Writ Petition No. 15651 of 2012

Muhammad Fazal Rasool. **A.D.J. Etc.**

25.7.2012. Mr. Zafar Iqbal Bhatti, Advocate for the petitioner.
Ch. Kashif Ali, Advocate for respondent No.3.

Through this petition under Article 199 of Constitution of Islamic Republic of Pakistan, 1973, the petitioner has prayed for setting aside of impugned order dated 24.5.2012 passed by Additional District Judge, Ferozewala (respondent No.1), whereby he dismissed application of the petitioner for setting aside judgment and decree dated 18.7.2011 passed by learned Additional District Judge, Ferozewala, and also the *ex parte* judgment and decree dated 30.4.2011 passed by the learned Judge Family Court, Ferozewala.

2. Briefly, the facts, forming background of this petition, are that respondents No.3 to 5 filed a suit for recovery of maintenance allowance, dowry articles and gold ornaments in the court of learned Judge Family Court, Ferozewala. Despite issuance of notices as well as the publication in the newspaper daily "Jinnah" the

petitioner did not entered his appearance, therefore, vide order dated 25.3.2011 he was proceeded against *ex parte* and vide judgment and decree dated 30.4.2011 the learned trial court decreed suit filed by the said respondents *ex parte*. Feeling dissatisfied with the said *ex parte* judgment and decree respondent No.3 preferred an appeal before the Additional District Judge Ferozewala, who vide *ex parte* judgment and decree dated 18.07.2011 partially accepted the same and the amount in lieu of dowry articles was enhanced to Rs.5,00,000/-. After having *ex parte* judgment and decree in her favour respondent No.3 filed execution petition. During the pendency of the execution petition learned counsel for respondent No.3 appeared and made a statement to the effect that the petitioner-judgment debtor does not possess any property in the Ferozewala, therefore, the decree be transferred to Faisalabad for its execution. Accordingly, the learned Executing Court sent a precept to Senior Civil Judge, Faisalabad. The Executing Court, to which the precept was sent, issued non-bailable warrants of arrest of the petitioner and having coming to know about the same the petitioner filed an application before the learned Additional District Judge, Ferozewala for setting aside

ex-parte judgments and decrees dated 18.07.2011 and 30.04.2011. However, the same was dismissed by the learned appellate Court vide order dated 24.05.2012; hence this petition.

3. Learned counsel for the petitioner contends that respondent No.3 with a view to harass and blackmail the petitioner filed the suit at Ferozewala and got *ex parte* judgments and decrees in a clandestine manner; that the petitioner was never served with any notice regarding the institution of the suit as well as filing of the appeal by respondent No. 3; that the newspaper wherein the publication for service of the petitioner was issued is of limited circulation; that while passing the impugned judgments and decrees, both the Courts below have failed to consider that about one and half years prior to the filing of the suit, respondent No.3 was divorced by the petitioner; that the petitioner was deprived of the opportunity to defend himself and to rebut the inadmissible evidence of the petitioner; that the law favours the decision of *lis* on merits instead of technicalities; that the learned appellate Court dismissed the application filed by the petitioner for setting aside of *ex parte* judgments and decrees passed by the learned trial Court as well as by the appellate

Court in a slipshod manner; that the verdicts of both the courts below are based on misreading and non-reading of evidence; that in case the impugned judgments and decrees are not set aside, the petitioner is bound to suffer an irreparable loss and incalculable injury. In support of his contentions, learned counsel has relied upon the cases reported as Farid Ullah Khan Kundi v. Rustam Khan (**PLD 2012 Peshawar 121**), Qazi Laeeq v. Najeebur Rehman and others (**2012 MLD 50**), Muhammad Bakhsh v. Additional District Judge and 2 others (**2012 MLD 990**), Muhammad Ahmed v. Muhammad Younus Lakhani (**2011 YLR 1912**), Mubarak Ali v. First Prudential Modaraba (**2009 CLC 849**), Ijaz Ahmad v. Habib Bank Imited, Karachi (**2012 CLC 1762**), Mst. Nasreen v. Additional District Judge with Power of Guardian Judge, Alipur and others (**PLD 2007 Lahore 576**), Messrs Bashir Leather Int. (Pvt.) Limited and 2 others v. Muslim Commercial Bank Limited through Manager (**2006 CLD 132**), Manzoor Ahmad v. District Officer Revenue, Lahore and others (**2006 CLC 1647**), Syed Salim Imtiaz Hussain through Syed Imtiaz Hussain v. Muhammad Salim and 2 others (**2004 MLD 1548**), Muhammad Aslam v. Muhammad Usman and others

(**2004 CLC 473**), Messrs Mahmood Brothers through Mahmood Ahmad and another v. National Bank of Pakistan through Manager and another (**2004 CLD 771**), Messrs Quetta Silk Centr through Sole Proprietor and 2 others v. Muslim Commercial Bank Limited through Branch Manager/General Attorney (**2003 CLD 254**), Arshad Ali v. Additional District Judge, Vehari and others (**2002 CLC 1450**), Asim Shahzad v. Muslim Commercial Bank Limited through President and another (**2002 CLD 1258**), M. Saleem Ahmad Siddiqui v. Mst. Sabira Begum and others (**2001 YLR 2329**), Ghazanfar Abbas v. Asifa Bokhari (**2000 YLR 841**), Mst. Faiz Noor v. Dilawar Hussain and others (**1995 CLC 1319**), Zahid Hussain Dar v. Ahmad Shaukat Dar 3 and others (**1994 MLD 574**), Shaikh Muhammad Hussain v. Additional District Judge, Lahore and others (**1993 CLC 795**), Mst. Muhammadi v. Jamil-ud-Din (**PLD 1960 (WP) Karachi 663**), Mst. Rahilan v. Sana Ullah (**PLD 1959 (W.P.) Lahore 470**) and Ahmed Ali v. Sabha Khatun Bibi and others (**PLD 1952 Dacca 385**).

4. Conversely, learned counsel appearing on behalf of respondent No.3, while defending the impugned judgments and decrees, argued that since the

brother of respondent No.3 was employed in Police department and he was living in Ferozewala, therefore, suit filed by respondent No.3 while living with her brother at Ferozewala was competent; that it is not open for the petitioner to claim that wrong address was mentioned by respondent No.3 while filing suit at Ferozewala inasmuch as the address of the petitioner is not only the same in the Nikahnama but also in the application filed by the petitioner for setting aside the *ex parte* judgments and decrees; that conduct of the petitioner speaks volume towards his all out efforts to undo the decrees in favour of respondent No.3; that the petitioner was arrested on 10.05.2012, however, as the operation of the impugned judgments and decrees was suspended by the learned appellate Court, he was released but despite that he has not paid even a single penny towards the maintenance of the minors and that the petitioner want to deprive the respondent of the fruits of the judgments and decrees.

5. I have given anxious consideration to the arguments advanced by the learned counsel for the parties in support of their respective pleas and have also gone through the documents appended with this

petition in addition to going through the case-law cited by the learned counsel for the petitioner at the bar.

6. The most pivotal point pressed into service by the learned counsel for the petitioner is that the address of the petitioner was wrongly mentioned by respondent No.3 while filing suit at Ferozewala, therefore, no notice was served upon him. Likewise, the proclamation issued in daily Jinnah was also not delivered at the residence of the petitioner. To evaluate the point raised by the learned counsel for the petitioner I have minutely gone through the contents of the Nikahnama according to which, the address of the petitioner is the same as mentioned by respondent No.3 in his suit. Further, according to the application filed by the petitioner himself for setting aside ex parte judgments and decrees passed by the learned trial Court as well as the appellate Court the address of the petitioner is the same as mentioned by respondent No.3 in his suit irrespective of the fact that in para-5 of the said application the petitioner had averred that he was not resident of mauza Makhanwala rather he was resident of B-Block Sitara Colony, Faisalabad. Moreover, while filing execution petition, respondent No.3 mentioned the same address of the petitioner as

was given in the suit and warrants were executed against the petitioner at the said address. In these circumstances, the stance of the petitioner that respondent No.3 succeeded to get ex parte judgments and decrees while giving wrong address of the petitioner is not tenable. In my view the petitioner was well aware about the suit filed against him by respondent No.3 but he deliberately did not join the proceedings of the said suit and kept on waiting till the passing of the impugned *ex parte* judgments and decrees. The conduct of the petitioner is also manifest from the fact that as per his own showing, he was not putting up at the given address, therefore, he had no knowledge about filing of the suit by respondent No.3 against him but he has not referred to any material from where he came to know about the issuance of warrants of arrest against him by the Court to whom precept was sent by the executing Court despite the fact that the warrants were issued against the petitioner at the address mentioned in the execution petition.

7. Insofar as the petitioner's contention that the name of newspaper was substituted from daily "Insaf" to daily "Jinnah" and the newspaper wherein the proclamation against the petitioner was issued had

limited circulation is concerned, suffice it to observe that it is not the case of the petitioner that the said newspaper is not published in Faisalabad. Further, the petitioner has also not denied the publication of the proclamation. Moreover, a number of close relatives of the petitioner are residing in Faisalabad, therefore, presumption of truth is attached to the fact that after issuance of proclamation in a daily newspaper, the petitioner was served in accordance with law. Even otherwise, the choice of the newspaper is not that of the parties rather the court has the discretion to direct for issuance of publication in the newspaper from amongst the list approved by the Court. Moreover, a perusal of the order sheet of the learned trial court brings it to light that when the representative of daily "Insaaf" was not available the name of the newspaper was substituted with that of daily "Jinnah".

8. Now coming to the petitioner's objection that suit filed by respondent No.3 at Ferozewala was not competent, I am the view that to determine the jurisdiction of a Judge Family Court, the ordinary residence the plaintiff/female is considered as her place of abode and the court concerned has the jurisdiction to try any family suit. Since the two

brothers of respondent No.3 were residing at Kot Abdul Malak and the possibility of respondent No.3's residence with them, being their real sisters, cannot be brushed aside lightly, therefore, the learned Guardian Judge has rightly heard the suit and decided the same.

9. As far as the question that the petitioner was not afforded an opportunity to rebut the inadmissible evidence of respondent No.3 is concerned, I am of the opinion that right from the filing of the suit in the year 2008, till the time the petitioner was proceeded against *ex parte* notices were issued to him through different modes. As a last resort, the learned trial court also got published a proclamation to procure the attendance of the petitioner but he failed to appear before the Court; hence at this juncture the petitioner cannot claim that he was not given an opportunity to defend himself.

10. Now while adverting to the case law cited by the learned counsel for the petitioner I am of the humble view that the same is not applicable to the facts and circumstances of the present case for the reason that in the case of *Farid Ullah Khan Kundi* (supra) the impugned *ex parte* judgments and decrees were set aside on the ground that the defendant after joining the

proceedings of the suit could not appear before the Court being cardiac patient but in the case in hand the petitioner did not bother to join the proceedings either before the trial Court or before the learned appellate Court. Likewise, in the matter of *Najeeb ur Rehman and others* (supra) the question involved was whether the party concerned can only ask for setting aside of *ex parte* judgments and decrees or the previous order can also be challenged in the said application as the application was dismissed by the learned trial court on the account of joinder of two reliefs in the said application and the said order of the learned trial court was set aside by the High Court. Similarly, in the case of *Muhammad Bakhsh* (supra) the *ex parte* judgment and decree was set aside by the High Court on the ground that the delivery of the notices by the courier service was not established. It is important to mention over here that no publication was issued in the said case. Insofar as case of *Muhammad Ahmad* (supra) is concerned the ex parte decree was set aside wherein only official address of the defendant was mentioned which is not the case in the instant case. As far as cases of *Mubarak Ali, M/s Bashir Leather INT (Pvt.) Ltd and two others, Asim Shehzad, M/s Mahmood*

brothers, M/s Quetta Silk Centre and Ejaz Ahmad (supra) are concerned, the same relate to section 12 of the Financial Institutions (Recovery of Finances) Ordinance, 2001, where-under special procedure for service has been laid down, therefore, the same cannot be quoted in the present case. In the case of *Mst. Nasreen* (supra), the notices were sent at wrong address and process server reported that the defendant refused to accept the same but no proclamation was published in the newspaper. The preposition involved in the cases of *Manzoor Ahmad*, *Syed Saleem Imtiaz Hussain*, *Muhammad Aslam*, *Arshad Ali*, *M. Saleem Ahmad Siddiqui and Zahid Hussain Dar* (supra) was that quantum of maintenance cannot be enhanced/awarded beyond the known sources of the father. The question involved in the case of *Ghazanfar Abbas* (supra) was the non-service of the defendant in post remand proceedings whereas in the matter of *Mst. Faiz Noor* (supra) the impugned order was set-aside to enable the petitioner to cross-examine the witness. The ex parte decree was set-aside in the case of *Shaikh Muhammad Hussain* (supra) on the ground that the address of the defendant given by the plaintiff in her suit was incomplete while the preposition settled in the

cases of *Mst. Rahilan, Ahmad Ali and Mst. Muhammadi* (Supra) was that whether wife while living away from the husband was entitled to maintenance or not.

11. Insofar as the petitioner's contention that respondent No.3 did not prove the contents of the documents produced by her in support of her version is concerned, suffice it to observe that according to section 17 of the West Pakistan Family Court Act, 1964, the application of the provisions of Qanoon-e-Shahadat Order, 1984, and that of the Code of Civil Procedure, 1908, has been ousted, therefore, respondent No.3 was not bound to prove the contents of the said documents as is done in the cases covered under Civil Procedure Code. Even otherwise, while appearing in the witness box, respondent No.3 fully supported the contents of the said documents.

12. The concurrent findings of facts recorded by the court below cannot be upset in Constitutional jurisdiction until and unless they are proved to be perverse or arbitrary. Reliance in this regard is placed on the case reported as Farhat Jabeen v. Muhammad Safdar and others (**2011 SCMR 1073**) wherein the

august Supreme Court of Pakistan has declared as under: -

> *"Heard. From the impugned judgment of the learned High Court, it is eminently clear that the evidence of the respondent side was only considered and was made the basis of setting aside the concurrent finding of facts recorded by the two courts of fact; whereas the evidence of the appellant was not adverted to at all, touched upon or taken into account, this is a serious illegality committed by the High Court because it is settled rule by now that interference in the findings of facts concurrently arrived at by the courts, should not be lightly made, merely for the reason that another conclusion shall be possibly drawn, on the reappraisal of the evidence; rather interference is restricted to the cases of mis-reading and non-reading of material evidence which has bearing on the fate of the case."*

13. It is pertinent to point out here that though the learned counsel for the petitioner has contended that petitioner divorced respondent No.3 prior to the filing of the suit but neither any document has been appended with this petition in proof thereof nor any material from the record has been referred by the learned counsel for the petitioner. Thus, in absence of any documentary proof the assertion of the petitioner cannot be taken as a gospel truth.

14. As a sequel to the discussion made in the above paragraphs I feel no hesitation to hold that the

petitioner was proceeded against *ex parte* after the due process of law. On the other hand, all the efforts of the petitioner seems to focus to defuse the effect of the judgments and decrees passed in favour of respondent No.3, prove positive whereof is that despite passing of judgments and decrees against him he has not paid a single penny towards the maintenance of the minors let alone the amount deposited by him pursuant to order dated 19.07.2012. Consequently, this petition is **dismissed** with the observation that the amount of Rs.1,20,000/- deposited by the petitioner with the D.R. (Judicial) of this Court shall be released to respondent No.3 upon her due verification and the same would be adjusted while determining the outstanding amount of maintenance against the petitioner. The parties are left to bear their respective costs.

(Shujaat Ali Khan)
Judge

Approved for Reporting

Judge

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