

ORDER SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Writ Petition No. 676 of 2012,
Shahid Mehmood
Versus
Mst. Naureen Ejaz Etc:

S. No. of order proceedings	Date of order/ proceedings	Order with signature of Judge and that of parties or counsel where necessary.
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25-06-2012. Barrister Mustafa Aftab Sherpao & Mr. Hamid Ahmad,
Advocate for petitioner,
Mr. Nadeem Hussain Mughal, Advocate for respondent
No.1.

The facts, relevant & necessary for disposal of this petition, are that the petitioner (Shahid Mehmood) married with respondent (Mst. Naureen Ejaz) on 5-11-2006 but the tie did not continue and ultimately divorce took place on 10-03-2008, followed by a suit by the respondent for recovery of maintenance allowance, dowry articles & dower which was decreed in her favour vide Judgment & Decree dated 08.07.2010, in terms mentioned hereunder:-

“For what has been discussed on the afore mentioned issues, the suit of the plaintiff to the extent of recovery of maintenance allowance at the rate of Rs. 5,000/- per month for the period of Iddat only is decreed in her favour and against the defendant. The plaintiff is also found entitled to recovery dowry articles as per list annexed with the plaint or price thereof Rs. 5,14,900/-. However, the suit of the plaintiff to the extent of recovery of dower amount of Rs.2,00,000/- is hereby dismissed. Parties are left to bear their own costs.”

2- The petitioner feeling aggrieved by that Judgment & Decree, preferred an appeal but the same met with failure vide Judgment dated 18.01.2011. Thereafter respondent filed Execution Petition wherein, learned Executing Court by order dated 23-9-2011 directed the petitioner to produce 10-Tola Jewellery mentioned in the list in the Court or to deposit the amount equal to its current market value. The petitioner challenged said order before the learned ADJ through an appeal which was dismissed vide order dated 09-02-2012. Hence, the present constitutional petition challenging the legalities of orders dated 23.09.2011 and 09.02.2011 mainly on the ground that

both the orders are violative of the principle laid down by the superiors courts in cases: **Mst. Mehbooba versus Abdul Jalil (1996 SCMR 1063)** and **"Shamshad Bibi versus District Judge Multan (PLD 2011 Lahore 790)**. It has also been contended that the learned Executing Court passed the order with undue haste and without application of judicial mind, which requires interference by this Court as the learned Executing Court cannot go beyond the decree, whose execution is being made.

3- Conversely, learned counsel for respondent supported the impugned orders. It was his stance that the learned Executing Court had rightly observed that the judgment debtor should return the gold or to pay its present price keeping in view market value and this order would not be taken an order beyond the scope of the decree because the principle of fading utility would not apply to the gold ornaments, therefore, the petition deserves dismissal.

4- I have considered the arguments and gone through the material available on file besides the case law relied by learned counsel for the petitioner.

5- First of all, we have to see as to what was the respondent claim in her suit? She demanded dowry articles as per list Ex. P-7 which includes ten tola gold ornaments valuing Rs. 1,20,000/- . Her claim was accepted in total and she was held entitled to recover dowry articles including ten tola gold ornaments valuing Rs. 1,20,000/- as per list annexed with the plaint or price thereof (Total) Rs. 5,14,900/-. It means that total claim of the plaintiff in the shape of dowry articles was accepted by the learned Judge Family Court. The appeal of the petitioner against that Judgment & Decree was dismissed and thereafter the respondent filed Execution Petition with the following claim mentioned at Sr. No. 11:-

”عدالت حضور نے حور خ 8.4.2010 کو ڈگری بابت حلفانے خرچہ عدالت مایانہ
5000/- روپے کل مبلغ 15000/- روپے ملے ہیں بلکہ اس کے ساتھ عدالت ادا کی
5,14,900/- رقم ڈگری دار / مدعیہ کو دلائل میں جائیں، کل رقم 5,29,900/-
دلائی جائے۔“

6- During the proceedings, learned Executing Court directed the petitioner to deliver ten tola gold ornaments to the respondent in the Court or to pay its price as per existing market value. This order, in my view, has been passed in excess of jurisdiction as the same was beyond the scope & mandate of the decree for which the respondent had filed the Execution Petition. She herself claimed its alternate price as Rs. 1,20,000/- and the decree was also passed to this effect, therefore, in case

of its non recovery, she is entitled to recover Rs. 1,20,000/-, the value which she herself claimed in her suit and contained in List (Ex.P7).

7- The direction of the learned Executing Court through the impugned order is, therefore, unjustified, in excess of the claim of the respondent and in fact beyond the scope of the decree.

8- Now I advert to the case law referred to by the learned counsel for the petitioner. In case **1996 SCMR 1063**, the Hon'ble Apex Court wherein after discussing **Order XX Rule 10 Civil Procedure Code** and the case law "**L. Tilok Chand son of L. Mul Chand v. L. Damodar Dass son of L. Daso Ram (AIR (32) 1945 Peshawar 5)**", it has held that in case of non recovery of gold ornaments, the plaintiff will be entitled to its market value on the date of institution of the suit. In case **PLD 2011 Lahore 790** It was held that alternate value of gold would be the value which was at the time of institution of suit and Executing Court would determine the value at the time of institution of suit.

9- The principle provided by the case law referred above, would be that in case of non recovery of gold ornaments, the plaintiff shall be entitled to recover its price according to the market value prevalent at the time of filing of the suit and not as per current market value. Even otherwise, execution beyond claim & decree cannot be made.

10- In view of above discussion, I accept this petition and set-aside both the orders dated 23.09.2011 & 09.02.2012, passed by learned ADJ & learned Executing Court, being beyond the scope of decree. The learned Executing Court is directed to proceed with the Execution Petition strictly within the stricture of decree & observations made hereinabove. Parties are left to bear their own costs.

(MUHAMMAD ANWAR KHAN KASI)
JUDGE

M.Suhail
25th June, 2012:

APPROVED FOR REPORTING