W.P.No.404 of 2015

Major (R) Abrar Hussain Judge Family Court, Lahore etc.

12.01.2015 **Mr. Moeen Ahmad, Advocate for petitioner.**

Facts giving rise to the present litigation are that on 23.12.1996, parties (**petitioner and respondent No.2)** entered into a matrimonial bond and out of this wedlock a daughter and son namely Dhuhha (about 16 years) and Muhammad Abdullah (about 15 years) were born.

2. It is the case of respondent No.2 that on 22.04.2010 a notice of divorce was sent to her, whereafter, upon expiry of 90 days mandatory period, as the certificate of effectiveness of Talak was not issued to her, therefore, she was constrained to file W.P.No.26915/2010 before this Court, in which on 13.11.2012 it was settled between the parties to the said Writ Petition that she will move an application for issuance of certificate regarding the effectiveness of divorce, whereupon, the departmental functionary shall act in accordance with law.

3. In view of the fact that the petitioner still claims respondent No.2 to be his wife, respondent No.2 on 09.01.2013 filed a suit for dissolution and cancellation/termination of marriage in the light of divorce deed dated 22.04.2010 before the Judge Family Court.

This suit was decreed *ex parte* on 11.10.2013, whereafter an application for setting aside the *ex parte* decree was filed by the petitioner, which was accepted on 03.06.2014 and petitioner was allowed to file his written statement. Thereafter, vide judgment and decree dated 12.12.2014, suit of respondent No.2 was decreed, therefore, this petition.

4. Learned counsel for the petitioner submits that the judgment and decree passed by respondent No.1 is without jurisdiction, insofar as that the declaration asked for could not have been given by the Family Court; although notice for Talak was sent on 22.04.2010, however, the same was subsequently withdrawn, therefore, the Talak never became effective.

5. I have heard the learned counsel for the petitioner and have gone through the available record.

6. It is admitted between the parties that a notice of Talak was issued on 22.04.2010. It was the case of respondent no. 2 that the same became effective with the efflux of time i.e. after lapse of 90 days as contemplated in Section 7 of the Muslim Family Laws Ordinance, 1961 (VIII of 1961). For convenience, the afore-noted provision is reproduced as under:-

> *"**7. Talaq:**- (1) Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of talaq in any form whatsoever, give the Chairman a notice in writing of his having done so, and shall supply a copy thereof to the wife.*

(2) Whoever, contravenes the provisions of sub-section (1) shall be punishable with simple imprisonment for a term which may extend to one year, or with fine which may extend to five thousand rupees, or with both.

(3) Save as provided in sub-section (5) talaq, unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from the day on which notice under sub-section (1) is delivered to the Chairman. (emphasis supplied)

(4) Within thirty days of the receipt of notice under Sub-section (1), the Chairman shall constitute an Arbitration Council for the purpose of bringing about conciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation.

(5) If the wife be pregnant at the time talaq is pronounced, talaq shall not be effective until the period mentioned in Sub-section (3) or the pregnancy, whichever later, ends.

(6) Nothing shall debar a wife whose marriage has been terminated by talaq effective under this section from remarrying the same husband, without an intervening marriage with a third person, unless such termination is for the third time so effective."

7. It was acknowledged by respondent No.2 that petitioner did withdraw the said notice on 14.10.2010 but her case was that the same was done with *malafide* intention and moreover, it was withdrawn after the culmination of 90 days' period. Learned counsel for the petitioner has not denied the afore-noted date of withdrawal of notice of Talak. The assertion of respondent no. 2 is further fortified by the written statement, copy of which has been appended with this petition at page 15; in reply to paragraph no. 4, no specific date has been mentioned regarding withdrawal of the said notice. Similarly, it has not been denied that the notice of talak

was not given on 22.04.2010. Learned counsel at this juncture has produced copy of proceedings before the Arbitration Council which further fortify the stance of respondent no. 2 regarding date of withdrawal of notice i.e. 14.10.2010.

8. In view of the above facts and the legal provisions, although it was well within the rights of the petitioner to have withdrawn the notice of Talak within given time (90 days), which he has failed to do, because of which Talak became effective and irrevocable. Reliance can be placed on *M. Salahuddin Khan v. Muhammad Nazir Siddiqi & others* (**1984 SCMR 583**) and *M. Zikria Khan v. Aftab Ali Khan & another* (**PLD 1985 Lahore 319**). Respondent No.1 rightly held that the Talak became effective and the matrimonial bond came to an end on the expiry of 90 days.

9. Great emphasis has been laid by the learned counsel on the fact that it was not the mandate of the Judge Family Court to have given such a declaration. It will be of use to peruse Section 5 and Schedule (Part I) attached to West Pakistan Family Courts Act (XXXV of 1964), which for convenience is reproduced as under:-

> ***"5. Jurisdiction:--*** *(1) Subject to the provisions of the Muslim Family Laws Ordinance, 1961, and the Conciliation Courts Ordinance, entertain, hear and adjudicate upon matters specified in [Part I of the Schedule].*
>
> *(2) ……..*
>
> ***(3)*** *……..."*
>
> ***"Schedule Part I***
>
> *1. Dissolution of marriage [including Khula]*
> *2. Dower*

3. Maintenance.

4. Restitution of conjugal rights.

5. Custody of children [and the visitation rights of parents to meet them].

6. Guardianship.

7. [Jactitation of marriage].

8. [Dowry].

9. Personal property and belongings of wife."

10. It is clear and obvious from the above that Family Court has the exclusive jurisdiction to entertain, hear and adjudicate upon the matters specified in Part-I of the Schedule attached to the Act ibid, which include Dissolution of Marriage. In view of the above entry, any direct or indirect issue involving the question of dissolution of marriage shall be raised and adjudicated upon, before and by the Family Court.

11. As regards the maintainability of this petition, it shall not be out of place to mention here that under Section 14 of the Act ibid, a right of Appeal has been provided to a person, who is aggrieved of a decision given or a decree passed by a Family Court. For convenience Section 14 of the Act ibid is reproduced as under:-

> *"**14. Appeal:--** [(1) Notwithstanding anything provided in any other law for the time being in force, a decision given or a decree passed by a Family Court shall be appealable—*
>
> *(a) to the High Court, where the Family Court is presided over by a District Judge, an Additional District Judge, or a person notified by Government*

to be of the rank and status of a District Judge or a Additional District Judge, and

(b) to the District Court, in any other case.]

(2) No appeal shall lie from a decree passed by a Family Court--

(a) for dissolution of marriage, except in the case of dissolution for reasons specified in clause (d) of item (viii) of section (2) of the Dissolution of Muslim Marriage Act, 1939.

(b) for dower [or dowry] not exceeding rupees [thirty thousand];

(c) for maintenance of rupees [one thousand] or less per month.

(3) No Appeal or revision shall be against an interim order passed by a Family Court.

(4) The Appellate Court referred to in sub-section (1) shall dispose of the appeal within a period of four months.]"

12. From the perusal of the above, it is clear that but for the exceptions highlighted in Section 14(2) (a), (b) & (c) wherein an appeal cannot be filed against an order passed by the Family Court, in all other eventualities, an appeal can and has to be preferred before the District Judge be that for highlighting the question of jurisdiction.

13. In the case in hand, as a declaration has been given by the Family Court qua the non existence of marriage *inter se* parties, therefore, the impugned judgment and decree was appealable under Section 14 of the Act ibid, therefore, this petition, even otherwise is not maintainable in view of availability of alternate remedy. Reliance can be placed on *Dr. Sher Afghan Khan Niazi v.*

Ali S. Habib & others (**2011 SCMR 1813**) and *M. Abbasi v. S.H.O. Bhara Kahu & 7 others* (**PLD 2010 SC 969**).

14. The upshot of the above discussion is that this petition being incompetent is not maintainable therefore the same is **dismissed in *limine.***

(**FAISAL ZAMAN KHAN**)
JUDGE

Shafaqat*

Approved for reporting