

2011 YLR 3034

[Lahore]

Before Malik Shahzad Ahmed Khan, J

AWAIS KHALID---Petitioner

Versus

JUDGE FAMILY COURT and others---Respondents

Writ Petition No.1991 of 2011, decided on 5th August, 2011.

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

---S. 5, Sched., Ss.10(3) & 18---Constitution of Pakistan, Art. 199---Constitutional petition---Suit for dissolution of marriage---Defendant's application for summoning of plaintiff in person---Defendant's plea was that plaintiff had not filed suit with her free consent; that she was not a pardahnashin lady and that her personal attendance in court was essential for reconciliation and to resolve question of authenticity of her signatures on plaint---Dismissal of such application by Family Court---Validity---Plaintiff living abroad had been pursuing suit through her attorney/father---Plaintiff had appeared before Family Court and made statement after putting her signatures on its order-sheet that she had to go to America and could not live with the defendant---Plaintiff was identified before Family Court by her counsel---Order of Additional Sessions Judge disposing of habeas corpus petition on plaintiffs statement was still holding field for not having been challenged any further by the defendant---Plaintiff was duly represented by her attorney, thus, there was no need of her personal appearance before Family Court---Plaintiff having appeared before Family Court, once or twice, would not be disentitled

her to avail legal right provided under S. 18 of West Pakistan Family Courts Act, 1964 for all times to come---Personal appearance of plaintiff in conciliation proceedings was not mandatory---Question as to whether plaintiff was a pardahnashin lady or not, being factual one could not be decided in constitutional jurisdiction of High Court---Defendant could raise such question before Family Court during trial or at time of final decision of case---Impugned interim order was neither illegal nor mala fide or without jurisdiction, thus, could not be challenged in constitutional jurisdiction---High Court dismissed constitutional petition in circumstances.

Muhammad Javed Iqbal v. Mst. Tahira Naheed and others 2002 CLC 1396 and Shahida Perveen and another v. Sher Afzal and 2 others 2006 MLD 1752 ref.

Khalid Mehmood Syed v. Razi Abbas Bokhari, Judge, Family Court, Lahore PLD 1979 Lah. 217; Mst. Saeeda v. Lal Badshah 1981 SCMR 395 and Saad Amanullah Khan v. Ayesha Tahir Shafique and another 1999 CLC 1544 rel.

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

---S. 10(3) & 18---Pre-trial conciliation proceedings---Personal appearance of wife in such proceedings---Scope---Provision of S.10(3) of West Pakistan Family Courts Act, 1964 for being directory neither required personal appearance of wife nor such appearance was mandatory---Court under S. 18 of the Act could dispense with legal requirement of personal appearance of Pardahnashin lady and allow her to be represented in such proceedings through her authorized agent---Wife having appeared before Family Court, once or twice, would not be disentitled to avail legal right provided under S. 18 of West Pakistan Family Courts Act, 1964 for all times to come---Principles.

Khalid Menunood Syed v. Razi Abbas Bokhari, Judge, Family Court, Lahore PLD 1979 Lah. 217 and Mst. Saeeda v. Lal Badshah 1981 SCMR 395 rel.

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

---Ss. 5 & 14---Constitution of Pakistan, Art.199--- Constitutional jurisdiction of High Court---Scope---Interim order of Family Court---Such order, if neither illegal nor mala fide nor without jurisdiction, could not be challenged in such jurisdiction.

Saad Amanullah Khan v. Ayesha Tahir Shafique and another 1999 CLC 1544 rel.

Umer Ali Khan for Petitioner.

ORDER

MALIK SHAHZAD AHMED KHAN, J.---This petition has been filed to challenge the order dated 14-7-2011, passed by learned Judge Family Court, Murree, whereby, the application filed by the petitioner for summoning the plaintiff in person, has been dismissed.

2. As per brief facts of the present case, Mst. Ummara Naeem (respondent No.3) filed, a suit for dissolution of marriage against the petitioner in the court of learned Judge Family Court, Murree. During the pendency of the said suit, the petitioner filed an application for summoning of plaintiff in person. The said application has been dismissed vide the impugned order dated 14-7-2011, passed by the learned Judge Family Court, Murree; hence, the present petition.

3. It is contended by the learned counsel for the petitioner that the petitioner and the plaintiff/respondent No.3 had contracted marriage with each other, without the consent of the parents of the plaintiff/respondent No.3; that the suit for dissolution of marriage filed by respondent No.3 was not filed with free consent of the said respondent, therefore, the appearance of respondent No.3, in person, was mandatory for the ends of justice; that the object of reconciliation will not be fulfilled if respondent No. 3 is not summoned; that the petitioner has challenged the authenticity and genuineness of the signatures of the plaintiff/respondent No.3 on her plaint, therefore, the personal attendance of the plaintiff was essential; that the plaintiff is not a Pardahnashin lady,

therefore, she may be summoned in order to resolve the above mentioned dispute; that this petition may be accepted and the impugned order dated 14-7-2011, passed by the learned Judge Family Court, Murree may kindly be set aside.

4. I have heard the learned counsel for the petitioner and have also gone through the documents annexed with the present petition.

5. A suit for dissolution of marriage has been filed by Mst. Ummara Naeem (respondent No.3), against the petitioner. The petitioner during the pendency of said suit filed a petition for summoning of plaintiff (respondent No.3) in person, which application has been dismissed vide the above mentioned impugned order, passed by the learned Judge Family Court, Muree. The learned counsel for the petitioner has argued that personal attendance of the plaintiff was mandatory in view of his above mentioned contentions. The plaintiff/respondent No.3 has been pursuing her suit through her attorney/respondent No.2 (her real father). It is also evident from record that the plaintiff/respondent No.3, appeared before the learned trial court on 9-5-2011, and got her statement recorded wherein she had categorically stated that she had to go to America and she could not live with the defendant/petitioner. She also put her thumb impression on the order-sheet of the learned trial court. Respondent No.3/plaintiff was duly identified by her counsel. It is also mentioned in para No. 4 of the grounds of present writ petition that a habeas corpus petition was filed by the petitioner before the learned Additional Sessions Judge, Lahore. The said petition was disposed of on the statement of respondent No.3. The said respondent appeared before the court of learned Sessions Judge, Lahore and made a statement which was not in favour of the petitioner and as such the habeas corpus petition filed by the petitioner was disposed of. Though it is alleged by the petitioner that statement of respondent No.3 was made under threats extended by her father (respondent No.2) but the fact remains that the above mentioned order of the learned Additional Sessions Judge Lahore, still holds the field and the same was not challenged any further by the petitioner on the above said alleged grounds. The plaintiff/respondent No.3 has been living abroad (USA). She was duly represented by her attorney, therefore, there was no need of her personal appearance before the learned trial court. Under section 18 of the West Pakistan Family Courts Act, 1964, the

plaintiff/respondent No.3 can validly pursue her case through her attorney. 'Section 18 of the West Pakistan Family Courts Act, 1964 is reproduced as under:

"Section 18. **Appearance by agent**.---If a person required under this Act to appear before a Family Court, otherwise than as a witness, is a pardahnashin lady, the Family Court may permit her to be represented by a duly authorized agent."

In view of the above-mentioned section, respondent No.3 can validly pursue her case through her attorney. Appearance through agent was legally permissible under the said provision of law, therefore, the learned Judge Family Court, Murree has rightly declined to summon the plaintiff/ respondent No.3, in person. Similar proposition has already been discussed by this Court in the case of Muhammad Javed Iqbal v. Mst. Tahira Naheed and others (2002 CLC 1396) and it was held in the said case as under:--

"--S.18---Appearance through agent---Non-appearance of plaintiff in witness-box---Defendant raised an objection that the plaintiff did not appear herself in the suit but had produced her father as special attorney in the Family Court--Validity--Appearance through agent was legally permissible under S.18 of West Pakistan Family Courts Act, 1964---Family Court had rightly not drawn adverse inference due to non-appearance of the plaintiff in the witness-box in support of her Claim."

I am also fortified in my above mentioned views by another judgment of this Court in the case of Shahida Perveen and another v. Sher Afzal and 2 others (2006 MLD 1752).

6. The learned counsel for the petitioner has contended that respondent No. 3/plaintiff has already appeared before the Judge Family Court, Murree, therefore, she cannot be termed as Pardahnashin lady. This argument of the learned counsel for the petitioner is not convincing. One or two time appearance of the plaintiff/ respondent No. 3 before a

court does not disentitle her for all times to come to avail her legal right, provided under section 18 of the West Pakistan Family Courts Act, 1964. Even otherwise the question as to whether the plaintiff (respondent No. 3) is a Pardahnashin lady or not, is a question of fact which requires recording of evidence. The said question cannot be decided in writ jurisdiction. The petitioner ' can raise his above mentioned objection during the trial or at the time of final decision of the case before the learned trial court.

7. It was also argued on behalf of the petitioner that the object of reconciliation will not be fulfilled if respondent No.3 is not summoned. In this context relevant provisions of the law are section 10(3) and above referred section 18 of the West Pakistan Family Courts Act, 1964. Section 10(3) reads as under:--

"Section 10(1)?

??????????? (2) ??????..????

(3) At 'the pre-trial, the Court shall ascertain the points at issue between the parties and attempt to effect a compromise or reconciliation between the parties, if this be possible."

The above mentioned provision i.e. 10(3) of the West Pakistan Family Courts Act, 1964 is directory in nature and the same cannot be regarded as mandatory but the directory provision cannot be regarded as mere surplusage, worthy of no notice. The said provisions cannot be lightly ignored. Anyhow, the real question for determination is, as to whether, the provisions of section 10(3) of the West Pakistan Family Courts Act, 1964, require the personal appearance of the parties. In this respect reference may again be made to section 18 of the above mentioned Act. As discussed earlier, the said section has empowered the court to permit a Pardahnashin lady, required under the Act to appear before the Family Court, to be represented by an authorized agent. This provision enables the court to dispense with the legal requirement of personal appearance of a Pardahnashin lady and allow the said lady to be represented through an authorized agent. Section 10(3) of the said Act does not require the plaintiff to appear in

