

2021 C L C 561

[Balochistan]

Before Naeem Akhtar Afghan and Rozi Khan Barrech, JJ

SHAH MAQSOOD----Petitioner

Versus

KHAIR-UN-NISA and 2 others----Respondents

Constitution Petition No.1128 of 2019, decided on 13th July, 2020.

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

---Ss.5, Sched & 17-A---Suit for recovery of maintenance allowance and dowry articles---Non-payment of interim maintenance---Striking off defence---Scope---Defendant failed to pay interim maintenance and his defence was struck off---Suit was decreed concurrently---Validity---Family Court had warned the defendant that in case of failure to pay interim maintenance the suit of plaintiff would be decreed without recording of evidence---Defendant did not pay interim maintenance nor complied with the order of the Family Court---Father was bound to provide maintenance to his minor children---Order of Family Court directing the father to pay maintenance to the minor during pendency of suit was according to law---Conduct of defendant did not entitle him to discretionary relief---Defendant had not challenged the order of Family Court whereby he was ordered to pay interim maintenance---Impugned judgments and decrees passed by the Courts below could not be declared to have been passed without jurisdiction and lawful authority---Family Court had jurisdiction to strike off defence of defendant who had failed to pay interim maintenance and to decree the suit without recording evidence---No illegality or irregularity had been pointed out in the impugned judgments and decrees passed by the Courts below---Constitutional petition was dismissed, in circumstances.

(b) Constitution of Pakistan---

---Art.199---Constitutional jurisdiction of High Court---Scope---Conduct of petitioner to be taken into consideration in allowing or disallowing equitable relief---Principles.

The conduct of petitioner can be taken into consideration in allowing or disallowing equitable relief in constitutional jurisdiction. The principle that the Court should lean in favour of adjudication of causes on merits, appears to be available for invocation only when the person relying on it himself comes to the Court with clean hands and equitable considerations also lie in his favour. High Court in exercise of writ jurisdiction is bound to proceed on maxim "he who seeks equity must do equity". Constitutional jurisdiction is an equitable jurisdiction. Whoever comes to High Court to seek relief has to satisfy the conscience of the Court that he has clean hands. Writ jurisdiction cannot be exercised in aid

of injustice. The High Court will not grant relief under Article 199 when the petitioner does not come to the Court with clean hands. He may claim relief only when he himself is not violating provisions of law, especially of the law under which he is claiming entitlement who is guilty of bad faith and unconscionable conduct. The right is in the nature of *ex debito justitiae*, but will only be granted if the petitioner can show that his conduct has not been such to disentitle him of such a relief. This jurisdiction of the High Court should not be exercised if it leads ultimately to a patent injustice.

Manzoor Hussain v. Zulfiqar Ali 1983 SCMR 137; Abdul Wahid Khan v. Custodian of Evacuee Property PLD 1966 Quetta 25 and Muhammad Arif v. Uzma Afzal 2011 SCMR 374 rel.

(c) Administration of justice---

---He who seeks equity must do equity.

Abdul Bashit for Petitioner.

Date of hearing: 7th July, 2020.

JUDGMENT

ROZI KHAN BARRECH, J.----Brief facts of the case are that respondent No.1 filed a suit for maintenance and return of dowry articles before the learned Family Judge Noshki (trial court) with the averment that she contracted marriage with petitioner on 5th October 2017 against consideration of Rs.300,000/- prompt dower and Rs.200,000/- (deferred dower) payable on demand and at the time of Rukhsati precious dowry articles and gifts were also given to respondent No.1. Subsequently the relations between the spouses became strained, in consequence whereof the respondent No.1 was deserted from petitioner's house and ultimately she took refuge at her parents' house. During subsistence of marriage respondent No.1 gave birth to a daughter in her parents' house. The petitioner failed to provide maintenance to respondent and her child. Resultantly they respondent No.1 filed the aforesaid family suit.

Notice was issued to the petitioner, who filed written statement denying the claim of respondent No.1 on legal as well as factual grounds. Thereafter issues were framed. In the meanwhile respondent No.1 filed an application under Section 17-A of West Pakistan Family Courts Act, 1964 (in short "the Act") for interim maintenance of herself and her daughter. The application was contested by the petitioner by means of filing rejoinder and after hearing the arguments from both sides on said application, the same was accepted by the trial court vide order dated 15th March 2019, whereby the petitioner was directed to deposit interim maintenance allowance in court, but the petitioner failed to deposit the stipulated maintenance amount on various dates of hearing. Under such circumstances the right of the petitioner was struck off and suit filed by respondent No.1 was decreed in her favor vide judgment dated 07.05.2019 in the following manner:

"6. In view of supra made discussion and attending facts, there is no second opinion

to be exercised besides to decree the suit with declaration that the defendant shall pay maintenance allowance to the plaintiff/wife at the rate of Rs.10,000/- per month, baby namely Shammah at Rs.8000/- per month and as well as Rs.15,000/- as maternity expenditure consumed at the birth of the baby and past maintenance allowance from the date of birth of the baby and past maintenance allowance from the date of birth of the baby and shifting the plaintiff/wife to the house of her parents, thus, the suit of the plaintiff stands decreed with above mentioned terms which are exclusively payable by the defendant to the plaintiff forth with."

Being aggrieved from the judgment passed by the trial court the petitioner filed an appeal under Section 14 of the Act before the learned Additional District Judge, Noshki, but the same was dismissed on 18th September 2019. Hence, the instant petition.

3. On 07.07.2020 since learned counsel for the petitioner was not present despite service, therefore we were left with no other option but to decide the matter on the basis of available record after hearing the learned counsel appearing on behalf of respondent No.1. Besides hearing the arguments advanced by learned counsel for respondent No.1 we have also gone through the available record with minute particulars,

4. There is no cavil to the proposition that the conduct of petitioner can be taken into consideration in allowing or disallowing equitable relief in constitutional jurisdiction. The principle that the Court should lean in favour of adjudication of causes on merits, appears to be available for invocation only when the person relying on it himself comes to the Court with clean hands and equitable considerations also lie in his favour. High Court in exercise of writ jurisdiction is bound to proceed on maxim "he who seeks equity must do equity". Constitutional jurisdiction is an equitable jurisdiction. Whoever comes to High Court to seek relief has to satisfy the conscience of the Court that he has clean hands. Writ jurisdiction cannot be exercised in aid of injustice. The High Court will not grant relief under this Article when the petitioner does not come to the Court with clean hands. He may claim relief only when he himself is not violating provisions of law, especially of the law under which he is claiming entitlement. It is well settled that who is guilty of bad faith and unconscionable conduct. The right is in the nature of *ex debito justitiae*, but will only be granted if the petitioner can show that his conduct has not been such to disentitle him of such a relief. This jurisdiction of the High Court should not be exercised if it leads ultimately to a patent injustice. Reliance in this regard is placed on *Manzoor Hussain v. Zulfiqar Ali* (1983 SCMR 137), *Abdul Wahid Khan v. Custodian of Evacuee Property* (PLD 1966 Quetta 25) and *Muhammad Arif v. Uzma Afzal* (2011 SCMR 374).

In the instant case the respondent No.1 filed the application under section 17-A of the Act for interim maintenance allowance during pendency of the suit. After hearing both the parties, the trial court passed the order dated 15th March 2019, whereby the petitioner was directed to pay interim allowance of Rs.8000/- per month from 25.08.2018, for the baby Shammah as well as to pay maternity expenditure to the parents of respondent i.e. Rs.15,000/-. However, after passing the interim order the petitioner on one pretext or the other played delay tactics in order to avoid payment of interim allowances as such, on 01.04.2019, 08.04.2019, 22.04.2019 and eventually on 26.04.2019 the petitioner was warned

that in case of failure of submission of ad-interim maintenance allowance the suit of respondent No.1 shall be decreed ex-parte without recording evidence, but the petitioner did not bother to deposit the amount nor complied with the court order. Both under statutory law and Islamic Law, the father was obliged to provide maintenance to his child. Order of Family Court directing the father was obliged to pay maintenance to his minor children during the pendency of the suit was just and according to the situation demanded. Father was given opportunity to deposit part of maintenance allowance which had become due against him as token of goodwill but he had refused to deposit any amount. Conduct of the father throughout the proceedings of the matter also did not entitle him to any discretionary relief.

In the present case since the petitioner did not challenge the validity of the order dated 15th March 2019 whereby he was ordered to pay interim maintenance, he stands estopped to question the correctness thereof in the instant writ petition. As regard the orders dated 07.05.2019 and 18.07.2019 respectively passed by the trial court and District Judge, Noshki, the same cannot be declared to have been passed without jurisdiction and lawful authority. The trial court rightly insisted upon implementation of its order dated 15th March 2019. Again, section 17-A of West Pakistan Family Courts Act, 1964 empowers him to strike off the defense of a defendant, who fails to pay the interim maintenance ordered by him and to decree the suit of the plaintiff right away without recording evidence. No doubt, the law as it stands is so designed as to confer the discretionary powers on the learned Judge Family Court, but he has to exercise this discretion to decree or not to decree the suit, keeping in view the attending circumstances and the conduct of the defendant. Conduct of the petitioner throughout the proceedings of the matter also did not entitle him to discretionary relief. While during proceedings before this court, at the time of admission of the instant petition on 21.10.2019 learned counsel for the petitioner stated that the petitioner is ready to comply with the order dated 15.03.2019 passed by the trial court for depositing the interim maintenance allowance but he did not deposit the said amount and from that date on neither the counsel for the petitioner nor he himself appeared before this court and on 11.12.2019 the petitioner again appeared in person before this court and stated that the parties have entered into compromise whereby the respondent No.1 has joined the petitioner as his legally wedded wife. However, from that date again neither the petitioner nor his counsel appeared before the court and on several dates of hearing neither the petitioner nor his counsel appeared before the court. On 07.07.2020 learned counsel for respondent No.1 appeared before this court and stated that no compromise whatsoever has been affected between the parties.

From the above circumstances the conduct of the petitioner from the outset has been rather dubious and shady.

5. The nutshell of the above discussion is that there is no jurisdictional defect which requires invocation of Constitutional Jurisdiction of this Court in exercise of jurisdiction conferred under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973. No illegality or irregularity was committed by the learned Family Judge Noshki as well as learned District Judge Noshki while passing the impugned judgments, as such the petition is hereby dismissed.

ZC/120/Bal.

Petition dismissed.