

2012 M L D 216

[Lahore]

Before Malik Shahzad Ahmed Khan, J

Mst. TALAT SHAHEEN and others---Petitioners

Versus

MUHAMMAD IBRAR and others---Respondents

Writ Petition No.432 of 2011, decided on 9th September, 2011.

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

---S. 5, Sched. & S.7---Constitution of Pakistan, Art.199---Constitutional petition---Suit for recovery of maintenance allowance, dowry articles, etc.---Production of documents as additional evidence---Scope---Plaintiffs moved an application for submission of documents as additional evidence, in order to prove the monthly income and financial status of the defendant, during the trial of the suit---Said application was dismissed vide impugned order on the ground that documents intended to be produced, were neither appended with the plaint nor were relied upon by the plaintiffs in the list of reliance---Family Court under first proviso to S.7(ii) of West Pakistan Family Courts Act, 1964 was possessed with the powers to allow any document to be produced, which was expedient and just for the fair administration of justice---Additional evidence which was necessary for just and fair decision of the case, could be allowed at any stage of the case---Documents intended to be produced by the plaintiffs were expedient and important for the just decision of the case---Judge Family Court had not exercised his jurisdiction properly while passing the impugned order and dismissed the application by the plaintiffs on the ground that they did not append said documents with the plaint at the

time of filing the suit---Impugned judgment of the Judge Family Court, being illegal and void was set aside and the plaintiffs were permitted to produce additional evidence, in circumstances.

Mst. Faiza Firdous v. Ghulam Sabir 2002 CLC 1801 and Zar Wali Shah v. Yousaf Ali Shah and others 1992 SCMR 1778 rel.

Nemo for Petitioner

Khawaja Hassan Riaz for Respondent No.1

ORDER

MALIK SHAHZAD AHMED KHAN, J.---This petition has been filed against the order dated 2-2-2011, passed by the learned Judge Family Court, Rawalpindi, whereby the application for production of additional document/evidence filed by the petitioners was dismissed.

2. As per brief facts of this petition, a suit for recovery of maintenance allowance, dowry articles, car and gold ornaments was filed by the petitioners against respondent No. 1. The said suit was filed in the court of learned Judge Family Court, Rawalpindi. During the trial, the petitioners moved an application for submission of documents as additional evidence, in order to prove the monthly Income and Financial Status of the defendant/respondent No.1. The said petition was contested by respondent No.1. The learned Judge Family Court has dismissed the above mentioned application moved by the petitioners vide the impugned order dated 2-2-2011, hence, the present constitutional petition, before this Court.

3. No one entered appearance on behalf of the petitioners.

4. It is contended by the learned counsel for respondent No.1 that the impugned order has been passed strictly in accordance with law; that the documents intended to be

produced by the petitioners were not relied upon by the petitioners in the list annexed with the plaint and the same were not appended with the plaint at the time of filing the suit; that the plaintiffs cannot be permitted to produce the said documents at a belated stage; that under section 7 of the West Pakistan Family Courts Act, 1964, the petitioners can only be allowed to produce such documents in evidence, which were either appended with the plaint or the same were relied upon, in the list annexed with the plaint, therefore, this writ petition may be dismissed.

5. I have heard the learned counsel for respondent No.1 and have also gone through the grounds taken in the instant writ petition and the documents annexed with it.

6. The petitioner No.1 Mst. Talat Shaheen along with her minor children (petitioners Nos.2 to 5) had filed a suit for the recovery of maintenance allowance, dowry articles, car and gold ornaments against respondent No. 1. During pendency of the said suit, the petitioners moved an application to produce different documents in additional evidence, to show monthly income and financial status of the defendant/ respondent No.1. The petitioners intended to produce inter alia the pay slip, rent agreement executed by the defendant/respondent No.1, proof of lectures delivered by respondent No.1 in NUST Institute Rawalpindi and receipt of pick and drop of the minor plaintiffs in order to establish the monthly income and status of the defendant/respondent No.1 and expenditures of the plaintiffs. The above said application of the petitioner has been dismissed vide the impugned order, on the ground that the documents intended to be produced were neither appended with the plaint nor relied upon by the plaintiffs/petitioners in the list of reliance. Under section 7(3) of the West Pakistan Family Courts Act, 1964, the petitioners were liable to produce those documents at the time of filing of suit, which were under their power or possession. Section 7(3) of the West Pakistan Family Courts Act, 1964 is reproduced hereunder:--

"Section 7(1)-----

(2)-----

(3) Where a plaintiff sues or relies upon a document in his possession or power, he shall produce it in Court when the plaint is presented, and shall at the same time, deliver the document or a copy thereof to be filed with the plaint"

Similarly under section 7(3)(ii) of the Act, *ibid*, the petitioners were obliged to rely on other documents not in their possession or power, in the list to be appended with the plaint. Section 7(3)(ii) is reads as under:--

"Section 7(3)(ii) Where he relies on any other document, not in his possession or power, as evidence in support of his claim, he shall enter such documents in a list to be appended to the plaint [giving reasons of relevancy of these documents to the claim in the plaint"].

The learned Judge Family Court, Rawalpindi while passing the impugned order has completely overlooked first proviso of section 7(ii) of the West Pakistan Family Courts Act, 1964 which is relevant for the decision of controversy involved in the instant petition. The said proviso is reproduced hereunder:--

"7-(ii) Provided [further] that the parties may, with the permission of the court, call any witness at any later stage; if the court considers such evidence expedient in the interest of justice."

The above mentioned proviso in section 7 of the West Pakistan Family Courts Act, 1964 was inserted by Ordinance LV of 2002 dated 1-10-2002. The learned Judge Family Court, under the above mentioned provision of law was possessed with the powers to allow any document to be produced, which was expedient and just for the fair administration of justice. The above-mentioned documents like pay slip of the defendant/respondent No.1, rent agreement executed by the defendant/ respondent No.1, etc., could not be under the power or possession of the petitioners/plaintiffs. It was duty of the defendant/respondent No.1 to produce the said documents before the court, but it appears that he deliberately withheld those documents. The petitioners might not be in the knowledge of the above-mentioned documents at the time of filing

her suit, therefore, the same could not be relied upon in the list appended with the plaint. The petitioners anyhow managed to obtain the above-mentioned documents and they intended to produce the same before the learned trial court in order to establish the income/status of the defendant/respondent No.1, so that the court may give a proper decision about the issue of maintenance and may reach at a just and fair decision of the case. The documents intended to be produced by the petitioners are expedient and important for the just decision of the case, in hand. The learned Judge Family Court has not exercised his jurisdiction properly while passing the impugned order. A similar proposition came under discussion of this court in the case of Mst. Faiza Firdous v. Ghulam Sabir (2002 CLC 1801) and it was held in the said judgment as under:--

"S.5 Sched. & S.7---Suit for recovery of dowry articles---Provision of S.7, West Pakistan Family Courts Act, 1964 makes it mandatory upon the parties to give schedule of witnesses giving summary of evidence and also production of all the documents in possession of the parties---Family Court, under S.7 is possessed with power to allow any witness to produce any document on record and pass order as the Court thinks expedient and just for the fair administration of justice"

It is by now a well settled law that the additional evidence, which is necessary for just and fair decision of the case, could be allowed at any stage of the case. Reference in this respect may be matter to the case of Zar Wali Shah v. Yousaf Ali Shah and others 1992 Law Notes 718 SC = 1992 SCMR 1778. In the said case, the Hon'ble Supreme Court of Pakistan has held as under:--

"Additional Evidence---Courts duty to allow suo motu under present Pakistan Jurisprudence - Even if one or the other party had failed to produce all the material documents and/or failed to request for proper examination of the disputed document/signatures, the Court had ample power to do the needful so as to advance justice rather than injustice---The concept of bar against filling the gaps is no more available in the present Pakistan jurisprudence and the law, including the precedent law on Islamic principles, which are being made applicable progressively to the proceedings before the Courts and other forums which are required to record/admit evidence."

7. The learned Judge Family Court, Rawalpindi has wrongly dismissed the application, moved by the petitioners, vide its impugned order on the ground that the plaintiffs did not append the above referred documents with her plaint at the time of filing her suit. As discussed earlier, the documents intended to be produced by the petitioners were not under their possession or power at the time of filing, the suit, therefore, the petition for production of the said documents could not be dismissed on the above mentioned grounds.

8. In the light of above discussion, this petition is allowed. The impugned order dated 2-2-2011, passed by the learned Judge Family Court, Rawalpindi is hereby declared illegal and void and the same is set-aside. The application of the petitioners/plaintiffs for production of additional evidence is, therefore, accepted and they are permitted to produce additional evidence. Similarly, the defendant/respondent No.1 will also be permitted by the learned trial court to file documents, if any, in rebuttal of the additional evidence produced by the petitioners/plaintiffs.

H.B.T./T-35/L

Petition allowed.