

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.1359 of 2016

Mst. Safa Arshad

Versus

The learned Additional Sessions Judge (East), Islamabad, etc.

Date of Hearing:	17.10.2016
Petitioner by:	Mr. Ali Raza Kayani, Advocate,
Respondent No.2 by:	Mr. Sajid Abbas Khan, Advocate.

MIANGUL HASSAN AURANGZEB, J:-Through the instant writ petition, the petitioner, Mst. Safa Arshad, impugns the Order dated 14.01.2016, passed by the Court of the learned Additional District Judge, Islamabad, whereby respondent No.2's appeal against the judgment and decree dated 30.10.2015, passed by the learned Judge Family Court, was set aside, and the matter was remanded to the learned Judge Family Court with the direction to frame issues in the light of the pleadings of the contesting parties, especially respondent No.2's counter-claim. Vide judgment and decree dated 30.10.2015, the learned Judge Family Court had decreed the petitioner's suit for recovery of maintenance, dower, dowry articles and personal belongings against respondent No.2.

2. The record shows that the petitioner and respondent No.2 got married on 02.11.2013. As per the pleadings in the plaint, four *tolas* of gold ornaments were settled as dower. It is also pleaded that in addition to the said dower, three *tolas* of gold, which were gifted by the petitioner's parents to her, were taken from the petitioner by respondent No.2 and his mother. Subsequently, the relations between the couple turned sour, causing the petitioner to leave her matrimonial abode on 30.03.2014. On 02.05.2014, the petitioner instituted a suit for the recovery of maintenance, dower, dowry articles and personal belongings against respondent No.2 before the learned Judge Family Court, Islamabad. Respondent No.2 contested this suit by filing a written statement. In the prayer-

clause of the written statement, respondent No.2 prayed for a decree for the restitution of conjugal rights, and for a direction to the petitioner to rejoin respondent No.2 and bring along with her the gold ornaments, which she is alleged to have taken with her. From the divergent pleadings of the contesting parties, the learned Judge Family Court framed the following issues on 29.10.2014:-

- "1. Whether the plaintiff is entitled for the recovery of maintenance from defendant, if yes, at what rate and from which period? OPP*
- 2. Whether the plaintiff is entitled to recover dower amount and personal belongings from defendant or not? OPP*
- 3. Whether this Court has no territorial jurisdiction to entertain the suit? OPD*
- 4. Whether the plaintiff has no cause of action to file the instant suit? OPD*
- 5. Whether the plaintiff has come to this court with unclean hands? OPD*
- 6. Relief."*

3. Thereafter, during the trial, the petitioner entered the witness box as P.W.1. Additionally, four more witnesses tendered their evidence in the petitioner's support. Respondent No.2 entered the witness box as D.W.1. It was not controverted that the petitioner left her matrimonial abode on 30.03.2014. The first notice of *Talaq* was issued to her on 21.04.2014. After the institution of the suit on 02.05.2014, efforts to bring about reconciliation between the warring couple did not bear any fruit. The learned Judge Family Court held that since after the issuance of the said notice of *Talaq*, no effort for "*Rajjuh*" were made, the *Talaq* was confirmed three months after the issuance of the said notice. Vide judgment and decree dated 30.10.2015, the petitioner's suit was partially decreed. The learned Judge Family Court held that the petitioner was entitled to the recovery of maintenance at the rate of Rs.3,000/- per month from 30.03.2014 till the completion of *Iddat* period. She was also held entitled to the recovery of gold ornaments weighing seven *tolas* and certain dowry articles and personal belongings or in the alternative, their price with 30% deduction. The said judgment and decree was assailed by respondent No.2 before the learned Appellate Court.

4. Vide judgment dated 14.01.2016, the learned Appellate Court allowed respondent No.2's appeal and remanded the matter to the learned Judge, Family Court with the direction to frame issues in the light of the pleadings of the contesting parties and considering the counter-claim of respondent No.2. The said judgment dated 14.01.2016, has been impugned by the petitioner in the instant writ petition.

5. Learned counsel for the petitioner submitted that the judgment and decree dated 30.10.2015, passed by the learned Judge Family Court, was well reasoned and strictly in accordance with the facts and the law; that issues were framed as far back as 29.10.2014, and respondent No.2 did not seek framing of any additional issue; that evidence was adduced by the parties bearing in mind the issues framed by the learned Judge Family Court; and that respondent No.2 was estopped from seeking the re-framing of issues after the learned Judge, Family Court passed a judgment and decree against him.

6. On the other hand, learned counsel for respondent No.2 submitted that since respondent No.2 in his written statement had prayed for the restitution of conjugal rights as well as the return of the gold ornaments taken away by the petitioner, it was obligatory upon the learned Judge Family Court to have framed an issue on these matters. Learned counsel for respondent No.2 defended the judgment of the appellate Court, and prayed for the dismissal of the writ petition.

7. I have heard the contentions of the learned counsel for the contesting parties, and have perused the record with their assistance. The facts leading to the filing of the writ petition have been set out in sufficient detail in paragraphs 2 to 4 hereinabove and need not be recapitulated.

8. Now, the core issue to be determined in these proceedings whether it was lawful for the learned Appellate Court to have set aside the judgment and decree dated 30.10.2015, passed by the learned Judge, Family Court and remand the matter with the direction to frame additional issues. When the learned counsel for respondent No.2 was confronted

with the fact that issues had been framed as far back as 29.10.2014, and that it had been recorded by the learned Judge Family Court that "no other issue was pressed by either party", he had no explanation to advance. In the event, respondent No.2 was not content with the issues framed by the learned Judge, Family Court, there was nothing preventing him from filing an application under the principles of Order XIV, Rule 5 C.P.C. for the framing of additional issues or reframing issues. Even though, the provisions of Code of Civil Procedure, 1908, are not applicable to the proceedings before the learned Judge, Family Court, but the principles enshrined therein may be invoked for the just and proper adjudication of the case. The record is silent as to whether respondent No.2 agitated the framing of additional issues before the learned Judge Family Court, at any stage. Respondent No.1 is, therefore, estopped from seeking an issue to be framed after the conclusion of the trial. Reference to the following case law on the subject would be appropriate:-

- (i) In the case of Mst. Sughra Bibi Vs. Asghar Khan (1988 SCMR 4), it was held that it was the duty of the parties to get proper issues framed if they had any objection or suggestion regarding the framing of issues. Furthermore, the Hon'ble Supreme Court did not agree with the contention that failure to frame an issue at the trial stage would have the effect of nullifying the trial.
- (ii) In the case of Eada Khan Vs. Mst. Ghanwar (2004 SCMR 1524), it has been held as follows:-

"4. ... It is a settled principle of law that if once the parties are alive to the contentions raised and when once evidence is adduced in support of such contentions, the framing or non-framing of issues loses significance."
- (iii) Recently, in the case of Noor Vs. Mst. Sattan (PLD 2013 Lahore 30), it has been held by the Hon'ble Lahore High Court that where a party does not claim an issue or does not make any effort to get an issue framed then his plea stands abandoned.

- (iv) In the case of Mehmood Ahmad Vs. Malik Abdul Ghafoor (PLD 2011 Lahore 522), the Division Bench of the Hon'ble Lahore High Court has *inter alia* held as follows:-

"15. ...It is also interesting to note that the appellants did not, at any stage, raise any objection or moved any application for framing of additional issue. We have specifically asked the learned counsel for the appellant whether any objection was taken in this regard. He has candidly conceded that no objection was even raised or application moved with regard to framing of additional issues.

17. From a perusal of the record, we also notice that both parties had ample opportunity to adduce evidence in support of their respective pleas. It is not the case of the appellants that they were in any manner prevented from producing evidence, which could have helped their case. It is settled law that non-framing of issues where both parties had opportunities to adduce evidence is not material and does not constitute a ground for reversing the decree. Reference in this regard may also be made to "Muhammad and 9 others v. Hasham Ali" (PLD 2003 SC 271), "Mr. M. Akram and Raja v. Muhammad Ishaq" (2004 SCMR 1130), "Eada Khan vs. Mst. Ghanwar and others," (2004 SCMR 1524), "Laloo and another v. Ghulaman" (2000 SCMR 1058), "Malik Safdar Ali Khan v. Public at Large" (2004 SCMR 1219) and "Fazal M. Bhatti another v. Mst. Saeeda Akhtar and others" (1993 SCMR 2018)."

- (v) In the case of Charagh Begum Vs. Raj Muhammad (2004 YLR 1421), it has been held as follows:-

"This brings me to the arguments of the learned Advocates for the appellants that the issues have not been properly framed, in my opinion, the contention is devoid of any force. The suit remained pending for pretty long period and the plaintiffs never, requested for proper framing of the issues, they are, therefore, not entitled to raise the objection in second appeal. In Khadim Hussain's case (PLD 1981 SC (AJ&K) 40), it has been opined that if a party omits to claim any issue no capital can be made out of such omission and such issue shall be deemed to have been abandoned."

- (vi) In the case of Karam Dad Vs. Mst. Barkat Jan (2004 CLC 910), it has been held that a party cannot be allowed to raise the question of framing of any issue at an appellate stage, because it was the duty of the Court as well as the Advocates of the parties to ensure that necessary issues arising out of the pleadings of the parties are framed. Furthermore, it was held that where a counsel never

brought to the notice of the Trial Court any omission or incorrectness of any issue framed by it, such a point could not be raised in an appeal.

- (vii) In the case of Capital Development Authority Vs. Shaikh Muhammad Hanif (2003 CLC 1684), no objection whatsoever was taken by any party during the trial regarding non-framing of an issue. Even in the memorandum of appeal no ground was taken as to the non-framing of an issue. Hence, the Hon'ble Lahore High Court rejected the contention of the petitioner that correct issues had not been framed from the pleadings of the parties.

9. In the case at hand, respondent No.2 in his appeal, did not even take the ground as to the non-framing of any issue. The learned Appellate Court ought to have appreciated that respondent No.2's prayer for a decree for a restitution of conjugal rights could not have been granted, because the notice of *Talaq* dated 21.04.2014 had got confirmed after three months of its issuance, since there had been no efforts for a "*Rajjuh*". In the case of Abdul Baqi Vs. Abdul Baseer Qureshi (NLR 1982 Civil 18), it has been held that a decree for the restitution of conjugal rights is not warranted in the presence of evidence showing that the husband had given an un-revoked notice of *Talaq*.

10. As regards the non-framing of an issue regarding respondent No.2's claim for the recovery of the gold ornaments allegedly taken away by the petitioner, had respondent No.2 felt strongly about this, he would not have remained silent all along the trial, but would have insisted on framing of an issue on this matter. As respondent No.2 did not press any other issue, when the issues were framed by the learned Judge Family Court on 29.10.2014, he could not, after the conclusion of a trial, seek to turn back the clock and seek the framing of an issue. As mentioned above, the non-framing of an issue by the learned Judge Family Court, was not even a ground taken in respondent No.2's appeal.

11. In view of the above, the petition is allowed the impugned judgment dated 14.01.2016, passed by the learned Appellate Court, is set aside and the judgment and decree dated 30.10.2015, passed by the learned Judge Family Court, is restored. There shall be no order as to costs.

**(MIANGUL HASSAN AURANGZEB)
JUDGE**

ANNOUNCED IN AN OPEN COURT ON _____/2016

(JUDGE)

APPROVED FOR REPORTING

Qamar Khan*

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