

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

Writ Petition No. 219/2020
Muhammad Yousaf
Versus
AD&SJ-VII, Islamabad-West, etc.

Petitioner by: Malik Babar Hamid, Advocate,
Respondent No.3: In person,
Date of Hearing: 23.07.2020.

FIAZ AHMAD ANJUM JANDRAN, J.- Through the instant writ petition, petitioner impugns the order dated 14.06.2019 & amended decree dated 07.10.2019, passed by learned Additional District Judge-VII Islamabad-West, whereby appeal filed by the respondent No.3 was allowed while that of petitioner was dismissed and consequently, judgment of the learned Trial Court dated 10.12.2018 was modified in terms that suit of the petitioner for jactitation of marriage was dismissed while suit of the respondent No.3 for recovery of dower amount and maintenance was decreed. Both the learned courts below are at variance.

2. Facts, relevant for the disposal of instant writ petition, are that on 09.10.2009 petitioner filed suit for jactitation of marriage with the averments that he contracted marriage with respondent No.3 on 10.11.2007; that their relations turned hostile which ultimately led to separation of spouses on 11.11.2008; that he sent notice of Talaq in the Arbitration Council on the next day i.e. 12.11.2008 and Certificate of Effectiveness of Talaq was issued on 30.03.2009; that the event was also published in Daily Jang dated 04.02.2009; that in retaliation, respondent No.3 filed a suit for recovery of dower amount and maintenance which was contested by the petitioner through a written statement but the respondent No.3 subsequently withdrew her suit; that the respondent No.3 coerced the petitioner time and again to cohabit and re-unite, which necessitated this suit.

3. On the contrary, respondent No.3 filed separate suit for recovery of dower amount and maintenance allowance by claiming herself to be the lawfully wedded wife of the petitioner. On facts, she asserted that Talaq has not become effective, as the petitioner, soon after pronouncing the Talaq, has withdrawn the same by making 'Rujoooh'. Both the suits were consolidated and following consolidated issues were framed on 03.03.2011:-

1. *Whether the plaintiff Mohammad Yousaf is entitled to the decree for jactitation of marriage? OPP*
2. *Whether suit of plaintiff Mohammad Yousaf is liable to be dismissed in view of preliminary objections No.1 to 5? OPD*
3. *Whether the defendant lady is entitled to the decree for recovery of maintenance, if so for which period and to what rate? OPD*
4. *Whether defendant lady is entitle to recovery of Haq Mahar of rupees 3 lac and 10 tola gold ornaments? OPD*
5. *Whether suit of defendant is liable to be dismissed in view of preliminary objections No.1, 2, 6, 8, 9, 10 raised by defendant? OPP (As mentioned in the original order dated 03.03.2011 by the trial Court)*
6. *Relief*

4. The parties produced evidence in support of their respective versions. The petitioner appeared as PW-1 and in documentary evidence tendered Nikah Nama Exh.P2, attested copy of divorce deed Exh.P3, Talaq Certificate Exh.P4 and other documentary evidence comprising Exh.P5 to Exh.P40. On the other hand, respondent No.3 appeared as DW-1 and got examined Mohammad Islam as DW-2. In documentary evidence she tendered original Nikah Nama Exh.D4, Nikah Nama Register Exh.D5, Nikah Nama issued by Secretary, Arbitration Council Rawalpindi Cantt, Exh.D6 and other documentary evidence comprising Exh. D7 to Exh.D34.

5. The learned Trial Court after hearing both the parties, decreed both the suits vide Judgment & Decree dated 10.12.2018 in following terms:-

“In view of my above findings, suit of plaintiff for jactitation of marriage is decreed in his favour. Suit of defendant for payment of maintenance allowance and dower is partially decreed in her favour as defendant is found entitled for recovery of maintenance allowed of rupees 30 thousand per month for the iddat period and defendant is also found entitled for recovery of dower amounting to rupees 3 lac and 10 tola gold ornaments from plaintiff. Regarding remaining claim suit of the defendant is hereby dismissed.”

6. Both the sides preferred separate appeals against the Judgment & Decree *ibid*. The appeal of the petitioner was dismissed while that of the respondent No.3 was allowed vide Order 14.06.2019, and pursuant thereto decree dated 07.10.2019 was modified as under:-

“Suit of the plaintiff for jactitation of marriage is dismissed. Suit of plaintiff for payment of maintenance allowance and dower is decreed in her favour as defendant is found entitled for recovery of dower amounting to rupees 3 lac + 10 tolas gold and pocket money 10 thousand per month. Where the currency exchange rate of US Dollar \$ shall be applicable on Pakistani rupees till realization of these amounts. Defendant is also found entitled for recovery of maintenance allowance @ 30 thousand per month from 10.11.2007 with 10% annual increase.”

7. The Order *ibid* is being assailed through the instant writ petition. Learned counsel for the petitioner contends that petitioner divorced the respondent No.3 through Divorce Deed by pronouncing Three Talaqs at a time, the notice of the Talaq was sent to the concerned Arbitration Council, where parties entered appearance and got recorded their statements and thereafter Talaq Effectiveness Certificate was issued on 30.03.2009; that respondent No.3 challenged said certificate before the District Officer Revenue Rawalpindi, who upheld the same and also awarded maintenance for the period of Iddat to the respondent No.3; that the learned Appellate Court failed to consider these important documents and even the

statement of the respondent No.3 which she got recorded on 18.12.2008 before the Arbitration Council; that the respondent No.3 herself has sworn in an affidavit whereby she has waived her dower and maintenance; that earlier respondent No.3 filed a suit for recovery of maintenance allowance for Iddat period but subsequently withdrew the same unconditionally, therefore, second suit on the same cause of action was not maintainable; that petitioner hails from Hanfi School of Thought while respondent No.3 belongs to Ahl-e-Hadees Sect and, therefore, questioned the Talaq pronounced thrice at once; that findings to the extent of commission of any perjury by the petitioner are uncalled for, unjust, whimsical and arbitrary and that the impugned order being based on surmises and conjunctures is liable to be set aside.

8. The respondent No.3, on the other hand, reiterated the stance contained in her pleadings; claims to be lawfully wedded wife of the petitioner and thus entitled to matrimonial rights of dower amount and maintenance.

9. Heard the learned counsel for the petitioner and respondent No.3 and examined the record.

10. The case in hand contains intricate questions, to be answered in accordance with the Family Courts Act 1964 (Act of 1964) and the Specific Relief Act, 1877 (Act of 1877).

11. In this case, undoubtedly the marriage through a valid Nikah is an admitted fact; not only this but the divorce pronounced by the petitioner is also recognized and acknowledged by the respondent No.3 and the dispute is on the point as to whether the petitioner has revoked the same by making Rujooh, while on the other hand petitioner constantly denied the same and claimed that Talaq had become final after undergoing the mandatory procedure that includes proceedings of Arbitration Council and issuance of '*Talaq Effective Certificate*' (***The Certificate***).

12. The term '*jactitation of marriage*', according to Black's Law Dictionary, Eleventh Edition means that:-

"jactitation of marriage. Hist. 1. False and actionable boasting or claiming that one is married to another. 2. An action against a person who falsely boasts of being married to the complainant.

"Jactitation of marriage is a cause of action which arises when a person falsely alleges that he or she is married to the petitioner, and the remedy sought is a perpetual injunction against the respondent to cease making such allegations. The cause is now uncommon in English municipal law and almost unknown in the conflict of laws."

13. From plain reading of the definition *supra*, it is clear that kinds of disputes where the very basis of the marriage i.e. performance of Nikah, claim and counter claim on its basis is made, could be the subject of a suit of jactitation. When circumference of the suit mainly revolves around the claim and counter claim qua existence of marriage or otherwise. For instance, a decree for jactitation of marriage is sought on the ground that no valid Nikah was ever performed between the parties and that he or she cannot claim himself or herself to be the lawfully wedded wife or husband, as the case may be. It is unambiguously held that for entertaining a suit for *jactitation* of marriage, the foundation of the marriage i.e. Nikah Nama and existence of valid marriage is to be made subject of that litigation.

14. The Hon'ble Federal Shariat Court in "*Muhammad Anwar V. Mst. Shagufta Ahmad and 2 others*" (2004 P.Cr.LJ 1071) held that:-

"here is marked difference between suit for dissolution of marriage and suit for jactitation of marriage; whereas in the former suit existence of valid marriage is admitted by the wife and decree is sought by her for its annulment/dissolution from the Qazi/Judge, Family Court on one or more grounds, enumerated in the law i.e. Dissolution of Muslim Marriage Act; 1939, while in the latter case the Qazi is petitioned to declare that at no point of time marriage took place, thereby putting a permanent restraint on

the opponent from claiming the lady, to be his lawfully wedded wife.” [Emphasis Added]

The Hon’ble Lahore High Court in case of “***Irshad Ahmad V. Muhammad Sharif and another*** (PLD 2006 Lahore 260), in an irresistible manner expounded that “*when anyone of the parties i.e. husband/wife alleges that Nikahnama is forged and has a cause of action about adjudgment of Nikahnama, would be a cause of action under Section-5 of the Act, 1964.*”

15. In terms of Section 5 of the West Pakistan Family Courts Act 1964 (‘**Act of 1964**’), subject to the provisions of the Muslim Family Laws Ordinance, 1961 (‘**Ordinance of 1961**’), the Family Courts shall have exclusive jurisdiction to entertain, hear and adjudicate upon matters specified in the Schedule. The matters depicted in the schedule are as under:-

1. Dissolution of marriage.
2. Dower.
3. Maintenance.
4. Restitution of conjugal rights.
5. Custody of children.
6. Guardianship.
7. Jactitation of marriage.
8. Dowry.
9. Personal property and belongings of wife.

The ‘*jactitation of marriage*’ made part of the schedule pursuant to the West Pakistan Family Courts (Amendment) Act, 1969 (I of 1969).

16. Undoubtedly, suit for *jactitation* of marriage is triable by the Family Court but the instant matter entails altogether different proposition, rather two steps ahead of the situation that deals with the suit, mentioned in the schedule *ibid* i.e. not only marriage between the parties is admitted, birth of a daughter and thereafter her death after two days is admitted, pronouncement of Talaq has also been admitted by both the parties and the dispute has arisen thereafter.

17. What would be the proper course in dealing with the suit of the petitioner, whereby he sought jactitation of marriage on the basis of aforementioned circumstances?

The learned Court of first instance while exercising jurisdiction as a Family Court, without adhering to the legal proposition decreed the suit as prayed for, while the learned Appellate Court, has not only reversed the said findings but also proceeded to dismiss the suit of the petitioner by treating it as a suit for declaration without adverting to the admitted documentary evidence placed on record. Even no evidence/record has been referred for dismissing the suit by treating it a suit for declaration.

18. Merely stating that the parties are married according to the Ordinance of 1961 and each and every dispute arising out between them would be triable by the Judge Family Court amounts to oversimplification of a highly complex subject. There was the conflicting legal opinion of the Hon'ble Lahore High Court regarding the matter that each and every case between husband and wife would fall within the ambit of the Act of 1964 (PLD 2004 LHR 588 titled as Nasrullah V. District Judge) and every dispute between husband and wife is not amenable to the Act of 1964, rather it is the claim of the parties (PLD 2007 LHR 515 titled as Mohammad Akram V. Hajira Bibi). The Hon'ble Supreme Court of Pakistan resolved this conflict in a judgment reported as PLD 2011 SC 260 by approving the case of Mohammad Akram (supra) in the following manner:-

“Thus the interpretation of entry No.9 ibid as provided by Mohammad Akram v. Mst. Hajra Bibi and 2 others (supra) is the correct explication of law, which is hereby approved. However adding thereto, it may be held that if the ratio of Nasrullah dictum (supra) which is entirely and solely founded on the noted concept/definition is taken to be correct, than a suit for Specific Performance, declaratory suits of any nature, or any other civil litigation between a wife and husband shall be amenable to the special jurisdiction of the family Court, which is not intent of the law.” (emphasis added)

19. By seeking guidance from the above referred dictum of the Hon'ble Supreme Court of Pakistan it is held that it is not the relationship between the parties that is to be given significance but matter and substance regarding which they are in litigation. In the case in hand, the petitioner alleges that he had divorced the respondent No.3, while she denies this fact by alleging that the petitioner had revoked the same afterwards. The petitioner in support of his claim has a divorce deed in his possession; *talaq effective certificate* duly issued by the Chairman Arbitration Council, upheld by the Deputy Collector concerned while the writ petition filed by the respondent No.3 was dismissed *in limine* by the Hon'ble Lahore High Court, Rawalpindi Bench vide order dated 05.04.2010.

20. In presence of all these documents along with other available record, the petitioner, as per his claim has grievance to be declared that he is not husband of the respondent No.3, while on the other side; all these facts had been denied by respondent No.3, merely on the ground that she is the wife of the petitioner. This fact demonstrates that the substance in question is declaration of status of particular individual, whether he is the husband of respondent No.3 or otherwise.

21. The claim of the petitioner, in presence of above facts and record, in pith and substance, is a claim, whereby he sought declaration of his legal character as an ex-husband of the respondent No.3.

22. Section 42 of the Act of 1877 provides remedy to a person entitled to any legal character to file a suit against any person denying such character. For ease of reference, Section *ibid* is reproduced hereunder:-

“42. Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in

its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation - A trustee of property is a "person interested to deny" a title adverse to the title of someone who is not in existence, and for whom, if in existence, he would be a trustee." [emphasis added]

23. The section *ibid* provides that any person entitled to any legal character or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right. In the present case, the petitioner seeks decree to the effect that the respondent No.3 is no more his lawfully wedded wife and that she be restrained to claim as such after the pronouncement of divorce that has become effective. The suit of the petitioner, therefore, falls within the ambit of section *ibid*, triable by the court of competent jurisdiction to try the said matters. The Hon'ble Lahore High Court in case of "**Mst. Sadia Khan V. Muhammad Asim Khan and another**" (2001 CLC 330), endorsed the position regarding talaq and suit for declaration.

24. The next question is whether the learned Appellate Court rightly exercised the jurisdiction vested in it and that whether the judgment in appeal, suffers from jurisdictional defect and result of misreading and non-reading of the evidence on record.

25. The facts, as glean out of the evidence on record, are that the petitioner and respondent No.3 (hereinafter to be described as the parties) entered into contract of marriage on 10.11.2007. On 27.08.2008, a daughter was born who, unfortunately died two days later on 29.08.2008. The petitioner pronounced three talaqs upon the respondent No.3 vide divorce deed, Ex.P3 on 11.11.2008 and thereafter applied for issuance of talaq effective certificate from the

concerned Union Council. The respondent No.3 appeared before the Union Council and got recorded her statement. The petitioner also got recorded his statement in those proceedings, wherein he expressly asserted that no compromise could be effected between the parties and certificate regarding effectiveness of divorce be issued.

26. The Chairman of the concerned Union Council, after due procedure, issued the Certificate on 30.03.2009. The respondent No.3 challenged the said certificate before the District Collector Revenue but her revision was dismissed by upholding the Certificate vide order dated 27.01.2010. The respondent No.3, then, filed W.P. No.347/2010 before the Hon'ble Lahore High Court Rawalpindi Bench which too was dismissed *in limine* on 05.04.2010 by observing that the competent forum i.e. Family Court was already seized of the matter.

27. She also filed a suit for recovery of dower and maintenance on 29.01.2009. In the said suit under para No 7&8, respondent No.3 stated that the talaq has not been revoked by the petitioner, so, she is filing the suit for maintenance and dower. In prayer clause amongst other grounds, she also claimed the maintenance for the Iddat period, while in paragraph No.10, she specifically mentioned regarding her claim in respect of period of Iddat. The petitioner filed written statement in the said suit on 08.04.2009, wherein it had been categorically mentioned that there was no Rujooh between the parties and certificate regarding effectiveness of divorce had already been issued by the concerned Union Council, which has been upheld by the Hon'ble High Court. The petitioner had specifically stated that the lady now falls within the prohibited degree for him; that he is subject of Hanfi sect, where-under after the pronouncement of three talaqs, wife becomes prohibited upon the individual except undergoing the Halala. The date was fixed for reconciliation of the matter after filing of the

written statement, wherein respondent No.3 without any permission to file fresh suit, recorded her statement that she is not interested to pursue the matter and wants to withdraw the same. Ultimately, the suit was dismissed as withdrawn vide order dated 25.06.2009. The respondent No.3 claims that there is no divorce and that she is still wife of the petitioner which compelled him to file suit for permanent injunction against the respondent No.3, wherein she got recorded her statement on 06.02.2009 that she will not illegally harass the petitioner and the suit was dismissed being infructuous.

28. Thereafter, the petitioner also issued a proclamation in the daily Jang, wherein he reiterated the stance that respondent No.3 is no more his wife; he has divorced her and is not responsible for any act of the respondent No.3. In addition, the petitioner filed an application to the police authorities in respect of conduct of respondent No.3 which was disposed of.

29. At the end, petitioner filed suit for *jactitation* of marriage on 09.10.2009 while on 17.02.2010, respondent No.3 filed suit for recovery of maintenance and dower. The respondent No.3 filed application for amendment in the plaint of the suit for recovery of maintenance allowance and dower consisting of 19 pages. She also filed another application for amendment in written statement, filed by her, in suit for *jactitation* of marriage consisting of 28 pages. Both the applications were dismissed by the learned Trial Court vide order dated 31.05.2016 which had been assailed by her through W.P. No.4526/2016 before this Court. The said writ petition was dismissed through a detailed order dated 17.02.2017 with the direction to the Family Court to decide the case within a period of one month. C.P. No. 907/2017 was filed against the said order before the Hon'ble Apex Court but the same too was dismissed vide order dated 14.04.2017.

30. The history of the case referred above is part of record and evidence. The learned trial Court proceeded to decree the suit of the petitioner for *jactitation* of marriage while partly dismissed the suit of respondent No.3 for recovery of maintenance and dower in terms noted in Para-5 above, while the learned Appellate Court reversed the findings by dismissing the suit of the petitioner even by treating it as a suit for declaration, while suit of the respondent No.3 was decreed as prayed for in terms noted in Para-6 above.

31. The proposition of law if put in juxtaposition with the facts highlighted above, it transpires that the issue between the parties is not whether the marriage is in existence or otherwise but a question as to whether, Talaq has become effective or has been revoked as alleged by the respondent No.3. The findings of the learned Appellate court qua dismissal of the suit of the petitioner by treating it as a suit for declaration, is not based on any of the documents and the evidence highlighted above. The documents i.e. divorce deed, talaq effectiveness certificate, order of District Collector Revenue, statement of respondent No.3 during proceedings before the arbitration counsel, her stance during first suit for maintenance and recovery of dower and subsequent claim were neither considered nor discussed. No observation with regard to said documentary evidence has been rendered which makes the impugned judgment, result of misreading and non-reading of the evidence, illegality floating on the surface of record.

32. The other important aspect of the matter is that the learned Appellate Court proceeded to dismiss the suit of the petitioner by treating it as a suit for declaration which, of course, as a matter of fact and under the spirit of the law, when it was established that the proceedings before the learned Family Court were *coram non judice*, proper course was to return the plaint for its presentation before the court of competent jurisdiction. However, the learned Additional

District Judge, while hearing an appeal against judgment and decree of the Family Court, dismissed the suit for declaration, when there was no appeal filed/ pending before him in a civil suit, against the declaratory decree under Section 42 of the Act of 1877, therefore, to the extent of dismissal of the suit of the petitioner by treating it as a declaratory suit, is an order without jurisdiction.

33. The sequel of above discussion is that the decrees passed by the learned Judge Family Court and upheld by the learned Appellate court in a suit of the respondent No.3 for the recovery of dower amount and ten tola gold ornament are upheld, being based on correct appreciation of evidence on record. The decree of learned Family Court to the extent of jactitation of marriage and that of learned Appellate Court to the extent of dismissal of suit of the petitioner by treating it as a suit for declaration, is not legally sustainable and is accordingly set aside. Likewise, the decrees of the two learned courts to the extent of award of maintenance to the respondent No.3 are also set aside.

34. The suit of the petitioner for *jactitation* of marriage shall be deemed pending by considering it a suit for declaration, which shall be decided afresh. The claim of the respondent No.3 for the recovery of maintenance for the period of Iddat or otherwise, would depend upon the outcome of the suit of the petitioner, to be tried by the court of competent jurisdiction.

35. As the order dated 14.06.2019 passed by the learned Addl. District Judge, Islamabad (West) in a suit for jactitation of marriage by considering it a declaratory suit and amended Decree in the light of said order dated 07.10.2019 passed by the learned Judge Family Court to that extent have been set aside, therefore, proceedings initiated against the petitioner under Sections 476 and 195(b) Cr.P.C are also set aside. The learned District Judge concerned is directed to entrust the suit of the petitioner for

its decision by the Court of competent jurisdiction established to adjudicate the matters in terms of Section 42 of the Act of 1877. As the parties are in litigation since 2009, therefore, learned Court, to whom the trial will be entrusted, shall decide the case within a period of one month by proceeding on day to day basis. No orders as to costs.

36. The instant writ petition is accordingly disposed of in above terms.

(FIAZ AHMAD ANJUM JANDRAN)
JUDGE

Announced in open Court on _____

JUDGE

Imran

Approved for reporting.