FORM No. HCJD/C-121

ORDER SHEET

IN THE LAHORE HIGH COURT, MULTAN BENCH, MULTAN

JUDICIAL DEPARTMENT

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W.P.No.2152 of 2020

Muhammad Kashif **Vs.** Judge Family Court etc.

Sr. No. of order/ proceedings	*Date of order/ Proceeding*	*Order with signature of Judge, and that of Parties' counsel, where necessary*
	12.02.2020	Mr. Abdul Rasheed Khera, Advocate for petitioner. Mahar Zameer Hussain Naz, Deputy Attorney General and Mr. Muhammad Aurangzaib Khan, AAG and Mian Arshad Waqas Chhajra, Advocate.

Through this constitutional petition, the petitioner has called in question the order dated 28.10.2019 passed by Judge Family Court, Multan, whereby the application filed by Respondent No.2 ("**Respondent**") for setting-aside judgment and decree dated 04.10.2018 passed against the present Petitioner by Judge Family Court, Multan was allowed, as a consequence thereof, the decree for dissolution of marriage on the basis of khula passed on a suit allegedly filed by Respondent was recalled as having been obtained through fraud and misrepresentation.

2. Learned counsel for the petitioner has argued that the impugned order is against the facts of the case and law on the subject as there is no provision in law whereby an application can be filed by the decree holder for recalling of decree passed in his/her own favour. Besides, states that the learned trial court has exceeded the power vested in it. Consequently, the impugned order is liable to be set-aside.

3. The Petitioner has been outrightly confronted that the impugned order, whereby the afore referred application for recall of decree has been allowed, is a decision given in terms of Section 14 of the Family Courts Act, 1964 ("**Act**") against which appeal is maintainable and this constitutional petition at this stage is premature due to availability of alternate remedy, in response to which he has argued that no remedy lies against a decree for dissolution of marriage passed by Judge Family Court, therefore, the order of acceptance of application for recalling of decree can also not be called in question by filing an appeal. Moreover, it is argued that impugned order has been passed on an interlocutory application, against which decision, which is also interlocutory in nature, appeal is not maintainable under Section 14(3) of the Act.

4. Conversely, learned Law Officers have argued that although remedy of appeal is not generally available against an interim/interlocutory order, however, if the said order finally determines an issue or dispute, the same cannot be treated as merely an interlocutory order as the same would amount to a "*decision given*" in terms of Section 14 of the Act, against which an appeal would be maintainable.

5. **Heard**. Record perused.

6. It is observed that a suit for dissolution of marriage stated to be filed on behalf of the respondent against the present petitioner on 04.10.2018, was decreed vide judgment and decree that was also passed on the same day in the following terms:

"*04.10.2018*

Present: Learned counsel for the parties.

Suit is fresh, be it registered.

Fresh power of attorney as well as consenting written statement has been filed by the defendant.

Arguments heard. Record perused.

Written statement on behalf of the defendant has been filed, in which he has stated that he has no objection if the suit of the plaintiff for dissolution of marriage be decreed in her favour. Hence, the plaintiff's suit for dissolution of marriage on the basis of khula is hereby decreed in favour of the plaintiff and against the defendant on the basis of khula. However, she is directed to surrender up to 50% of her deferred dower and up to 25% of her prompt dower to her husband. A copy of this judgment be sent to the Secretary Union Council concerned for further progress. No order as to costs. Decree sheet be prepared accordingly. File be consigned to record room after its due completion."

7. Subsequently on 02.09.2019, application for cancellation of decree was filed by the respondent on the ground that she had not filed the afore referred suit for dissolution of marriage which had been managed by the present Petitioner through fraud and misrepresentation. The said application was contested by the present Petitioner but the same was allowed on the ground that the respondent had denied filing the suit and consequently the decree dated 04.10.2018 was set-aside being based on fraud and misrepresentation.

8. The question that arises for determination is whether the impugned order is of the nature of interim/interlocutory order against which appeal is not maintainable under Section 14(3) of the Act or amounts to "a decision given" in terms of Section 14 of the Act making the same amenable to the jurisdiction of appellate court by way of filing an

appeal. To determine whether the said order is appealable, Section 14 of the Act which relates to appeals is reproduced below:-

> ***14. Appeals.- (1) Notwithstanding anything provided in any other law for the time being in force, a decision given or a decree passed by a Family Court shall be appealable-***
> ***(a) to the High Court, where the Family Court is presided over by a District Judge, an Additional District Judge or a person notified by Government to be of the rank and status of a District Judge or an Additional District Judge; and***
> ***(b)to the District Court, in any other case.***
> ***(2) No appeal shall lie from a decree by a Family Court__***
> ***(a) for dissolution of marriage, except in the case of dissolution for reasons specified in clause (d) of item (viii) of Section 2 of the Dissolution of Muslim Marriages Act, 1939.***
> ***(b)for dower or dowry not exceeding rupees one hundred thousands.***
> ***(c)for maintenance of rupees five thousands or less per month.***
> ***(3)No appeal or revision shall lie against an interim order passed by a Family Court."***

9. From the perusal of Section 14, it is observed that the said section bars appeal against interim orders and certain decrees, including a decree for dissolution of marriage especially at the behest of the husband but apart from those any order or a judgment that amounts to a final determination of a particular issue is treated as a decision given by the family court and is appealable provided that the said decision is not an interim order as provided in Sub Section (3) of Section 14 ibid. It is settled by now that every order passed during the pendency of a family suit cannot be treated merely as an interim/interlocutory order if the said order finally determines an issue. Reliance in this regard may be placed on the judgment reported as ***MUHAMMAD ZAFFAR KHAN versus Mst.***

SHEHNAZ BIBI and 2 others (1996 CLC 94), the relevant portion is reproduced below:-

> ***"Regarding the first question, I am of the opinion that every order passed by a Family Court during the pendency of a suit cannot be treated interlocutory, unless the nature of such order reflects so. To test whether an order passed on any application by a Family Court be treated interlocutory or not the Appellate Court must find out what possible orders could be passed by the Judge Family Court on such applications. If the nature of an order appears to be final then it may not be treated interlocutory.***
>
> ***…….***
>
> ***In the light of above discussion, I am of the view that if an order of dismissal or allowance passed on an application in respect of any issue has finally decided the said issue, then such an order possesses the characteristic of finality notwithstanding to the pendency or final disposal of the case on the basis of that order and an appeal against such an order would be maintainable. If no final order regarding an issue has been passed on an application and the point raised by any party has been deferred for the time being, then such order, can be termed as "interlocutory".***
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> ***It may not be out of place to mention that the words "Interlocutory" in its dictionary meaning means "not final or definitive", pronounced during the course of a suit pending final decision as "an interlocutory divorce decree." (Websters' New Universal Unabridged Dictionary). Therefore, an order passed on an application cannot be treated interlocutory if the Court has given a final or definitive decision on an issue relating to the maintainability of a suit or the jurisdiction of the Court."***

10. In case reported as ***Imtiaz Ahmad Khan vs. Mst. Aqsa Manzoor and others*** (PLD 2013 Lahore 241), the question for determination before the Court was maintainability of an Intra Court Appeal under

Section 3 of Law Reforms Ordinance, 1972 arising out of suit for maintenance and return of dowry articles on the ground that whether dismissal of application under Section 11 CPC would amount to an appealable decision in terms of Section 14 of the Act or not. The Division Bench declared the dismissal of said application as '*a decision given*' by observing as under:

> ***"The basic question to be resolved is, whether the order dated 12.11.2009 dismissing the petitioner's application seeking the dismissal of respondent's suit is a decision given or an interlocutory order, the two terms used in section 14 of the West Pakistan Family Courts Act, 1964.***
> ***The order dated 12.11.2009 impugned in the writ petition was passed on the application made by the applicant. The question whether the court could try the subsequent suit when the earlier one had already dismissed for want of evidence was finally decided vide the above referred order. No further order was to be passed on the said application. The order passed falls within the term of "a decision given". Reliance is placed on Rao Muhammad Owais Qarani v. Mst. Tauheed Aisha and others. 1991 MLD 1097. In view of the ratio of the referred judgment the order assailed in writ petition finally decides the application made by the appellant cannot be termed to be an interlocutory order. It is a decision given and is appealable. The instant Intra Court Appeal arising out of the proceedings whereby the law provides a remedy by way of an appeal or revision is not competent. This appeal is dismissed."***

In ***Rao Muhammad Owais Qarni's*** case (Supra), the question before the Court for determination was whether the order of the trial court in allowing the application filed by a party to recall the witnesses of

other party for the purposes of cross examination would amount to '*a decision given'* or not and whether it is appealable. The Court observed as under:

> ***"With regard to the question as to whether or not the impugned order of the learned Court was appealable, it seems that in view of the several decisions referred to by the parties it is almost settled that the word 'decision' used in section 14 of the Act does not include every interlocutory order of the Family Court, but covers only such orders as are passed under some provision of the Act and this, it appears, would imply the final or temporary determination of a matter forming part of some issue involved in the case. Applying this test, the order dated 6.8.1990 passed by the trial Court would, in my view, not be 'decision' for purposes of section 14 of the Act and therefore, not appealable."***

In ***Mst. Naureen vs. Ehsan Sabir, Family Judge, Faisalabad and 2 others*** (2010 C.L.R. 110), the petitioner wife had challenged the decision of the appellate court whereby her appeal had been dismissed as not maintainable in view of Section 14 of the Act. The matter under consideration before the Court was that whether appeal would be maintainable against an order of the Judge Family Court allowing the husband to resile from his previous offer to decide the case on the basis of oath to be taken by the wife when the offer had been accepted and she was willing to take the oath. This Court observed as under:

> ***"The word "decision" not only covers the final judgment but also interlocutory order, therefore, in such situation, the appeal would be maintainable while having a look of a different meaning and definition is broad enough to cover both final judgments and interlocutory***

> ***orders and although, it is some times limited to the sense of judgment and sometimes understood as meaning simply the first step leading to a judgment. Lastly, the word "decision" may include various rulings as well as orders.***
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> ***In this case, the offer was made by the respondent to decide the lis on oath but subsequently backed out without any reason. Had the offer made by the respondent been materialized, the case would have been decided either way, therefore, it can safely be held that the act of the respondent is leading to a final judgment, therefore, in any case, it was a decision and the appeal was competent."***

11. In the case reported as ***Nargis Naureen vs. Judge Family Court, Multan and others*** (PLD 2018 Lahore 735) the question for determination before the Court was whether dismissal of an application for seeking interim relief by the Family Court would be an appealable order, the Court observed that dismissal of application filed under Section 21-A of the Act is tantamount to decline the relief of preservation and protection of property that may be available to a party (if it was otherwise entitled to the same) during the pendency of suit, which amounts to a final determination of a claim to that extent and hence cannot be treated as merely an interlocutory order that does not finally determine anything, thus said order would amount to a decision given in terms of Section 14 of the Act. Consequently, an appeal against the same would be available before the appellate court. Similar principle has been laid down in the judgments reported as ***Tasadaq Nawaz vs. Masood Iqbal Usmani and others*** (PLD 2018 Lahore 830), ***Rahim Bakhsh vs. Mst. Shahzadi & others*** (2018 CLC 1789) and

Memoona Ilyas vs. Additional District Judge and others (2017 CLC 1747).

12. In case titled ***Nusrat Bibi and another vs. Zeeshan Ahmad another*** (PLD 2019 Lahore 226), this Court observed that dismissal of an application for fixation of interim maintenance allowance in favour of the minor plaintiff amounted to a final decision against which appeal would be maintainable in terms of the Act as due to refusal of such relief by the Family Court, the minor cannot be kept in waiting for decision of the main case before he could receive maintenance, if he was otherwise found entitled for the same.

13. Keeping in view the afore-referred verdicts, the position of law that emerges is that appeal under Section 14 of the Act is not barred against every interlocutory order and remedy of appeal, unless specifically barred, would be available against a decision relating to a right or a remedy provided under the law subject to the condition that finality is attached to such an order or decision and nothing remains to be further decided between the parties on the said issue. In the present case, a suit for dissolution of marriage was filed on behalf of Respondent against present Petitioner which was decreed on the same day on consenting written statement filed by present petitioner. The Respondent disowned having filed said suit and filed an application for setting-aside/recall of said decree on the basis of fraud and misrepresentation which application despite contest by the petitioner was allowed on the ground that Respondent had denied having filed the suit, therefore, the said decree dated

14.10.2018 was held to be based on fraud and misrepresentation and was set-aside. The said order was an order that could have also been obtained on an application under Section 12(2) CPC as well which is applicable to the cases where the decree has been obtained through fraud or misrepresentation. Even otherwise, every court has inherent jurisdiction to recall an order if the same is based on misrepresentation or fraud, therefore, as the decree had been set-aside and the said order has determined the question of its legality by declaring that the same was based on fraud and misrepresentation which amounts to finally determining the said issue, hence, nothing to that extent is pending before the family court for further/final determination and in these circumstances bar of jurisdiction under section 14(3) would not apply. Furthermore, although appeal is not maintainable in terms of Section 14(2)(a) of the Act against a decree for dissolution of marriage, the said bar would not be applicable on acceptance of an application filed by wife to challenge a decree for dissolution of marriage obtained in her favour surreptitiously against her will on the basis of fraud and misrepresentation, which legal position would be true even if the main suit was revived by setting aside the said decree.

14. Thus impugned order would amount to '*a decision given*' in terms of Section 14 of the Act. Consequently an appeal against the same would be available before the appellate court on any available ground. Hence, this constitutional petition is premature and not maintainable due to availability of alternate remedy and the same is ***disposed of*** as such. The

petitioner may, if advised, seek remedy by way of filing an appeal before the appellate court. However, before parting with this decision, it is observed that in case an appeal is filed by the petitioner, the appellate court, while deciding the same on its own merits, shall take into consideration the fact that the petitioner had invoked the constitutional jurisdiction of this Court to seek relief under the impression that appeal was barred under Section 14(3) of the Act.

(Muzamil Akhtar Shabir)
Judge

Approved for reporting

Naveed.