SUPREME COURT OF AZAD JAMMU AND KASHMIR

[Shariat Appellate Jurisdiction]

PRESENT:

Ch. Muhammad Ibrahim Zia, C.J.
Ghulam Mustafa Mughal, J.

Civil Appeal No.28 of 2019
(PLA filed on 11.02.2019)

Arshid Mehmood s/o Karamat Hussain r/o Kangra P/O Mangla Colony, Tehsil and District Mirpur.

……APPELLANT

VERSUS

Yasmin Arshid d/o Mohammad Jamal r/o Amar Khari Near Staff Colony Sector A/1, Tehsil and District Mirpur.

…..RESPONDENT

[On appeal from the judgment of the Shariat Appellate Bench of the High Court dated 28.12.2018 in Family Appeal No.16 of 2018]

FOR THE APPELLANT: Mr. Abdul Wahab Hussain, Advocate.

FOR THE RESPONDENT: Miss Nosheen Iqbal, Advocate.

Date of hearing: 24.04.2019

JUDGMENT:

Ch. Muhammad Ibrahim Zia, C.J.– The captioned appeal by leave of the Court is the outcome of the judgment of the Shariat Appellate Bench of the High Court dated 28.12.2018,

whereby the appeal filed by the appellant, herein, has been dismissed.

2. The brief facts of the case are that the respondent, herein, filed a suit for recovery of dowry articles before the Judge Family Court, Mirpur on 16.03.2016 against the appellant, herein. In the suit the appellant was proceeded ex-parte vide order dated 28.11.2016. The learned Judge Family Court, Mirpur passed an ex-parte decree on 26.05.2017 against the appellant. The appellant filed an application on 21.09.2017 for setting aside the aforesaid ex-parte judgment and decree. It was contended that he was unaware of the institution of the suit. He was neither properly served upon nor any registered post was sent to him on proper address. It was further alleged that the appellant was abroad but the proclamation was published in a local newspaper having no circulation at abroad. The ex-parte decree was obtained by way of fraud. The learned trial Court after due process of law, vide order dated 04.11.2017 dismissed the application being time barred. On appeal the

learned Shariat Appellate Bench of the High Court maintained the order passed by the trial Court, hence, this appeal by leave of the Court.

3. Mr. Abdul Wahab Hussain, Advocate, the learned counsel for the appellant after narration of necessary facts submitted that both the Courts below have not properly appreciated the legal and factual proposition raised on behalf of the appellant. The appellant in his application for setting aside the ex-parte decree has categorically stated that he is working abroad. On return to the country, he got knowledge of the Court proceedings on 16.09.2017 when he received notice of the Court. After obtaining the requisite copies, the appellant filed application for setting aside the ex-parte decree on 21.09.2017, within a week from the date of knowledge. He further submitted that the appellant specifically mentioned in his application that neither service was effected upon him through any registered post nor proclamation or advertisement in the newspaper is in his knowledge. The appellant also furnished the copy of his passport and the

documentary proof of his exit and entry into Pakistan. The respondent also admitted the fact that the appellant is serving abroad. The learned Family Court has wrongly relied upon some judgments of the apex Court which had been subsequently modified. He further submitted that without appreciation of the statutory provisions of Limitation Act, 1908 the application has been decided merely on the ground that under the Azad Jammu and Kashmir Family Courts Act, 1993 and the rules made thereunder the limitation provided is 30 days. Even for resolution of the factual controversy, the Family Court did not bother to take into consideration the documents produced by the appellant in relation to his travelling. The so called proclamation was also not issued according to law because according to the statutory provisions of law such publication has to be published in the approved newspaper. These are legal questions of public importance, which have not been properly attended by the Courts below justifying interference by this Court.

4. Conversely, Miss Nosheen Iqbal, Advocate, the learned counsel representing the respondent forcefully defended the judgments passed by the Courts below on the ground that the application for setting aside the ex-parte decree has been filed with mala fide intention, just for harassment of the respondent. Although, the appellant is serving abroad but he was in the country at the time of institution of the suit. He was in knowledge of the whole proceedings but he intentionally defaulted his appearance, thus, the Courts below have rightly decided the application. She further submitted that according to the statutory provisions of Azad Jammu and Kashmir Family Courts Act, 1993 and the rules made thereunder, the application for setting aside the ex-parte decree can only be entertained, if the same is filed within a period of 30 days of the passing of the order or decree. In this case, the application has been filed after almost four months which on the face of it is time barred and has been rightly rejected.

5. We have heard the learned counsel for the parties and gone through the record made available. Without discussion of the merits of the case, the examination of the record reveals that against the appellant the suit was filed on 16.03.2016. The learned Judge Family Court, Miprur proceeded ex-parte against the appellant on the ground that he defaulted to appear despite service of plaint through registered post and publication of the proclamation in the newspaper. Be that as it may, in the application filed for setting aside the ex-parte decree, the appellant has categorically taken the stand that he is serving abroad. He also tendered the documents in relation to exit from and entry into Pakistan. The Courts below have neither taken into consideration these documents nor expressed any opinion in this regard. It has also not been determined whether the proclamation was published in the newspaper approved by the Family Court as required under the statutory provisions of Family Courts Act, 1993 or not. This Court in an unreported case titled

Muhammad Rashid vs. Nazia Kousar [Civil Appeal No.147/2016 decided on 05.07.2017] held that:-

> "6. The perusal of the record reveals that the appellant filed the applications for setting aside the ex-parte decrees on 25.09.2014 in which he raised factual proposition and also furnished the list of the witnesses. Same like the respondent filed objections on 16.12.2014 and furnished the list of the witnesses but regrettably, the Family Court without recording any evidence regarding the factual proposition disposed of the applications merely on the point of limitation which according to the stated facts appears to be a mixed question of law and facts. Under the provisions of the Family Courts Act, the application of the provisions of the Limitation Act is not excluded. In the impugned orders of the Family Court it is clearly mentioned that the appellant has raised the plea that neither any acknowledgement receipt is available on record nor the notice has been published in the newspaper approved by the Family Court but he learned Family Court has neither attended these points nor clarified from the record that any such acknowledgment receipt is available on the record or the notice has been published in the newspaper approved by the Family Court."

It is settled proposition that under the provisions of Family Courts Act, 1993 the application of the provisions of Limitation Act, 1908 has not been excluded. Section 13 of the Limitation

Act, 1908 provides that the time during which the plaintiff or the defendant has been absent from Pakistan, shall be excluded while computing the period of limitation. Our this view is fortified from the principle of law laid down in the case reported as *Fazal Hussain vs. Fatima Bibi & others* [2015 SCR 1384], wherein it has been observed that:-

> "11. A juxtapose perusal of the provision of section 13 and 29 of the Limitation Act read with the provision of special law, the Land Acquisition Act, there remains no doubt and ambiguity that provision of section 4, sections 9 to 18, and section 22 of the Limitation Act are applicable to the proceedings because there is no express provision of special exclusion of the application of the mentioned section. Our this view finds support from the case reported as *Chairman District Evacuee Trust Committee Rawalpindi vs. Sharif Ahmed and others*, [PLD 1991 SC 246] wherein while interpreting section 29 of the Limitation Act, it has been observed as under:-
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> > '….. It is not denied that the Displaced Persons (Compensation and Rehabilitation) Act is a special law and sub-clause (a) of subsection (2) of section 29 would be attracted. It is also not denied that the period of limitation provided in the Limitation Act and the special law are different. The essential condition for application of section 29 (2) thus stands satisfied. Accordingly, section 4, 9 to 18 and 22 would straight away become applicable to Appeals under section 4 subsection (4) of the

> Displaced Persons (Compensation and Rehabilitation) Act. And section 12 of the Limitation Act relating to exclusion of time requisite for obtaining copies would thus become applicable. …….
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> Thus, in order to avoid application of the said provisions of the Limitation Act including section 12 the exclusion by a special or local law had to be expressed. And as there is no such express exclusion, their application could not have been excluded by implication as implied exclusion is not visualized.'

Same like the apex Court of Pakistan in the case reported as *Mt. Jamila Khatoon and another vs. Mst. Tajunnisa and others*, [PLD 1984 SC 208] has held that exclusion of time under section 12 of the Limitation Act is a substantial right. It is not mere a matter of procedure. It will be suffice to reproduce here para 4 of the judgment as under:-

> '4. The crucial words used in section 12 (2) of the Limitation Act are "time requisite" and the Court is required by law to exclude the time requisite for obtaining a copy of the order appealed from. This is a statutory provision of exclusion and is to be distinguished from the power conferred on a Court of law under section 5 of the Limitation Act to admit an appeal after the period of limitation prescribed therefor, if it is satisfied that the appellant had sufficient cause for not preferring the appeal within such period. In this sense the operation of section 12 is distinct from that of section 5, which confers a discretionary power on the Court. No such discretion vests under section 12 and the litigant is entitled, as of right, to exclude the

period spent in obtaining copies. Thus section 12 confers a substantive right upon the appellant to claim the time as excluded and the Court cannot impose upon the statutory right of any appellant a restriction not warranted by the Act. But on the language of section 12 their Lordships of the Privy Council in *J.N. Surty v. T.S. Chettyar* made the following observation:

> 'The words 'requisite' is strong word; it may be regarded as meaning something more than the word required. It means 'properly required', and it throws upon the pleader or counsel for the appellant the necessity of showing that no part of the delay beyond the prescribed period is due to his default.
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> But for that time which is taken up by his opponent in drawing upon the decree or by the officials of the Court in preparing and issuing the two documents, he is not responsible.'

This is the second principle to be applied in cases of this nature. The appellant must act with reasonable promptitude and diligence in order to satisfy the Court that the time which he claims to be excluded was properly required in obtaining copies. The third principle to be kept in mind is that the question as to what is the time requisite for obtaining the copy must necessarily depend upon the practice and rules in force, and no general principles on this question can safely be formulated. The question is one of fact, to be determined on the circumstances of each in the light of the rules framed on the subject."

> 12. In the light of the statutory provisions as well as survey of law, it becomes crystal clear that benefit of exclusion of time provided under section 13 of the Limitation Act will be available to the parties in the proceedings conducted in special law i.e the Land Acquisition Act."

In our considered view, the Courts below have failed to appreciate the aforesaid propositions, while passing the impugned judgments.

6. For the above stated reasons, we are constrained to accept this appeal, set aside the impugned judgments of the Shariat Appellate Bench of the High Court and the learned Family Court and remand the matter to the Family Court Mirpur to rehear the parties, conduct the proper proceedings and thereafter decide the application within a period of two months from the date of communication of this order.

This appeal is accepted in the above terms with no order as to costs.

CHIEF JUSTICE JUDGE

Mirpur,
24.04.2019