Judgment Sheet

IN THE PESHAWAR HIGH COURT,
ABBOTTABAD BENCH.
JUDICIAL DEPARTMENT

W.P.No. 1144-A/2017.

JUDGMENT

Date of hearing	*05.12.2017*
Petitioner (Iqbal Rabbani & three others) by	*Malik Shujahat Ali, Advocate*
Respondents No. 1 and 2 (Noor ul Ain and Muhammad Rehan) by:-	*Malik Waseem Fazal, Advocate.*

SYED ARSHAD ALI, J:- The petitioners seek the constitutional jurisdiction of this Court praying that:-

> *"On acceptance of instant writ petition, the order/judgment dated 11.11.2017 of Respondent No. 3 may graciously be set aside and the application for submission of power of attorney and completing signing the Wakalatnama may kindly be accepted while an application for striking of defense due not filing legal written statement may kindly be rejected. Any other relief deems fit may also be granted*".

2. Brief but essential facts of the case are that respondent namely Noor-ul-Ain filed a Family Suit bearing No. 93/FC of 2017 against the petitioners for recovery of her dower, 10 tolas gold ornaments given to her by her husband as gift, recovery of dowry articles as per list annexed with the plant or Rs. 18,40,380/- as market value thereof and recovery of maintenance allowance of minor at the rate of Rs. 30,000/- per month from October, 2014 onwards.

It is averred in the plaint that marriage between the parties was solemnized on 19.09.2012 in lieu of 10 tolas gold ornaments as dower while 10 tolas gold ornaments were additionally given to her as gift which are still in the possession of defendants. In the month of October, the plaintiff along with minor was left at the house of her parents and thereafter on 21st December, 2014 a notice of divorce was sent to her. The defendants have not only occupied the valuable dowry articles of the plaintiff but have also failed to provide any maintenance for the minor since October, 2014.

3. In response to the summon issued to defendant/ petitioner regarding the said suit, on 10.05.2017, Malik Shujahat Ali Advocate filed memo of appearance on behalf of all the three defendants and undertook to file wakalatnama on their behalf. The order sheet dated 10.05.2017 reflects that the said request of the learned counsel was accepted by the learned trial Court and the case was adjourned to 05.06.2017 for filing wakalatnama and written statement. On 05.06.2017, the learned counsel submitted wakalatnama and the case was adjourned for filing written statement and ultimately the written statement was filed on behalf of all the three defendants on 19.07.2017. The said written statement was signed by the counsel and Muhammad Iqbal, defendant No. 2.

4. On 04.10.2017, Malik Shujahat Ali Advocate, through an application, had requested the learned trial Court to place on file the power of attorney executed by defendant No. 1 in favour of defendant No. 2 and to fill the wakalatnama by inserting certain particulars which could not be incorporated in the wakalatnama at the time its filing. It is pertinent to mention that defendant No. 1 is out of country and for that reason he has appointed defendant No. 2 as his attorney through power of attorney dated 31.10.2017, attested by the Consulate of Pakistan, Bradford, U.K. In view of the aforesaid position, the plaintiff through an application dated 09.10.2017 requested the Court for striking of the defence of the defendant as there was no valid written statement before the Court because neither the wakalatnama contains the signature of the defendant No. 1 nor the written statement was filed by the defendant No. 1. The main ground alleged in the application was that (i) there is no power of attorney on behalf of defendant No. 1 in favour of defendant No. 2, therefore, the written statement available on record is not on behalf of defendant No. 1. (ii) there is no wakalatnama on behalf of defendants as the wakalatnama submitted in the Court neither contains the material particulars i.e. on whose behalf the said wakalatnama has been filed nor does it contain the signature of Malik Shujahat Ali, Advocate. The learned trial Court, vide

impugned order dated 22.11.2017 dismissed the application of defendant/petitioner, whereas the application of the plaintiff for striking of the defence of defendant was accepted.

5. The learned counsel for the petitioner has argued that;-

i. The filing of incomplete wakalatnama was only an irregularity which was curable and the petitioner/defendant has never denied that Mr. Shujahat Ali, Advocate, was not appointed as counsel on behalf of defendants, hence, the alleged defect is curable.

ii. The filing of duly attested power of attorney at subsequent stage by defendant No. 1 in favour of defendant No. 2 has rectified the omission.

iii. The Family Court has no jurisdiction to strike off the defense of the defendants/petitioners.

iv. The findings of the learned trial Court that memo of appearance was given by one counsel and the written statement was signed by another counsel, does not amount to material irregularity entailing striking of defense. He has relied on 1981 SCMR 395, 2011 CLC 1836, PLD 1996 SC AJ&K 13, PLD 1984 SC 12, 1985 SCMR 1386.

6. The learned counsel appearing on behalf of the respondent, while rebutting the arguments of learned counsel for the petitioner, has raised the following objections:-

i. That under Section 18 of the West Pakistan Family Court Act, 1964, only the wife has been facilitated to appear through agent and the husband has to appear personally. He relied on 2010 MLD 904 and PLD 2001 Lahore 495.

ii. That the Family Court has the jurisdiction to strike off the defense of the defendants and in this respect has relied on 2014 SCMR 1365.

iii. That the High Court has no jurisdiction to interfere in the interlocutory order, passed by the Family Court and in this respect has relied on PLD 2015 Lahore 612, PLD 2016 Lahore 73, 2015 MLD 265.

iv. That the written statement without valid authority on behalf of defendants is inadmissible and in absence of valid written statement, the Court had rightly struck off the defense of the defendant.

v. That the non-filing of proper wakalatnama is fatal to the proceedings.

7. Arguments heard and record perused.

8. From respective arguments of the learned counsel and the available record, the following points cropped for determination:-

i. Whether West Pakistan Family Court Act, 1964, mandates the personal attendance of the defendant and that the defendant has no authority to appoint agent(s) to represent him and under Section 18 of the West Pakistan Family Court Act, 1984 only the Parda Nasheen ladies can be represented through agent(s). The husband defendant can't appoint agent to represent him before the Family Court and in absence of defendant No. 1, the Court has rightly struck off the defense of the defendants?

ii. Whether the wakalatnama filed on behalf of defendant, which does not contain the signature of the learned counsel, can be rectified?

iii. Whether the Family Court has the jurisdiction to strike off the defense of the defendants?

iv. Whether the written statement, which only contains the signatures of defendant No. 2 and the learned counsel representing him, can be construed to have been filed on behalf of all the defendants, when at the time of filing written statement, admittedly defendant No. 2 had no written authority on behalf of defendant No.

1, who was admittedly abroad. Similarly, the learned counsel signing the written statement had also no power of attorney on behalf of defendant No. 1?

v. Whether the order impugned, which is interim in nature, is amenable to the jurisdiction of this Court?

9. For the sake of convenience, this Court will render findings on all the questions separately.

The procedure before the Family Court is regulated through West Pakistan Family Court Act, 1964 (hereafter referred to as "***Act***") and West Pakistan Family Court Rule, 1965 (hereafter referred to as ***"Rules"***). Suits relating to the family matters can be filed before the Family Court by presentation of a plaint as envisaged under Section 7 of the ***Act*** read with Rule 4 of the ***Rules***. On presentation of the plaint, the Court shall fix a date for the appearance of the defendant and in this regard shall issue summons to the defendant to appear on the date specified therein. The mandate of Section 9 of the ***Act*** is that if defendant receives the summon then he shall appear before the Family Court and shall file the written statement along with a list of witnesses. On his failure to appear, the Court may proceed ex-parte against the defendant. The Section 9 reads as:-

> *"9. Written statement. 1) On the date fixed under clause (a) of sub-section (1) of section 8, the plaintiff and the defendant shall appear before the Family Court and*

the defendant shall file his written statement, and attach therewith a list of his witnesses along with a precise of the evidence that each witness is expected to give.

1a) A defendant husband may, where no earlier suit for restitution of conjugal rights is pending, claim for a decree of restitution of conjugal rights in his written statement to a suit for dissolution of marriage or maintenance, which shall be deemed as a plaint and no separate suit shall lie for it. -

1b) A defendant wife may, in the written statement to a suit for restitution of conjugal rights, make a claim for dissolution of marriage including Khula which shall be deemed as a plaint and no separate suit shall lie for it.-

***Provided that** the proviso to sub-section (4) of section 10 shall apply where the where the decree for dissolution of Marriage is to be passed on the ground of Khula.*

2) Where a defendant relies upon a document in his possession or power, he shall produce it or a copy thereof in the Court along with the written statement.

3) Where he relies on any other document not in his possession or power as evidence in support of his written statement, he shall enter such documents in a list to be appended to the written statement. [3][giving reasons of relevancy of these documents to the defence in the written statement].

4) Copies of the written statement, list of witnesses and precise of evidence referred to in sub-section (1) and the documents referred to in sub-section (2) shall he given to the plaintiff, his agent or advocate present in the Court.

5) If the defendant fails to appear on the date fixed by the Family Court for his appearance then:--

a) if it is proved that the summons or notice was duly serve on the defendant, the Family Court may proceed ex parte:

Provided that where the Family Court has adjourned the hearing of the suit ex parte, and the defendant at or before such hearing appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Family Court directs, be heard in answer to the suit as if he had appeared on the day fixed for his appearance; and

b) if it is not proved that the defendant was duly served as provided in sub-section (4) of section 8, the Family Court shall issue fresh summons and notice to the defendant and cause the same to be served in the manner provided in clauses (b) and (c) of sub-section (1) of section 8.

6) In any case in which a decree is passed ex parte against a defendant under his Act, he may apply within [4][thirty days of the service of notice under sub-section (7) of the passing of the decree] to the Family Court by which the decree was passed for an order to set it aside, and if he satisfies the Family Court that he was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was heard or called for hearing, the Family Court shall, after service of notice on the plaintiff, on such terms as to cost as it deems fit, make an order for setting aside the decree as against him and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only,, it may be set aside against all or any of the other defendant also.'

[7) The notice passing of the ex-parte decree referred to in sub-Section 96 shall be sent to the defendant by the Family court together with a certified

> *copy of the decree within three days of the passing of the decree, through process server or by registered post, acknowledgement due, or through courier service or any other mode or manner as it may deem fit.*
>
> *8) Service of notice and it accompaniment in the manner provided in sub-section 7 shall be deemed to be due service of the notice and decree on the defendant."*

Whereas, under Section 18 of the ***Act***, Parda Nasheen lady, party to a family suit, may be permitted to be represented by a duly authorized agent. For better understanding the language of Section 18, the same is reproduced:-

> *18.* ***Appearance through agents.*** *– If a person required under this Act to appear before a Family Court, otherwise than as a witness, is a pardanashin lady, the Family Court may permit her to be represented by a duly authorized agent.*

The perusal of enabling provisions of the ***Act*** does not call upon the defendant for personal appearance before the Court. The words appearance as occurring in Section 9 ibid and personal appearance are not synonymous. According to Blacks Law Dictionary IInd Edition, appearance means "*coming into Court as party to the suit, whether as plaintiff or defendant. The formal proceedings by which the defendant submits himself to the jurisdiction of the Court.*" Similarly, in Wikipedia, the appearance has been explain as "*(from Latin apparere, to*

appear) is the coming into Court of either of the parties to a lawsuit, and/or the formal act by which a defendant submits himself to the jurisdiction of the Court". Whereas the word '*personal appearance*' has been defined by Oxford Living Dictionary as "*the attendance or presence of an (especially important) individual in person*". Needless to mention that the right to be represented through counsel is a statutory right recognized by Section 22 of the Legal Practitioners and Bar Councils Act, 1973. Similarly, under Section 183 of the Contract Act 1872, any person who is of the age of majority according to law to which he is subject, and who is of sound mind, may employ an agent through an express or implied authority and under Section 188 of the Contract Act, 1872, agent having an authority to do an act has authority to do every lawful action which is necessary in order to do such act. It was held in 1997 CLC 487 that:-

> *"Although Code of Civil Procedure, 1908 is not applicable in proceedings before the Supreme Court, yet provision of Section 182 of the Contract Act, 1872 gives to citizen right to appoint agent to act on his behalf. Attorney would fall within the definition of agent within the meaning of this Section. Azad Jammu & Kashmir Rules 1976 do not prohibit appointment of attorney which would mean that such right which is available under the law of the land would remain unaffected."*

Hence, in any proceedings, when the defendant or the party is not required to personally appear, he can be represented through attorney and can also be represented through an advocate.

10. Now moving to Section 18 of the ***Act***. Plain reading of the language of the said Act would show that it has facilitated a Parda Nasheen lady to be presented by a duly authorized agent, however, it does not mean that other than a Parda Nasheen lady, the defendant is required to personal appear before the Court. A similar provision also appears in the Code of Civil Procedure, 1908, which exempts a woman from personal appearance in a court which is Section 132, which reads as under:-

> *"132. A woman, who according to the customs and manners of the country, ought not to be compelled to appear in public, shall be exempt from personal appearance in Court".*

Keeping in view the local customs, the legislation has always taken care of the same and special concession has also been bestowed upon a Parda Nasheen lady from personal appearance in the Court in all circumstances. However, this would never lead to an inference that other than female defendants, the male defendants are required to appear personally. In ***Mst. Saeeda Vs. Lal Badshah*** **(1981 SCMR 395)**, the august Supreme Court has held:-

> *A similar contention was raised in the case of Khalid Mahmood Syed v. Razi Abbas Bokhari, Judge, Family Court, Lahore and another (PLD 1979 Lah. 217), wherein it was held that the personal attendance of the parties in Court was not indispensable and a party could be represented by an agent/counsel. In this connection it was observed that the provisions of Section 18 which enable the court to permit an authorized agent to represent a pardanashin lady does not in any manner take away the right of a counsel to appear and act for and on behalf of his client. Such a right is recognized by Section 22 of the Legal Practitioners and Bar Councils Act, 1973 and it is by virtue of that provision that he is "entitled to appear or act" for his client. We are inclined to agree with the view taken in the aforesaid judgment.*

The same view has been followed by the hon'ble Lahore High Court in ***Mst. Rugayya Bibi Vs. Additional District Judge, Khushab***, (**PLD 2012 Lahore 408**), ***Shahida Perveen Vs Sher Afzal,*** (**2006 MLD 1752 [Lahore])**, ***Noreen Rehman Vs. Raja Javed Akhtar (1997 CLC 142)***.

11. Nowhere does the ***Act*** or the ***Rules*** call upon the defendant for personal appearance before the Family Court and appearance of the parties would obviously include appearance through duly constituted attorney. In cases where the parties are represented through agent, the paramount thing which is to be considered by the Court is to confirm genuineness of pleadings/presentations and that her/his consent to be

represented has not been obtained by way of force, fraud or undue influence.

ii. Whether the wakalatnama filed on behalf of defendant, which does not contain the signature of the learned counsel, can be rectified?

Under Section 22 of the Legal Practitioners and Bar Councils Act, 1973, a person appointed as counsel by a party to the proceedings can duly represent his/her client before the Court. Execution of wakalatnama is the written instrument and proof of such appointment. If from the record, it is clear that the party to the proceedings had intention of appointing a particular counsel, then mere omission of certain particulars in the wakalatnama, at the most, can be held an irregularity and would not vitiate the relations between the counsel and client. In ***Toor Gul Vs. Mst. Mumtaz Begum, (*PLD 1972 SC 09**), the august Supreme Court has held:-

> *"We find ourselves unable to accept the view taken by the high Court that such an omission will by itself invalidate the vakalatnama. The rules framed in the Code of Civil Procedure are rules made for the advancement of justice and they should not, as far as possible, be allowed to operate so as to defeat the ends of justice. If we were to accept the highly technical view taken by the High Court in the present case, then it would result in making it extremely difficult for people living in the interior of the country to appoint pleaders to represent their cases at the District Headquarters where Courts are usually situated. These rules are in the nature of enabling provisions and substantial*

compliance with them should be enough.

No one has in the present case challenged that the appellant did not wish to engage Mr. Mahmood Akhtar to represent his case before the Rent Controller, nor has it been challenged that Mr. Mahmood Akhtar was not willing to accept the appellant's brief. Indeed, at the appellate stage before the District Judge, an affidavit was actually put in by the appellant himself saying that he had sent the power duly thumb marked to his nephew Sargul with instructions to engage Mr. Mahmood Akhtar, who has his office almost next door to the place where the appellant carries on business. It is nowhere provided in rule 4 of Order III of the Code of Civil Procedure that both the pleader as well as the client must execute the Power of Attorney in each other's presence. We are unable, therefore, to accept this over-technical view of the High Court. The Courts below have, in our view, clearly gone wrong in holding that the appellant was not properly represented by a pleader holding a duly executed Power of Attorney before the Rent Controller.

In any event we are clearly of the opinion that the Rent Controller was not justified in the facts and circumstances of the case to proceed exparte without giving any opportunity to the Pleader concerned to remedy defect in the power or to prove that he had been duly appointed to represent the appellant in this case."

Similarly, in ***Ghulam Qadir Vs Abdul Sattar*** **(PLD 1984 SC 12**), it was held:-

"*Power of attorney duly executed could not be filed by Advocate-on-Record inadvertently with petition duly signed--- Held, failure to file power-of-attorney in*

> *circumstances, no more than irregularity which stood cured by subsequent filing of same".*

In "***Liaqat Hayat Vs. Muhammad Sarwar* (1985 SCMR *1386)***, the august Supreme Court, while dealing with a situation wherein the wakalatnama attached to the memorandum of appeal was neither signed nor thumb marked by the appellant, it was held:-

> "*We find that in granting the relief to the plaintiff-respondents who were appellants before the first appellate court certain findings of fact had been recorded and they formed the basis of the decision. For example, the findings that the appeal had been filed by Mr. M.A. Rehman under instructions from the appellant and the defect was only in not properly completion the power-of-attorney. On such a finding the decisions of this Court in Toor Gul V. Mst. Mumtaz Begum PLD 1972 SC 9; Ghulam Qadir and others v. Abdul Sattar and others, PLD 1984 SC 12 and Ismail and others V. Mst. Razia Begum 1981 SCMR 687, would be attracted and justify the treatment afforded by the Letters Patent Bench of the High Court. We do not find any merit in the petition and leave to appeal is refused."*

In ***Sabir Ali Vs Mst. Zubaida Bibi* (1993 MLD 321**), the hon'ble Lahore High Court has held that non signing of the plaint as well as wakalatnama was mere irregularity which defect could be cured at any stage by permitting plaintiff to put

signature on the same. Hence, the wakalatnama in the present case which is deficient in certain particulars, is curable.

iii. Whether the Family Court has the jurisdiction to strike off the defense?

12. Section 17-A of the ***Act*** envisages the striking off the defense in the circumstances when the Family Court passes order for interim maintenance and if the defendant fails to comply with such order, the Court may strike off the defense of the defendant and decree the suit. In no other eventuality does the ***Act*** provide for striking off defense of the defendant. However, if the conduct of defendant is contumacious and he has willfully disobeyed the lawful order of the Family Court, i.e. for production of evidence or for filing written statement, then the Family Court has the jurisdiction to strike off the defense as laid by the august Supreme Court of Pakistan in ***Muhammad Tabish Naeem Khan Vs. Additional District Judge, Lahore*****, (2014 SCMR 1365**) that:-

> "*Suffice it to say that the Family Court is the quasi-judicial forum, which can draw and follow its own procedure provided such procedure should not be against the principle of fair hearing and trial, thus if a defendant of a family matter, who is duly served; and especially the one who appears and disappears and also does not file his written statement within the time allowed to him by the Court, the Court shall have the inherent power and ample power to proceed ex parte*

> *against him, to strike off the defence and to pass an ex parte decree in line with the principles as are enunciated by the Civil Procedure Code. In any case, such order (striking off defence) cannot be said, treated or deemed to be void, which should be ignored as nullity in the eyes of the law as argued by the learned counsel for the petitioner. If the petitioner was aggrieved of the order, he should have either got it set aside by filing an application before the Family Court or by challenging the same in appeal, which admittedly was not so done."*

13. However, in the present case, the written statement was signed by one of the defendants and the counsel, and the submission of belated submission of power of attorney was not fatal, then there was a valid written statement before the trial Court and as such in the presence of a valid written statement, the order of striking off of defense of the defendant, which too without any notice, was unwarranted and not sustainable in the eyes of law.

iv. Whether the written statement which only contain the signature of defendant No. 2 and learned counsel, can be construed to have been filed on behalf of all the defendants, when at the time of filing written statement, admittedly defendant No. 2 had no written authority on behalf of defendant No. 1, who was admittedly abroad. Similarly, the learned counsel signing the written statement had also no power of attorney on behalf of defendant No. 1?

The ***Act*** does not provide any mechanism, or procedure nor does it describe the contents which the wakalatnama shall contain. Section 9 of the ***Act*** only envisages

that on the date fixed for the appearance of the defendant, the defendant shall file his written statement and attach therewith the list of his witnesses along with precis of the evidence that each witness is expected to give. It is by now settled law that non-signing of pleadings as well as wakalatnama are mere irregularity and the said defect can be cured at any stage by allowing the party to put his/her signatures on the same. In the present case, the written statement has been signed by the father of the defendant No. 1, who is also one of the defendants in the suit and since the ***Act*** does not call upon all the defendants to sign the written statement, therefore, guidance can be sought in this regard from the enabling provisions of Code of Civil Procedure, 1908 Order-VI Rule-15 which envisages that if any of the defendant has signed the written statement, it will be deemed a valid written statement before the Court. Even otherwise, if it is assumed that at the time of filing of written statement, the father of defendant No. 1 had no valid authority i.e. power of attorney, the said defect is curable and indeed has been cured by filing power of attorney duly attested by the Consulate of Pakistan, Bradford, U.K.

In ***Ismail and another Vs. Mst. Razia Begum*** **(1981 SCMR 687**), the august Supreme Court has held that:-

> "*In so far as the first contention is concerned it has no force in it. The learned counsel conceded before us*

> *that the respondents had all along prosecuted their suits with diligence and had appeared as their own witnesses. In these circumstances, the non-signing of the plaints by them at the proper stage was a mere irregularity, and consequently the learned District Judge was entirely justified to direct that the said irregularity may be rectified. Furthermore, the learned counsel has not been able to show as to how he has been prejudiced, therefore, the objection raised by him is only technical—the moreso when substantial justice has been done between the parties.*

In ***Sabir Ali Vs Mst. Zubaida Bibi, (*****1993 MLD 321)**, the hon'ble Lahore High Court has held that:-

> *"the argument that non-signing by the plaintiff of the plaint and Vakalatnama was not curable defect, has no force. AS I have already observed the respondent in her application seeking permission to amend the ejectment petitioner to put her signatures on the same, categorically stated that the ejectment petition had been filed on her instructions, therefore, she rectified the proceedings already taken and owned the same as if the same had been initiated and conducted by her.*

The same view has been re-affirmed in ***Shahida Parveen Vs Sher Afzal*** **(2006 MLD 1752),** ***Taj Muhammad Vs Muhammad Azam Sattar*** **(1998 CLC 787), and** ***Muhammad Munshi Vs Rikiya Bibi (1990 CLC 301).***

v. *Whether the order impugned which is interim in nature, is amenable to the jurisdiction of this Court?*

14. The effect of the impugned order whereby the defense of the petitioner has been struck off is that the defendant has been restrained from defending his case before the Family Court which, in view of the aforesaid findings, is against the law, therefore, allowing the parties to conclude the trial and thereafter the same issue to be agitated before the appellate or constitutional forum, would obviously be against the interest of both the parties. The order impugned being manifestly illegal and final in nature as for as the cause of defense is concerned, is obviously amenable to the constitutional jurisdiction of this Court. While summing up the issue, needless to mention that in our country the superior Courts have always encouraged adjudication of disputes on merits as curial law is always framed for regulating the procedure of the Court and its technical clause cannot be permitted to defeat the substantial rights of the parties.

15. In view of the above, while setting aside the impugned order dated 11.11.2017, this Court holds that:-

i. Defendant can be represented through a duly authorized agent.

ii. The Wakalatnama be returned to the learned counsel for the defendant for filling the same and to resubmit it before the trial Court.

iii. The defendant No. 2 is allowed to place on file the power of attorney executed in his favour by defendant No. 1 and thus the deficiency in the written statement filed before the Court stands cured.

iv. The learned Family Court shall provide sufficient opportunity to the parties to produce their evidence.

Announced.
Dt.05.12.2017. ***J U D G E***

*Tufail/** *Justice Syed Arshad Ali*