

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.

No.

IHC/Judl.Deptt.

(REVISED FORM OF BLUE SLIP)

Case No. WP-3133-13

Titled. Mst. Nomail Zia Versus Adnan Riaz

a) Judgment approved for reporting

✓
Yes/~~No~~

b) Judgment any comment upon the conduct of the
Judicial officer for quality of the impugned judgment
Is desired to be made.

Yes/~~No~~

(In case the answer is affirmative separate
confidential note may be sent to the Registrar
drawing his attention to the particular aspect)

Sd/
Initial of the Judge.
[Signature]

NOTE.

1. If the slip is used, the Reader must attach on top of first
Page of the judgment.
2. Reader may ask the Judge writing the judgment whether the
judgment is to be approved for reporting of any comment is
to be made about the judicial officer / quality of judgment.
3. This slip is only to be used when some action is to be taken.

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ORDER SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P. NO: 3133/2013

MST. NOMAIL ZIA- VERSUS- ADNAN RIAZ

Serial No. of order of proceeding.	Date or order of proceedings	Order with signatures of judge, and that of parties or counsel, where necessary.
1	2	3

16.9.2013 Mr. Akram Shaheen, Advocate:


ORDER
MUHAMMAD ANWAR KHAN KASI, CJ:

The facts relevant for the disposal of this petition are that on 26.03.2011, the petitioner filed a suit for dissolution of marriage on the basis of Khula against respondent No.1, who contested the same through a written reply, wherein he prayed for dismissal of the suit with further prayer that if the plaintiff [petitioner herein] resists to carry on the marriage, she may be directed either to return the gold ornaments mentioned in the plaint and other articles or pay its value to the tune of Rs.25,00,000/-. [Twenty-Five Lac] The suit was decreed vide Judgment & decree dated 6.7.2011. It's operative Para 3 is reproduced hereunder:

"The suit of plaintiff for dissolution of marriage is hereby decreed on the basis of khula. Copy of this judgment be sent to Chairman Arbitration Council, concerned. It is contention of learned counsel for the defendant that she be ordered to restore the gifts and benefits, taken by her from defendant. In my humble view to this effect defendant has the other lawful course upon to him, if so advised." [Emphasis provided]

2- None of the parties questioned the judgment & decree of the learned Judge Family Court dated 6.7.2011, however, the respondent No.1 filed a suit for recovery of gold/diamond and other articles against the petitioner seeking decree of the same or in alternative value thereof. The petitioner contested the suit through written reply refuting the claim of respondent No.1 and also filed an application under Order VII, Rule 11 CPC which was resisted by the respondent No.1 through a written reply. The learned Trial Court, vide order dated 17.9.2012 accepted the application of the petitioner and rejected the plaint Under Order VII Rule 11 CPC. Operative para 05 of the order is important which reads as under:

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" But despite of filing any appeal against the judgment dated 6.7.2011 being dissatisfied from the judgment, he filed instant suit for recovery of gold/diamond ornaments and other articles, whereas 3rd schedule of Est Pakistan Family Court, 1964, Section 5 Sched & S.10 (4) of Muslim Family Laws Ordinance, the said issue had to be resolved in same so also the suit is barred U/S 10 of CPC, therefore, relying upon the case of **Muhammad Ijaz Ahmad Khan vs. Judge Family Court and another**" reported in **2005 YLR 2799** Lahore which is reproduced as under:-

The decree for dissolution of marriage having been passed in favour of Mst. Samia Naz is upheld and is not being disturbed but the case is remanded to the learned Judge Family Court, concerned, to grant an opportunity of hearing to the parties, record the evidence and to determine as to how much Haq Mehr was received by wife in consideration of marriage at the time of marriage and as to whether the petitioner/defendant was entitled to such benefits or not and to pass a decree strictly in accordance with law. In view of above discussion and relevant provision of law, the plaint is rejected Under Order 7 Rule 11 CPC."

3- Feeling aggrieved by that order, respondent No.1 went in appeal which was allowed by the learned ADJ-West, Islamabad vide Judgment dated 18.6.2013. The order impugned was set aside and the case was remanded to the learned Family Court for its decision in accordance with law.

4- Learned counsel questioned the order of learned ADJ mainly on the ground that the subject matter of dower is right of wife recoverable through Family Court, however, Family Court has no jurisdiction to restore any dowry to the husband, and therefore, respondent No.1 has no cause of action. It is further contended that the learned Appellate Court erred in observing that a Family Court has jurisdiction under Section 5 of the Family Court Ordinance to try a suit for recovery of bridal gifts as restoration of dower to the husband.


5- It is the contention of the learned counsel that in presence of earlier judgment of the learned Family Court, whereby no relief was given to the respondent No.1 and still holds the field, second suit is not competent and is hit by the principle of res judicata.

6- Heard & record perused.

7- The proposition in this case is that the petitioner filed a suit for dissolution of marriage on the basis of Khula which was resisted by the respondent No.1 [husband] wherein besides refuting the allegations of the wife, he also claimed for recovery of gold ornaments in case, the petitioner refused to live with him.

8- The learned Trial Court decreed the suit of the petitioner to the extent of dissolution on the basis of Khula but to the extent of claim of the respondent No.1, it was directed to knock the proper forum.

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9- That Judgment & Decree was never challenged by the parties and thus attained finality.

10- Thereafter the respondent No.1 came up with fresh suit seeking decree for recovery of gold ornaments or price in lieu thereof. The petitioner besides filing written reply also moved a separate application under Order VII, Rule 11 CPC which was allowed by the learned Trial Court by observing that the respondent No.1 never filed appeal against the first decree which has attained finality wherein the claim of the respondent No.1 was not accepted, therefore, second suit is not maintainable on the basis of res judicata.

11- The respondent No.1 filed an appeal against the said Judgment which was allowed by the learned ADJ and the case was remanded to the learned Trial Court for its decision afresh by observing that the suit is for recovery of dowry articles and, therefore, cannot be tried together with the suit for dissolution of marriage and that the learned Family Court is competent to try the suit.

12- Heard & record perused.

13- The claim of the respondent No.1 is contained in Para 6 of his plaint wherein he asserted that he had given certain gold ornaments to the petitioner on various occasions, from engagement till divorce, therefore, he is entitled to recover same as the petitioner had broken the marriage bond.

14- For resolving the controversy, the definition of bridal gifts has to be ascertained. In this respect, Section 2 (a) of Dowry & Bridal Gifts [Restriction] Act, 1976 is very much relevant which reads as under:

"2(a) "Bridal Gift" means any property given as a gift before, at or after the marriage, either directly or indirectly, by the bridegroom or his parents to the bride in connection with the marriage but does not include "Meher".

15- The subject matter of the suit of the respondent No.1, therefore, can safely be termed as Bridal Gifts U/s Section 2 (a) of Dowry & Bridal Gifts [Restriction] Act, 1976.

16- Now we advert to the forum where a person with such claim may file a suit. Pursuant to Ordinance, LV of 2002, amendment was made in Section 7 of West Pakistan Family Courts Act, 1964, whereby personal property of a wife as defined under Section 2(a) of Bridal Gifts [Restriction] Act, 1976, was brought in the jurisdiction of Family Court. For convenience proviso to Section 7 is reproduced hereunder:-

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"Provided that a plaint for dissolution of marriage may contain all claims relating to dowry, maintenance, dower, personal property and belongings of wife, custody of children and visitation rights of parents to meet their children."

17- It is thus clear that the claim of the respondent No.1 falls within the jurisdiction of Family Court and, therefore, the suit of the respondent No.1 is competent in its present form.

18- Adverting to the next objection that the suit is hit by the principle of res judicata, it is obvious that a decision not being on merits of the controversy would not be hit by res judicata in a subsequent suit. This view is solicited from the case law "Sheodan Singh Vs. Daryao Kunwar" [AIR 1966 SC 1332], wherein it was held that "in order that a matter may be said to have been heard and finally decided, the decision in the former must have been on the merits."

19- The respondent No.1 cannot be non-suited merely on the basis of technicalities. It is the spirit of law to decide controversies on merits rather than on technical knockout. The petitioner, on the other hand, shall have full opportunity to re-but the claim of the respondent No.1 by adducing her evidence.

20- In view of above, the second suit of the respondent No.1 is competent before the learned Judge Family Court, who shall decide the same after taking evidence from both the sides.

21- The petition, being devoid of merits, is dismissed in limine.

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M. Suhail
16.09.2013

[Signature]
CHIEF JUSTICE

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APPROVED FOR REPORTING

