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Court
SINDH HIGH COURT

Date
2013-04-30

Appeal No.
CONSTITUTIONAL PETITION NO. D-288 OF 2013

Judge
MUSHIR ALAM, C.J. AND NADEEM AKHTAR

Parties
SYED SAJID ABBAS RIZVI—PETITIONER VERSUS MST. NAUREEN AND OTHERS—RESPONDENTS

Lawyers
ABBAD-UL-HASNAIN FOR PETITIONER. ,MASOOD KHAN GHAURI FOR RESPONDENTS NOS. 1 TO 4.MIRAN MUHAMMAD SHAH, ADDL. A.-G., SINDH FOR RESPONDENTNO.5.

Statutes
WEST PAKISTAN FAMILY COURTS ACT (XXXV OF 1964) - S. 10, PROVISO CONSTITUTION OF PAKISTAN - ARTICLE 199 ISLAMIC LAW

Judgment

NADEEM AKHTAR, J.—This Constitutional Petition arises out of Family Suit No. 1031 of 2012 filed by respondents Nos.l to 4 against the petitioner, wherein respondent No. 1 has prayed for dissolution of her marriage with the petitioner and maintenance till the expiration of her period of iddat, and the minor respondents Nos.2 to 4 have prayed for their future maintenance. The Suit is sub judice before respondent No.5, the XXth Civil and Family Judge, Karachi (East). .

2. The relevant facts of this case are that the Nikah of the petitioner and respondent No. 1 was solemnized on 25-3-2000 at Karachi according to the Shia Muslim Law, and respondents Nos.2 to 4 are their minor children. The Suit for dissolution of the marriage and maintenance was filed by respondents Nos.l to 4 on 30-4-2012. The Family Court held the service good on the petitioner / defendant on 6-8-2012 in view of the publication,of summons in a newspaper, and he was directed to file his written statement. As the petitioner did not file his written statement, he was declared ex parte by the Family Court on 17-8-2012, whereafter the Suit was ordered to be fixed for the ex parte proof of the plaintiffs/respondents 1 to 4. Accordingly, the affidavit in ex parte proof was filed on 3-9-2012 by respondent No.l on behalf of respondents 1 to 4. Meanwhile, the petitioner filed two applications on 25-8-2012 before the Family Court; one for initiating an inquiry against the staff of the Family Court, by alleging that they had intentionally given short dates, written wrong diaries and filed wrong reports to facilitate respondents 1 to 4 in obtaining the ex parte order; and the second for setting aside the ex parte order passed against him, praying that he may be allowed to contest the Suit and to adduce evidence.

3. On 21-11-2012, the petitioner filed an application under section 151, C.P.C., praying that no further proceedings should be conducted in the Suit and the points raised in the said application be decided first by the Family Court before proceeding with the Suit. The points urged in .the said application were about the jurisdiction of the Family Court, and the difference in the law and procedure for dissolution of a marriage under the Shia law, particularly with regard to the performance of Sighas. In reply to this application, a detailed counter affidavit was filed by respondent No.l, vehemently opposing the same and denying every purported point raised by the petitioner, to which no rejoinder was filed by the petitioner. Vide order dated 21-12-2012, the application was dismissed by the Family Court after hearing the counsel for the parties. It was held in this order by the Family Court that "It appears that the plaintiff filed Suit for dissolution of marriage by way of Khulla and maintenance so there is no question of procedure of divorce of Shia law or other sects of Islam. So far the Sighas is concerned the same shall be performed after decree of divorce." It was observed by the Family Court that the petitioner was allowed time to file written statement despite the fact that he was debarred earlier, but he did not comply with the order since 21-11-2012, and that the proceedings were being delayed because of his delaying tactics. By the said order dated 21-12-2012, a last and final chance was giveifby the Family Court to the petitioner with a direction to file his written statement without fail by 24-12-2012. '

4. During the pendency of the application mentioned in the preceding paragraph, the petitioner filed yet another application under section 151, C.P.C. on 14-12-2012, praying that a reference be sent by the Family Court to the High Court for interpretation of the

purported Constitutional and law points mentioned in the said application. By order dated 21-12-2012 passed on this application, it was observed by the Family Court that there was no need to refer the matter to the High Court as the Suit was for maintenance and dissolution of the marriage by way of Khula, and the petitioner's counsel was directed to proceed with the case according to law. Instead of filing the written statement and proceeding with the case according to law, as ordered by the Family Court by two separate orders dated 21-12-2012, the petitioner filed this petition on 23-1-2013.

5. It was submitted on behalf of the petitioner that this petition is in the nature of a public interest litigation as the points raised herein are of public importance. It was urged that while conducting and deciding family suits for dissolution of marriage under the Family Courts Act, 1964, (the Act of 1964), all the Family Courts throughout Pakistan, are acting contrary to the Shariah and the Muslim Personal Law prevailing in Pakistan. Since we were very much intrigued with this contention of the petitioner's counsel, we enquired from him to elaborate and explain his contention by specifying the particular provision of law that had compelled him to form such an opinion. It was urged by the petitioner's counsel that the Proviso contained in section 10 of the Act of 1964, violates the Shariah and the Constitution; because of the same, the parties are condemned unheard; Khula' cannot be granted at the initial stage of the proceedings without recording the evidence of the parties ; the Proviso overrides the main section 10, which is not permissible in law ; there is an ambiguity in the said section 10 with regard to pre-trial and post-trial reconciliation between the parties in a case for Khula; section 10 of the Act of 1964 is contrary to Shariah and ultra vires the Constitution; and the decrees passed by all the Family Courts in Pakistan under the said section 10, are un-Constitutional and coram non judice. On the basis of the above, it was prayed that the proviso in section 10 of the Act of 1964 be declared as un-Constitutional and against the law, and be struck down; and the Family Courts be directed to adopt the procedure as provided in the said section 10 prior to the insertion of the Proviso therein, and as per the grounds urged in this petition.

6. In support of his submissions, the learned counsel for the petitioner cited and relied upon the cases of (1) Enmay Zed Publications (Pvt.) Ltd.

through Director-General v. Sindh Labour Appellate Tribunal through Chairman and 2 others, 2001 SCMR 565, (2) Dr. Muhammad Anwar Kurd and 2 others v. The State through Regional Accountability Bureau, Quetta, 2011 SCMR. 1560, and (3) Naseem Ahmed Khan v. XIVth Civil and Family Judge, Karachi Central, and another, 2011 YLR 2625. The first two cases were relied upon by the learned counsel in support of his contention that according to the well-established principles of interpretation of statutes, a Proviso attached to the main Section operates as an exception and cannot render redundant or ineffective the substantial provisions of the main Section. The case of Naseem Ahmed Khan (supra), goes against the petitioner as a learned Division Bench of this Court in the said case dismissed the Constitutional Petition filed against the order passed by the Family Court on a miscellaneous application filed in a Family Suit.

7. The learned counsel for respondents Nos.l to 4 strongly refuted all the contentions raised on behalf of the petitioner. He referred to the aforementioned orders passed by the Family Court in order to show that the petitioner had filed frivolous applications one after the other before the Family Court in order to pressurize respondents 1 to 4 and to

celay the matter which was initiated by them on 30-4-2012. He submitted that several opportunities were granted to the petitioner to file a written statement, but the orders of the Family Court were not complied to, by him. It was urged that the points raised by the petitioner before the Family Court and the grounds urged before this Court, are mala fide, misconceived and ill-advised, as the petitioner has no locus standi to question the vires of section 10 of the Act of 1964, which is not contrary either to the Shariah or to the Constitution. In support of .his submissions, the learned counsel cited and relied upon the cases of (1) Farzana Rasool and 3 others v. Dr. Muhammad Bashir and others 2011 SCMR 1361, (2) Syed Matanat Moazzam Bukhari v. Dr. Arfa Saeed and 2 others 2010 CLC 58, (3) Aamir Iqbal Khan v. Mst. Faryal Aamir Khan and another 2010 CLC 942, (4) Shakeel Ahmad v Judge, Family Court 2010 CLC 1 and (5) Mudassar Butt v. Judge, Family Court, Lahore and another, 2010 CLC 1729.

8. Mr. Miran Muhammad Shah, the learned Additional Advocate General, Sindh, also opposed this petition. He submitted that the Act of 1964 is a special Act, and section 10 thereof is in line with its preamble, which specifically provides for establishment of Family Courts for expeditious settlement and disposal of disputes relating to marriage and other family affairs connected therewith. The learnedA.A.-G. further submitted that granting any relief in this petition would tantamount to negating the effect of a specific provision of a special law.

9. In order to appreciate the contentions of the learned counsel for the petitioner, it is necessary to examine section 10 of the Act of 1964, which is reproduced here for convenience and ready reference :

10. Pre-trial proceedings. —(1) When the written statement is filed, the Court shall fix an early date for a pr trial hearing of the case.

(2) On the date so fixed, the Court shall examine the plaint, the written statement (if any) and the precis of evidence and documents filed by the parties and shall also, if it so deems fit, hear the parties and their counsel.

(3) At the pre-trial, the Court shall ascertain the points at issue between the parties and attempt to effect a compromise or reconciliation between the parties, if this be possible.

(4) If no compromise or reconciliation is possible the Court shall frame the issues in the case and fix a date for recording of the evidence:

Provided that notwithstanding any decision or judgment of any Court or tribunal, the Family Court in a suit for dissolution of marriage, if reconciliation fails, shall pass decree for dissolution of marriage forthwith and shall also restore to the husband the Haq Mehr received by the wife in consideration of marriage at the time of marriage."

10. After carefully examining the above-quoted section 10, we deem it necessary to discuss all the subsections and the Proviso thereof, one by one. Under subsection (1) of section 10, an early date for pre-trial hearing is fixed by the Family Court only when the defendant has filed his written statement. In other words, if the written statement is not filed, there will be no pre-trial proceedings. It is to be noted here that admittedly the petitioner has not filed his written statement till this date despite several opportunities

granted by the Family Court. Therefore, there should be no pre-trial hearing as long as there is no written statement by the petitioner.

11. Subsections (3) and (4) of section 10 shall come into play only if the requirement of subsection (1) is fulfilled by a defendant in a Suit under the .said section 10, that is, only if the defendant files his written statement. If the defendant does not file his written statement, like the petitioner in this case, the Family Court will not be required either to examine under subsection the written statement and the precis of the evidence and documents filed by the parties ; or to ascertain under subsection the points at issue between the parties in order to make an attempt to effect a compromise or reconciliation between them or to frame issues under subsection and fix the matter for recording of the evidence in case no compromise or reconciliation is arrived at. In view of his failure in filing the written statement, the petitioner has no right to seek a pre-trial hearing and/or to object to the procedure laid down in section 10 of the Act of 1964, as there is no question of his adducing evidence without filing the written statement.

12. The Proviso contained in section 10 of the Act of 1964 empowers the Family Court to pass a decree for dissolution of marriage forthwith upon failure of the reconciliation. It further provides that the wife shall be ordered by the Family Court to return the Haq Mehr to the husband that was received by her in consideration of the marriage. A Muslim woman has been given the right in Islam to get herself released from the bond of marriage if she feels, due to any reason, that she cannot live with her husband within the limits prescribed by Allah Almighty. In such an event, the wife has to seek Khula' by foregoing the Haq Mehr received by her from her husband in consideration of the marriage. The wife can also pronounce Talaq to herself on behalf of the husband, provided such right and authority had been given to her by the husband at the time of the Nikah. Khula' can be granted only by the Family Court having jurisdiction in the matter. For this purpose, Family Courts were established in Pakistan through the West Pakistan Family Courts Act of 1964, which is now known as the Family Courts Act of 1964. We are of the firm opinion that there is nothing in the Proviso that is or that may be contrary to the Injunctions of Islam, and also that the Proviso does not have the overriding effect, but it in fact supports and complements section 10 of the Act of 1964. Therefore, we do not see any reason for discussing the cases of Enmay Zed Publications (Pvt.) Ltd. (supra) and Dr. Muhammad Anwar Kurd (supra), cited by the petitioner's counsel, wherein the overriding effect of a Proviso has been discussed.

13. We have noticed that Section 10 of the Act of 1964 provides that two attempts for reconciliation shall be made by the Family Court before passing a decree for the dissolution of marriage, provided the defendant has filed his written statement. The first attempt referred to as "a pretrial hearing of the case" is to be made by the Family Court by fixing an early date for this purpose under subsection by examining the plaint, the written statement, the prdcis of the evidence and documents, under subsection and by ascertaining the points at issue between the parties, under subsection The second attempt referred to as "reconciliation" is provided in the Proviso, a bare reading whereof shows that the Family Court shall pass a decree for the dissolution of marriage forthwith upon failure of the reconciliation. We have said so because subsection (4) is available between the stages of pre-trial hearing and the passing of decree, which specifically provides framing of issues and fixing a date for recording of the evidence in case no compromise or reconciliation is possible. Thus, a decree for dissolution of marriage is

passed under the said section 10 either when the defendant does not file his written statement and there is no pre-trial hearing, or when the reconciliation fails at the pre-trial stage and also after filing of the written statement, consideration of the pleadings, the prdcis of the evidence and documents, framing of issues and recording of evidence. This clearly shows that there is no ambiguity in section 10 of the Act of 1964 with regard to pre-trial and post-trial reconciliation between the parties in a case for Khula.

14. Our above view is fortified by the case of Farzana Rasool (supra), wherein a learned Full Bench of the Hon'ble Supreme Court was pleased to hold in paragraphs 19 and 20 as under: —

"19. Reference to above provisions of the Act has made ii crystal clear that procedure prescribed therein is different from the procedure of trial under the Code and that before passing any judgment and giving a decree, the Act provides at two stages that the Family Court shall undertake exercise of trying to bring about the compromise between the parties at pre-trial stage and also on the conclusion of -the trial but before pronouncement of judgment. These provisions appear to be in consonance with the . command of Allah Almighty. In Surah-An-Nisa (Ayat No.

35), it has been commanded that "AND IF YOU FEAR A BREACH' (SHIQAK) BETWEEN THEM TWAIN (I.E. THE HUSBAND AND WIFE), APPOINT AN ARBITER FROM HIS FOLK AND AN ARBITER FROM HER FOLK. IF THEY DESIRE AMENDMENT ALLAH WILL MAKE THEM OF ONE MIND. LO ALLAH IS. EVER KNOWER AWARE."

20. A bare reading of command of Allah Almighty, as described in the above Surah, reveals that efforts are to be made by induction of one Hakam from the family of husband and one from the family of wife for ultimate reconciliation or compromise, so the family ties between the husband and wife remains intact. It is the spirit of above ayat of Suran-An-Nisa that sections 10 and 12 of the Act have been promulgated to give effect to the above quoted ayat from Surah-AnrNisa.". (Emphasis . added)

15. The preamble of the Act of 1964 provides that "Whereas it.is expedient to make provision for the establishment of Family Courts for the expeditious settlement and disposal of disputes relating to marriage and family affairs and for matters connected therewith." The above discussion shows that section 10 of the Act of 1964 and the Proviso contained therein are in line with the preamble, as the object given in the i preamble is clearly reflected in the said section 10. In Fazal Dad v. Col. (Rtd.) Ghulam Muhammad Malik and others, PLD 2007 Supreme Court 571, it was held by the Hon'ble Supreme Court that "It is a settled law that preamble is always key to interpret the statute". The contention of the petitioner's counsel that Section 10 of the Act of 1964 is contrary to Shariah or ultra vires the Constitution, is without any force.

16. It may be noted that as the petitioner has admittedly not filed his written statement till this date despite several opportunities granted by the Family Court, the stage of adducing the evidence by him and / or hearing him, has still not been reached. In fact, the petitioner has never been denied the right of adducing the evidence and/or hearing by the Family Court. The contention of the petitioner that the provisions of section 10 of the Act of 1964 are un-Constitutional and against the Shariah as the parties are condemned unheafd when such procedure is followed by .the Family Courts, is therefore

fallacious. Looking at the conduct of the petitioner before the Family Court, especially the delaying tactics adoptpd by him, by filing ill-advised, misconceived and frivolous applications one after the other due to which no progress has been made in the Suit filed by respondents Nos.l to 4, constrains us to impose costs of Rs.25,000.00 on the petitioner.

17. We are unable to convince ourselves to agree with the contentions raised and the grounds urged on behalf of the petitioner that because of section 10 of the Act of 1964 or the Proviso contained therein, the parties to a Suit filed under section 10 of the Act of 1964 are condemned unheard, or that Khula' cannot be granted at the initial stage of the proceedings without recording the evidence of the parties, or that the Proviso overrides the main section 10, or that there is an ambiguity in the said section 10 with regard to pre-trial and post-trial reconciliation between the parties in a case for Khula', or that Section 10 of the Act of 1964 is contrary to Shariah or ultra vices the Constitution, or that the decrees passed by all the Family Courts in Pakistan under the said section 10, are un-Constitutional and coram non judice. In view of the above discussion, we do not find any merit in this petition, which is liable to be dismissed along with the listed application. Foregoing are the reasons of the short order announced by us on 25-4-2013, whereby this petition along with the listed application was dismissed with cost of Rs.25,000.00 to be deposited by the petitioner in the High Court Pro Bono Fund, and the learned Family Court was directed to proceed with the matter expeditiously in accordance with law.

KMZ/S-48/K Petition dismissed