

IN THE HIGH COURT OF SINDH AT KARACHI

C.P. No.S-398 of 2020

[Muhammad Azhar ul Haqv..... V(MCAC) Additional District & Sessions Judge West & others]

Date of Hearing : 22.02.2023
Petitioner through : Mr. Mehmood Hassan, Advocate.
Respondents through : *Nemo.*

ORDER

Zulfiqar Ahmad Khan, J:- The Petitioner impugned the findings of the learned Family Court as well as First Appellate Court on the ground that the learned Family Court passed an ex parte Judgment and upon his filing an application under Section 12(2) CPC for setting aside the said ex parte judgment dated 14.10.2014, the learned Family Judge dismissed the said application vide order dated 14.09.2019 on the ground that the proper service was effected upon the petitioner. Petitioner impugned the said findings before the learned First Appellate Court by filing Family Appeal No.89/2019 which met the same fate, hence the petitioner is before this Court.

2. The crux of arguments of learned counsel for the petitioner is that the service of the family suit filed by the respondent No.2 was not effected upon the petitioner to contest the same, hence the Judgment and Decree was obtained by way of fraud and misrepresentation of facts, therefore, he filed an application under Section 12(2) CPC which was not considered by the Courts below and passed the concurrent orders.

3. None present for the respondents. I have heard learned counsel for the petitioners at length and have also scanned the available

record. It is well settled that it is the sacrosanct duty of the father to provide maintenance to his child and to fulfill this obligation, the father is required to earn money even by physical labour, if he is able-bodied, and could not avoid his obligation.

4. Reverting to the another limb of arguments of learned counsel for the petitioner that he filed an application under Section 12(2) CPC for setting aside the ex-parte judgment of the learned Family Judge which was obtained by way of fraud and misrepresentation, it is well settled that the provisions of Code of Civil Procedure, 1908 as well as Qanun-e-Shahadat Order, 1984 are not applicable to family matter. The Apex Court in the case of Syed Muhammad v. Mst. Zeenat and others (PLD 2001 SC 128) and Ahmad Yar v. Additional District Judge, Chiniot, District Jhang and others (2007 SCMR 1768) has dilated upon Section 17 of the Act, 1964 and held that the provisions of CPC as well as Qanun-e-Shahadat Order, 1984 are not applicable in family matters. The rationale embedded in these provisions, besides being expeditious disposal, is to apply an unfettered judicious mind keeping in view the practice and customs prevalent in the society. My lord Mr. Justice Sarmad Jalal Osmani (as his lordship then was) in the case of Abdul Sattar v. Mst. Kalsoom (PLD 2006 Karachi 272) also held the similar view and it is considered expedient to reproduce the relevant excerpt hereunder:-

“However, where a dispute arises on this issue between the parties as to the payment/receipt/remission of dower then the same would have to be resolved by the Family Court. In this situation if the wife is willing to deposit the dower amount in Court, then too a preliminary decree for dissolution of the marriage should be passed by the Family Court whereafter the disputed issue regarding the dower amount could be resolved. Of course if the wife does not deposit the dower

amount in Court; the matter would have to be decided upon taking evidence whereafter the decree should be passed accordingly. In this connection it would be seen that where the husband asserts payment but the same is denied by the wife, he would have to prove the same because the onus of proof is always upon the person who alleges a fact. Reference can also be made to *Mulkhan Bibi v. Muhammad. Wazir Khan* PLD 1959 (W.P.) Lahore 710. As regards section 17 of the Family Court Act, 1964, which provides that the Qanun-e-Shahadat, 1984 and the Code of Civil Procedure, 1908 shall not apply to proceedings before the Family Court, in my opinion the same does not debar such Court from passing a preliminary decree dissolving the marriage on the basis of Khula' or any other ground. The provision of section 17 as to non-applicability of the Qanun-e-Shahadat Order and Civil Procedure Code in my view, is to expedite the proceedings before the Family Court so that the same are not delayed for lack of procedural formalities as contained in the aforementioned laws. The same cannot be construed so as to defeat the purposes of the Family Courts Act, 1964."

[emphasis supplied]

5. Apart from above, the learned Family Court as well as learned First Appellate Court are concurrent on the ground that proper service having been effected upon the petitioner. It unfurls from the record that all modes of service were attempted by the learned Family Court to affect the service upon the petitioner, however, he failed to turn up to contest the matter. It is a matter of record that at the time of service of execution proceedings, the father of the petitioner received the summon in the execution proceedings and it is the same address where the notice/summon of family suit was also issued, therefore, no fraud and misrepresentation arises on the face of record.

6. It is regretful to mention here that the petitioner being father of the respondent No. 3 & 4 is contesting the matter rather providing

them food, shelter and such other ancillaries as it is the sacrosanct duty of the father to provide maintenance to his child and to fulfill this obligation.

7. In view of the rationale and deliberation delineated above, the petition at hand is dismissed alongwith pending application.

Karachi
Dated: 22.02.2023.

JUDGE

Aadil Arab.