

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

WRIT PETITION NO. 812 OF 2022

MUHAMMAD IRFAN.

Vs.

FARHAT NAWAZ, ETC.

Petitioner by : Ch. Abdul Khaliq Thind, Advocate.

Respondent by : Mr. Aziz Ahmed Wajahat, Advocate.

Date of hearing : 21.07.2022.

SAMAN RAFAT IMTIAZ, J.:- Through the instant writ petition, the Petitioner has assailed the Judgment and Decree dated 31.05.2021 (“**Impugned Judgment and Decree**”) passed by the learned Judge Family Court, East-Islamabad (“**Family Court**”) as well as the Order dated 20.11.2021 (“**Impugned Order**”) passed by the learned Additional District Judge-I (East), Islamabad (“**Appellate Court**”), whereby suit for Dissolution of Marriage on the basis of Khulla and Recovery of Maintenance, Dowry Articles, etc. filed by the Respondents No. 1 to 3 has been allowed and the Petitioner’s appeal along with application for condonation of delay have been dismissed respectively.

2. The brief facts, as per the Memo of Petition, are that the Respondent No. I filed a suit for Recovery of Maintenance and Dowry Articles against the Petitioner. The Petitioner contested the suit. Out of the divergent pleadings of the parties issues were framed and after recording of documentary as well as oral evidence, the learned Trial Court passed the Impugned Judgment and Decree allegedly without providing opportunity for arguments to the Petitioner /defendant. Thereafter the said Judgment/ decree was assailed before the learned Appellate Court, which appeal was dismissed by the learned Appellate Court vide Impugned Order in *limine*. Hence, present petition.

3. The learned counsel for the Petitioner argued that maintenance for the two minors was fixed as Rs. 9,000/- each aggregating to Rs. 18,000/- per month vide order dated 22.11.2019; that the Petitioner’s evidence was struck off on 07.04.2021 which was contrary to the record as he had been making payment regularly; that in

any event the Impugned Judgment and Decree passed by the learned Trial Court is in excess of jurisdiction as it pertains to matters which are beyond the purview of the learned Family Court; and that the maintenance has been fixed at Rs. 15,000/- per month for each minor Respondent as a result of non-reading and misreading of evidence, which is beyond the means of the Petitioner. With regard to the appeal dismissed in *limine* by the learned Appellate Court he submitted that such order is wrongful because the Petitioner was unable to file an appeal within the limitation period as he was suffering from depression due to which he was also dismissed from service.

4. Learned counsel for Respondents, at the very outset, conceded to the submission made on behalf of the Petitioner to the extent of Issue No. (1) and acknowledged that such issue was beyond the jurisdiction of the learned Family Court. With regard to Issue No. (2) he submitted that the Petitioner is serving as Sub-Inspector and the Impugned Judgment and Decree has been passed with due regard to the Petitioner's salary as well as the needs of the minor children, which therefore does not require interference. He further submitted that the Petitioner was given seventeen (17) opportunities to make payment of past maintenance but he failed to comply, therefore, he was neither condemned unheard nor is the order striking off his defense unlawful or illegal in any respect.

5. I have heard the learned counsel for the parties and have also perused the available record including the Impugned Judgment and Decree and Impugned Order with their able assistance.

6. First and foremost, it has to be borne in mind that this Court in exercise of Constitutional jurisdiction does not act like a Court of appeal. It neither reappraises evidence nor does it substitute the concurrent findings of fact recorded by the Family Court with its own findings solely on the ground that another view was possible on the same evidence. A party approaching the High Court under Article 199 of the Constitution has to demonstrate that there is a gross misreading or non-reading of evidence or jurisdictional error or such legal infirmity that has caused miscarriage of justice.

7. No illegality or lack of jurisdiction or misreading/non-reading of evidence has been pointed out by the learned counsel for the Petitioner in the Impugned Judgment and Decree in respect of Issue No. 2 regarding maintenance of the minor

Respondents which would warrant interference of this Court in exercise of its Constitutional jurisdiction. Even otherwise the Petitioner had an adequate remedy available in the form of appeal under Section 14 of West Pakistan Family Courts Act, 1964 which he failed to avail within the limitation period. The grounds mentioned to justify the delay are factual in nature which cannot be adjudicated upon in the exercise of constitutional jurisdiction by this Court and even otherwise the findings of the learned Appellate Court are unexceptionable and as such the learned Appellate Court rightly dismissed the Petitioner's appeal as well as condonation application vide the Impugned Order.

8. Even otherwise, Constitutional jurisdiction is discretionary and equitable. The scope of such jurisdiction was discussed ably in the following judgments:

Muhammad Arif versus Uzma Afzal and others, 2011 SCMR 374:

"5. There is no cavil to the proposition that the "conduct of petitioner can be taken into consideration in allowing or disallowing equitable relief in constitutional jurisdiction. The principle that the Court should lean in favour of adjudication of causes on merits, appears to be available for invocation only when the person relying on it himself comes to the Court with clean hands and equitable considerations also lie in his favour. High Court in exercise of writ jurisdiction is bound to proceed on maxim "he who seeks equity must do equity". Constitutional jurisdiction is an equitable jurisdiction. Whoever comes to High Court to seek relief has to satisfy the conscience of the Court that he has clean hands. Writ jurisdiction cannot be exercised in aid of injustice. The High Court will not grant relief under this Article when the petitioner does not come to the Court with clean hands. He may claim relief only when he himself is not violating provisions of law, especially of the law under which he is claiming entitlement". *Manzoor Hussain v. Zulfiqar Ali* 1983 SCMR 137, *Khan Gul v. District Judge* (PLD 1990 Lah. 263), *Syed Shah v. Political Agent Bajaur Agency* (PLD 1981 Pesh. 57), *Muhammad Asif v. Province of Sindh* 1990 MLD 2192, *Wali Muhammad v. Sakhi Muhammad* PLD 1974 SC 106, *Saleh Shah v. Custodian of Evacuee Property* 1971 SCMR 543, *Ahmad Khan v. Custodian of Evacuee Property* PLD 1963 Kar. 450, *A.K.M. Fazlul Quader Chowdhury v. Govt. of Pakistan* PLD 1957 Dacca 342, *Momin Motor Co. v. R.T.A. Dacca* PLD 1962 Dacca 310, *Fazal Elahi v. Shaikh Muhammad* PLD 1962(2) W.P.1, *Abdul Wahid Khan v. Custodian of Evacuee Property* PLD 1966 Quetta 25, *P.G. Braganza v. Border Area Allot. Committee* 1984 CLC 1479). It is well-settled by now that "who is guilty of bad faith and unconscionable conduct. **The right is in the nature of ex debito justitiae, but will only be granted if the petitioner can show that his conduct has not been such as to disentitle him of such a relief.** This jurisdiction of the High Court should not be exercised if it leads ultimately to a patent injustice. **The Court refused to issue a**

writ where the conduct of the petitioner from the outset had been rather dubious and shady. "(Syed Shah v. Political Agent Bajaur Agency PLD 1981 Pesh. 57, Saifullah Khan v. Settlement Commissioner 1982 SCMR 853, Sardar Muhammad v. Deputy Administrator Residual Property 1981 SCMR 738, Ali Muhammad v. Secretary Housing and Physical Planning Deptt. 1984 CLC 2203, Abdul Wahid Khan v. Custodian of Evacuee Property PLD 1966 Quetta 25)." [Emphasis added].

9. Following such principles, I am not compelled to exercise discretion in favour of the Petitioner given his negligent and inequitable conduct toward the minor Respondents who are his legal and moral responsibility. The record shows irregular payments made by him toward their monthly maintenance and then eventually he stopped making payment altogether which is when his right of defence was struck off. The Petitioner paid the arrears only when this Court directed him to do so before proceeding with the instant writ.

10. Issue No.(1) pertained to an alleged loan of Rs. 250,000/- given by the Respondent No. 1 to the Petitioner for which recovery was sought by the former and has been decreed by the learned Family Court vide the Impugned Judgment and Decree. As noted above, the learned counsel for the Respondents has conceded and acknowledged that the learned Trial Court had no jurisdiction to adjudicate upon such issue. Indeed, the issue does not come within the scope of Section 5 read with Schedule 1 of the Family Courts Act, 1964 and as such, it is correct that the said issue was beyond the jurisdiction of the learned Family Court.

11. Consequently, the instant Writ Petition is partly **allowed** and the findings of the learned Judge Family Court, East-Islamabad regarding Issue No. (1) i.e. “*whether the Plaintiff is entitled to recovery of Rs. 250,000/- from defendant as prayed for?*” recorded vide Impugned Judgment and Decree dated 31.05.2021 are hereby set aside. As far as Issue No. (2) is concerned, in view of the discussion hereinabove, the titled petition stands **dismissed**. Decree sheet be modified accordingly.

(SAMAN RAFAT IMTIAZ)
JUDGE