Stereo.HCJDA-38

JUDGMENT SHEET

IN THE LAHORE HIGH COURT, LAHORE

JUDICIAL DEPARTMENT

W.P. No.26235 of 2017

Ijaz Ali

v.

Robina Kausar, etc.

J U D G M E N T

Date of Hearing	18.3.2021
Petitioner by	Ms. Sajida Awan, Advocate
Respondent by	Muhammad Kafeel Salik Niaz, Advocate

Rasaal Hasan Syed, J. This Constitutional petition calls into question orders dated 22.2.2017 and 24.3.2017 of the learned Judge Family Court, Zafarwal.

2. Facts from which the instant petition emanates are that respondent No.1 along with her minor child, respondent No.2 instituted a suit for dissolution of marriage, recovery of maintenance allowance, delivery expenses and recovery of dowry articles. Suit was resisted by the petitioner through his written statement. Issues were framed whereafter evidence was recorded by the learned Judge Family Court. At this stage, a miscellaneous application was filed by the petitioner for permission to submit receipts of dowry articles was dismissed vide order dated 22.2.2017. Petitioner moved

another application for permission to produce the same receipts and to file an amended schedule of witnesses so as to produce Muhammad Aslam son of Karamat Ali as additional witness which application, after due contest, was also dismissed vide impugned order dated 24.3.2017.

3. Main arguments raised by the learned counsel for the petitioner are that the application for submission of documentary evidence could be allowed in the interest of justice and that the law required filing of schedule of witnesses along with the written statement; yet the learned Family Court will not be denuded of its jurisdiction to allow this to be done at a later stage or the production of any document or witness not named in the schedule or not mentioned in the list of reliance. It was added that the receipts were mentioned in the written statement but could not be produced due to *bona fide* inadvertence at the relevant stage and that the same should have been allowed to determine the matter in controversy. Learned counsel for the respondents supported the order and submitted that the impugned orders were strictly in accordance with law and that no ground was made out for interference therein.

4. Submissions made at the bar have been given due consideration and copies of the documents annexed with the

instant petition have been closely examined. The claim of respondent No.1 was that she was married to the petitioner on 15.6.2014 and was ousted from matrimonial home during pregnancy and that she was not attended to even at the time of child delivery and that the treatment of the petitioner towards respondent No.1 was cruel. In these circumstances she claimed dissolution of marriage, recovery of maintenance allowance, delivery charges as also recovery of dowry articles which according to the respondent were in the possession of petitioner. The suit was instituted on 15.6.2015, written statement was filed on 06.10.2015 and evidence of respondent No.1 was concluded, whereafter, the petitioner took certain adjournments to produce evidence. It is discernable from the order-sheet that the oral evidence of the petitioner was concluded on 24.1.2017 when the case was adjourned to 30.1.2017 and, thereafter, to 02.2.2017 when the petitioner moved a miscellaneous application seeking permission to produce receipts of alleged articles including jewelry which were allegedly mentioned in the written statement. It was claimed that inadvertently the same could not be attached with the written statement nor could be relied in the list. The application was dismissed on 22.2.2017. On 27.2.2017, the post-trial reconciliation proceedings were

declared to be unsuccessful and the case was set up for final arguments on 28.2.2017. On the next date, the case was again adjourned at the request of the counsel for the petitioner, for arguments. On 06.3.2017, the petitioner moved another miscellaneous application repeating his request for permission to produce the documents claiming that the earlier application was dismissed on a day the lawyers were on strike and that the order was passed in a hurry and also that the petitioner be allowed to produce the documents as well as amended schedule of witnesses so as to include the name of the additional witnesses. For arguments on this application five dates were given whereafter the application was decided vide order dated 24.3.2017 in terms whereof the same was declined.

5. Main argument of the learned counsel for the petitioner was that the learned Judge Family Court had the jurisdiction under section 7 of *The Family Courts Act, 1964* (the "**Act**") to grant permission for the production of documents and also to file an amended schedule of witnesses notwithstanding that section 9 of the Act mandated filing of list of witnesses with a gist of evidence and copy of documents relied upon along with the written statement and that the petitioner had explained in the application that the earlier non-filing of the

document was inadvertent for which he could not be penalized and that the interest of justice warranted that permission should have been accorded.

6. As per provisions of the Act the procedure prescribed is that parties shall file with their pleadings schedule of witnesses with number of statements, list of documents relied upon and also the copies of documents to be produced in evidence. The learned Family Court has the discretion to allow an application for amendment in the schedule of witnesses or filing of documents but the exercise of such discretion is subject to certain conditions. To invoke discretion sufficient reasons needed to be given and the party is required to give admissible explanation for the omission to file the documents at proper stage or for permission to file amended schedule of witnesses. The requirement also needs to be satisfied that the documents are relevant, material and necessary for the determination of real controversy and that the same are either public documents or are coming from such safe custody and there was no possibility of fabrication or forgery. While considering the application for permission to produce documents, the stance of the petitioner in the first application was that due to inadvertence, he could not file the receipts of articles with the written statement and in the

second application he had raised the allegation that the earlier application was dismissed on the day of the strike of the lawyers and that he was also not heard and that he was entitled to produce documents with amended schedule of witnesses.

7. In the impugned order the learned Judge Family Court observed that notwithstanding the fact that the application was decided on the day of the strike yet the fact remained that the learned counsel for the petitioner argued the case and that the application was decided after hearing both sides and order-sheet confirms the same and presumption of truth is attached to judicial proceedings. The stance of the petitioner was, therefore, factually incorrect. If his counsel opted to argue the case and the court decided the application, the order could not be challenged on the plea that it was a day of lawyers' strike. While considering the second application, the learned Judge Family Court also took note of the conduct of the petitioner and observed that in the instant case, the evidence of the respondent was concluded, petitioner himself had concluded his oral evidence, the learned counsel for the petitioner had recorded her statement on 24.1.2017 regarding closure of oral evidence and sufficient grounds were missing for seeking permission. It was also observed by the learned

Family Court that the petitioner wanted to fill up the lacuna which could not be allowed and the application was belated. It is thus manifest that the application was not simply dismissed on account of incompetency or absence of power with the court to allow such relief but the decision rested on ground that sufficient reasons could not be shown to exist for seeking permission to produce additional schedule or receipts.

8. To consider as to whether the discretion was exercised fairly and judiciously, it appears to be necessary to take note of the peculiar circumstances of the case. In the first instance, the suit was filed on 15.6.2015 and a period of approximately five years and nine months was consumed to conclude the trial. Written statement was filed by the petitioner on 06.10.2015, evidence of the respondent was concluded since long, number of dates were obtained by the petitioner to complete his oral evidence which was concluded on 24.1.2017. On 02.2.2017 the petitioner moved first application for permission to produce documents which was ultimately dismissed on 22.2.2017 and, thereafter, adjournments were sought on 27.2.2017, 28.2.2017 and 04.3.2017 as well as on 06.3.2017 for final arguments and instead of making final arguments, second miscellaneous

application for permission to produce receipts and amended schedule was made. For arguments on this application the case was fixed for 10.3.2017, 13.3.2017, 17.3.2017, 21.3.2017 and it was only on 24.3.2017 when application was dismissed after hearing both sides. After the disposal of the said application, the case could not be concluded for some strange reason and despite number of dates, arguments were not addressed. Adjournments were sought on 27.3.2017, 06.4.2017, 07.4.2017 and 11.4.2017, whereafter the instant writ petition was filed. It is deplorable that the suit could not be disposed of though a period of five and half years had lapsed. Miscellaneous application was filed after approximately two years of the institution of the suit and that too after completion of oral evidence. Copies of receipts were not annexed with the written statement and neither was there any reliance on the receipts at the time of filing of written statement nor the names of additional witnesses were ever given in the original schedule of witnesses.

9. The suit was instituted on 15.6.2015 and approximately a period of five and half years had been wasted yet the suit could not be concluded. There was no explanation for the inordinate delay in filing of the application. If the petitioner wanted the receipts to be part of

record, there appears to be no reason for not filing the copies thereof or non-mentioning the same in the list of reliance.

10. Even otherwise, the plea of receipts and articles was vague and unspecific. Perusal of para 1 of the preliminary objections of the written statement shows that the petitioner specifically claimed that no dowry was given by the parents of the respondents; instead the parents of the petitioner gave some items with their own funds for which the parents of the petitioner had receipts. Even details of ornaments or what was the nature of the articles that the parents of the petitioner had allegedly given were not disclosed. It is not the case of the petitioner that alleged receipts pertain to articles of dowry which were being claimed by respondent No.1 in her suit. Instead the stance of the petitioner was that his parents had given some things from their own funds for which they had receipts. Even if it is assumed that the parents of the petitioner gave some articles there is no cross-suit or cross-claim to recover those articles and the alleged receipts which the petitioner seeks to produce may be relevant in a case where the petitioner seeks recovery thereof but could not in any case be relevant in determination of the claim of the respondent.

11. In the matter of grant of permission to produce documents which were not relied upon, one of the important factors which is kept in view is that as to whether the document was a public document admissible *per se* and that there was no possibility of its fabrication and that it was coming from safe custody. This was not the situation in the present case. The unspecific receipts with no details of items as to which they related, being private documents the possibility of their fabrication could not be ruled out particularly in a situation where copies of the documents were never produced at the initial stage and no details were given in the written statement nor were the documents relied upon or confronted to the witnesses of the respondent or even endeavoured to be produced during the oral evidence of the petitioner. Additionally, the application was filed at a belated stage and that too without any admissible or sufficient reason to explain the delay or to seek permission. It is settled rule that where a document is neither relied upon nor produced at the earlier stage, the order of the learned Trial Court rejecting the prayer to receive it at a belated stage is deemed to be just, fair and in accordance with law and such order could not be claimed to be illegal or unreasonable. Reference may be made to "*Allah Bakhsh v. Mst. Fathe Bibi*" (**1994 SCMR**

1945) and "*Rab Nawaz and 8 others v. Muhammad Amir and another*" (**1999 SCMR 951**).

12. In the instant case the learned Judge Family Court, after taking into consideration the conduct of the petitioner throughout the trial and also other material factors including the fact that there was no sufficient cause for such permission, rightly declined the applications which orders do not suffer from any error of law or jurisdiction as to warrant interference.

13. For the reasons above, this Constitutional petition is without substance and being devoid of any merit is, accordingly, ***dismissed***.

14. As the family suit has been pending for more than five years it is directed that the learned Judge Family Court shall finally dispose of the suit within ***thirty days*** from the receipt of this Order by proceeding day to day. Parties shall appear before the learned Judge Family Court on ***05.4.2021*** for further proceedings.

(Rasaal Hasan Syed)
Judge

Approved for Reporting

Judge

*Imran**