Journal
2005 PLD 70

Court
BALOCHISTAN HIGH COURT

Date
2004-08-11

Appeal No.
CONSTITUTIONAL PETITION NO. 203 OF 2004

Judge
RAJA FAYYAZ AHMED, C.J. AND AKHTAR ZAMAN MALGHANI, J .

Parties
MST. MAH BIBI (PETITIONER) VERSUS KHUDADAD AND 2 OTHERS RESPONDENTS

Lawyers
PETITIONER IN PERSON. ADNAN EJAZ FOR RESPONDENT.

Statutes
WEST PAKISTAN FAMILY COURTS RULES 1965 - R. 12(2) WEST PAKISTAN FAMILY COURTS ACT (XXXV OF 1964) - SS.5, SCHED., 8, 9 AND 10 LIMITATION ACT (IX OF 1908) - ARTICLE 181 CIVIL PROCEDURE CODE (V OF 1908) - PREAMBLE CONSTITUTION OF PAKISTAN (1973) - ARTICLE 199

Judgment

RAJA FAYYAZ AHMED, C J.- In this Constitutional Petition order dated 25-8-2003 passed by the learned Qazi Dasht at Turbat cum Judge Family Court, has been assailed whereby application filed by the petitioner lady for restoration of the suit for the recovery of maintenance allowance for Iddat period was rejected as barred by time, and; against the judgment and decree dated 1-12-2003 passed by the learned District Judge, Mekran Division at Turbat in Family Appeal No.39 of 2003 dismissing the appeal of the petitioner/plaintiff preferred against the orders dated 19-5-2003 and 25-8-2003.

2. The brief facts of the case are that the petitioner instituted suit against the respondent No.l for recovery of maintenance allowance for her Iddat period in the Qazi Court cum Judge Family Court Dasht at Turbat, registered as Family Suit No. 12 of 2003, presented in person in the Family Court on 8-5-2003, the suit was accordingly registered on the same date and the respondent was summoned for 19-5-2003. On this date i.e. 19-5-2003 the petitioner/plaintiff was absent when the case was taken up by the learned Judge, Family Court, whereas; on behalf of the respondent/defendant his counsel appeared in the Court and filed his Vakalatnama. The learned counsel submitted that since the petitioner is absent, therefore, the absence of the plaintiff indicates that she is not interested to prosecute her .case. In view of the submission made by the learned counsel for the respondent, the learned Judge, Family Court dismissed the suit.of the petitioner for non-prosecution. Order passed by the learned Family Court is reproduced hereinbelow in extenso:- .

j, \ I - i Vi/l- Petitioner feeling aggrieved of the order .passed by .the learned Family Court referred to above challenged the same in the Court of learned District Judge, Mekran Division at Turbat in Family Appeal No.39. of 2003. The learned Appellate Court after hearing the parties vide judgment and decree dated 1-12-2003 dismissed the appeal of'the petitioner mainly on the ground that application for restoration of suit was filed after two (2) months and twenty (20) days of the dismissal of her suit dismissed for non-prosecution, and; the plea taken in such application that on account of the death of her first cousin on 9-5-2003 she had to leave for Awaran with the dead body and remained there during this period for Fatehah, was not entertained for being unreasonable and acceptable. Operating part of the judgment of the Appellate Court for convenience and reference, is reproduced hereinabelow:- “The perusal of application filed ,by the appellant before the . Family Court on 7-8-2003 for restoration of her suit clearly . reveais that she filed said application after two months and 20 days of the date of dismissal of her suit for non-prosecution.

The appellant had taken the plea in her application that one day after . registration of her suit i.e. on 9-5-2003, her first cousin died at . Turbat and she accompanied with the dead body of her first cousin to Awaran where the dead body of her cousin was buried. According to her, she remained, at Awaran in order to take part in the Fatehah ceremony of her first cousin, therefore, her . . absence from proceedings on 19-5-2003 was not intentional. This ground for her absence was rightly not accepted by the . learned Family Judge and he dismissed her application. It is general practice of the Muslims that only three days or in some .

cases 10/15 days are allowed for burial and Fatehah ceremony but the appellant stayed

at Awaran for about two months and 20 days which cannot be accepted as a reasonable ground for condonation of such a long delay in filing application for restoration of her suit. Reliance is placed on a case reported in 2003 SCMR 648 (Supreme Court of Pakistan) wherein it has been held:- "Supreme Court Rules, 1980- --O.XIII, R.I-Constitution of Pakistan (1973), Art. 185 Petition for leave to appeal-Delay-Condonation-Delay of two days in filing petition was sought to be condoned on the ground that petitioners (Government Department) first sought . advice of Ministry of'Law and Justice Division for filing the petition and thereafter certified copy of judgment was obtained and that delay had occurred due to completion of necessary official formalities in concerned Department of petitioner-Plea raised by petitioners related to their internal difficulties for which opposite party could not be penalized-Government did not enjoy preferential treatment qua on ordinary litigant in the applicability of law of limitation" In may opinion, the appellant has failed to show existence of a cogent and reasonable ground for setting aside the judgment/order of learned Family Judge, Dasht at Turbat made/passed by him on 19-5-2003 and on 25-8-2003. Article No. 163 of Limitation Act applies to an application for restoration of suit dismissed in default. This Article has provided a period of 30 days for filing of an application for restoration of a suit dismissed for non-prosecution which runs from the date of dismissal of the suit but the appellant has failed to file her application within the stipulated period. The appeal, being without any merit and substance is, therefore, dismissed with no order as to cost. Decree sheet be drawn up. The original record along with a certified copy of this judgment be sent back to the concerned lower Court. File after completion be consigned to record. " 3. The petitioner and the learned counsel for the respondent No.l have been heard. The petitioner, who is unrepresented, submitted that she is a poor old lady being extremely constrained due to poverty instituted suit for recovery of maintenance allowance for Iddat period presented the suit in person in the Family Court, Dasht at Turbat, which was to be prosecuted by her in person, as she was not in a position to engage a counsel for representing her in the matter, but on account of sudden death of her first cousin she had to leave for Awaran, where as per custom she had to stay there for considerable time and immediately on her return to Turbat she filed application for restoration of the suit praying therein that on account of abovesaid reason she failed to appear in the Family Court on 19-5-2003 no sooner she returned to Turbat filed - application for restoration of the suit, but the learned Family Court illegally rejected her application, similarly; the learned Appellate Court illegally and for unfounded reasons dismissed the appeal filed by her. She prayed that both the orders passed by the learned Courts below may be set aside, and; the case be remanded to the Family Court. She submitted that grave injustice has been meted out to her and she being entitled for the maintenance allowance for her Iddat period, has been deprived of her.legitimate rights.

4. ' The learned counsel for the respondent No.l vehemently argued by controverting the submissions made by the petitioner thait the application filed by the petitioner for restoration of the suit was hopelessly barred by time and no sufficient cause was shown by her, which prevented her to file application within the period of thirty (30) days from the date of order of dismissal of her suit as provided by Subrule (2) of Rule .12 of the Balochistan Family Courts Rules,. 1965..The learned counsel further submitted that the Appellate Cpurt- on due consideration of the plea taken in the application filed by the petitioner and in accordance with law for substantial reasons recorded by it in the judgment impugned herein dismissed the appeal of the petitioner, as such'; the orders passed by the learned Courts below based on correct application of ..law in the' light of

the given facts of the- case, are unexceptionable and thus; the same are not amenable.to the exercise of extraordinary-Constitutional .jurisdiction by this Court.

\ 5. The contentions put forth by the petitioner and on behalf of the respondent No.l, have been considered in the light of the impugned "orders and the documents filed with the memo, of Constitutional, Petition. Bare perusal of the diary-sheet dated 8-5- 2003, maintained by the Family Court, shows that the suit was personally presented to the Judge Family Court by the petitioner on the abovesaid date, which was registered and the respondent No. 1/defendant was summoned for' 19-5-2003, on which date the petitioner /plaintiff was absent when the case was called, whereas; on behalf of the respondent No.l his appointed counsel - appeared in the Court and filed his .Vakalatnama. The learned counsel for the respondent, as is evident from the diary-sheet dated 19-5-2003 submitted to the Court that as the plaintiff has failed to appear in tlje Court on the case being called, therefore, it was evident that the plaintiff was not interested to prosecute her case, accordingly; the learned Family Court in view of the submission made by the learned counsel for the. respondent No. 1/defendant, dismissed the suit of the petitioner for-non-prosecution. Admittedly, the petitioner after two (2) months and twenty (20) days of the dismissal of her suit for nonprosecution, filed application for restoration of the suit on the ground mentioned hereinabove. The learned Family Court after hearing the parties vide order dated 25-8-2003 dismissed the application of the petitioner as barred by time for having not been filed within the prescribed period of thirty (30) days. The diary-sheet of the case dated 8-5-2003 clearly indicates that the defendant was summoned to appear on 19-5-2003 and the case was not fixed for hearing or settling the issues. Obviously, as provided by Clause (b) of subsection (1) of section 8 of the Family Courts Act, 1964 the date i.e. 19-5-2003 was fixed for appearance of the defendant pursuant to the summons issued to him, on which date on service of summons the defendant is supposed to file his written statement as provided in subsection (1) of section 9 of the Family Courts Act, and; further by virtue of the provisions of this subsection both the parties i.e. plaintiff and defendant as per mandate of law to appear before Family Court on the date fixed in the summons.

After filing of the written statement by the defendant; in accordance with the provisions of subsection (1) of section 10 of the Family Courts Act, the Court shall fix an early date for a pretrial hearing of the case and on such date within the purview of subsection (2) of section 10 of the Act the Court shall examine the plaint, 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 and; at the pretrial stage as provided in subsection (3) of section 10 of the Act, 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, and; if no compromise or reconciliation is possible, the Court shall frame the issues in the case and fix the case for recording of the evidence. The order dated 19-5-2003 by means of which the suit of the petitioner was dismissed for non-prosccution shows that on this date, as the summons was duly served on the defendant he was required to appear in Court and to file written statement within the meaning of above quoted provisions of the law, but admittedly he did not file written statement and on his behalf his counsel made appearance and filed his power of attorney, who submitted to the Court that since the plaintiff is absent therefore, such default on the part of the plaintiff was indicative of the fact that she was not interested to prosecute her case, and; the Family Court without independently applying its mind in respect of the stated fact

agitated by the learned counsel for the defendant passed the order dismissed the suit of the plaintiff for non-prosecution in view of the submissions so made by the learned counsel. The only course open to the Family Court was to have dismissed the suit of the plaintiff in default, as by virtue of provisions of subsection (1) of section 9 of the Act the plaintiff and the defendant, if summons was duly served on him are required to appear on the date fixed in the summons before the Family Court, therefore, there was no occasion on the part of the Family Court when the case was at its very initial stage and was fixed for appearance of the defendant, who was also supposed to file written statement on such date under subsection (1) of section 9 of the Act, to have dismissed the suit for non- prosecution. Furthermore; as provided in the abovereferred provisions of law the case was not fixed nor could have been fixed on 19-5-2003 for hearing or for settling the issues, hence; dismissal of the suit on such date for non-prosecution was wholly misconceived unwarranted and legal, and secondly;' as provided by Sub-rule (1) of Rule 12 of the Family Courts Rules, 1965 the suit instituted by the plaintiff at best could have been dismissed in default, but the permissible course as provided under the Sub-rule for failure of the. plaintiff or her counsel to appear before the Court was riot adopted,'therefore, dismissal of suit for .

non-prosecution in absence of any provision to such effect available in the Family Courts Act and the Rules made thereunder was absolutely void and without jurisdiction nor the powers vested in a Civil Court to dismiss a suit for non-prosecution can be exercised by the Family Court in absence of any such provision made applicable to the proceedings under the Act and for the reasons that by virtue Of section 17 pf the Family Courts Act, 1964 the Code of Civil Procedure, 1908 except sections 10 & 11 has been made inapplicable to the proceedings before a Family Court. It appears that the Family Court presumably was under the impression that the period of thirty (30) days as provided in sub-rule (2) of Rule 12 of the Family Courts Rules, 1965-was applicable to the case which provided thirty (30) days' time period for filing of { application for restoration of the suit dismissed in default and thus; dismissed the application filed,by the petitioner as barred by time, which has no application to the instant case in which the suit was dismissed for . non-prosecutiOn and not in default, although; no period of limitation has been provided in the Family Courts Act or the Rules made thereunder within which an application for restoration, of the suit dismissed for'non- prosecution is to be filed and- such omission of limitation period seems to be logical and intentional, because the Family Courts Act and the Rules made thereunder do not embrace a concept of dismissal of family suit for non-prosecution except in default, hence; dismissal of the application,for restoration of the suit on the point of limitation and maintained by the Appellate Court amounts to misexercise of the powers vested in the Courts below and mis-application of the law on the point of limitation on the subject, inasmuch as; the learned District Judge, Mekran Division in utter disregard of the law pressed into service the "provision of A.rtilce-164 of the Limitation Act, 1908, who appears to have even not ' cared to read the said Article having no relevance or any -application to the case in hand, which provides, as period of thirty (30) days for making application to the Court by a defendant for an order to set aside a decree passed ex parte whereas; in the instant case no ex parte decree has been passed against the defendant, rather; the suit filed by the plaintiff in the Family Court was dismissed for non-prosecution. In our view in absence of any specific provision providing the period of limitation for making application for restoration of the suit dismissed for non-prosecution by a Family Court as above discussed the residuary Article-181 of the Limitation Act will be applicable to the case, which provides a period of

three years for making the .application seeking for restoration of the family suit dismissed for non-prosecution from the date when the right to apply accrues, therefore, dismissal of the application by the Family Court for restoration of the suit filed after two months and twenty days from the date of the order on which .the suit of the petitioner was dismissed for non- prosecution, as well as; the dismissal of the appeal filed by the petitioner by the District Judge, Turbat on the ground that the application for restoration of. the suit was not filed within the thirty (30) days from the date of the order passed by the Family Court being illegal, void and without jurisdiction are set aside and declared to be of no legal effect. Furthermore; as sufficient cause was shown by the petitioner of her failure to appear before the Family Court on 19-5-2003 in the application filed for restoration of the suit, therefore, for the above reasons, we are inclined to set aside the impugned orders and allow the application filed by the petitioner for restoration of the suit. The result is that the suit instituted by the petitioner shall be deemed as pending with the Family Court Dasht at Turbat, which shall be proceeded with in accordance with law after service of notice to the parties. This Constitutional Petition is. accepted, leaving the parties-, to bear their own costs.

M.B.A./57/Q Petition accepted.