

IN THE HIGH COURT OF SINDH, CIRCUIT COURT,
HYDERABAD

Constitution Petition No.S-1969 of 2016

1. For hearing of MA 18065/2016.
2. For hearing of main case.

06.04.2023.

Mr. Khalid Mustafa Shoro, Advocate for petitioner.
Mr. Muhammad IdreesNaqshbandi, Advocate for respondent No.1.

ORDER

MUHAMMAD FAISAL KAMAL ALAM, J.- The matter was partly heard on the last date of hearing when the Petitioner's Counsel was directed to file an Affidavit about payment of the maintenance as ordered by the learned Family and Appellate Court(s), as it was stated by the Respondent's Counsel that nothing has been paid so far towards the maintenance. Today Affidavit is filed in Court, copy whereof is provided to the Respondent's counsel. As per paragraph No.2 of the Affidavit, present petitioner (Saifullah Abbasi) has paid an amount of Rs.2000/- towards maintenance as ordered by the learned Family Court, till 6th September, 2016. It is further stated that the Father of the Petitioner is paying maintenance by sending it at the door step of Respondent's residence, but it is not accepted by her, thus, amount is also sent through Easy Paisa [payment facility through Cellular Network]. He has appended the transaction slip of 07.10.2022. However, learned Advocate of Respondent No.1 (Mst. Faiza Mughal) has denied this.

2. Coming to the merits of the case. The learned counsel for the Petitioner has read the judgment of learned Family Court in which it was observed that the Petitioner will pay an amount of Rs.2000/- [rupees two thousand] towards

maintenance with 10% increment, for the minor son Bilal, and the same amount to Respondent No.1 from the date of her rejoining the Petitioner [her husband, as the Marriage was intact], besides, Petitioner will also arrange a separate residence for the Respondent No.1. However, the claim of recovery of dower amount was rejected. The Decision on the Suit filed by the Respondent No.1, of the Family Court was never challenged by present Petitioner but by Respondent No.1 in the Family Appeal No.20 of 2016, which is decided by the impugned Judgment of 05.10.2016, wherein with regard to the provision of residence, the learned Appellate Court states that due to financial constraints of present Petitioner, he cannot be compelled to provide the same, whereas the maintenance amount for Respondent No.1 and minor son Bilal was increased from Rs.2000/- to Rs.3000/- with further direction to give 20 Tola gold towards Dower to the Respondent No.1.

3. Learned counsel for the Petitioner states that the above Family Appeal was time barred as it was filed on 18.07.2016 and should have been filed on 06.07.2016. He undertook a comparative reading of both the Judgments (of learned Family and the Appellate Court), to fortify his argument that the Appellate Court did not appreciate the evidence correctly with regard to claim of dower amount / gold. He has cited the judgments reported in the cases of Muhammad Anwar (deceased) through L.Rs. and others v. Essa and others (**PLD 2022 Supreme Court 716**) and Fahad Khan v. Mst. Farukh Tabbassum and others (**2021 MLD 109**) of Peshawar High Court.

4. The first judgment is with regard to law of limitation, inter alia, that even where the issue of time barred claim is not raised by defence, it is the duty of the Court, in view of Section 3 of the Limitation Act, 1908, to adjudicate this point first and the time barred claim is to be dismissed, unless exceptions are shown; **whereas**, the second judgment of learned Peshawar High Court is

with regard to presumption, that gold ornaments are usually in the custody of wife.

5. The learned Counsel for the Respondent has supported the impugned Appellate Judgment and states that conduct of the Petitioner is to be seen, who till date has not complied the directions of the both the Judgments passed by the learned Family Court and the Appellate Court, respectively.

6. Arguments heard. Record perused.

7. As per the Affidavit filed today, it is quite clear that even the Maintenance awarded by the learned Family Court has not been paid. A Receipt dated 07.10.2022 with regard to transaction of Rs.5000/- is appended with the Affidavit, according to which said amount is paid to one Faraz Mughal by Attique Rehman; per Petitioner's Advocate, the above amount is sent by the relative of Petitioner to the Brother of Respondent No.1. The above Transaction of rupees five thousand does not show that this amount was given to Respondent No.1 by the Petitioner. If the petitioner has deposited the Maintenance amount of Rs.2000/- in Court, as per paragraph No.2 of the Affidavit (*ibid*), then the documentary evidence should have been filed, but nothing is on record. Consequently, the Petitioner has failed to comply the directions of the Court and even of that judgment which was not appealed against by the Petitioner himself.

With regard to the point of limitation, the judgment cited above is distinguishable because it is in respect of the Limitation Act [1908]; whereas the present proceeding is governed by the Special Law, viz. Muslim Family Laws Ordinance, 1961 and West Pakistan Family Courts Act 1964. **Rule 22** of the West Pakistan Family Courts Act 1964, contains a proviso that an appellate Court may extend the period of limitation, if sufficient cause exists. The learned Appellate Court has not dismissed the appeal on the point of

limitation, rather has given the decision on merits and hence has condoned the issue of limitation.

8. The Honourable Supreme Court in its very recent Decision handed down in the case of Arif Fareed v. Bibi Sara & others in C.P.No.5601 of 2021, ruled, *inter alia*, not approving the exercise of writ jurisdiction in such matters [concerning the Family Laws], unless there are exceptional circumstances. On the other hand learned counsel for the Respondent has filed a Statement [available in the Record] in which break down is given about the outstanding amount. **Secondly**, With regard to the modification of Decision of the Family Court by the Appellate Court, in view of the above facts, nothing illegal has been surfaced, requiring interference in this writ jurisdiction; even otherwise, in the present Proceeding, generally an appraisal of the evidence cannot be done. Consequently, this Petition is dismissed along-with pending Application(s).

JUDGE

Tufail