble Lahore High Court, vide verdict given in case titled

Saeed Ahmed vs. Ghulam Fatima reported as (PLD 2019 Lahore 723) has also held that:

“Even otherwise law favours adjudication of cases on merits. Non-suiting a party on mere technicalities has never been approved. Reference can be made to Anwar Khan v. Abdul Fazal Manan (2010 SCMR 973). The consistent rule is that in the matter of restoration generous consideration should weigh with the Court and every possible attempt should be made to allow the parties opportunity of producing evidence and seeking decision on merits.”.

6. Respectfully following the rulings and principles laid down in the above said judgments, I am of the view that the learned Additional District Judge was not justified in non-suiting the Petitioner by dismissing the case for non appearance on only one date and thereafter refusing to allow the restoration application submitted by him.

7. For what has been discussed above, instant writ petition is allowed and impugned orders dated 10.04.2019 and 02.02.2019 are set-aside and the appeal is deemed to be pending before the learned Additional District Judge which is directed to be decided on merits by allowing opportunity of hearing to the parties in accordance with law.

(LUBNA SALEEM PERVEZ)
JUDGE

Adnan