

Order Sheet
IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD

CP No. S- 1327 of 2017

Date of hearing:
& decision: 25.10.2019

Petitioner: Irfan Victor through Mr. Sundardas,
Advocate.

Respondent No.1: Mst. Khalida through Mr.Sajid Ali Soomro,
Advocate

ORDER

ADNAN-UL-KARIM MEMON J: Petitioner is ex-husband of Respondent No.1 and through this petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, has assailed the legality and validity of the Judgment and Decree dated 26.4.2017 passed by the learned Appellate Court in Family Appeal No. 47 of 2016.

2. Brief facts of the case as per pleadings of the parties are that the petitioner was married with respondent No.1 on 9.2.2012. It was not a peaceful and happy matrimonial life of the spouses and respondent wife had to take resort of filing a suit *inter alia* for judicial separation on the ground of cruelty. The said suit was contested by filing written statement raising certain preliminary, as well as, factual objections. Out of the divergent pleadings of the parties, the learned Judge Family Court proceeded to frame necessary issues. Plaintiff led evidence in respect of her claim. The learned Judge Family Court after hearing the arguments advanced by learned counsels for the parties proceeded to decide the aforesaid suit through Judgment and Decree dated 30.4.2016 in the following terms:-

In view of the above discussion I came to the conclusion that the petitioner is not entitled for judicial separation on any of the ground mentioned above and the suit of the petitioner is hereby dismissed with no order as to cost.

Respondent No.1 / Plaintiff being aggrieved filed Appeal before the learned lower Appellate Court, who vide impugned Judgment and Decree dated 26.4.2017 proceeded to decide the appeal in the following terms:-

“ In view of above discussion and finding on point No.1 come to the conclusion that Judgment and Decree dated 30.04.2016 passed by the trial court is due to mis-reading and mis-appreciation of evidence of appellant/ plaintiff, therefore, Judgment and Decree dated 30.04.2016 passed by the learned trial court is hereby set-aside. Accordingly present appeal is hereby allowed and the suit of the appellant is hereby decree.

Being not satisfied with the Judgment and Decree of learned Appellate Court, the petitioner has filed the instant Constitutional petition.

3. During the course of arguments, I inquired from learned Counsel for the Petitioner, whether the purpose of filing this petition has been served or otherwise. He replied that the Petitioner has impugned the Judgment and Decree dated 26.4.2017 passed by the learned Appellate Court in Family Appeal No. 47 of 2016. The findings of learned Appellate Court are not based on sound appreciation of facts, so he prayed for setting aside the impugned judgment and decree being perverse and illegal; that during pendency of the instant petition private respondent No.1 could not have entered into second marriage under the Christian Law; that the Judgment and Decree passed by the learned trial Court was well within parameters of law which ought not to have been upset by the learned Appellate Court in Family Appeal.

4. Learned counsel for Respondent No.1 has raised objection that instant petition is not maintainable as disputed questions of facts cannot be decided without recording of evidence.

5. I have heard the parties on the issue involved in the present proceedings and perused the material available on record.

6. The first question arises regarding maintainability of the present writ petition against Judgment and Decree passed by the Appellate Court?

7. Christian matrimonial issues are governed by the Christian Marriage Act 1872, the Christian Divorce Act 1869. The Divorce Act, 1869 is the State law for divorce of Christians in Pakistan. The term “Divorce” as a verb means “to separate.” When the word “divorce” is confined to its strict legal sense, it means the legal dissolution of a lawful union for a cause arising after marriage. Divorces under Christian law are generally of two distinct types: Absolute divorce, or divorce “a vinculum matrimonii” is a judicial dissolution of the marriage ordered as a result of marital misconduct or other statutory cause arising after the marriage ceremony, whereas limited divorce,

sometimes referred to as divorce “a mensa et thoro,” “divorce from bed and board,” or legal separation is a change in status by which the parties are separated and are precluded from cohabitation, but the actual marriage is not affected. Limited divorce is sometimes termed a judicial separation, which suspends the marriage relation and modifies its duties and obligations, leaving the bond in full force. In order to understand the term divorce under the Christian Divorce Act 1869, let us have a glance on certain sections of the aforesaid Act.

8. Section 10 of the Act provides for divorce on grounds of (a) Change in religion (b) Second marriage (c) Rape (d) Sodomy and (e) Bestiality (f) Adultery with bigamy, (g) Incestuous adultery, (h) Adultery coupled with cruelty or (i) Adultery coupled with desertion.

9. The Act also provides for annulment of marriage and judicial separation. Therefore, the existing State law provides for grounds of divorce other than the sole ground of adultery.

10. Sections 10, 18, 19 and 22 of Divorce Act, 1869 are reproduced hereunder for reference:-

“Section 10. When husband may petition for dissolution: Any husband may present a petition to the Court of Civil Judge praying that his marriage may be dissolved on the ground that his wife has, since the solemnization thereof, been guilty of adultery. When wife may petition for dissolution: Any wife may present a petition to the Court of Civil Judge praying that her marriage may be dissolved on the ground that, since the solemnization thereof, her husband has exchanged his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman; or has been guilty of incestuous adultery or of bigamy with adultery or of marriage with another woman with adultery or of rape, sodomy or bestiality or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce a mensa et thoro or of adultery coupled with desertion, without reasonable excuse, for two years or upwards.

Section 18. Petition for decree of nullity. Any husband or wife may present a petition to the court of Civil Judge, praying that his or her marriage may be declared null and void.

Section 19. Grounds of decrees. Such decree may be made on any of the following grounds:

- (1) That the respondent was impotent at the time of the marriage and at the time of the institution of the suit;
- (2) That the parties are within the prohibited degrees of consanguinity (whether natural or legal) or affinity;
- (3) That either party was a lunatic or idiot at the time of the marriage;
- (4) That the former husband or wife of either party was living at the time of the marriage, and the marriage with such former husband or wife was then in force.

Nothing in this section shall affect the [jurisdiction of the District Court] to make decrees of nullity of marriage on the ground that the consent of either party was obtained by force or fraud.

Section 22. Bar to decree for divorce a mensa et toro; but judicial separation obtainable by husband or wife.

No decree shall hereafter be made for a divorce a mensa for at toro, but the husband or wife may obtain a decree of judicial separation, on the ground of adultery, or cruelty, or desertion but: without reasonable excuse for two years or upwards, and such decree shall have the effect of a divorce a mensa et toro under the existing law, and such other legal effect.

11. Mr. Sajid Ali Soomro, learned Counsel representing the respondent No.1 has made a categorical statement that upon passing of a Decree by the learned Appellate Court the Respondent lady viz. Mst. Khalida daughter of Nazeer Masih contracted second marriage; that there was no restriction under the law to contract second marriage as discussed supra, more particularly when the learned Appellate Court decreed her suit for dissolution of marriage; that the very purpose of filing of the present lis is over upon the marriage of Respondent No.1, which cannot be stretched further; that there are findings of learned Appellate Court and it has not been contended or established that the findings were perverse, coram non judice, without jurisdiction and without lawful authority so as to enable this Court to assume jurisdiction; that the findings of learned Appellate Court cannot be successfully assailed in the Constitutional jurisdiction of this Court unless Courts below had exceeded from its jurisdiction which has not been urged by petitioner.

12. If this being the position of the case, in my tentative view the purpose of filing the instant petition is over on the premise that the lady has contracted second marriage in execution of Appellate decree which has attained finality. Record does not reflect that this Court suspended the impugned Judgment and Decree, in such circumstances the rights of the parties cannot be adjudicated without going into the root of the case, which requires evidence and this Court has limited jurisdiction under Article 199 of the constitution to dilate upon the evidences of the parities. Since the Appellate Court has dilated upon each and every aspect of the case no further indulgence is required.

13. In view of the above, this petition is disposed of having served out its purpose as discussed in the preceding paragraph.

JUDGE