2013 Y L R 1509

[Balochistan]

Before Muhammad Noor Meskanzai and Muhammad Hashim Khan Kakar, JJ

HAMID ALI---Petitioner

Versus

Mst. FARZANA and others---Respondents

Constitutional Petitions Nos.398 and 532 of 2010, decided on 11th April, 2013.

(a) West Pakistan Family Courts Act (XXXV of 1964)---

----S. 5, Sched.---West Pakistan Family Courts Rules, 1965, R.6---Suit for recovery of maintenance---Territorial jurisdiction---Parties were residing at place "P"---Suit was to be tried by the Family Court at place "P"---Cases were remanded to the Family Judge, at place "P" for decision afresh in accordance with law.

CLC 2004 Pesh. 1700; MLD 1996 Lah. 2017; YLR 2010 Lah. 520 and PLD 1993 Lah. 810 distinguished.

(b) West Pakistan Family Courts Act (XXXV of 1964)---

----S. 17---Civil Procedure Code (V of 1908), S.11---Section 11, C.P.C. was applicable to the proceedings under West Pakistan Family Courts Act, 1964.

(c) West Pakistan Family Courts Act (XXXV of 1964)---

----S. 10---Compromise or reconciliation between spouses---Parties continued to be legally wedded and courts were required to leave no stone unturned to effect compromise and reconcile the matter between the spouses.

Khursheed Khosa for Petitioner.

Tahir Ali Baloch and M. Rauf for Respondents.

Date of hearing: 28th March, 2013.

JUDGMENT

MUHAMMAD NOOR MESKANZAI, J.---By this judgment, we propose to dispose of Constitutional Petitions No. 398 and 532 of 2010, as common question of facts and law is involved in both the petitions.

Facts of C.P. No.398 of 2010.

2. Facts relevant for the disposal of instant petitions are that the respondent No.1 instituted a suit for recovery of past, future maintenance at the rate of Rs.15,000 (Rupees Fifteen Thousand per month and medical expenses of Rs.50,000 (Rupees Fifty Thousand) against the petitioner in

the Court of Family Judge, Turbat. It was averred in the plaint that the plaintiff was married to petitioner at Panjgoor on 30th August, 1986 however, later on relations between the spouses remained strained and petitioner neglected the plaintiffs. It was further stated in the plaint that prior to instant suit, the respondent No.1/plaintiff also filed a suit for maintenance in the Court of Family Judge, Panjgoor against the petitioner, which was decreed in favour of respondent No.1/plaintiff. The matter came up to this Court, but eventually on 25th March, 1996, the parties settled the matter in the following terms:

"That the petitioner will pay Rs.3000 only as maintenance to his wife i.e. respondent No. 1 per month from the date of decree to the attorney the respondent also agrees.

That in case the petitioner returns to Pakistan and keep respondent as his wife in accordance with injunction of Islam, the said respondent will perform her duties as wife in accordance with injunction of Islam. In case respondent No. I refuses to join the petitioner, she will not be entitled to maintenance".

3. It was also stated that thereafter the parties joined each other, remained in Muscat and out of the wedlock, a son namely Talha was born. On return from Muscat, the spouse came to Panjgoor and lived together for three years, however, when the defendant retired from his service in the year, 2003 and came to Panjgoor and contracted second marriage and did not pay maintenance to her for the last six years. Plaintiff also claimed Rs.50,000 on the ground that her son fell sick and was treated at Karachi.

4. The suit was contested by the petitioner by way of filing written statement, whereby, besides raising certain preliminary objections, claim of respondent was resisted on merits as well. The trial Court out of the pleadings of parties framed following issues for determination:--

5. Thereafter, the parties were directed to adduce evidence in support of their respective claims. The plaintiff besides recording statement of her attorney also produced two P.Ws., whereas in rebuttal, the respondent produced two DWs and himself appeared in the witness box. The learned trial Court after hearing the parties and evaluating the evidence decreed the suit vide judgment and decree dated 13th March, 2010. The petitioner feeling aggrieved by the judgment/decree passed by the trial Court preferred an appeal before the District Judge Turbat but the same was also dismissed vide judgment/ decree dated 17th May, 2010, hence, instant petition.

FACTS OF C.P. NO. 532

6. The petitioner instituted a suit for restitution of conjugal rights and custody of minor before the Family Judge/Qazi Panjgoor. It was averred in the plaint that he married respondent No. 1. In the year 1999, out of wedlock, a child was born at Muscat. It was further averred that on the enticement of the respondent No.2, the respondent No.1 refrained from performing conjugal rights. According to plaintiff, the son namely Talha has attained the age of Hizanat and hence he is entitled to have the right of Hizanat under law and Sharia. The petitioner took the respondent No.1 to Muscat and provided all facilities, however, the respondent No.1 failed to mend her attitude, hence the suit.

7. The suit was contested by the respondent No. 1 by way of filing written statement wherein besides raising certain legal objections; the claim of the petitioner was resisted on merits as well. The learned trial Court, out of the pleadings of parties framed following issues:--

(i) Whether the suit of plaintiff is not maintainable in view of the preliminary legal objection raised by the defendant in her written statement?

(ii) Whether the defendant No. 1 on the enticement of defendant No.2 left the house of plaintiff and ceased to cohabit him without lawful cause for about four years?

(iii) Whether the plaintiff is entitled to right of Hizanat of his son named Talha?

(iv) Whether the plaintiff is entitled to decree as claimed for?

(v) Relief.

8. Thereafter the parties were directed to adduce evidence in support of their respective

claims. The plaintiff besides recording his statement also produced two P.W.s whereas in rebuttal the respondent produced two D.Ws. and Attorney for respondent No. 1 also appeared in the witness box. The trial Court after hearing the parties and evaluating the evidence dismissed the suit vides judgment and decree dated 5th May, 2010. The petitioner feeling aggrieved by the judgment/decree passed by the Family Judge, Panjgoor preferred an appeal before the District Judge Panjgoor but the same was also dismissed vide judgment/decree dated 21st June, 2010 hence instant petition.

9. We have heard the learned counsel for the petitioner and respondents. Learned counsel for the petitioner in Constitutional Petition No. 398 of 2010 submitted that the very suit filed by the respondent was not competent because the matter was adjudicated upon by the Court of competent jurisdiction in earlier round of litigation. therefore, judgments impugned herein are not sustainable under law. Besides, the defendant/petitioner resides at Panjgoor and Court at Turbat does not have injection.

Learned counsel for the petitioner in Constitutional Petition No. 532 of 2010 argued that the custody of son of the petitioner is liable to be handed over to the petitioner for better future but both the courts below while passing the impugned judgment failed to consider that in such like cases the courts have to see the welfare of the minor. Learned counsel stressed that neither the petitioner has divorced the respondent No.1 nor any mal-treatment has been proved, as such; the respondent No. 1 must perform conjugal right but both the courts below did not take into consideration this aspect of the case.

On the other hand, learned counsel for respondent in both the petitions strenuously opposed the petitions and maintained that since concurrent finding of facts have been recorded by the lower forums, therefore, while exercising constitutional jurisdiction this Court cannot undertake exercise of reappraisal of evidence. It was further argued that the petitions are based on mala fide intention and thus are liable to be dismissed. Reliance was placed on following judgments:

(1) CLC 2004 Peshawar 1700

(2) MLD 1996 Lahore 2017

(3) YLR 2010 Lahore 520

(4) PLD 1993 Lahore 810

10. We have considered the arguments advanced by both the learned counsel for parties and perused the available record of the case minutely. In our considered opinion, the suit filed before the Family Judge, Turbat was not competent and the objection raised by the defendant (petitioner in Constitutional Petition No. 398 of 2010) was illegally turned down by both the Courts below: admittedly the marriage between the parties was solemnized at Panjgoor. Lastly, the parties resided there together. Prior to the suit in question, the plaintiff/respondent filed a suit for maintenance before the Family Judge Panjgoor which ultimately came to this Court and was decided by means of consent order dated 25th March, 1996 in the terms mentioned hereinbelow:--

"Both the learned counsel for parties have submitted following compromise, and request that petition be disposed of in terms thereof:--

The parties in the petition have reached to a compromise in the fallowing terms:--

(1) That the petitioner will pay Rs.3000 only as maintenance to his wife i.e. respondent No. 1; per month from the date of decree to which the attorney of the first respondent also agrees.

(2) That in case the petitioner returns to Pakistan and keeps first respondent as his wife in accordance with injunctions of Islam the said respondent will perform her duties as wife in accordance with injunctions of Islam. In case respondent No.1 refuses to join the petitioner she will not be entitled to maintenance.

It is prayed that the petition may be disposed of in terms of above compromise

Sd/ Counsel for respondent No. 1

Sd/ Attorney for respondent No. 1

In view of above settlement arrived at between the parties, the petition is disposed of and directions are hereby issued to modify the decree of family Judge/Qazi, Panjgoor, in accordance with the conditions, agreed between the parties.

No order as to costs."

11. Thereafter, the execution application filed by the respondent No.1 before the Family Judge, Panjgoor was dismissed in following terms:--

12. After passing of the order referred to hereinabove by the Family Judge, in execution proceedings, the parties joined each other and remained at Muscat for the period of almost 3 years. Thereafter, they returned to Panjgoor and resided there together. According to petitioner, the respondent/plaintiff left the house of petitioner. The petitioner resisted the suit on the principle of res judicata and incompetency of the same before the Court of Family Judge, Turbat. For the sake of convenience, the relevant objections are reproduced herein below:--

13. The trial Court framed issue No.1 and decided the same as under:--

The defendant raised legal objection while filing written statement that the suit is not maintainable under section 11, C.P.C. On the ground of res judicata.

It is worth to add here that on 6-1-2010 the issue No.1 has been No.1 has been disposed off after argument advanced by counsel of both the parties and issue No.1 has already been decided in negative meaning thereby issue No.1 need not to be discussed again. Apart from this it is well-settled that section 11, C.P.C. does not attract on family laws therefore, as the issue No.1 has already been discussed and has been decided in favour of plaintiffs on 6-1-2010 thus, need not be discuss (sic) again."

14. The learned trial Court and the appellate court did not attend to both the points in accordance with relevant law, which of course, affects the competency of the suit qua the territorial jurisdiction and maintainability of the proceedings, as per the section 11 of the Civil Procedure Code read with section 17 of West Pakistan Family Courts Act, 1964. Moreover; the perusal of plaint reveals that it has never been stated that parties have ever resided at Turbat even for a day what to speak of three years; secondly the respondent No.2 is getting education at Panjgoor; thirdly, in the plaint there is no claim that respondent has ever ousted the plaintiff out of his house. The law regarding the institution of the suit stands clear on the subject that as per the rules framed under the West Pakistan Family Courts Act, 1964 and known as West Pakistan Family Courts Rules, 1965. Rule 6 thereof is relevant for the purpose which is reproduced herein below:--

"The court which shall have jurisdiction to try a suit will be that within the local limits of which:--

(a) the cause of action wholly or in part has arisen; or

(b) where the parties resided together;

Provided that in suits for dissolution of marriage or dower, the Court within the local limits of which the wife ordinarily resides shall also have jurisdiction."

15. Furthermore; in Para No.6 of the plaint, it has categorically been stated that the brother of plaintiff is serving in PIA and recently been posted at Turbat. Similarly in para 12 of the plaint, the plaintiff stated that she is temporarily residing at Turbat. For the sake of convenience, Para 12 is reproduced herein below:--

16. In these circumstances, we are of the considered opinion that the Court at Turbat ceased to have any jurisdiction over the matter but this point despite being raised was not attended to by the lower forums. Secondly, the issue No.1 i.e. as to whether the suit is hit by the provisions of section 11, C.P.C. was also dealt with illegally. It is painfully noted that both the courts below remained oblivious of the relevant provisions of law i.e. section 17 of the

Family Court Act, which reads as under:--

Provision of Evidence Act and Code of Civil Procedure not to apply.---(1) Save as otherwise expressly provided by or under this Act, the provisions of the Qanun-e-Shahadat, 1984 (P.O. No. 10 of 1984) and the Code of Civil Procedure, 1908 except sections 10 and 11, shall not apply to proceeding before any Family Court in respect of Part I of Schedule.

(2) Sections 8 to 11 of the Oaths Act, 1873, shall apply to all proceedings before the Family Court."

Besides, the trial Court did not conduct pre-trial and post trial proceedings. which are mandatory in nature.

17. In view of the clear legal provision mentioned hereinabove, there was no occasion for the trial Court to have held that section 11 of the C.P.C. does not apply in the proceedings under Family Court Act and the failure of the appellate Court to adhere to this aspect of the matter is something that compels us to interfere in the impugned judgment and decree by way of exercising constitutional jurisdiction. With the result, the judgment and decree dated 13th March, 2010 passed by Family Judge, Turbat and upheld by the District Judge are hereby set aside. The suit filed by the respondent/plaintiff stands transferred from the file of Family Judge, Turbat to the of Family Judge, Panjgoor.

18. Now adverting to Constitutional Petition No. 532 of 2010, it is quite strange that both the Courts despite holding that the respondent is still legally wedded wife of the petitioner but dismissed the suit for restitution of conjugal rights. The trial Court has observed that at the eve of reconciliation proceedings, the plaintiff failed to appear, therefore, it was concluded that me petitioner/plaintiff has lost interest in defendant/respondent No.1. The trial Court could have adjourned the case and may have adopted the coercive method for procuring the attendance of plaintiff, enabling itself to ascertain as to whether the parties could live within the limits prescribed by Almighty Allah. During the pendency of the proceedings of Civil Suit No. 60 of 2006 while entering into witness box, the plaintiff/petitioner, though refuted a suggestion, yet the intention of respondent can well be gathered that if she is paid her dower and maintenance, she is prepared to live with petitioner. For the sake of convenience, the relevant answer is reproduced:--

19. Admittedly, both the parties still continue to be legally wedded and the Courts are required to leave no stone unturned to effect compromise and reconcile the matter between the spouses, because such relations are sacred and deserve utmost respect, particularly in Islam. As the record reflects that despite rejection on execution application in the case of maintenance, the arties differences, resided together and the kid namely Talha was born in consequence of the last reconciliation. If the Court and the parties arrive at a definite conclusion that the parties can no more live within the limits and parameter ordained by Almighty Allah, then in that case the course lies in respectable separation. Had both the matters been proceeded with by one and the same Court, it is expected that the trial Court might have reached at a better conclusion regarding either of the options. But since both the cases were proceeded with by different Courts, with the result, the main object i.e. the continuity or discontinuity of the marriage could not be achieved. We have gone to the citation referred to by the learned counsel for the respondent No.1 but the same are inapplicable as the suit filed by the respon-dent/plaintiff was not competent before the learned Family Judge, Turbat, therefore, the question of concurrent finding of facts or appraisal of evidence does not arise. Besides in order to avoid conflicting judgments, the consolidation of such sorts of suits is essential and inviolable.

In these circumstances and, in view of the above discussion, we deem it appropriate to set aside both the judgments and decrees dated 5th May, 2010 passed by Family Judge, Panjgoor and upheld by the District Judge, Panjgoor vide judgment and decree dated 21st June, 2010 and the suit filed by the petitioner shall be deemed pending before Family Judge, Panjgoor.

In view of above stated situation, we are of the considered opinion; let a fair opportunity be provided to both the parties to resolve their differences by arriving at a positive solution and the remedy lies in remanding both the cases to the learned Family Court, Panjgoor, who shall consolidate the same and proceed with the matters deciding the same in accordance with law within the span of two months after the receipt of this judgment by providing fair opportunity to both the parties to produce further evidence, if so advised. Needless to observe, that the reconciliation proceedings within the meaning of sections 10 and 12 of the Act shall be conducted by ensuring the presence of the parties in person at the relevant dates. Resultantly both the petitions stand disposed of in the above terms.

AG/35/Q Order accordingly.