SUPREME COURT OF AZAD JAMMU AND KASHMIR
(APPELLATE JURISDICTION)

PRESENT:

Raja Saeed Akram Khan, J.

Civil PLA No.385 of 2016
Civil Misc. No.260 of 2016
(Filed on 05.12.2016)

1. Syed Kafiat Hussain Shah son of Mir Haider Shah,
2. Syed Ali Haider Shah son of Ahmed Shah, r/o Kanoor, Tehsil Pattika Naseerabad, District Muzaffarabad.

….PETITIONERS

VERSUS

1. Syeda Khadija Kazmi d/o Syed Iqbal Hussain Shah,
2. Rida Fatima,
3. Batool Fatima, daughters of Syed Kafiat Hussain Shah, r/o Kanoor, Tehsil Pattika Naseerabad, District Muzaffarabad. (respondents No.2 and 3 minors through respondent No.1, real mother).

….RESPONDENTS

(On appeal from the order of the Shariat Court dated 04.11.2016 in misc. application No.132 of 2016)

APPLICATION FOR INTERIM RELIEF

FOR THE PETITIONERS:	Ch. Muhammad Manzoor, Advocate.
FOR THE RESPONDENTS:	Mr. Mujahid Hussain Naqvi, Advoate.
Date of hearing:	16.02.2017

ORDER:

Raja Saeed Akram Khan, J.— This petition for leave to appeal has been directed against the order of the Shariat Court dated 04.11.2016, whereby the application filed by the petitioners, herein, for setting aside the ex-parte judgments/decrees of the trial Court as well as the Shariat Court, has been dismissed.

2. The facts necessary for disposal of this petition for leave to appeal are that the respondents, herein, filed a suit for recovery of

maintenance allowance in the Court of Judge Family Court, Patika (Naseerabad), against the petitioners, herein. The learned trial Court after necessary proceedings, on 25.09.2014, passed ex-parte decree in favour of the plaintiff-respondents, herein, in the terms that respondent No.1, herein, is entitled for recovery of delivery expanses of Rs.10,000/- and plaintiff-respondents, No.1 and 2, herein, are entitled for maintenance allowance at the rate of Rs.9000/- per month from January 2014 till the delivery according to the agreement deed, moreover, respondent No.2 and 3 are entitled to get the maintenance allowance at the rate of Rs.3000/- per month. Feeling aggrieved from the amount of delivery expanses and the maintenance allowance fixed by the trial Court, the plaintiff-respondents, herein, preferred an appeal before the Shariat Court. The learned Shariat Court while

accepting the appeal vide ex-parte judgment and decree dated 04.06.2015, modified the judgment and decree passed by the trial Court in the terms that respondent No.1, herein, is entitled to receive Rs.20,000/- as delivery expenses and respondents No.2 and 3 are entitled to get maintenance allowance at the rate of Rs.5000/- each per month from 16.06.2014. The judgment and decree to the extent of respondent No.1 and 2, herein, for the payment of maintenance allowance at the rate of Rs.9000/- from January 2014 to delivery date i.e. 16.06.2014, was maintained. On 28.04.2016, the petitioners, herein filed an application for setting aside the ex-parte decision of the trial Court as well as learned Shariat Court before the Shariat Court. The learned Shariat Court vide impugned order dated 04.11.2016, dismissed the said

application, hence, this petition for leave to appeal.

2. Ch. Muhammad Manzoor, Advocate, the learned counsel for the petitioners, argued that the impugned order passed by the Shariat Court is against law and the facts of the case which is not sustainable in the eye of law. He contended that the Courts below passed the judgments without summoning the petitioners. In this way, the opportunity of hearing has not been provided to the petitioners, which is against the principle of audi alteram partem. Petitioner No.1, after coming from abroad got the knowledge of ex-parte judgments and decrees, whereupon, he immediately filed application for setting aside the same before the Shariat Court, but the learned Shariat Court without application of judicial mind dismissed the same. He lastly submitted that it is in the interest of justice that the impugned

order along with the ex-parte judgments and decrees of the Courts below be set aside and remand the case to the trial Court to decide the same afresh after providing opportunity of hearing to the petitioners.

4. On the other hand, Mr. Mujahid Hussain Naqvi, Advocate, the learned counsel for the respondents strongly opposed the arguments advanced by the learned counsel for the petitioners. At first, he raised the objection that this petition has been filed in violation of the mandatory provisions of Azad Jammu and Kashmir Supreme Court Rules, 1978, as the affidavit in support of the contents of petition has not been filed as per requirements of Order XIII (3)(iii) read with Order XVII (4) of the said Rules. Thus, this petition is liable to be dismissed on this sole ground. In support of this argument, he referred to a copy of an unreported judgment

delivered in a case titled *Azad Jammu and Kashmir Government & others v. Javed Iqbal and others* (Civil appeal No.58 of 2015, decided on 23.02.2016). While arguing on the merits of the case, he submitted that the petitioners failed to file application for setting aside the ex-parte decree before the trial Court within prescribed period of limitation, i.e. 30 days. The ex-parte judgment and decree of the trial Court was also appealable but the petitioners have not filed any appeal before the Shariat Court. Moreover, the ex-parte judgment and decree of the Shariat Court could be challenged before this Court, but the petitioners instead of filing appeal before this Court filed application before learned Shariat Court. In this way, the petitioners failed to avail the remedy provided under law within prescribed period of limitation. Now the petitioners want to

challenge the ex-parte judgment and decree of the Shariat Court dated 04.06.2015, through instant petition for leave to appeal after a lapse of considerable time which is not permissible under law. He lastly submitted that no legal question of public importance is involved in this case, therefore, leave cannot be granted in routine.

5. I have heard the learned counsel for the parties and gone through the record made available along with the impugned judgment. To appreciate the objection raised by the learned counsel for the respondents that the affidavit filed by the learned counsel for the petitioners in support of the content of petition for leave to appeal is not in consonance with the relevant provisions of the Azad Jammu & Kashmir Supreme Court Rules, 1978, I have examined the contents of affidavit and the relevant provisions of the Rules, i.e. Order

XIII, Rule 3(iii) and Order XVII, Rule 4. After examining the contents of the affidavit and the relevant provisions (supra), I agree with the stance taken by the learned counsel for the respondents that the affidavit has not been filed as per requirement of the Supreme Court Rules. During the course of arguments, this position was also confronted to the learned counsel for the petitioners but he failed to controvert the same. In such state of affairs, when the affidavit in support of the contents of the petition for leave to appeal has not been filed as per requirement of the Supreme Court Rules, this petition is liable to be dismissed on the sole ground. In the case law referred to by the learned counsel for the petitioners same proposition was under consideration, wherein, this Court after detailed discussion has held that:-

> "From the juxtapose perusal of the hereinabove reproduce contents of the affidavit and the relevant rules it appears that the affidavit has not been filed by the learned counsel for the appellant in the prescribed mode. Even during the course of arguments, when this position was confronted with the learned counsel for the appellant he conceded the factual position. As he himself admitted that the affidavit has not been filed in accordance with the Supreme Court Rules, therefore, no further deliberation in this regard is required and this appeal is liable to be dismissed on this sole ground."

Even otherwise, under rule 13 of the AJ&K Family Court Procedure Rules, 1998, the petitioners had to file an application for setting aside the ex-parte decree before the trial Court within 30 days but they failed to approach the proper forum within prescribed period of limitation. The record also reveals

that proper procedure had been adopted by the trial Court for summoning the petitioners, therefore, it cannot be said that the petitioners were not aware about the filing of the suit. The stance taken by the petitioners that they have no knowledge about the filing of the suit appears to be a lame excuse which has no value. The learned Shariat Court after discussing all the factual and legal aspects of the case has dismissed the application while recording the well reasoned findings. It may also be observed here that under section 14(5) of AJ&K Family Court Act, 1993, an appeal to the Supreme Court from a judgment, decree or order of the Shariat Court shall lie only if the Supreme Court being satisfied, that the case involves a substantial question of law of public importance, grants leave to appeal. In a number of pronouncements, this Court interpreted the question of law of public

importance as a question which affects and has its repercussions on the public at large, whereas, in the present case, no such question is involved. In the case reported as *Basharat Aziz v. Mst. Dil Jan and 10 others* [1998 SCR 129], while dealing with the proposition this Court held as under:-

> "It may be stated that in view of sub-section (5) of section 14 of the Act known as Family Courts Act, 1993, leave to the Supreme Court is only permissible if this Court is satisfied that the case involves a substantial question of law of 'public importance' and not otherwise. In the instant case the Shariat Court has come to the conclusion that the petitioner failed to prove that Mst. Dil Jan was given to him in marriage by her father by performing 'Nikah' according to Muslim Law. Obviously, this is a question of fact and it cannot be said that 'a question of law of public importance' is involved

> in the present case. Even if there is a question of law involved in such a case, leave can only be granted if the question involved is not only a 'question of law' but also a 'question of public importance'. No such eventuality exists in the instant case. Hence the petition for leave to appeal is dismissed."

In view of the above, this petition for leave to appeal along with application for interim relief stands dismissed. No order as to costs.

Muzaffarabad, **JUDGE**
__.02.2017

Date of announcement: 22-02-2017