Form No.HCJD/C-121

ORDER SHEET
IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

Writ Petition No. 4735 of 2017.

Muhammad Muzammil. Vs. Judge Family Court, Pakpattan etc.

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14.01.2020. Ms. Sumera Fazil Khan, Advocate for the petitioner.
Mr. Sami Ullah, Advocate for respondents No.3 to 6.

Unnecessary details apart, respondents No.3 to 6 filed a composite suit for recovery of maintenance and dowry articles, worth Rs.13,68,000/- which was decreed by the learned Judge Family Court, Pakpattan (the learned Trial Court) vide *ex-parte* judgment & decree, dated 09.12.2013. Upon knowledge of the *ex-parte* judgment & decree, the petitioner filed an application for setting aside thereof which was dismissed by the learned Trial Court through order, dated 20.04.2016, against which he filed an appeal but without any success as the same was dismissed by the learned Additional District Judge, Pakpattan Sharif (the learned Appellate Court) through judgment, dated 22.12.2016; hence this petition.

2. Learned counsel for the petitioner contends that according to CNIC of the petitioner, he is

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resident of *Chak No.80/10-R, Peerowal, District Khanewal* whereas in plaint of the suit respondents No.3 to 6 mentioned his address as *Chak No.8/10-R, Peerowal, District Khanewal*, thus, the petitioner was not served prior to initiation of *ex-parte* proceedings against him; that since application of the petitioner for setting aside of *ex-parte* judgment & decree as well as appeal were dismissed on technical grounds, he was condemned unheard and that in case the impugned decisions are not set-aside, the petitioner would suffer irreparable loss.

3. Conversely, learned counsel, representing respondents No.3 to 6, while defending the impugned decisions of the courts below, contends that *mala-fide* on the part of the petitioner is manifest from the fact that he has not paid even a single penny towards maintenance of the minors; that the learned Trial Court while dismissing application of the petitioner for setting aside of *ex-parte* judgment & decree observed in unequivocal words that he was aware about pendency of proceedings in the year 2013 when he procured certified copy of the *ex-parte* judgment & decree, dated 09.12.2013 and that since there is only one Adda Peerowal in Khanewal, the

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assertion of the petitioner regarding wrong mentioning of Chak Number is not worth consideration.

4. While exercising his right of rebuttal, learned counsel for the petitioner contends that since it was established in evidence that the certified copy used by the petitioner, at the time of his release was got issued by the respondents as he never applied for the same, the period of limitation could not be reckoned from the date of issuance of certified copy; that since the petitioner has paid reasonable amount before the learned Trial Court, it cannot be believed that he has not paid a single penny for maintenance of the minors and that since marriage between the parties is still intact, the petitioner is ready to rehabilitate respondent No.3.

5. I have heard learned counsel for the parties at considerable length and have also gone through the documents, appended with this petition.

6. A perusal of the impugned decisions of the learned courts below shows that while deciding the matter they mainly hinged upon the fact that since the petitioner was in knowledge of *ex-parte* judgment &

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decree, from the year 2013, his application for setting aside of *ex-parte* judgment & decree was barred by law of limitation. Perhaps, learned courts below have observed so in oblivion of the fact that period of 30-days to assail the *ex-parte* judgment & decree passed by a Family Court, contained under rule 13 of the West Pakistan Family Court Rules, 1965, has been declared ultra-*vires* by the Apex Court of the country in the case reported as *Maj. Matloob Ali Khan v. Additional District Judge, East Karachi and another* (**1988 SCMR 747**) by *inter-alia* observing as under:-

> *"6. It will be noticed from the passage of the impugned judgment reproduced above that the learned Additional District Judge as well as the learned Judge in the High Court took the view that the application for setting aside ex parte decree passed by the Family Court was to be made within 30 days of the passing of the decree as provided by rule 13 of the West Pakistan Family Courts Rules, 1965, which reads as follows:*
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> > *"Ex parte decree or proceedings may, for sufficient cause shown, be set aside by the Court on application made to it within 30 days of the passing of the decree or decision."*
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> *However, subsection (6) of section 9 of the Family Courts Act, 1964, provides as under:*
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> > *"In any case in which a decree is passed ex parte against a defendant under this Act, he may apply within reasonable time of the passing thereof to the Family Court by which the*

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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 defendants also."

The plain reading of the aforesaid provisions makes it clear that the statute provided no time limitation for making application for setting aside an ex parte decree passed by a Family Court. The point to be noted is that this is not a case where the statute is silent with regard to the period of limitation for making an application of this nature, but a positive provision has been made permitting the making of such application "within reasonable time of the passing" of the ex parte decree. The question is whether in the face of such statutory provisions, the rule making authority could frame a rule in any way limiting the period of limitation to a fixed period. The rule making power has been vested in the Government under section 26 of the Family Courts Act for making rules to carry into effect the provisions of the Act. When the Act itself provides for making the application within reasonable time, apparently fixing a period of limitation for general application to all cases, cannot be in consonance with the provisions of the Act and cannot be said to carry into effect the provisions of the Act. See Ch. Altaf Hussain v. The Chief Settlement Commissioner and others PLD 1965 SC 68. The reason is that the question of what constitutes reasonable time would obviously depend upon the facts of

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each particular case and it will not be possible to lay down a rule of thumb that in all cases the fixed period of 30 days would be reasonable time. Subsection (2) of section 26 clearly expresses the legislative intent that the rules made thereunder shall not be inconsistent with the provisions of the Act. It is well established that the subordinate power of framing rules granted by the statute cannot be exercised to override the express provisions of the statute. Clearly, therefore, rule 13 is ultra vires the power of the rule-making authority. The learned Additional District Judge and the High Court did not examine the plea of the appellant on merits and disposed of the case on the ground that his application was barred by limitation, which was clearly against the express provisions of the statute. The order of the Additional District Judge was, therefore, passed in excess of jurisdiction and without lawful authority and was, therefore, liable to be declared as such. It seems that this aspect of the matter was not brought to notice of the learned Judge in the High Court." (emphasis provided)

7. According to Article 189 of the Constitutional of Islamic Republic of Pakistan, 1973 every verdict of the Hon'ble Supreme Court of Pakistan, deciding a question of law has binding force upon all organs of the State and while violating the same learned courts below have committed grave illegality which cannot be allowed to sustain.

8. The next question which boils down for determination by this Court is as to whether the reasons mentioned by the petitioner in his application

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for setting aside of *ex-parte* judgment & decree were sufficient or not. It has not been rebutted by the learned counsel for the respondents No.3 to 6 that Chak Number of petitioner was wrongly mentioned in the plaint. As far as plea of the respondents that since there is only village with the name of Adda Peerowal in Khanewal, wrong mentioning of Chak Number was inconsequential, is concerned, suffice it to note that common residence of a person is identified according to his Chak Number except villages without such demarcation and if the respondents No.3 to 6 did not reflect the exact Chak Number of the petitioner, the presumption is that the notices issued in his name did not reach him. In this scenario, the reasons provided by the petitioner for setting aside of *ex-parte* judgment & decree were fully justified.

9. For what has been discussed above, instant petition is **accepted** and impugned decisions of the courts below are **set-aside** and the application of the petitioner for setting aside of *ex-parte* judgment & decree shall be deemed to be pending which shall be decided by the learned Trial Court **afresh**.

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10. Before parting with this order, it is observed that since the minors have no other source of income, this order is subject to payment of maintenance to them, by the petitioner, at the rate of Rs.2,000/- (Two Thousand Rupees) each per month, since the filing of suit. Further, till the decision of the matter by the learned Trial Court afresh, the petitioner would continue payment of future maintenance at the said rate. In the event of default on the part of the petitioner to pay past and future maintenance of the minors in terms of this Para, this order would cease to exist. This arrangement, being tentative in nature, learned Trial Court is required to re-decide the matter without being influenced by the above observations. It is further clarified that the amount already deposited/paid by the petitioner, towards maintenance, shall be scored off while calculating tentative past maintenance in terms of this order.

11. The Registrar of this Court is directed to ensure circulation of this order to all the District & Sessions Judges in the province for its onwards information and compliance by the courts in future.

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12. The Registrar of this Court is also directed to take relevant authorities on board for amendment in the Family Court Rules, 1965 in line with the judgment of the Hon'ble Supreme Court of Pakistan, referred Supra.

(Shujaat Ali Khan)
Judge

APPROVED FOR REPORTING.

Judge

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