

W.P. No. 17659/2013

Ihsan Ahmed Khan

Addl. District Judge etc.

01.12.2015 Malik Matee Ullah, Advocate for the
petitioner.
Mr. Imtiaz Hussain Khan Baloch, Advocate for
respondent No.3.

Through this constitutional petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the judgment and decree dated 07.05.2013 has been challenged whereby appeal of respondent No.3 filed against the judgment and decree dated 26.09.2012 passed by the Judge Family Court dismissing the suit for recovery of dowry articles, was allowed and the case was remanded to the Family Court to decide it afresh as principle of *resjudicata* was not applicable to this case.

2. Brief facts giving rise to the filing of this petition are that respondent No.3 filed a suit for recovery of dowry articles worth Rs. 3,93,300/- with the background that earlier suit for the same relief filed by her was concurrently dismissed i.e. both by Family Court and Appellate Court as pre-

mature since the marriage was found intact. The suit was resisted by filing the written statement by the petitioner as a result of which following issues were framed:-

ISSUES.

1. Whether the plaintiff is entitled to recover dowry articles from the defendant as prayed for? OPP
2. Whether the instant suit is barred by principle of resjudicata? OPD
3. Relief.

3. Vide judgment and decree dated 26.09.2012 the issue No.2 was decided in favour of the petitioner and against the respondent No.3 who filed an appeal which was allowed by the appellate court and remanded the case to the Family Court by observing that issue of dowry articles is yet to be finally and conclusively decided after discussing the evidence on record, therefore, the case be decided keeping in view the ingredients of *resjudicata*, hence this writ petition.

4. Learned counsel for the petitioner contends that earlier suit filed by respondent No.3 for the recovery of dowry articles was dismissed concurrently whereafter she cannot file a fresh suit as it will be directly hit by Section 11 of the Code of Civil Procedure under which no

second suit can be filed between the same parties on the same subject matter.

5. Conversely, learned counsel for respondent No.3 submits that dissolution of marriage provides fresh cause of action and that the issue of recovery of dowry articles was not conclusively decided on the basis of evidence between the parties. Prays for the dismissal of the writ petition.

6. Arguments heard. File perused.

7. The precise legal question raised before this Court is about the applicability of principle of *resjudicata* enshrined in Section 11 CPC, which is reproduced as under for ready reference:-

11. *Res Judicata.* – No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

(Underline is for emphasis).

8. A perusal of said section amply demonstrate that if a matter in a subsequent suit was directly and substantially the same as in earlier suit between the same parties litigating under

the same title if decided by the court of competent jurisdiction it cannot be re-challenged. Here for the purpose of decision of this case, "litigation under the same title" is of great significance.

9. Admittedly, first suit of respondent No.3 for recovery of dowry articles and maintenance allowance was filed on 02.04.2010 in which while giving finding on issue No.2, i.e. "*Whether the plaintiff is entitled to recover dowry articles as detailed in the list annexed with the plaint or value thereof Rs. 3,93,300/-? OPP,*" it was observed that since respondent No.3 was given a separate house in which the dowry articles were placed, therefore, the petitioner was not in possession of the same. The claim for the recovery of dowry articles was, therefore, dismissed and the suit for restitution of conjugal rights was decreed it was observed as follows:-

...."In other words, she was provided with residence and gold ornaments by the defendant as agreed through nikahnama Ex.P1. She is in the possession of the same. The dowry articles always follow the residence of spouse. Therefore, court is of the view that defendant is not in possession of any dowry articles as demanded by the plaintiff. For the reason and as discussed above, the instant issue is answered against the plaintiff."

10. However, the appellate court while deciding the appeal on 07.07.2011 observed that during the subsistence of marriage the filing of suit for recovery of dowry articles was premature and was rightly dismissed. According to the position taken by the parties the matter was subsequently reconciled and they started living together as husband and wife but on 18.06.2012 another suit for recovery of dowry articles was filed taking the ground in paragraph No.2 that after the dissolution of marriage on the basis of *Khula* on 10.04.2012 from the Family Court, the said suit was filed.

11. In other words the question as to whether the dowry articles are still lying in the house in possession of petitioner after the divorce, needs to be proved on the basis of evidence, as the facts and circumstances have been changed between the parties. The cause of action, invariably in the suit for recovery of dowry articles accrues from the date of desertion as it is the breakage of marriage which necessitates the litigation of matrimonial nature. It is always possible that during the subsistence of marriage, certain rights may not claimed by a wife for the sake of

saving her marriage. However, the dissolution of marriage gives rise to an antagonizing situation where the parties have to take adverse stands in order to agitate their respective rights relating to the custody of minor, recovery of maintenance allowance for Iddat period, recovery of dower, or recovery of dowry articles, etc. If the arguments of the learned counsel for the petitioner that a decree passed during the subsistence of marriage, cannot be challenged after reconciliation and divorce, is accepted, it will become a common practice that whenever matrimonial suits are decided in favour of either party, the divorce or separation would be meaningless for the purpose of determining a cause of action. In all societies matrimonial relations are very sensitive in nature as they are mostly based on emotions but the fabric of our society is based on the strength of relationship between the immediate members of a united family. Needless to observe the fact that strength of family relationship is a distinguished feature of our society which has exalted us from the western world.

12. In the instant case undoubtedly the parties are the same, the subject matter of recovery of dowry articles is the same and the jurisdiction of the Family Court was also rightly exercised, but now the litigation is not under the same title as respondent No.3 has become the ex-wife for the petitioner and the petitioner has become ex-husband for respondent No.3. In other words the title of the litigants have now changed to ex-wife and ex-husband.

13. For what has been stated above, this petition has been found meritless and is, therefore, dismissed.

(ALI BAQAR NAJAFI)
JUDGE

Announced in open Court on 11.12.2015

JUDGE

Shahzad