

2021 C L C 1342

[Balochistan]

Before Naeem Akhtar Afghan and Rozi Khan Barrech, JJ

MUHAMMAD ASHRAF MAGSI----Petitioner

Versus

Mst. SHAFIQA AKBAR and another----Respondents

Constitution Petition No.1271 of 2019, decided on 25th August, 2020.

Family Courts Act (XXXV of 1964)---

---Ss.5, Sched. & 10 ---Suit for dissolution of marriage---Pre-trial proceedings---Scope---
Petitioner assailed the validity of decree passed by Trial Court for dissolution of marriage on the basis of khula---Trial Court had afforded several opportunities to the defendant to appear for pre-trial reconciliation proceedings to reconcile the controversy but he failed to do so, therefore, the right of the petitioner was struck off---Validity---No specific provision existed in the Family Courts Act, 1964, for striking off the defence of the defendant, however, mentioning of a word "if any" in subsection (2) of S.10 of the Family Courts Act, 1964, clearly showed the intention of legislature that the Family Court was neither helpless nor supposed to act as a silent spectator towards the inaction of the defendant in filing of written statement or not appearing for pre-trial reconciliation and if need arose it could proceed to strike off the defence of the defendant---Trial Court had not committed any illegality or irregularity warranting interference by the High Court in exercise of its constitutional jurisdiction---Constitutional petition was dismissed, in circumstances.

Naseebullah Agha for Petitioner.

Date of hearing: 20th August, 2020.

ORDER

ROZI KHAN BARRECH, J.----Through this petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner calls in question the validity of the impugned judgment dated 19.10.2019 passed by the learned Family Judge-I, Quetta, (hereinafter "the trial Court") whereby the suit filed by the respondent No.1/plaintiff for dissolution of marriage on the basis of Khula was decreed.

2. Brief facts of the case are that the respondent No.1/plaintiff filed a suit for dissolution of marriage on the basis of Khula and recovery of laptop against the petitioner/defendant before the learned Family Judge-I, Quetta, with the following prayer:-

"A decree may be passed in favour of the plaintiff and against the defendant by

dissolving the marriage tie between the parties in terms of Khula on the basis of cruelty for which the plaintiff is ready to forgo her Sharai dower amount;

B. Direct the defendant to hand over laptop to the plaintiff in the interest of justice".

3. The suit was resisted by the petitioner being a defendant on legal as well as factual grounds.

4. After filing written statement by the petitioner/defendant, the learned trial Court issued summons to the petitioner/defendant to appear for pre-trial reconciliation proceeding but the petitioner/defendant failed to appear and the right of the petitioner/defendant was struck off on 19.10.2019 and the learned trial Court directed the plaintiff/respondent to produce her respective evidence, the plaintiff/respondent produced two witnesses and lastly got recorded her statement on oath in support of her claim.

5. The learned trial Court after hearing argument of the learned counsel for the respondent/plaintiff decreed the suit of the respondent/plaintiff on 19.10.2019. Hence this petition.

6. Record transpires that the instant petition was filed by Mr. Allauddin Saeed, Advocate on 14.11.2019. Subsequently on 16.03.2020, Mr. Allauddin Saeed, Advocate informed that he has separated his Chamber and the brief is held by Mr. Naseebullah Agha, Advocate.

On all the subsequent dates, despite service of notices Mr. Naseebullah Agha, Advocate remained absent.

Notice for 20.08.2020 was also served upon Mr. Naseebullah Agha, Advocate but despite service and repeated calls, Mr. Naseebullah Agha, Advocate was not in attendance due to which we were left with no other option but to decide the petition on the basis of available record being at katcha peshi stage.

7. It may be observed that the learned trial Court has afforded many opportunities to the petitioner/defendant to appear for pre-trial reconciliation proceeding to reconcile their controversy but he failed to do so, therefore, the right of the petitioner/defendant was struck off. There is no denial to the fact that there is no specific provision in the West Pakistan Family Court Act, 1964 ("the Act") for striking of defence of the petitioner/defendant, however, mentioning of a word "if any" in subsection (2) of section 10 of the Act clearly shows the intent of the legislature that the family Court is neither helpless nor supposed to act as a silent spectator towards the inaction of the defendant in filing of written statement or not appearing for pre-trial reconciliation and if need arises can proceed to strike off the defence of the defendant. Therefore, in our considered view word "if any" empowers the family Court to strike off the defence of the defendant if he fails to file a written statement or failed to appear before the family Court for pre-trial reconciliation within a specified period of time.

8. It is not evident from the pleading of the parties i.e. plaint and written statement nothing has been mentioned that anything has been paid at the time of marriage and

execution of Nikah Nama to plaintiff/respondent. Section 10 (4) of the Act requires a family Court that if reconciliation fails Court shall pass decree of dissolution of marriage forthwith and also restore the husband Haq Mehr paid in consideration of marriage "at the time of marriage" therefore, there is no option with the trial Court except to pass a decree when reconciliation fails, particularly when wife makes a clear statement that she is not willing to continue the marriage and union has become hateful. No party can be compelled to live with the other even if there are compatibility issues only.

9. In the case in hand, the plaintiff/respondent appeared before the trial Court and stated that she just want Khula and waives of her claim for recovery of her laptop.

10. After filing written statement by the petitioner/defendant, the learned trial Court afforded many opportunities for pre-trial reconciliation but the petitioner/defendant failed to appear before the trial Court, as such, while passing the impugned judgment, the learned Judge Family Court has not committed any illegality or irregularity warranting interference by this Court in its constitutional jurisdiction.

Resultantly, this petition being without substance is dismissed in limine.

SA/229/Bal.

Petition dismissed.