

2018 M L D 496

[Lahore]

Before Jawad Hassan, J

MUHAMMAD SHAMAS-UL-HAQ---Petitioner

Versus

Mst. FAUZIA PARVIN and others---Respondents

W.P. No.107664 of 2017, decided on 20th November, 2017.

Family Courts Act (XXXV of 1964)---

---S.14---Suit for recovery of maintenance allowance---Ex parte decree---Appeal---Scope---Application to set aside judgment instead of preferring appeal---Effect---Invoking constitutional jurisdiction against interim order---Maintainability---Petitioner(defendant) contended that his application to set aside the ex parte judgment and decree should have been accepted---Validity---Record revealed that the petitioner maintained in his application to set aside ex parte judgment and decree that he had paid Rs.70,000/-, which fact denoted that the petitioner had accepted the validity of the judgment and decree being satisfied---Petitioner had submitted application for setting aside ex parte judgment and decree and record manifested that he had actively participated in the proceedings in question---Petitioner in his constitutional petition had challenged the order passed by Executing Court which was an interlocutory/interim order---When the Legislature had specifically prohibited the filing of appeal or revision against an interim order and if the constitutional petition was allowed to be filed against said order, that would tantamount to defeating the intent of the legislature---Petitioner had adequate remedy available to him by challenging impugned order in appeal which, he might file against the ultimate order/judgment if the same would be against him---No illegality or irregularity having been noticed in the impugned order passed by the Family/Executing Court---Constitutional petition was dismissed accordingly.

Aman Ullah Khan v. District Judge and 3 others 2012 CLC 679; Syed Saghir Ahmad Naqvi v. Province of Sindh through Chief Secretary S&GAD, Karachi and others 1996 SCMR 1165 and Muhammad Sabir v. Mst. Azra Bibi and 2 others 2011 CLC 417 ref.

Haq Nawaz Japal for Petitioner.

ORDER

JAWAD HASSAN, J.---Through this constitutional petition, the Petitioner has called in question order dated 02.11.2017 passed by the learned Judge Family Court, Lahore whereby his application for setting aside ex parte judgment and decree was dismissed being, barred by time.

2. Arguments heard and record perused.

3. It is reflected from perusal of record that an ex parte judgment and decree dated 28.10.2015 was passed by learned Judge Family Court in a suit for recovery of maintenance allowance. The Petitioner filed application on 12.11.2016 under Order IX, Rule 13, C.P.C. for setting aside/recalling of the above said ex parte judgment and decree. The said application was contested by the Respondent No.1 by filing a written reply to the said application. The learned Executing Court vide order dated 2.11.2017, dismissed the said application being barred by time instead of filing an appeal, the Petitioner filed this writ petition.

4. From the perusal of record it reveals that the Petitioner in his application maintained that he has made payment of Rs.70,000/-, which fact denotes that the Petitioner had accepted the validness of the judgment and decree being satisfied. It also transpires that on 26.11.2015, the Petitioner himself submitted application for setting aside ex parte judgment and decree, which clearly manifests that he had actively participated in the proceedings. Further, the Petitioner in the petition had challenged the order passed by learned Executing Court which is an interlocutory/interim order and when the statute had specifically prohibited the filing of constitutional petition against such order, would tantamount to frustrating and defeating the intent of legislature. Reliance in this respect is placed upon Aman Ullah Khan v. District Judge and 3 others (2012 CLC 679). Admittedly, the execution proceedings are still underway and during its pendency, the order passed by the Executing Court, for all intents and purposes is an interlocutory order, as the lis is pending before the Executing Court and it has still to render its final verdict. The legislature has made such order, as an non-appealable by specifically making a provision in that respect by virtue of subsection (3) of Section 14 of the West Pakistan Family Courts Act, 1964 (the "Act"), which is reproduced below:--

"Appeal.----(1) Notwithstanding anything provided in any other law for the time being in force, a decision given or decree passed by a Family Court shall be appealable.

(a)

(b)

(2)

(a)

(b)

(c)

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

5. In these circumstances, when the Legislature has specifically prohibited the filing of an appeal or revision against an interim order and if the constitutional petition is allowed to be filed against such order, it would tantamount to defeating and diverting the intent of the legislature. Reference in this context is made to the case of Syed Saghir Ahmad Naqvi v. Province of Sindh

through Chief Secretary S&GAD, Karachi and others (1996 SCMR 1165), wherein the Hon'ble Supreme Court of Pakistan has held as under:--

"Constitutional jurisdiction, exercise of statute excluding a right of appeal from the interim order could not be bypassed by bringing under attack such interim orders in constitutional jurisdiction. Party affected has to wait till it matures into a final order and then to attack it in the proper exclusive forum created for the purpose of examining such orders."

The Petitioner has got an adequate remedy available to him by challenging the impugned order-in-appeal, which, he may file against the ultimate order/judgment if the same would be passed against the Petitioner. This petition is hit by Article 199(1) of the Constitutional, hence cannot be entertained. Reliance in this respect is placed upon Muhammad Sabir v. Mst. Azra Bibi and 2 others (2011 CLC 417). The petitioner has an alternate remedy by filing an appeal after final decision of the matter by learned Executing Court.

The learned counsel for the Petitioner could not point out any illegality or material irregularity in the impugned order passed by the learned Family/Executing Court, calling for interference in the constitutional jurisdiction, therefore, this petition is, hereby, dismissed in limine.

MQ/M-203/L

Petition dismissed.