JUDGMENT SHEET
PESHAWAR HIGH COURT D.I.KHAN BENCH
JUDICIAL DEPARTMENT

WP No. 529-D of 2015

JUDGMENT

Date of hearing 23.06.2016

Appellant / petitioner Syed Agha Hussain Shah etc by

Muhammad Waheed Anjum Advocate

Respondent Mst Deena Bibi etc by

Chaudhry Muhammad Aziz Advocate

MUHAMMAD GHAZANFAR KHAN, J.-This writ petition under Article 199 of the Constitution of Pakistan, 1973 is directed against the judgment dated 06.06.2015 of the learned Additional District Judge, Paharpur (D.I.Khan), whereby appeal of the present petitioners against the order dated 22.04.2015 of the learned Civil Judge-I/Judge Family Court, Paharpur (D.I.Khan) has been dismissed.

2. Brief facts of the case are that the respondents No.1 & 2 filed a suit for dissolution of marriage, recovery etc against the present petitioners before the Court of learned Judge Family Court, Paharpur (D.I.Khan). The petitioners appeared and filed their joint written statement, whereafter in the light of divergent pleadings of the parties issues were framed and parties

were asked to examine their witnesses. Respondents No.1 & 2 examined their witnesses and closed the same on 30.09.2013, whereafter the case was adjourned for evidence of present petitioners but they failed to produce their evidence. Thereafter the present petitioners failed to appear before the learned Judge Family Court and ex-parte decree was passed in favour of respondents No.1 &2 on 31.01.2014. On 02.12.2014, the present petitioners filed an application for setting aside ex-parte decree, which was dismissed by the learned trial Court on 22.4.2015. Feeling dissatisfied from order dated 22.04.2015, the petitioners preferred an appeal before learned appellate Court, which was also dismissed by learned appellate Court on 06.06.2015 , hence the instant writ petition.

3. Learned counsel for petitioners argued that though the petitioners have shown plausible and good cause for their non-appearance but both the Courts below have miserably failed to appreciate the law on the point in the case and dismissed the application of petitioners merely on the basis of technical ground of limitation.

4. On the contrary, learned counsel for respondents argued that the conduct of petitioners throughout proceedings remained lethorgic and after passage of ex-parte decree in favour of respondents

valuable rights have been accrued in their favour and both the Courts below have concurrently dismissed the application and appeal of petitioners, which is just, fair and in accord with law, so needs no interference by this Court in writ jurisdiction. He solicited for dismissal of instant writ petition.

5. I have heard arguments of learned counsel for parties and perused the record with their valuable assistance.

6. It is a fact that provisions of Civil Procedure Code except Sections 10 and 11 are not applicable to the proceedings before Family Court and Family Court can adopt any procedure acceptable in the law to carry on its proceedings. However, it is also a matter of fact that section 9 (5) of the Family Courts Act, 1964 provides that;

> " *If the defendant fails to appear on the date fixed by the Family Court for his appearance then:-*
> *(a) if it is proved that the summons or notice was duly served on the defendant, the Family Court may proceed ex parte:*
> *Provided that where the Family Court has adjourned the hearing of the suit ex parte, and the defendant at or before such hearing appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Family Court directs, be heard in answer to the suit as if he had appeared on the day fixed for his appearance; and*
> *(b) if it is not proved that the defendant was duly served as provided in sub-section (4) of section 8, the Family Court shall issue fresh*

> *summons and notice to the defendant and cause the same to be served in the manner provided in clauses (b) and (c) of sub-section (1) of section 8*".

7. This case squarely comes under proviso (a) of section 9(5) of Family Courts Act, 1964. However, this section cannot be read in isolation of sub-section 7 of section 9 of Family Courts Act, 1964, which reads as;

> "*The notice of passing of the ex-parte decree referred to in subsection (6) shall be sent to the defendant by the Family Court together with a certified copy of the decree within three days of the passing of the decree, through process server or by registered post, acknowledgement due, or through courier service or any other mode or manner as it may deem fit"*.

So it has been made imperative upon the Family Court to send notice to the defendant of ex-parte decree passed against him through process server or by registered post, acknowledgment due or through courier service or any other mode or manner as it may deem fit.

8. The entire record is silent that whether after passage of ex-parte decree the Family Court has ever sent certified copies of the ex-parte decree to the defendant as provided by the law. So in such scenario, the provision of subsection 6 of section 9 of Family Courts Act, 1964 shall come in field which provides that;

> "*In any case in which a decree is passed ex parte against a defendant under this Act, he*

may apply within [thirty days of the service of notice under sub-section (7) of the passing of the decree], to the Family Court by which the decree was passed for an order to set it aside, and if he satisfies the Family Court that he was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was heard or called for hearing, the Family Court shall, after service of notice on the plaintiff, an on such terms as to costs as it deems fit, make an order for setting aside the decree as against him and shall appoint a day for proceeding with the suit:
Provided that where the decree is of a such nature that it cannot be set aside as against such defendant only, it may be set aside against all or any of the other defendants also".

9. As is evident from the record that no notice of passing ex-parte decree under subsection 7 of section 9 of Family Courts Act, 1964 has been served upon the petitioners, so the time shall automatically start running from the date of knowledge of the decree. The learned Courts below have miserably failed to appreciate the mandate of law as discussed above.

10. Another aspect of the case is that the learned trial Court is duty bound under section 12 of Family Courts Act, 1964 that on conclusion of trial the Family Court shall attempt another effort to effect a compromise or reconciliation between the parties within a period not exceeding fifteen days. The entire record shows that on conclusion of trial no efforts were made for compromise/reconciliation between the parties, so the

mandate of section 12 of Family Courts Act, 1964 has also been violated in the present case. Though in the present case, the decree has been passed ex-parte but it can be taken as an exception that in such scenario complying with the mandate of section 12 of Family Courts Act, 1964 is impossible as the defendant/petitioner was not before the Court. As is discussed above when it has been made imperative upon the Family Court that after passage of ex-parte decree the Court has to send the certified copies of the decree at the known address of the judgment debtor through means discussed above, so this analogy can be applied. In eventuality of an ex-parte proceedings the Family Court can before passing the decree issue a notice to the defendant or as the case may be for his/her appearance for compliance of mandate of section 12 *ibid*. The intention of legislature was to keep intact bond of marriage at any cost. So these provisions cannot be bypassed in a hasty manner. At the time of arguments, the Court was apprised by learned counsel for the parties that after passage of ex-parte decree and after observing the period of Iddat, the respondent No.1 has contracted second marriage, so the ex-parte decree to the extent of dissolution of marriage has become infuctuous. So far as other reliefs claimed by the respondents are concerned

the petitioners should have been given fair opportunity to dislodge the claims of the respondents. Though the legal requirements as discussed above have not been complied with, so obvious result of the above is that the judgments passed by learned lower Courts are against law and facts available on file, therefore, this writ petition is partially allowed on payment of cost Rs.5000/- and the judgments of both the learned Courts below are set aside by accepting the application filed by petitioners for setting aside ex-parte decree passed by learned Judge Family Court to the extent of recoveries and return of dowry articles and the case is remanded back to the learned trial Court with direction to give full opportunity of hearing to the parties and thereafter decide the case in accordance with law.

Announced.
23.06.2016
Aftab/* *JUDGE*