IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE SARDAR TARIQ MASOOD
MR. JUSTICE AMIN-UD-DIN KHAN
MR. JUSTICE MUHAMMAD ALI MAZHAR

CIVIL PETITION NO.32-Q OF 2019
(Against the judgment dated 17.12.2018 passed by the High Court of Balochistan, Quetta, in C.P. No.724/2013)

Sana Jamali ...Petitioner

VERSUS

Mujeeb Qamar and another ...Respondents

For the Petitioner: Mr. Ahsan Rafiq Rana, ASC
(Video Link at Quetta)

For the Respondent No.1: Nemo

Date of Hearing: 05.10.2022

JUDGMENT

MUHAMMAD ALI MAZHAR, J. This Civil Petition for leave to appeal is directed against the Judgment dated 17.12.2018, passed by the High Court of Balochistan, Quetta ("**High Court**"), in C.P. No.724/2013, whereby the judgment and decree of the Family Court, Quetta were set aside and the matter was remanded to the Trial Court to decide the *lis* afresh.

2. According to the aide-mémoire of the Civil Petition, the petitioner had filed a suit in the Court of the learned Family Judge, Quetta for dissolution of marriage, maintenance for herself as well as for her two minor daughters and also entreated for the retrieval of dowry articles. The marriage of the petitioner was solemnized with respondent No.1 in consideration of dower in the sum of Rs.200,000/- which was payable on demand of the petitioner. Despite service of summons, the respondent No.1 failed to appear before the Family Court, hence he was declared as Ex-Parte and, after fulfilling codal formalities, the Family Suit was decreed *vide* judgment dated 29.03.2013 and the

marriage was dissolved on the basis of cruelty and non-maintenance. Thereafter the respondent No.1, through his attorney, filed an application on 19.09.2013 under Section 9 (6) of the West Pakistan Family Courts Act, 1964 ("**1964 Act**"), read with Order IX, Rule 13 of the Code of Civil Procedure, 1908 ("**CPC**"), along with another application under Section 5 of the Limitation Act, 1908 for setting aside the judgment and decree dated 29.03.2013. After hearing the arguments, the learned Family Judge-II, *vide* order dated 09.10.2013, dismissed the application. In order to challenge the Order of the learned Family Judge-II, the respondent No.1 filed a Constitution Petition in the High Court and, *vide* the impugned judgment, the Constitution Petition was allowed and the Ex-Parte Judgment and decree dated 29.03.2013, as well as order dated 09.10.2013, were set aside and the case was remanded back to the Trial Court for decision afresh in accordance with law.

3. The learned counsel for the petitioner argued that the Constitution Petition was not maintainable before the High Court in view of Section 14 of the 1964 Act in which a right of appeal is provided before the District Judge, and in the presence of a remedy provided under the law, Constitutional Jurisdiction could not be invoked under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 ("**Constitution**"), hence the impugned judgment is contrary to law. It was further contended that after a lapse of more than five years, the remand of the case was totally unjustified as, despite the passing of the decree, the respondent No. 1 had neither contacted his daughters, nor paid a single penny for their maintenance and enjoying his life in England.

4. Though on the date of hearing nobody was present to represent Respondent No.1, however, a concise statement filed on behalf of the respondent No.1 by Ch. Akhtar Ali (AOR) (C.M.A No.10205/2021) is available on record in which the factum of marriage and birth of two daughters out of the wedlock was not denied. However, it was averred that the petitioner on 20.02.2013 filed the aforesaid Family Suit but he was never served with the notice or summons issued by the Family Court and he had no knowledge of the Suit. It was further contended that the ex-parte decree was passed without effecting service on him. It was further avowed that if the petitioner had any

objection for filing a constitution petition, then the High Court had ample powers to covert the petition into an appeal.

5. Heard the arguments. To start with, we invited the attention of the learned counsel for the petitioner to an Order dated 05.07.2022 when this Court observed in view of the noting of the paper book that the petition is time-barred by 20 days and no application for condonation of delay was filed. The same Order further shows that the learned counsel argued that neither he, nor the AOR was ever informed about any such disability by the Office, but he also sought time for filing an application for condonation. Today when we asked whether any condonation application has been filed, he vigorously argued that the civil petition is within time and there was no need to move any application for condonation of delay. In order to satisfy us with regard to the office objection, we examined the note sheet prepared by the Office of this Court at Quetta Registry which shows a glaring mistake. In the Office Note, the date of the judgment is mentioned as 27.11.2018, whereas the certified copy of the judgment in the original file shows that the judgment was announced on 17.12.2018 and the application for the certified true copy was filed on 18.12.2018 i.e. the very next day from the announcement of judgment, and the copy was provided on 24.12.2018, while the Civil Petition was presented on 20.02.2019. Due to negligent conduct of the Office, the date of hearing i.e. 27.11.2018 was mentioned, rather than the date of announcement of the judgment i.e. 17.12.2018. After examination of this crucial aspect, we reached the conclusion that the Civil Petition was not time-barred and we rejected the office objection which is misconceived.

6. The judgment and decree of the Family Court depicts that the marriage was dissolved on the basis of cruelty and non-maintenance with the direction to the respondent No.1 to pay the dower amount of Rs.200,000/- to the petitioner; the respondent No.1 was further directed to pay maintenance for the last three years till dissolution of marriage and Iddat period @ Rs.3000/- per month and also to pay Rs.5000/- per month as maintenance for minor Hayaam w.e.f 13.6.2009 and Naba w.e.f. 10.01.2011 till date and future as well till the marriages of the girls with enhancement of 20% per annum. However, no decree was passed against the respondent No.1 for return of dowry articles etc. as no list was attached, nor any receipts

were produced to actually identify the articles. The petitioner was also denied the delivery expenses because no medical/hospital receipts were annexed with the plaint.

7. The learned High Court while rendering the impugned judgment adopted the view that the learned Family Court failed to follow the procedure for substituted service as laid down in Order V, Rule 20, CPC in letter and spirit, while this recourse should have been made when the service of summons could not be effected in the ordinary manner. It was further held that instead of defeating the course of justice by means of an ex-parte judgment, the principle of administration of justice should have been adhered to which requires that a fair opportunity of hearing be provided to the contesting parties in terms of Article 10-A of the Constitution.

8. It is a well settled exposition of law that the Court may order substituted service under Order V, Rule 20, CPC where it is satisfied that there is reason to believe that the other side is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way. In such a case the Court shall order for service of summons by (a) affixing a copy of the summons at some conspicuous part of house, if any, in which the defendant is known to have last resided or carried on business or personally worked for gain; or (b) any electronic device of communication which may include telegram, telephone, phonogram, telex, fax, radio and television; or (c) urgent mail service or public courier services; or (d) beat of drum in the locality where the defendant resides; or (e) publication in press; or (f) any other manner or mode as it may think fit; Provided that the Court may order the use of all or any of the aforesaid manners and modes of service. The service substituted by order of the Court shall be as effectual as if it had been made on the defendant/other side personally. The legislature in its judiciousness and astuteness has conferred a wide-ranging freedom of choice and options under Order V, Rule 20, CPC as to how the substituted service is to be effected to ensure service quickly and efficiently if the notice/summons could not be served personally at the given address or at the address which is given or known, but the remedy of substituted service can be resorted to only if the Court is satisfied that there is reason to believe that the other side is keeping out of the way only to avoid service.

9. Seeing as the respondent No.1 pleaded in his application submitted in the Family Court that he was not provided any opportunity of defence, hence it would be in the fitness of things to ruminate the provision contained under Section 9 of the 1964 Act for filing written statement of the defendant. This Section has put in plain words that if the defendant failed to appear on the date fixed by the Family Court for his appearance, then if it is proved that the summons or notice was duly served, the Family Court may proceed ex parte; and if it is not proved that the defendant was duly served, the Family Court shall issue fresh summons and notices to the defendant and cause the same to be served in the manner provided in clauses (b) and (c) of sub section (1) of Section 8. However, sub-section (6) of Section 9 has much significance which provides that in case of an ex-parte decree against a defendant, he may apply within thirty days of the service of notice of the passing of the decree, under sub-section (7), to the Family Court by which the decree was passed for an order to set it aside, and if he satisfies the Family Court that he was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was heard or called for hearing, the Family Court shall, after service of notice on the plaintiff, and on such terms as to costs as it deems fit, make an order for setting aside the decree as against him, and shall appoint a day for proceeding with the suit; provided that where the decree is of such a nature that it cannot be set aside as against such defendant only, it may be set aside against all or any of the other defendants also. Whereas under sub-section (7) of Section 9, the notice of passing of the ex-parte decree referred to in sub-section (6) shall be sent to the defendant by the Family Court together with a certified copy of the decree within three days of the passing of the decree, through process server or by registered post, acknowledgement due, or through courier service or any other mode or manner as it may deem fit.

10. The right of appeal is provided under Section 14 of the 1964 Act which reads as under:-

> "14. Appeals.- (1) Notwithstanding anything provided in any other law for the time being in force, a decision given or a decree passed by a Family Court shall be appealable-
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> (a) to the High Court, where the Family Court is presided over by a District Judge, an Additional District Judge or a person

notified by Government to be of the rank and status of a District Judge or an Additional District Judge; and

(b) to the District Court, in any other case.

(2) No appeal shall lie from a decree passed by a Family Court-

(a) for dissolution of marriage, except in the case of dissolution for reasons specified in clause (d) of item (viii) of section 2 of the Dissolution of Muslim Marriages Act, 1939;

(b) for dower or dowry not exceeding rupees thirty thousand;

(c) for maintenance of rupees one thousand or less per month.

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

(4) The appellate court referred to in sub-section (1) shall dispose of the appeal within a period of four months.

11. In the case in hand, neither the Family Court was presided over by a District Judge or Additional District Judge, nor any person notified by Government to be of the rank and status of a District Judge or an Additional District Judge, hence for all legal and practical purposes, the appeal against a decision or a decree of Family Court (except the bar contained against an interim order passed by Family Court) should have been challenged before the District Court/District judge and not directly in the High Court by means of Constitution Petition under Article 199 of the Constitution. According to the **Black's Law Dictionary** (Sixth edition), at page 407, the word **"Decision"** means *"A determination arrived at after consideration of facts, and, in legal context, law. A popular rather than technical or legal word; a comprehensive term having no fixed, legal meaning. It may be employed as referring to ministerial acts as well as to those that are judicial or of a judicial character. A determination of a judicial or quasi judicial nature. A judgment, decree, or order pronounced by a court in settlement of a controversy submitted to it and by way of authoritative answer to the questions raised before it. The term is broad enough to cover both final judgments and interlocutory orders. And though sometimes limited to the sense of judgment, the term is at other times understood as meaning simply the first step leading to a judgment; or as an order for judgment. The word may also include various rulings, as well as orders, including agency and commission orders. U. S. v. Thompson, 251 U.S. 407, 40 S.Ct. 289, 291, 64 L.Ed. 333"*

12. The maxim *Ubi jus ubi remedium* (wherever there is a right, there is a remedy), is an elementary principle of law and any person having a right has a corresponding remedy to institute suits in a Court unless the jurisdiction of the Court is barred. The aforesaid principle acknowledges the subsistence of a legal right and can also be invoked when the law seemingly does not provide a remedy for the enforcement of such right. In order to challenge the ex-parte judgment and decree, a right of appeal was provided to the respondent No.1 under Section 14 of the 1964 Act but, instead of filing an appeal as an equally efficacious and adequate remedy provided under the law, the respondent No.1 opted to invoke the Constitutional jurisdiction of the High Court which was not permissible. So far as the question of converting one proceedings into another is concerned, meaning thereby the writ petition into an appeal under the 1964 Act, both forums and jurisdictions are altogether different. In this case the appeal lies to the District Court against the Family Court judgment and not to the High Court; hence the High Court could not convert the proceedings into appeal. Had the statutory right of appeal been provided in the High Court, and due to wrong conception or some misunderstanding the Constitution Petition was filed, then obviously, subject to all just exceptions including the question of limitation, the Constitution Petition could be converted into appeal, but in this case the High Court could not assume the role of appellate Court, and if any attempt was made for conversion then that would also be without jurisdiction though the learned High Court had not converted the nature of proceedings but took the cognizance and allowed the constitution petition without taking into consideration Section 14 of the 1964 Act which deals with the right of appeal. In the case of Government of the Punjab thr. Secretary, Schools Education Department, Lahore and others v. Abdur Rehman and others (**2022 SCMR 25**), it was held by this Court that the renowned Latin maxim *ubi jus ibi remedium* articulates in well-defined terms that where there is a right, there is a remedy. In the command of jurisdictive prudence, the courts generally show restraint with the directions to the parties to first take recourse of an alternate and or equally efficacious mechanism and framework of remedy provided, rather than to take departure in order to surpass or circumvent such remedy.

13. The 1964 Act is a special law which provides various legal remedies and the intention of the legislature for creating such remedies is that disputes falling within the ambit of such forum be taken only before it for resolution and bypass or circumvention of the forums is not permissible under the command of Article 199 (1) of the Constitution which confers jurisdiction on the High Court only when there is no adequate remedy available under any law. Where an adequate forum is fully functional, the High Court must not interfere and must relegate the parties to seek remedy before the special forum created under the special law. In the case of Deputy Commissioner of Income Tax/Wealth Tax, Faisalabad and Others vs. Messrs. Punjab Beverage Company (PVT.) Ltd. (**2007 PTD 1347** = **2008 SCMR 308**), the tendency of by-passing the remedy provided under law, and resort to Constitutional jurisdiction of the High Court was deprecated by this Court, while in the case of Messrs. Amin Textile Mills (Pvt.) Ltd. vs. Commissioner of Income-Tax and 2 others (**2000 SCMR 201**), also this Court referred to the case of Al Ahram Builders (Pvt.) Ltd. v. Income Tax Appellate Tribunal (1993 SCMR 29) and discouraged the tendency to bypass the remedy provided under the relevant statute to press into service the Constitutional jurisdiction of the High Court.

14. The extraordinary jurisdiction under Article 199 of the Constitution is delineated in essence for affording an express remedy where the wrongfulness and impropriety of the action of an executive or other governmental authority could be demonstrated without any elongated inquiry. The expression “adequate remedy” represents an efficacious, reachable, accessible, advantageous and expeditious remedy. The object of proceedings under Article 199 of the Constitution is the enforcement of a right and not the establishment of a legal right and, therefore, the right of the incumbent concerned which he seeks to enforce must not only be clear and complete but simpliciter and there must be an actual infringement of the right. The writ jurisdiction of the High Court cannot be expended as the solitary resolution or treatment for undoing the wrongdoings, anguishes and sufferings of a party, regardless of having an equally efficacious, alternate and adequate remedy provided under the law which cannot be bypassed to attract the writ jurisdiction. The doctrine of exhaustion of remedies prevents a litigant from chasing a remedy in a new court or jurisdiction until the remedy already provided under the

law is exhausted, with the sole underlying principle that the litigant should not be persuaded to sidestep or disdain the provisions integrated in the relevant statute leading towards the remedies with a precise procedure to challenge the impugned action. In the case of Dr. Sher Afgan Khan Niazi Vs. Ali S. Habib & others (**2011 SCMR 1813**), this Court held that the question of adequate or alternate remedy has been discussed time and again by this Court and it is well settled by now that the words "adequate remedy" connote an efficacious, convenient, beneficial, effective and speedy remedy. It was further held that the superior Courts should not involve themselves into investigations of disputed questions of fact which necessitate taking of evidence. It was further held that if the law has prescribed any remedy that can redress that category of grievance in that way and to the required extent and if such a remedy is prescribed the law contemplates that resort must be had to that remedy.

15. As a result of the above discussion, this Civil Petition is converted into a Civil Appeal and allowed; the impugned judgment of the learned High Court dated 17.12.2018 is set aside, and the judgment and decree of the Family Court dated 29.3.2013 are restored.

Judge

Judge

Judge

Islamabad the
5th October, 2022
Khalid
Approved for reporting.