IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:
MR. JUSTICE YAHYA AFRIDI
MR. JUSTICE AMIN-UD-DIN KHAN

Civil Petition No.1737-L/2020
(Against the judgment dated 29.10.2020 passed by the Lahore High Court, Lahore in W.P. No.13063/20)
Fozia Mazhar

...Petitioner

Versus

Additional District Judge, Jhang and others

...Respondents

For the Petitioner: Mr. Muhammad Shahzad Shaukat, ASC
(via video link from Lahore)

For Respondent No.3: Mr. Ali Masood Hayat, ASC
(via video link from Lahore)

Date of hearing: 11.03.2024

ORDER

Yahya Afridi, J.- This petition relates to a matrimonial dispute between Fozia Mazhar **("Petitioner")** and Mubashir Hanif **("Respondent")** having a prolonged and chequered history spanning over more than a decade and still pending final adjudication in two jurisdictions – Pakistan and Canada.

2. The petition is a challenge made by the petitioner to the concurrent findings of three courts below declaring that recalling of the decree of dissolution of marriage on the ground of *khula* on a socalled joint application of the spouses was obtained through misrepresentation

warranting interference under Section 12(2), Code of Civil Procedure, 1908 **("C.P.C.")**.

3. The relevant facts for the adjudication of the present petition filed by Fozia Mazhar are that the petitioner and the respondent are first cousins and were married in Pakistan on 03.04.2010; the petitioner, on 17.10.2014, filed a suit for dissolution of marriage in the Family Court, Jhang, which following failure of pre-trial reconciliation, was decreed on the basis of *khula* subject to return of dower amounting to Rs. 2000/- *vide* judgment and decree dated 04.04.2015; and, on 27.04.2015, a purported joint application for setting aside the decree dated 04.04.2015 was filed on behalf of the petitioner and the respondent, which was allowed *vide* order dated 27.04.2015. This order of recalling the decree of dissolution of marriage on the basis of *khula* was challenged by the respondent in a petition under Section 12(2) of C.P.C. which was allowed by the Family Court and confirmed by the District Court, and not interfered with by the High Court in the impugned judgement. Hence, the present petition.

4. Learned counsel for the petitioner contends that, in the first place, the provisions of Section 12(2) of C.P.C. would not be invoked, in view of their inapplicability expressly provided under Section 17 of the Family Courts Act, 1964 **("Act")**. He further contends that the purport of Section 7 of the Muslim Family Laws Ordinance, 1961 **("Ordinance")**

read with Section 21 of the Act provides that the decree for dissolution of marriage would be effective only after the procedure provided under Section 7 of the Ordinance has been complied with, which the learned counsel contends was not done in the present case, and thus, the petitioner was well within her rights to seek reunion with the respondent, despite her earlier claim for dissolution of marriage. It was further argued that the application filed by the petitioner on 27.04.2015 was in fact an application simpliciter for withdrawal of the suit for dissolution of marriage, and thus, did not require the consent of her husband, Mubashir Hanif. Finally, it was asserted that the very conduct of the respondent in executing a divorce deed dated 27.11.2015 amounts to an admission as well as manifests his knowledge that the decree earlier passed on 04.04.2015 had been recalled, otherwise there was no need for the respondent to proceed with the divorce. The learned counsel seeks reliance on **Syed Ali Nawaz Gardezi v. Lt.-Col. Muhammad Yusuf (PLD 1963 SC 51)**, **Mst. Farida Parwin v. Qadeeruddin Ahmad Siddiqi (PLD 1971 Karachi 118)**, and **Mst. Rehmat Bibi v. Mst. Sharifan Bibi (1988 SCMR 1812)** to support his submissions.

5. In response, the learned counsel for the respondent contends that the general principles provided in C.P.C. are applicable in the proceedings before the Family Court under the enabling provisions of the Act. He further contends that the procedure provided in Section 7 of the Ordinance read with Section 21 of the Act is not

mandatory. Finally, the learned counsel contends that the stance of the respondent was supported by the evidence produced by both sides i.e. testimony of attorney of the respondent **("Attorney")**, namely, Khalid Yasir Hanif (AW-1), the counsel of the respondent, namely, Muhammad Asif Mughal (CW-1) and Junaid Hassan (CW-2), the counsel of the petitioner, who had actually filed the application for recalling of the decree. Reliance was placed on the judgments reported as **Muhammad Arshad Anjum v. Mst. Khurshid Begum and others (2021 SCMR 1145), Allah Dad v. Mukhtar and another (1992 SCMR 1273), Allah Rakha and others v. Federation of Pakistan and others (PLD 2000 Federal Shariat Court 1), Board of Governors, Area Study Centre for Africa and North America, Quaid-e-Azam, University, Islamabad and another v. Ms. Farah Zahra (PLD 2005 Supreme Court 153)** and **Barkhurdar and others v. Muhammad Razzaq and others (PLD 1989 Supreme Court 749)**.

6. Given the submissions rendered by the learned counsel for the parties and after reviewing the material on the record, we find that following issues require consideration and determination by this Court:

i) **Whether Section 12(2) of C.P.C. can be invoked to challenge the judgment and decree passed by a Family Court under the Family Courts Act, 1964?**

ii) **Whether the High Court in the exercise of its constitutional writ jurisdiction rightly declined to not interfere in the concurrent findings of facts recorded by the courts below?**

iii) **Whether recall of the decree of dissolution of marriage on the ground of *khula* passed by the Family Court vide order dated 27.04.2015 was in violation of Section 7 of the Muslim Family Law Ordinance, 1961 read with Section 21 of the Family Courts Act, 1964?**

7. Our views on each of the above stated issues are as follows in *seriatim*.

Issue No. I

Application of Section 12(2) of C.P.C. in proceedings before Family Courts

8. Section 17 of the Act clearly provides that:

> **"17. (1) Save as otherwise expressly provided by or under this Act, the provisions of the Qanun-eShahadat, 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, 1872, shall apply to all proceedings before the Family Courts."**

The letter of the above stated law is but clear, vesting the Family Court not to be shackled by rigors of intricate procedural rules provided under C.P.C., and granting the Family Court, the authority to proceed swiftly to resolve the dispute between the estranged spouses. A glance through the jurisprudence regarding the applicability of the provisions or for that matter, the general principles enunciated in C.P.C. that have developed over time by this Court would be beneficial for addressing the present issue before us.

Some of the pertinent discourse on the subject rendered by this Court is contained in the following decisions:

Sayed Abbas Taqi Mehdi v. Mst. Sayeda Sabahat Batool (PLJ 2010 SC 891)

The issue in this case involved a challenge made to an *ex-parte* order passed by the Family Court in suits for possession of dowry articles and maintenance. The Court held that the Family Court had correctly dismissed the application for setting aside *ex-parte* decree on merits as well as being time barred, and observed that though the provisions of C.P.C. and law of evidence are not applicable *qua* the proceedings before the Family Court in terms of Section 17 of the Act yet the Family Court has to regulate its own proceedings in accordance with the

provisions of the Act, and thus, the Family Court is not barred to follow the principles of C.P.C.

Muhammad Tabish Naeem Khan v. Additional District Judge, Lahore (2014 SCMR 1365)

The challenge made to an *ex-parte* order maintaining the decisions of the Family Court, District Court, and the High Court allowing the maintenance allowance to a spouse and granting her the dowry decree was repelled by this Court, since the challenging petitioner neither filed for seeking the setting aside of the *ex-parte* decree passed against him nor did he file any appeal against the same. This Court further opined that, if a defendant of a family matter, who is duly served; and especially the one who appears and disappears and also does not file his written statement within the time allowed to him by the Court, the Court shall have the inherent power to proceed to strike-off his defence, and to pass an *ex-parte* decree in line with the principles, as are enunciated by C.P.C. In any case, it was held that striking-off defence of a party by the
Family Court cannot be considered to be void.

Muhammad Arshad Anjum v. Mst. Khurshid Begum (2021 SCMR 1145)

In this case, the petitioner purchased land unaware that it was under attachment due to a decree of the Family Court in favor of the respondent. The question before the Court was in essence, whether the exclusion of certain provisions of C.P.C. provided under Section 17 of the Act barred the petitioner from approaching the Family Court for a re-examination of the

judgment within the contemplation of Section 12(2) of C.P.C. or that he should have asserted his claim of being a *bona fide* purchaser with consideration as an intervener in civil plenary jurisdiction. The Court ruled that the Family Court had the authority to re-examine its earlier decision to ensure justice and prevent abuse of its jurisdiction and for the said purpose, in the absence of any express prohibition in the Act, it could borrow the procedure from other legal avenues. The petition for leave to appeal was allowed, overturning the impugned judgment, and allowing the application of the petitioner under Section 12(2) of C.P.C. to proceed.

9. Given the above clear view of this Court on the issue, we have no manner of doubt that the Family Court may apply the general principles enshrined in C.P.C. in proceeding with not only the trial but also exercise jurisdiction in entertaining an application of an aggrieved party, challenging the validity of a judgment, decree or order on the plea of fraud or misrepresentation, as was done by the respondent in the present case, and rightly maintained so by the three Courts below.

Issue No. II

Interference in concurrent findings of facts while exercising constitutional writ jurisdiction.

10. It is important to underscore that the High Court, in exercise of its constitutional writ jurisdiction, is not supposed to interfere in the findings on controversial questions of fact based on evidence. The scope of judicial review by the High Court under

Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 **("Constitution")** in such cases is limited to the extent of misreading or non-reading of evidence, or if the finding is based on no evidence, which may cause a miscarriage of justice. It is not proper for the High Court to disturb the finding of fact through a reappraisal of evidence in constitutional writ jurisdiction or to exercise this jurisdiction as a substitute for revision or appeal.[1]

We, therefore, observe that the findings of facts rendered by the District Court on appeal under the Act must as a rule be treated final and any interference in the same by the High Court in its constitutional writ jurisdiction should only be resorted to as an exception in cases where the findings are based on no evidence or the findings are the result of gross misreading or non-reading of material evidence, making the findings without lawful authority and of no legal effect in terms of Article 199(1)(a)(ii) of the
Constitution.

11. In view of the above principle regarding the scope and ambit of interference by the High Court in the findings of fact while exercising jurisdiction under Article 199 of the Constitution, we now consider the crucial facts of misrepresentation asserted by the respondent in his application filed under Section 12(2) of C.P.C. and the findings recorded thereon by the Courts below.

12. On a careful reading of the application dated 27.04.2015,

[1] *Shajar Islam v. Muhammad Siddique PLD 2007 SC 45, Hamad Hassan v. Isma Bukhari 2023 SCMR 1434.*

it is noted that: firstly, it purports to be a joint application filed by the petitioner and the respondent; secondly, the latter is represented therein through his attorney, namely, Khalid Yasir Hanif and counsel, namely, Asif Mughal; thirdly, the said document does not bear any signature or thumb impression on behalf of the individuals representing the respondent, while the same is duly signed by the petitioner and is also accompanied by her affidavit verifying the veracity of the contents made therein; and finally, the said application asserts that the matter between the spouses has been reconciled, and in view thereof, the decree passed for dissolution of marriage on the ground of *khula* on 04.04.2015 was prayed to be set aside.

13. The record further reveals that the said application was attended to by the Civil Judge/Judge Family Court, Jhang on 27.04.2015, and two orders were passed. In the first instance, the original file was procured for considering the purported joint application filed by the parties. This order records as under:

> "Order
> 27.04.2015 Present:- counsel for applicant Junaid Hassan Advocate! Plaintiff in person
>
> Original file is produced. The applicant has moved an application for recording the statement. Statement be recorded.
>
> Announced."

Thereafter, on the same day, the statement of the petitioner was recorded which reads as under: -

> "Statement of Fozia Mazhar D/o Mazhar Hayat, Caste Chughtai, Age, 29 yrs, profession..... R/o Tasawar Manzil, Shahid Street, Civil Lines, Jhang---On oath stated that my reconciliation is made with Defendant. Divorce Decree dated 04.04.2015 be cancelled and set aside."

Thereafter, the Civil Judge/Judge Family Court, Jhang, decided the application vide order dated 27.04.2015 in the following terms:

> " ... ...
>
> After recording the statement of applicant and meticulous examination of record it is divulged that the parties are agree to live with each other. The court has appreciated the compromise between the parties in consonance with section 10 of West Pakistan Family Court Act 1964. So the application in hand is accepted in the larger interest of justice and for a family devastation. The decree dated 04.04.2015 is set aside. The instant file be annexed with main file."

14. On 16.04.2016, the respondent moved an application under Section 12(2) of C.P.C. through his attorney for setting aside the order dated 27.04.2015 whereby the decree of dissolution of marriage on the ground of *khula* was set aside, which according to the attorney, was obtained by practicing fraud as neither had the respondent affected any compromise nor did his attorney sign any application for compromise. The divergent pleadings of the parties, led to the framing of three issues, including the issue: whether judgment and decree of the Court dated 27.04.2015 is liable to be set aside on the grounds of being made beyond jurisdiction, being obtained by fraud and misrepresentation with the Court, and if so, for what effect?

15. It would be pertinent to note that the attorney of the respondent appeared as AW-1, and made a categorical statement that neither was he instructed nor authorized to enter into any compromise on behalf of the respondent nor was any compromise entered into by the respondent himself, and further that he did not file the purported joint application dated 27.04.2015 and was not present before the Family Court on 27.04.2015. Asif Mughal, Advocate,

was called as court witness (CW-1) and he also deposed that neither the respondent nor his attorney appointed him as a counsel nor did he dictate or sign any application and further that he did not appear in the Family Court on 27.04.2015.

16. The Judge, Family Court considering the evidence produced by the parties and in particular, the testimony of witnesses produced by the respondent, namely, Khalid Yasir Hanif, the brother and attorney of the respondent and an Advocate, namely, Asif Mughal, accepted the application of the respondent filed under Section 12(2) of C.P.C. declaring that the application of 27.04.2015 was filed without the respondent's consent and was based on misrepresentation and, thus, the order passed on the said application warranted interference and, consequently, order of recalling of the decree of dissolution of marriage dated 27.04.2015 was set aside and the order of dissolution of marriage on the basis of *khula vide* order dated 04.04.2015 was restored. These findings of the Judge, Family Court were maintained by the District Court *vide* its order dated 04.02.2020 and not disturbed by the High Court in its impugned judgment dated 29.10.2020.

17. When the very application on the basis of which an order of recalling a decree of dissolution of marriage was passed was put to doubt, the super-structure built thereon could not be legally sustained. As far as the contention of the learned counsel for the petitioner that the said application be considered as a unilateral declaration of the petitioner to recall her declaration of dissolution of marriage is concerned, it cannot be considered at this stage, as the

same is contrary to the express stance already taken by her in the disputed application. We must not forget that she had pleaded therein that the parties had reconciled their differences and were ready to live as husband and wife. In such circumstances, the petitioner would be estopped by her conduct to claim otherwise, and that too at this final stage before this Court.

18. We have gone through the record and note that the concurrent findings of fact arrived at by the Family Court and the District Court are based on relevant admissible evidence, which clearly establish with proof that the application of 27.04.2015 was not a joint-application of the spouses, wherein both had agreed to pray for recalling of the decree of dissolution of marriage granted by a competent court *vide* judgment and decree dated 04.04.2015.

19. We take note that the learned counsel for the petitioner has been able to point out a weakness in the stance of the respondent, in particular, as to his knowledge regarding recalling of the decree of dissolution of marriage prior to the declaration made by him in a divorce deed. However, we are afraid this weakness in the case of the respondent, so highlighted by the learned counsel for the petitioner, would not distract our attention from the essential issue in hand, that the application filed on 27.04.2015 for recalling the decree of dissolution of marriage has been proved to have been filed by practicing misrepresentation.

20. In view of the above, we note that the learned counsel for the petitioner was unable to point out any infirmity in the concurrent findings on the above question of fact to justify the interference of the

High Court in the exercise of its constitutional writ jurisdiction.

Issue No. III

Recalling of the decree of dissolution of marriage – Section 7 of Muslim Family Law Ordinance, 1961

21. We must appreciate the assistance rendered by both the learned counsel for the parties on all three crucial issues highlighted hereinabove, and in particular, regarding the legal purport of Section 7 of the Ordinance read with Section 21 of the Act. However, as we have already maintained that the High Court has rightly declined to interfere in the findings of the Courts below that the very application of 27.04.2015 was based on misrepresentation practiced on behalf of the petitioner, answering the question of whether a decree of dissolution of marriage granted on the ground of *khula* could be recalled would only be an academic exercise in this case. "If it is not necessary to decide more to dispose of a case, then it is necessary not to decide more."[2] It would be better to discuss and determine this important issue in a more relevant case where its resolution directly impacts the adjudication of the dispute.

Conclusion

22. Accordingly, for the reasons stated hereinabove, we find that the High Court has rightly declined to interfere in the findings of the Courts below. This petition is, therefore, dismissed and leave to appeal is refused.

[2] Dobbs v. Jackson Women's Health Org. (597 U.S. 215, 348).

Judge

Judge

Announced in Open Court on 26.04.2024 at Islamabad.

Approved for reporting