Date of hearing: 28.10.2015.

Judgment

Through the above captioned petition filed under Section 44 of the Azad Jammu and Kashmir Interim Constitution Act, 1974, following relief has been claimed by the petitioners:--

> "In matrix of the above stated facts, it therefore, very humbly prayed that by accepting the instant writ petition through an appropriate writ the impugned order of Family Court No. Muzaffarabad dated 29.01.2014 may kindly be declared illegal, against the settled principle of statutory justice and contrary to provision of family Court Act 1993 and the same may kindly be set aside. Resultantly the application of petitioner for setting aside *ex-parte* proceedings may kindly be allowed while quashing the *ex-parte* order dated 21.09.2013. Any other relief which this Honble Court, deems proper may also be given to the petitioner in vindication of the grievance afore referred."

2. Facts of the case, shortly stated are that petitioner and Respondent No. 2 are husband and wife. It is stated that Respondent No. 2 filed a suit for dissolution of marriage before learned Family Court No. 1 Muzaffarabad and learned Family Court proceeded *ex-parte* against the petitioner. It is further stated that the service of the petitioner was not made in accordance with law, however, after knowing the *ex-parte* proceedings the petitioner approached the learned Family Court No. 1 Muaffarabad for cancellation of *ex-parte* proceedings dated 21.09.2013.

3. Respondents were summoned for filing comments/written statement, in response whereof, Respondent No. 2 has filed written statement, wherein, she has refuted the claim of the petitioner in toto and it has been stated that the petitioner has no *locus standi* to file the instant writ petition because he had not appeared before the trial Court in order to prolong the litigation, deliberately and the application for cancellation of *ex-parte* decree was also time-barred, hence, was not entertainable under law and has rightly been turned down by the learned trial Court. The respondent: has craved for dismissal of the writ petition with costs.

4. Mr. Amjad Siddiqui, Advocate, the learned counsel for the petitioner-contended that no other adequate remedy is available to the petitioners and further contended that the learned Family Judge has violated the provisions of Sections 8 & 9 of Family Court Act. The learned counsel further contended that the constitutionally guaranteed right of the petitioner has been infringed and the order is ab-initio, illegal and writ of certiorari is warranted in these circumstances. The learned counsel finally referred 2000 YLR 2 523.

5. Miss Kausar Awan, advocate, the learned counsel for Respondent No. 2 contended that the petitioner was served properly and he could not show sufficient cause for setting aside the *ex-parte* proceedings. The learned counsel further contended that family law is a special law which regulates its own procedure and principle of condonation of delay is not applicable to the case in hand and the application was time barred by one day. The learned counsel contended that other adequate remedy by way of appeal is also available to the petitioner, hence, the petition being devoid of any force is liable to be dismissed with exemplary costs.

6. I have heard the learned counsel for the parties and scanned the record of the case, with utmost care.

7. Having restricted myself from commenting upon the merits of the case, I would like to refer the proceedings of the trial Court that the plaintiff/respondent, herein despite being resident of Tehsil Sharda District Neelum, filed the suit for dissolution of marriage before the Court of Civil Judge/Judge Family Court No. 1, Muzaffarabad on 12.09.2013 and the case was fixed for 21.09.2013. On 21.09.2013 a receipt of registered post was presented before the Court alongwith a newspaper, dated 21.09.2013. On the same date, the petitioner, herein could not appear before the Court and was proceeded *ex-parte*.

8. A glance perusal of interim orders and the publication, available on the file shows that the service was issued on 12.09.2013 for appearance of the petitioner on 21.09.2013. It is pertinent to add that the plaintiff/non-Petitioner No. 2 herself admits that the defendant is an employee of Armed forces, serving in Pakistan but the service was issued on the address of District Neelum. It was impossible for the petitioner to appear before the Court in Muzaffarabad on the date, but the learned trial Court has passed the said *ex-parte* order in a hasty manner.

9. The application for vacation of *ex-parte* order was filed before the trial Court on 22.10.2013, which was placed before the Court on 23.10.2013, which was, as per the claim of the plaintiff and version of trial Court was beyond limitation. In this regard, Sections 8 and 9 of AJ&K Family Courts Act, 1993 are reproduced, herein below:

"**8. Intimation of defendants.--**(1) Within three days of the presentation of the plaint to a Family Court the plaintiff shall send to each

warranted under law. In this view of the matter, the order of *ex-parte* proceeding was not permissible in this case before 06.10.2013, hence, the *ex-parte* proceeding were only competent on or after 06.10.2013. In this eventuality the application filed by the petitioner on 22.10.2013 was within time. In view of above the order of the trial Court on application as being time barred is without any legal force which warrants vacation, hence, accordingly ordered. This view of the Court is fortified by 2000 YLR 2523 in case titled *"Rafhat Rashid and 7 others vs. Ghulam Sarwar"* decided by Honble Shariat Court AJ&K decided on 12.05.2000, relevant captions are reproduced hereunder:--

> "The word shall has been used in the above referred provision of law but no consequences are provided for non-compliance of the said provision of law. It means that this provision of law is not mandatory but directory in nature as no penal clause is provided to this provision of law. It is settled principle of law that where no penal clause has been provided to a certain provision of law, then it deems to be directory in nature. Thus under this provision of law, a plaintiff may intimate the defendant/defendants even after the expiry of three days time-limit.
>
> Sub-section (1) of Section 9 of the Act provides that within 15 days from service through registered post or through notice in the Newspaper whichever is earlier the defendant shall appear in the Court and file his written statement. It means that maximum time-limit is 15 days for his appearance and any action against him on the part of the Court before expiry of time-limit is not warranted under law. Sub-section (4) of Section 9 of the said Act envisages that if the defendant fails to appear within 15 days, the Court may proceed against him *ex-parte*. It implies that the Court may or may not proceed *ex-parte* and it is Left to the discretion of the Court to proceed *ex-parte* or otherwise even after the expiry of 15 days from service. It further shows that to proceed *ex-parte* against a defendant before expiry of time-limit is contrary to law.
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> Therefore, the tria1 Court in the instant case initiated the *ex-parte* proceedings before expiry of 15 days as time-limit specified for appearance of the defendant and this act of the Court was not in accordance with law.
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> The position which emerges out from the perusal of the relevant provision of law is that when the Court may abstain its hands to proceed *ex-parte* even after the expiry of 15 days, then to proceed *ex-parte* before the expiry of said time-limit definite1y amounts to subversion to the intent and purposes of the legislation.
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> Testing the case of the respondent on the above criteria, the trial Court has rightly set-aside the *ex-parte* decree as the same was recorded on the basis of *ex-parte* proceedings i.e., before expiry of time-limit specified in sub-section (1) of Section 9 of "The Family Court Act". Even otherwise the appellant has brought a suit for jactitation of marriage and the nature of the suit requires its disposal on its merits for the reason that the *ex-parte* decree in such-like case may not leave a positive effect while living in a Muslim society.
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> Thus, in the light of above observation, the appea1 being devoid of force is hereby dismissed and the impugned order is allowed to stand. The trial Court is directed to decide the case on merits at its earliest."

12. As far as the objection regarding the maintainability of the writ petition on ground of other adequate remedy in shape of appeal under Section 14 of AJ&K Family CourtAct, 1993 is concerned, it may be added that the impugned order is an interim order against which neither appeal nor revision lies. In this eventuality, it is to be seen that whether the discretionary powers exercised by the Family Court in dismissing the petitioner/defendant application for setting-aside *ex-parte* proceedings being not in accordance with the law can be looked in by exercising constitutional power. It is settled law that such like discretionary orders are not immune from judicial review. Hence, the constitutional petition against such interim order is competent in circumstances. The aforesaid view is fortified by the case titled *"Mohsin Shah vs. Qaseema Wahid"* (1995 MLD 1032) as well as case titled *Mst. Shereen Masood vs. Malik Naseem Hassan, Judge Family Court, Lahore and another"* (1985 CLC 2758), relevant reports are reproduced herein below:--

> **1995 MLD 1032**
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> "Now coming to the legal objection that the writ petition is not competent against an interim order. The case of *Mst.* Shereen Masood (supra) is a complete reply. On the other hand, the learned counsel for the plaintiffs could not substantiate his arguments with reference to any precedent. Even otherwise after holding that the order is illegal it is in nobodys interest that the writ petition should be dismissed being incompetent. The result would be that *ex-parte* decree would be set-aside by the appellate Court on this ground alone and case remanded to the trial Court for fresh decision. This would be only involving in superficial technicalities rather than affording justice to the parties."
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> **1985 CLC 2758**
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> "The power given to Court was not obligatory but discretionary-Arbitrary exercise of such powers and discretionary orders not made

"It is primarily to be seen as to whether the appeal against any interim order is competent. A perusal of the Azad Jammu and KashmirShariat Court Act reveals that no appeal is competent against an interim order. To avoid protracted litigation no appeal or revision is provided against interim orders. Reference is made to *Mst. Nasim Bashir vs. Abdul Jabbar* [2003 SCR 536].

Relevant reports from the case referred in above said case (2003 SCR 536) are usefully reproduced hereunder:--

> "Therefore, keeping in view the phraseology employed in use of words decision or `decree in Section 14 of the Family Courts Act, 1993 in the light of dictionary meaning approved by the wisdom of the learned Judges while resolving the controversy in above referred authorities, we can safely arrive at a conclusion that interlocutory matters which do not finally dispose of the cases are not appealable before the Shariat Court. It follows that the appeal filed before the Shariat Court against the order recorded by the Judge Family Court
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> for restoration of the suits was not competent. Therefore, the order passed by the Shariat Court was not maintainable as such is set-aside by accepting the appeal."

13. The nutshell of the above referred cases is that no appeal is competent against interim order.

14. The gist of the above detailed discussion is that the instant writ petition is accepted. The *ex-parte* order dated 21.9.2013 and 29.1.2014 passed by learned Judge Family Court No. 1Muazaffarabad (Respondent No. 1 herein)are hereby set aside. The defendant/ petitioner, herein is directed to file written statement before the Court within fifteen days from this order and the trial Court is directed to decide the case on merits, after hearing the parties within the period stipulated in the Act, first deciding the territorial jurisdiction of the Court.

Order announced. The file shall be consigned to record after due completion. In this case after arguments the record of the trial Court was summoned, hence, the same shall be sent to the said Court, forthwith.

(R.A.) Order accordingly