JUDGMENT SHEET
LAHORE HIGH COURT,LAHORE
JUDICIAL DEPARTMENT

Writ Petition No.700 -2010

Fakhar Abbas

Vs

Additional District Judge Tandlianwala, District Faisalabad, etc

Date of hearing: *27.01.2015.*

Petitioner by: *Rana Muhammad Ayub Tahir Joyya, Advocate.*

Respondent by: *Ch. Abdul Salam-I, Advocate*

MIRZA VIQAS RAUF, J:- The instant petition is directed against the judgment and decree dated 23.11.2009 passed by the learned Additional District Judge Sub Division Tandlianwala District Faisalabad, whereby the appeal filed by the petitioner against the judgment and decree dated 26.09.2009, passed by the learned Judge Family Court Tandlianwala has been dismissed.

2. Precisely the facts necessary for the adjudication of instant petition are that the respondents No.3 & 4 filed two suits one for recovery of dowry articles and the second for the recovery of maintenance against the petitioner before the learned Judge Family Court Tandlianwala District Faisalabad. The petitioner, being the defendant was proceeded ex.parte, vide order dated 23.05.2009 due to his non-appearance. To this effect the petitioner moved an application for setting aside the order which was allowed by the learned Judge Family Court subject to costs of Rs.1,000/- vide order dated 06.07.2009. However, due to the delinquent attitude of the petitioner his right for filing of written statement was struck of on 22.07.2009 and he was again proceeded ex.parte.

3. The learned Judge Family Court thereafter proceeded to record ex.parte evidence of the respondents. Respondent No.3 herself appeared as PW-1 and she also examined Ghulam Murtaza as PW-2. In documentary evidence Nikahnama was tendered as Exhibit P1, whereas list of dowry articles was placed as Mark-A

5. After completion of ex.parte evidence the learned Judge Family Court vide its judgment dated 26.09.2009 decreed the suit ex.parte.

6. Feeling aggrieved from the judgment passed by the learned Judge Family Court the petitioner preferred an appeal before the learned Additional District Judge,Tandlianwala District Faisalabad, which was also dismissed vide judgment and decree dated 23.11.2009.

7. Learned counsel for the petitioner contended that the right of the petitioner to file the written statement has illegally been closed by the learned Judge Family Court as there is no provision in the Family Courts Act 1964 empowering the Judge Family Court to pass such an order. He added that when the basic order is illegal and unlawful then the superstructure built thereon could not sustain. Learned counsel argued that the petitioner has been knocked out on the basis of technicalities. Learned counsel further contended that even in absence of any evidence led by the petitioner both the courts below were legally bound to determine the controversy after applying independent judicial mind. He added that the judgments of both the courts below are the result of misreading and non-reading of evidence. In support of his contentions learned counsel for the petitioner has placed reliance on **"MAQSOOD AHMAD versus JUDGE, FAMILY COURT, BUREWALA and 5 others" (2001 CLC 567, "BASHIR AHMAD vs. Mst. ZUBAIDA and**

others"(1990 ALD 180), and " MUHAMMAD ASHRAF VS. NASREEN BEGUM through Legal Heirs and 3 others" (PLD 1989 Lahore 69).

8. Conversely, the learned counsel for respondents No.3 & 4 supported the judgments of the Courts below and submitted that the judgments under challenge have been passed by both the Courts below in accordance with law and there is no illegality in the said judgments. He added that the Family Court is competent to pass an order for advancement of ends of justice. Learned counsel submitted that the right of the petitioner to file written statement was rightly struck off. He further contended that there are concurrent findings against the petitioner which cannot be assailed in the writ jurisdiction.

9. I have heard the learned counsel for the parties and perused the record.

10. It is evident from the record that initially the petitioner did not join the proceedings before the learned Judge Family Court which resulted into passing of order dated 23.05.2009, whereby he was proceeded ex.parte. The said order was, however, recalled vide order dated 06.07.2009 upon the application of the petitioner but he was directed to pay costs of Rs.1,000/-. Thereafter inspite of availing number of opportunities the petitioner neither deposited costs nor filed written statement as required under the law. As a sequel thereof the learned Judge Family Court vide order dated 22.07.2009 struck of his right of defence and proceeded against him ex.parte. In ex.parte proceedings respondent No.3 herself appeared as PW-1 and she examined Ghulam Murtaza as PW-2. In addition to the oral evidence Nikahnama and list of dowry articles were also made part of record in the documentary evidence. Respondent No.3 in her ex.parte evidence narrated her claim

as contained in the plaint and her evidence went unrebutted. As a consequence of ex.parte evidence the learned Judge Family Court decreed her claim and minor i.e respondent No.4 was also held entitled to the maintenance at the rate of Rs.1,000/- per month from the date of institution of the suit till he be disqualified by law, with 10% annual increase. Whereas the claim of dowry articles was partly decreed to the extent of Rs.50,000/-. The petitioner though assailed the said judgment and decree by filing an appeal before the learned Additional District Judge but the judgment of the learned Judge Family Court was maintained.

11. It is observed that in the absence of any evidence on behalf of the petitioner, both the Courts have rightly adjudged the claim of respondents No.3 & 4 and rightly decreed the suit. The petitioner himself is responsible for the same as he remained indolent throughout the proceedings before the learned Judge Family Court and he cannot seek equity from this Court in exercise of Constitutional jurisdiction. Reliance in this regard can be placed on case of **"RAJA KHAN versus MANAGER (OPERATION) FAISALABAD ELECTRIC SUPPLY COMPANY (WAPDA) and others (2011 SCMR 676)**, wherein the Hon'ble Supreme Court of Pakistan in somewhat similar circumstances held that:-

> **9. It is settled principle of law that constitutional jurisdiction under Article 212(3) is discretionary in character. It is settled law that grant of leave to appeal is discretionary. See Ghulam Qadir Khan's case (1986 SCMR 1386). It is also settled law that constitutional jurisdiction against void order may be refused if it was meant to enable petitioner to circumvent provisions of law of limitation or if he was estopped by his conduct from challenging of order. See:--**
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> **Muhammad Ismail's case (1983 SCMR 168)**
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> **Abdul Rshid's case (1969 SCMR 141)**
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> **Wali Muhammad's case (PLD 1974 SC 106)**

> **10. Keeping in view the conduct of the petitioner mentioned herein above in para 10 of the impugned judgment we are not inclined to exercise our discretion in favour of the petitioner on the well known maxim that he who seeks equity must come with clean hands as law laid down by this Court in Nawab Syed Raunaq Ali's case (PLD 1973 SC 236)"**

12. So far the contention of the learned counsel that the Family Court is not vested with any such authority to either strike of the defence of the petitioner or to close his right of defence. It is held that there is no cavil that though no such express provision exists in the Family Courts Act 1964, which gives authority to the court to close the evidence of a party or to strike off his right of written statement but on the same account there is even no provision to this effect that in case of failure by a party to file the written statement or to lead evidence his right of filing of written statement or evidence could not be closed in any circumstance. As already observed that the petitioner has availed sufficient opportunities to file the written statement but he has failed to submit the same. The Family Court cannot be made helpless in such a situation because it would not be in the interest of justice. Family Courts are established under the Family Courts Act, 1964, which is a special law thus the court can adopt any mode which is not inconsistent to The Family Courts Act 1964 or the Rules framed there under, for advancement and meeting the ends of justice.

13. The judgments cited by the learned counsel for the petitioner will be of no help to him and in this regard guidance can be sought from the judgment rendered by Peshawar High Court in the case titled **"SHAHID BAKHSH Vs. Mst. SHAZIA BIBI and another" (2004 CLC 703)**, wherein while dealing with somewhat similar issue the High Court has held as under:-

3. Mr. Hassan Afridi, Advocate for the petitioner contended with force that the impugned judgment and decree suffers from the vice of gross misreading and non-reading of evidence and that the learned trial Judge was not empowered to close the evidence of the petitioner and deprive him of the right of defence. The submissions of the learned counsel are not tenable. No doubt it is true that there is no express provision in West Pakistan Family Courts Act (XXXV of 1964) authorizing a Family Court to close the evidence of a party. There is also no provision to the effect that a party's evidence shall not be closed even if that party fails to produce evidence, without sufficient cause, despite having availed of several opportunities to do so. The Family Court can close the evidence of a party who fails to adduce evidence without sufficient cause as held in Syed Shaukat Abbas v. Mst. Bushra Rani and another PLD 1982 Lah. 281. Provisions of the Act, which is a special law enacted to provide facility to the litigants in family matters. The role of the Family Court is not merely adversely but it is also inquisitorial, therefore, it is within its power to pass any order which may promote the ends of justice, Family Court is empowered to take all steps which it deems necessary to ensure that substantial justice is done. Provisions of C.P.C. are not applicable in sitricto senso by virtue of section 17 of the Act and Judge, Family Court is competent to regulate its own proceedings as the Act does not make provisions for every conceivable eventuality and unforeseen circumstances. In Khalil-ur-Rehman Bhutta v. Razia Naz and another 1984 CLC 890 the following observations were made:--

> **"(6) As regards the contention that the petitioner's defence could not have been struck off, it is to be seen that despite having been, given opportunities, he did not file the written statement. It is true, that except sections 10 and 11, C.P.C., which have been made applicable to a Family Court, under section 17 of the Act the rest of the C.P.C. on its own force, does not apply to the proceedings before it. It is,**

> **however, to be kept in mind that the Family Courts Act, dots not provide for every conceivable eventuality and unforeseen circumstance. Though it is a forum of limited jurisdiction yet it has to regulate its own proceedings. A situation may crop up, before a Family Court that a defendant persistently defaults in submitting his written statement and acts contumaciously, as happened in the instant case. Will the Family Court be powerless to proceed against such a litigant? If the Court is held to be denuded of authority, to pass a punitive order against such a defaulter that would result in paralysing its function. It must be remembered that the Family Courts Act has been enacted with the object of expeditious disposal of the disputes relating to the family affairs. Thus, for the orderly dispensation of justice under the Act, in the case of a contumacious default of a defendant, to file the written statement, the Family Court will be well within its authority to make an order, in the nature of one envisaged by Order VIII, rule 10, C.P.C. and deprive him of his right to file the written statement. I think that the learned trial Court proceeded against the petitioner on a similar line and by using the expression as to the striking of his defence, it simple meant to take away his right of filing written statement. Anyhow, even if there is some betrayal of over-stopping by the trial Court in view of the conduct of the petitioner I do not feel persuaded in this behalf, to strike down the order dated 28th February, 1983."**

14. In the light of above discussion and the principles laid down in the judgment supra I am of the considered view that the petitioner has failed to point out any illegality or material irregularity in the judgments of both the courts below. It is observed that the petitioner has made all possible

efforts to circumvent the process of law and his conduct was contumacious throughout the proceedings. The petitioner has failed to point out any extraordinary and exceptional circumstances to interfere with the judgments of both the courts below. Even otherwise the Constitutional jurisdiction is discretionary relief which cannot be extended to a party, who himself has placed hurdles in the way of smooth running of the proceedings of the Court. Resultantly the instant petition, being devoid of any merit is dismissed with no order as to costs.

(Mirza Viqas Rauf)
Judge

APPROVED FOR REPORTING

JUDGE

Ramzan