

[Peshawar]

Before Mazhar Alam Khan Miankhel and Syed Sajjad Hussain Shah, JJ

ABDUL HAMID and another---Petitioners

Versus

Mst. ZUBAIDA and another---Respondents

Writ Petition No. 928 of 2010, decided on 28th September, 2010.

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

---S. 5 & Sched.---Constitution of Pakistan, Art.199---Constitutional petition-Witnesses-Non-production of---Striking off defence---Partial compliance of order---Scope---Judge Family Court directed the defendants to produce their entire evidence on the next date of hearing and put the defendants on notice of striking off defence in case of their failure to do the same---Defendants complied with the orders of Family Court by producing two witnesses and again requested for some time that their other witnesses were not available at the relevant time---Family Court on such failure to produce entire evidence struck off defence of the defendants---Validity---Defendants were required to produce their entire evidence but they had failed to produce the same and partial compliance of orders of the court was made by producing two witnesses which on the face of it reflected that defendants had no intention to flout the orders of the court and non-availability of rest of the witnesses might be due to some unavoidable circumstances---Order of striking off defence appeared to be harsh one and the Family Court instead of striking off the defence of the defendants should have provided yet another last and final opportunity as the orders of the Family Court were partially complied with---High Court allowed constitutional petition and set aside the impugned order of Family Court subject to payment of cost of Rs.3000---High Court further directed that last and final chance was granted to defendants to produce their evidence on the date fixed failing which they had to face the consequences and would have no further chance to produce any witness.

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

---S. 5 & Sched.---Civil Procedure Code (V of 1908), Preamble---Constitution of Pakistan, Art. 199---Constitutional petition---Applicability of Provisions of C.P.C.---,Scope---Provisions of C.P.C. were not applicable in proceedings under the West Pakistan Family Courts Act, 1964 and the latter excluded the application of general provisions of Civil Procedure Code, 1908---Family Court, for progress of the cases, had to regulate its own proceedings as West Pakistan Family

Courts Act, 1964 was deficient to cover each and every conceivable eventuality---Family Court in such a situation could adopt the procedure provided in the Civil Procedure Code, 1908 and as such the procedure adopted by the Family Court itself could not be questioned.

Gul Rehman Muhammad Ali for Petitioner.

Saadullah Khan for Respondent.

Date of hearing: 28th September, 2010.

JUDGMENT

MAZHAR ALAM KHAN MIANKHEL, J.---The petitioners herein, defendants in a suit, filed by the respondent have impugned the interim order dated 23-2-2010 passed by respondent No.2 whereby after recording of statement of D.W.2 and D.W.3, struck off the defence of the petitioners due to absence of their complete evidence. They have requested for declaring the said order to be against law, without lawful authority having no adverse effect against the rights of the present petitioners and requested for providing a chance to produce the remaining evidence.

2. As against that, learned counsel for the plaintiff/respondent in support of the impugned order, vehemently submitted that the same is within the spirit of law and because of repeated directions by the learned trial Court to the petitioners to produce their evidence, he failed to comply with the directions of the Court and ultimately last chance to produce entire evidence was also given to the present petitioners on 11-2-2010 but on the eventful day, the petitioners failed to produce the entire evidence. So, the impugned order is in accordance with law and the conduct of defendant/petitioners depicted before the trial Court deserves the same treatment. So, the impugned order does not require any interference.

3. We have heard the learned counsel for the parties and have gone through the record of the case. The same would reveal that in a family matter, the learned trial Court had directed the petitioners to produce their evidence but for one reason or other, the petitioners failed to produce their evidence. The petitioners were put on notice of striking off defence in case of their failure to produce their evidence on the next date i.e. 23-2-2010. The record of the case would further reveal that on 23-2-2010, the petitioners in a way complied with the orders of the learned trial Court by producing two witnesses and again requested for some time that their other witnesses were not available at the relevant time. On this failure to produce entire evidence, the right of further defence of the petitioners was refused by the impugned order.

4. Though the petitioners who were required to comply with the orders of the trial Court and were also required to produce their entire evidence, have failed to produce their entire evidence but partial compliance of the orders of the Court was made by producing two witnesses which on the face of it reflects that the petitioners had no intention to flout the orders of the Court and non-availability of the rest of the witnesses might be due to some unavoidable circumstances. In the circumstances, the order of striking off defence appears to be a harsh one and the learned trial

Court instead of striking off the defence of the petitioners should have provided yet another last and final opportunity as the orders of the learned trial Court were partially complied with. We are conscious of the fact that provisions of C.P.C. are not applicable in proceedings under the Family Courts Act, 1964 and the latter excludes the application of general provisions of C.P.C. but for progress of the cases, the Family Court has to regulate its own proceedings as the Act, 1964 *ibid* is deficient to cover each and every conceivable eventuality. In such a situation a family Court can adopt the procedure provided in C.P.C. and as such the procedure adopted by the Family Court itself cannot be questioned.

5. We, in the circumstances of the case and by providing the petitioners a full chance of defending their cause, without any hesitation in our mind, would allow this petition but on payment of costs of Rs.3000 (sic) of the parties. So by allowing this petition, the impugned order dated 23-2-2010 is hereby set aside and the parties are directed to appear before the trial Court on the date fixed i.e. 9-10-2010 and a last and a final chance to the petitioners is granted to produce their evidence on the date fixed failing which they have to face the consequences and will have no further chance to produce any witness. Copy of this judgment be sent to the trial Court well before the date fixed. Parties present in court along with their counsel are directed to appear in the trial Court on the date fixed.

H.B.T./330/P

Case remanded.