JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Writ Petition No. 13063 of 2020
Fozia Mazhar Versus Additional District Judge and others

J U D G M E N T

Date of hearing: ***11.09.2020***

Petitioner (s): M/s Muhammad Shahzad Shaukat, Barrister Taha Shaukat, Muhammad Uzair and Muhammad Ali Raza, Advocates

Respondent(s): M/s Najam-us-Saqib, Muslim Abbas, Muhammad Muzaffar Semor and Malik Muhammad Salik Awan, Advocates for respondent No.3

SHAHID BILAL HASSAN-J: Facts, in precision, are as such that petitioner and respondent No.3 entered into nuptial tie on 03.04.2010 and respondent No.3 went back to Canada after a few weeks of marriage and there-after neither contacted the petitioner nor provided her maintenance allowance. The petitioner instituted a suit for dissolution of marriage, which was contested by the respondent No.3; however, the said suit was decreed on 04.04.2015. Before the said decree dated 04.04.2015 could take effect in accordance with law, the matter was resolved inter se the parties and petitioner as well as respondent No.3 filed a joint application seeking annulment of the said decree. As it was a *Watta Satta* marriage, so the brother of the petitioner and his wife (sister of the respondent No.3) also submitted a compromise in the suit between them. Pursuant to the said application, on the basis of statement of the

petitioner, the decree dated 04.04.2015 was set aside and suit was dismissed as withdrawn on 27.04.2015. Similar compromise order was also obtained in suit between Faiza Hanif (sister of respondent No.3) and Tassavar Hayat (brother of the petitioner), which too was withdrawn on the basis of compromise on the same date i.e. 27.04.2015.

There-after the petitioner proceeded to Canada after her visa was arranged by the respondent No.3 as his lawfully wedded wife. However, the spouses could not lead an amicable life and as a result of physical assault on her, the petitioner lodged a criminal complaint against the respondent No.3, who was charged and convicted but later on was released on peace bond as per Canadian laws. The respondent No.3 proceeded to divorce the petitioner on 27.11.2015 but the said divorce deed was declared ineffective by the Administrator/Chairman Arbitration Council (UC-89) vide order dated 04.01.2016; revision against the said order filed by the respondent No.3 was allowed by the Additional District Collector, Jhang vide order dated 29.06.2016. The petitioner, being aggrieved, filed W.P. No.24174 of 2016 against the said order, which was allowed by this Court on 09.05.2017.

Faced with this situation, the respondent No.3 filed an application under section 12(2) of the Code of Civil Procedure, 1908 seeking setting aside of order dated 27.04.2015 on the ground that order sheet did not bear signatures of his special

attorney; the said application was contested by the present petitioner. Issues were framed and evidence of the parties was recorded. The learned trial Court vide impugned order dated 23.01.2018 allowed the said application. The petitioner being aggrieved of the same filed revision petition, which was allowed vide judgment dated 11.02.2019. The respondent No.3 filed W.P.No.12624 of 2019 against the said judgment, which was disposed of through a consent order by virtue of which the order passed by revisional Court was set aside and case was remanded for decision of the revision petition afresh. After remand, the learned Revisional Court vide impugned judgment dated 04.02.2020 dismissed the revision petition filed by the present petitioner, which has culminated in filing of the instant constitutional petition.

2. Learned counsel representing the petitioner has argued that the impugned judgments are against law and facts of the case and are illegal, unjust as the same are bad on account of sheer ignorance of section 17 of the Family Courts Act, 1964, which ordains that the provision of Code of Civil Procedure, 1908 except section 10 & 11 had no application to proceedings before the Family Court; that while deciding application under section 12(2) of the CPC, the learned trial Court assumed jurisdiction as Civil Judge instead of Judge Family Court and Civil Judge would have no jurisdiction to entertain and decide upon a challenge made to a judgment/

order of a Family Court of competent jurisdiction as has been contemplated in section 5 of the Family Courts Act, 1964; that the provisions of section 21 and 21-A (as amended by Punjab Family Courts (Amendment Act 2015) (Act XI of 2015) have totally been escaped the notice of the learned Courts below; that admittedly no proceedings before the Chairman, Arbitration Council were carried out after passing of the decree for dissolution of marriage, thus, the impugned order and judgment are illegal and incompetent; that application under section 12(2) of the CPC did not contain any description of fraud allegedly committed by the petitioner; that the learned Courts below have failed to appreciate that the application under section 12(2) CPC was clearly an afterthought and the respondent No.3 on realizing that the parties would be governed by Canadian Law most surreptitiously filed the said application; that the petitioner had already filed a claim for divorce and matrimonial property in the Court of Queen's Bench of Edmonton, in which order was granted by the said Court on 06.03.2017; that an issue as to the maintainability of the application under section 12(2) CPC was, though, framed but the same as brushed aside in a slipshod manner; that the impugned order and judgment suffer from gross misreading and non-reading of material evidence; that the impugned order and judgment are not, thus, sustainable in the eye of law as the learned Courts below have failed to exercise vested jurisdiction as per mandate of law. Thus, by allowing the

constitutional petition in hand, the impugned order and judgment may be set aside, consequent whereof application under section 12(2) of CPC, filed by the respondent No.3, may be dismissed.

3. Naysaying the above said submissions, learned counsel on behalf of the respondent No.3, has supported the impugned order and judgment and has further argued that the misapplication of section in an application is no ground to dismiss the same out-rightly when otherwise the Court has jurisdiction under the law to pass order; thus, the instant constitutional petition may be dismissed.

4. Heard.

5. Considering the arguments advanced at bar and perusing the record, made available and appended with the instant petition, it is observed that it is now settled position in law that merely citing or relying on wrong provision of law to assume jurisdiction over a *lis* is of no consequence, provided the Court otherwise has jurisdiction under the Constitution, statute or any other provision of law to pass order, as has been held in *Mst. Safia Bibi v. Mst. Aisha Bibi* **(1982 SCMR 494)**, *Jane Margrete William v. Abdul Hamid Mian* **(1994 SCMR 1555)**, *Rauf B Kadir v. State Bank of Pakistan and another* **(PLD 2002 Supreme Court 1111)** and *Olas Khan and others v. Chairman Nab through Chairman and others* **(PLD 2018 Supreme Court 40)**. In the present case, though the respondent

No.3 has mentioned wrong section i.e. 12(2) of CPC while filing application seeking setting aside of order dated 27.04.2015, but when the learned Judge Family Court has jurisdiction to adjudicate upon the same, mere mentioning of wrong section, does not oust its jurisdiction, because proceedings of the Family Court, whether as a Trial Court or an executing Court are governed by the general principle of equity, justice and fair-play, as has been held in *Haji Muhammad Nawaz v. Samina Kanwal* **(2017 SCMR 321)**. Moreover, Family Court has to regulate its own proceedings in accordance with the provisions of Family Court Act and in doing so it has to proceed on the premises that every procedure is permissible unless clear prohibition is found in law, meaning thereby that Family Court can exercise its own powers to prevent the course of justice being deflected from the path. Though Code of Civil Procedure, 1908 except sections 10 and 11 is not applicable but the Judge Family Court is not debarred to follow the principle of the Code, 1908 coupled with the fact, as has been held in *Sayed Abbas Taqi Mehdi v. Mst. Sayeda Sabahat Batool and others* **(PLJ 2010 SC 891)**; the same principle was followed by a Division Bench of Peshawar High Court in judgment reported as *Iftikhar Khan and another v. Mst. Amina Bibi and 2 others* **(PLD 2012 Peshawar 159)**. Moreover, in *Muhammad Tabish Naeem Khan v. Additional District Judge, Lahore and others* **(2014 SCMR 1365)**, it was held that, *'Family Court was a*

quasi-judicial forum, which could draw and follow its own procedure, provided such procedure was not against the principles of fair hearing and trial.'

Now, when this case is considered on the touchstone of the above ratio, it can safely be observed that mere wrong citing of section is no ground to dismiss the application when otherwise the contents of the same divulge that something fishy has been done and fraud has been played and the learned Court, before whom such application has been filed, has jurisdiction to adjudicate upon the matter, because the litigant cannot be ousted from the arena of litigation mere on the basis of technicalities, as it is a settled law that to keep the flag of justice high, substantial justice has to be done. Formal defects, technical defaults, clerical or arithmetical mistakes, wrong drafting of suit, appeal, review or revision or any petition, incorrect quoting, omission of section, Article of law or misquoting of a Rule or Regulation cannot deprive a genuine claimant or litigant and real contestant. If the power of the Court is there and the Court has got the jurisdiction to undo a fraudulent order obtained, then all these irrational technicalities and formalities should not deprive a real and genuine litigant. The contents of application and the prayer of a litigant are to determine the fate of a suit, an appeal or a petition. Substantial and real justice must be done, granted and showered upon the

genuine litigant, leaving aside all formal and minor technicalities hindering the path of justice.

6. In view of the above, If for the sake of arguments this Court considers that application section 12(2) of the Code of Civil Procedure, 1908 was not maintainable due to non-applicability of C.P.C., even then the learned Judge Family Court in a case where as decree or order has been obtained through fraud, deceits, misrepresentation or on any of such grounds, the learned Judge Family Court can competently entertain such an application under the inherent jurisdiction, which is presumed and considered to be vesting in all Courts, Tribunals or authority of even limited jurisdiction, because it is a settled principle of law that fraud vitiates the most solemn proceedings even and the decrees, orders or the judgments obtained in pursuit of these intentions or actions are to be reviewed, reversed, recalled or upset. This rule is based on the principle that an authority if can do act or pass an order, judgment or decree, it can undo it also but with some exceptions also, if the authority has been defrauded in the passing of that act, order or judgment.

In addition to the above, the general rule that power of review does not exist unless it is expressly conferred by law, has got two well-established exceptions i.e. (i) a court has inherent jurisdiction to set aside judgment or order which it had delivered without jurisdiction; (ii) a court or authority has the

power to review an order or judgment obtained by fraud. Reliance is placed on *The Chief Settlment Commissioner, Lahore v. Raja Muhammad Fazil Khan and others* **(PLD 1975 SC 331)**. In this view of the matter, when facts of this case are considered and read, it appears that the order dated 27.04.2015 has been obtained by the petitioner through misrepresentation, because in the entire file of the suit proceedings, Wakalatnama of Mr. Muhammad Asif Mughal Advocate, allegedly representing the respondent No.3 through his special attorney, is not available, which shows that he neither represented the respondent during the proceedings of suit nor he appeared as counsel till the decision of the suit on 04.04.2015; thus, there is nothing on record to suggest that the respondent No.3 was duly represented and even the first order which is in the handwriting of the learned Judge Family Court shows the presence of only Fozia Mazhar, the petitioner and margin of order sheet bears her signatures and thumb impression and only her statement is available on file and no statement of special power of attorney of the respondent No.3. When the position remained as such, the learned trial Court was vested with jurisdiction to undo the order dated 27.04.2015 obtained by the petitioner through misrepresentation.

7. Pursuant to the above discussion, it can safely be held that there appears no jurisdictional error, legal infirmity and illegality in the impugned order and judgment passed by

the learned Courts below, rather vested jurisdiction has judiciously and aptly been exercised. The impugned order and judgment are upto the dexterity and do not call for any interference by this Court in exercise of extraordinary constitutional jurisdiction. Resultantly, while placing reliance on the judgments supra, the constitutional petition in hand being without any force and substance stands dismissed. No order as to the costs.

(***Shahid Bilal Hassan***)
Judge

Announced in open Court on _____.

Judge

Approved for reporting.

Judge

M.A.Hassan