

JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Writ Petition No. 3363/2021

Muhammad Jahanzeb Abbasi
Vs.
Mst. Naima Akhtar Abbasi & others

PETITIONER BY: Mr. Muhammad Munir Gondal and
Mr. Iftikhar Ahmad Cheema,
Advocates alongwith petitioner.

RESPONDENTS BY: Mr. Aamer Mahmood and Mr. Sheraz
Ahmed Ranjha, Advocate alongwith
respondent No.1.
Mr. Alam Zeb, respondent No.2 in
Writ Petition No.2134 of 2020, in
person.

DATE OF HEARING: 29.08.2022.

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BABAR SATTAR, J.- Through this judgment this Court will decide Writ Petition No.3363 of 2021 and Writ Petition No.2134 of 2020. For purposes of this judgment, Muhammad Jehanzeb Abbasi, the petitioner in Writ Petition No.3363 of 2021 and respondent No.1 in Writ Petition No.2134 of 2020, will be addressed as Petitioner and Mst. Naima Akhtar Abbasi, the petitioner in Writ Petition No.2134 of 2020 and respondent No.1 in Writ Petition No.3363 of 2021, will be addressed as Respondent.

2. The Respondent filed Writ Petition No.2134 of 2020 impugning the order of the learned Judge Family Court dated 25.02.2020, pursuant to which an application filed by the Petitioner for setting aside ex-parte judgment and decree dated 18.02.2019 was allowed by holding that a partial ex-parte

judgment and decree in favor of the Respondent dated 22.03.2018 would stand. The Respondent has impugned the said order before this Court without availing the remedy of appeal before the learned District Court. The Petitioner has impugned order dated 25.02.2020 passed by the learned Judge Family Court and the order-in-appeal dated 23.06.2021 passed by the learned Additional District Court, whereby the order passed by the learned Judge Family Court was upheld.

3. The relevant facts are that the Petitioner and the Respondent are married and the Respondent filed a suit for recovery of maintenance and dower against the Petitioner before the learned Judge Family Court in Islamabad. The proceedings continued against the Petitioner ex-parte in Family Suit No.251 of 2017 and ex-parte judgment and decree dated 22.03.2018 were passed by the learned Judge Family Court. Aggrieved by such judgment and decree the Petitioner filed an appeal before the learned Additional District Court, which was partially accepted by the learned Additional District Court by judgment dated 01.12.2018 and the matter was remanded back to the learned Judge Family Court for decision on the question of maintenance and dower afresh. The learned Judge Family Court continued to proceed against the Petitioner ex-parte and after hearing the ex-parte arguments of the Respondent passed another ex-parte judgment and decree dated 18.02.2019. The Petitioner then filed two applications one for setting aside the ex-parte judgment and decree dated 22.03.2018 and the second for setting aside the ex-parte judgment and decree dated 18.02.2019. The learned Judge Family Court accepted the

Petitioner's application for setting aside ex-parte judgment and decree dated 18.02.2019 on the basis that after remand of the matter by the learned Additional District Court the learned Family Court had issued no fresh summons to the Petitioner and consequently, the ex-parte judgment and decree had been passed without serving any notice on the Petitioner. The Petitioner's application for setting aside ex-parte judgment and decree dated 22.03.2018 was, however, dismissed on the basis that the application did not state how the Petitioner came to know about the ex-parte judgment and decree, which led to the filing of the application twenty months after the ex-parte judgment and decree was passed on 22.03.2018. The learned Additional District Court found that the address of the Petitioner as mentioned in the suit was that of his family home also mentioned on the Nikahnama and the Petitioner could therefore not assert that he had no knowledge of the proceedings pending before the learned Family Court. It also upheld the reasoning of the learned Judge Family Court that the Petitioner did not clearly plead how he came to know that the ex-parte judgment and decree had been passed and concluded that the Petitioner had dodged the service and was silently observing the proceedings and now come to the Court seeking setting aside of the judgment and decree.

4. The learned counsel for the Petitioner submitted that the Petitioner had been living in Ireland since 2015 and at the time when the suit was filed by the Respondent, the Petitioner was not in Pakistan. This fact was also revealed by the Respondent herself in her plaint. There was no report that the

Petitioner had been served and in the absence of any record of service on the Petitioner, the learned Judge Family Court decided to proceed against him as ex-parte. The decision to proceed against the Petitioner ex-parte was taken without affecting service in accordance with Order V of the Code of Civil Procedure, 1908 ("**CPC**"), or affecting substituted service. While there was a proclamation issued, the correct address of the Petitioner was not mentioned in the proclamation. And finally, the Petitioner and the Respondent were not only married and their marriage was subsisting, but they were also family members and the Respondent had previously filed a family suit against the Petitioner in the Family Court in Sadiqabad where the Respondent resided and within the territory of which the Petitioner's family home was located. And in such case too, the Respondent had ensured that the service was not affected and had procured ex-parte judgment and decree by abusing the process of the Court. Such suit was finally withdrawn on 24.04.2017 when it was being contested by the Petitioner. And after withdrawing such suit, the suit in which the ex-parte judgments and decrees were passed, was instituted on 08.06.2017 in Islamabad, even though the Respondent continued to reside in Ireland and his family home was also in Sadiqabad and not in Islamabad.

5. The learned counsel for the Respondent submitted that the Petitioner and the Respondent were married in 2009 and the Petitioner then took a second wife in 2011 and had been negligent toward the Respondent ever since. And in 2015 the Petitioner moved to Ireland and had not paid dower to the

Respondent. He further submitted that notices were duly issued to the Petitioner at the address mentioned on the plaint, which was the same address as mentioned on the Nikahnama and the family of the Petitioner, including his brother, still lived at such address. He stated that the Petitioner had been delinquent in discharge of his responsibilities to maintain the Respondent as his wife and to pay the dower to her and was now seeking to have the judgments and decrees passed by the learned Family Court, Islamabad, set-aside only to delay the matter.

6. It is admitted that the marriage between the Petitioner and the Respondent subsists and they are still legally married. It is also admitted that the Respondent has been aware that the Petitioner has been living in Ireland since 2015 and such fact was stated in the Family Suit No.251 of 2017 in relation to which the impugned orders have been passed. Despite the knowledge of such fact, the Respondent did not provide the address of the Petitioner in Ireland for service of notice. The notices that were served according to the record of the learned Family Court were served at the family home of the Petitioner where he admittedly has not been residing since 2015. It is also evident from the record adduced before this Court that the Respondent filed a family suit before the Family Court in Sadiqabad in which an ex-parte judgment and decree dated 10.11.2014 was issued in favor of the Respondent. The Petitioner then filed an application for setting aside such ex-parte judgment and decree on the basis that he was in Ireland at the time when the suit was filed and no notices had been served upon him. The learned Civil Judge, Sadiqabad, by order dated 13.10.2015 found in favor of the

Petitioner and set-aside the ex-parte judgment and decree dated 10.11.2014. The said suit filed by the Respondent was then withdrawn as recorded in order dated 24.04.2017 when the Petitioner was also before the Civil Court in Sadiqabad contesting it. No satisfactory explanation has been furnished by the learned counsel for the Respondent as to why the proceedings pending before the Family Court in Sadiqabad were withdrawn to initiate fresh proceedings before the learned Family Court in Islamabad.

7. The learned counsel for the Respondent submitted that the Respondent came to Islamabad alongwith her father who was unwell and then decided to stay at Bharakahu in Islamabad and therefore filed the suit in Islamabad.

8. This Court asked both the Petitioner and the Respondent, who appeared before this Court in person, to determine if a settlement could be reached amicably given that their marriage was subsisting and further that they were not just spouses but were also cousins. However, none of the parties were willing to attempt an amicable resolution. What emerged from the submissions made by the Petitioner and the Respondent before this Court was that various settlement efforts had been made between the parties in relation to the question of maintenance and dower. But such efforts did not succeed. It also emerged that the Respondent was not living in Islamabad on a permanent basis. While she continued to visit Islamabad, she spent substantial of the time in Sadiqabad where her family lived. This Court is, therefore, not convinced that the Respondent could not effectively serve notices on the Petitioner

while providing his address in Ireland and by requesting the learned Family Court to affect service through substituted means under Order V Rule 20 of CPC at the address in Ireland, if she had so wanted.

9. It is also settled law that a Court must first affect service on a defendant through ordinary means as provided under Order V of CPC. And once service cannot be affected under Order V Rules 15 to 19 of CPC, the Court is to resort to substituted means of service under Order V Rule 20 of CPC. In order for the Court to proceed ex-parte against a defendant, it must be satisfied that the conscience of the party is affected by the knowledge of proceedings pending before the Court and despite such knowledge such party has elected not to appear before the Court to defend himself. [For the law on the manner in which service is to be affected see for example **Mrs. Nargis Latif vs. Mrs. Feroz Afaq Ahmed Khan (2001 SCMR 99)**, **Yaqoob Ali through L.Rs and others vs. Muhammad Ayub and others (PLD 2021 Lahore 678)** and **Muhammad Hussain vs. Rana Sohail Anjum and 8 others (2022 CLC 1529)**].

10. In the instant case, a perusal of the record does not reflect that the learned Family Court applied its mind to determine whether or not the Petitioner was duly served given that the plaint itself stated that the Petitioner was living in Ireland. Prudence demanded that the learned Family Court to have sought from the Respondent the address of her spouse (i.e. the Petitioner) in Ireland to affect service upon him. But

that was not done. This Court therefore finds that the Petitioner was not duly served. The learned Family Court and the learned Additional District Court have both assumed that as notices were served on the Petitioner at his family home, it was not possible that he had not been informed by his family members that notices were served. Other than basing such conclusion on conjecture, there is nothing on record to establish that the Petitioner's conscience was in fact affected by knowledge of the proceedings. The Petitioner and the Respondent are first cousins and spouses. But the Respondent has also produced no evidence to establish that the Petitioner had been informed about the proceedings. The previous round of litigation in Sadiqabad wherein the Respondent also procured an ex-parte judgment and decree against the Petitioner also creates some doubt in the mind of this Court and the benefit of such doubt must be given to the Petitioner as at stake in the present proceedings is the right of the Petitioner to due process and fair trial guaranteed under Article 10A of the Constitution.

11. The second argument that prevailed with the learned Family Court and the learned Additional District Court was that the Petitioner had not clearly pleaded as to how he became aware of the present proceedings. Perusal of the application filed by the Petitioner reflects that he had pleaded that he had been informed by his brother on 12.12.2019 with regard to the ex-parte judgment and decree dated 22.03.2018. This Court summoned the Petitioner's brother, Mr. Alam Zeb son of Muhammad Feroz Khan, who is also respondent No.2 in Writ Petition No.2134 of 2020 and he confirmed that he had been

informed by a family member that the Respondent had procured ex-parte judgments and decrees from the learned Family Court in Islamabad. He submitted that the Petitioner and the Respondent were cousins and consequently, it was during one of the conversation with a family member that he was made aware of the judgment and decree dated 22.03.2018 and after which he informed the Petitioner. This Court has no basis to doubt the averment of Mr. Alam Zeb. While there is a practice of dodging service and watching proceedings silently and then subsequently seeking setting aside of ex-parte judgments and decrees to delay the adjudication of rights, the Court cannot assume that this is what the Petitioner has done in this case, without any evidence being led before the Court supporting such conclusion. No such evidence has been led by the Respondent in the present case.

12. While this Court has sympathy for the circumstances of the Respondent, who claims to not being maintained by the Petitioner after marring for a second time and also not having been granted her right to dower. Such sympathy cannot be a basis to deny the Petitioner's right to a fair trial. The record reflects that at the time of filing of the suit the Petitioner was living in Ireland and no service was ever affected on the Petitioner. The Petitioner claims that he found out about the proceedings from his brother and immediately filed an application for setting aside the ex-parte judgments and decrees. There is nothing on record to controvert such assertion by the Petitioner.

13. In view of the above, this Court finds that the learned Judge Family Court and the learned Additional District Court passed the impugned orders based on misreading of the law and record. The Writ Petition No.3363 of 2021 is therefore **allowed** and the Writ Petition No.2134 of 2020 is **dismissed**. The impugned orders dated 25.02.2020 and 23.06.2021 are **set-aside**. The ex-parte judgments and decrees dated 22.03.2018 and 18.02.2019 are also **set-aside**. The suit filed by the Respondent will be deemed pending before the learned Family Court. The parties will appear before the learned Family Court on **05.12.2022**. On such date the Petitioner will file his written statement before the learned Family Court. And the learned Family Court in consultation with the learned counsels for the parties will put together a schedule to conclude the proceedings in the suit within a period of three months and will proceed with the matter on weekly basis and render a judgment within a period of three months. In the event that any of the parties seeks adjournment to delay the matter, the learned Family Court will exercise its penal powers under provisions of the CPC.

(BABAR SATTAR)
JUDGE

Announced in the open Court on 25.11.2022.

JUDGE