Form No: HCJD/C-121

ORDER SHEET

IN THE LAHORE HIGH COURT,
MULTAN BENCH MULTAN
JUDICIAL DEPARTMENT

Writ Petition No. 10648 of 2018

Muhammad Waqas
vs
Judge Family Court, Lodhran etc

S.No. of Order/ Proceeding	Date of order/ proceeding	Order with signature of Judge and that of parties or counsel where necessary
	12.07.2018	Mr. Shamshad-ul-Haq Rana, Advocate for petitioner. Mr. Abid Hussain Bhutta, Assistant Attorney General. On Court's call. Ch. Khalid Masood Ghani, AAG. On Court's call.

Through this constitutional petition, the petitioner has called in question the order dated 28.06.2018 passed by Judge Family Court, Lodhran whereby the said court while framing issues has not framed the issue relating to its jurisdiction to entertain the said suit.

2. The brief facts of the case are that respondent No.2, Mst. Yasmeen Bibi was married to the petitioner on 27.09.2007 and from the said wedlock, minors respondent Nos. 3 to 5 were born. The petitioner claims that respondent No.2 on 23.03.2017 left his house alongwith minors whereafter he tried his level best for their return but they refused. Consequently, the

petitioner filed a suit for restitution of conjugal rights in Multan which was contested by respondent No.2. The respondent No.2 filed a suit for recovery of maintenance allowance against the petitioner before the Judge Family Court, Lodhran instead of Multan by mentioning her address of Lodhran which suit was decreed ex-parte on 13.01.2018 against the petitioner. On attaining the knowledge, the petitioner filed an application on 14.04.2018 for setting-aside ex-parte decree which was allowed on the same day subject to costs of Rs.1,000/-. Thereafter, the petitioner through written statement raised objection to the jurisdiction of the Judge Family Court, Lodhran to adjudicate upon the said suit on the ground that respondent No.2 is a permanent resident of District Multan, therefore, Judge Family Court, Lodhran had no jurisdiction to entertain the said suit and filed an application for framing issue regarding the jurisdiction of court to entertain the suit. The said application was contested by respondent No.2 by submitting written reply, however, thereafter learned counsel for respondent No.2 got recorded his statement that he had no objection to accept the application of the petitioner for framing of issue and in the light of the said statement, Judge Family

Court, Lodhran on 28.06.2018 framed the issues but completely ignored the application of the petitioner, written reply and statement made by learned counsel for respondent No.2 and framed other issues except the issue relating to jurisdiction of the said court to try the suit. Through instant constitutional petition, said order dated 28.06.2018 is under challenge before this Court.

3. Learned counsel for the petitioner has argued that it is the duty of the court to frame proper issues and decide the question relating to its jurisdiction before entertaining and deciding the dispute between the parties as the court lacking jurisdiction cannot decide a dispute between the parties.

4. Heard. Record perused.

5. Respondent No.2, who is wife of the petitioner, has filed the suit for recovery of maintenance allowance, dower and dowry articles in the Family Court of District Lodhran. The petitioner contested the said suit, *inter-alia*, by raising objection relating to jurisdiction of the court to entertain the dispute and also filed an application for framing the following issue:

> *"Whether this court has no jurisdiction to entertain the suit?OPD."*

The said application was contested by respondent No.2 by filing written reply. During arguments on 28.06.2018 the learned Judge Family Court, Lodhran observed that an application for framing of additional issue relating to jurisdiction of the court has been filed by the petitioner/defendant and the learned counsel for the plaintiff/respondent No.2 wants to record his statement, whereafter the said court allowed the learned counsel to get his statement recorded which is reproduced below:

> *"Statement of learned counsel for plaintiff Shahbaz Ahmed Bhatti, Advocate.*
>
> Withoath.
>
> *It is stated that I have no objection for the acceptance of the application for framing of issue."*

Thereafter, learned trial court passed the following order:

> *" Statement of the learned counsel for the plaintiff has been recorded. In view of the statement of the learned counsel for the plaintiff the application for framing of additional issue is accepted. Pre-trial reconciliation proceedings conducted remained failed. After tentative assessment interim maintenance allowance of the plaintiffs No.2 to 4 are fixed as Rs.2200/- per month each from the date of appearance of the defendant and in case of non payment section 17(A) Family Court Act will be invoked.*

Out of divergent pleadings of the parties, following consolidated issues are hereby framed:

Issues.

1. *Whether plaintiffs are entitled to receive of maintenance allowance, if so for which period and at what rate?OPP*
2. *Whether the plaintiff is entitled to get decree for recovery of dowry articles or its value Rs.3,57,000/- from the defendant?OPP*
3. *Whether the plaintiff is entitled for recovery of Haq-Mahar as three marla plot or its value Rs.15,00,000/- and dower Rs.16000/- as prayed for?OPP*
4. *Whether the plaintiff has no cause of action to file this suit?OPD*
5. *Relief.*

Now to come up for evidence of the plaintiff and interim maintenance allowance on 03.07.2018."

6. In the said order, the learned trial court observed that the application for framing of additional issue has been accepted. However, perusal of the issues framed by the trial court shows that the issue relating to jurisdiction of the court was not included therein, therefore, the petitioner has filed this constitutional petition to call in question the afore referred order. The pivotal question for determination at this stage is whether this constitutional petition is directly maintainable before this Court or any alternate remedy is available to the

petitioner. Now there are two aspects of this matter; either the application filed by the petitioner for framing of issue relating to jurisdiction of the court has been allowed and erroneously the said issue has not been framed by the said court. In that eventuality, an application would lie before the said court pointing out this defect in the impugned order passed by the said court seeking its clarification or modification. On the other hand, if the said application has been disallowed and erroneously it has mentioned in the said order that the same has been allowed but by the act of framing the other issues and not framing the issue relating to jurisdiction of the said court has resulted into implied dismissal of the said application. In that case, the said order would be tantamount to have finally decided the application filed by the petitioner for framing of issue relating to jurisdiction by dismissing the petitioner's claim. In that eventuality, whether the said order would amount to a decision in terms of Section 14 of the West Pakistan Family Courts Act, 1964 ("**Act**") or not would be very relevant. For ready reference, said Section 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)…..**
>
> ***(3) No appeal or revision shall lie against an interim order passed by a Family Court."***
> *(emphasis supplied)*

7. From the perusal of Section 14 it is observed that a decision given by the family court is appealable provided the said decision is not an interim order or a decision of interlocutory nature. Every order passed during the pendency of a family suit cannot be treated as an interim or 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 of which 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 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".***
>
> ***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."***

8. 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 been 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 Qarni 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.***
> ***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."***

9. 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.

10. It appears that the impugned order does not clearly lay down what it has decided. Although the language of the order provides that the application has been allowed, however, issue relating to jurisdiction has not been framed and impliedly it appears that the application filed by the petitioner for framing of the afore referred issue has been dismissed. In that eventuality, the order regarding framing of issue would be deemed to have

attained finality and parties would be called to lead evidence on the issue framed by the court. Therefore, the matter relating to framing of issues inviting the parties to lead evidence on the same has attained finality and the said order could not be treated as an interlocutory order as finality seems to be attached to the same. Hence, the said order would amount to "*a decision given*" in terms of Section 14 of the Act and consequently would be amenable to the jurisdiction of the appellate court in appeal.

11. In view of availability of alternate remedies to the petitioner, in case the application has been allowed or dismissed, whatever the case may be, this constitutional petition would not be maintainable.

12. For what has been discussed above, this petition is ***dismissed*** as not maintainable. However, the petitioner may, if advised, seek alternate remedy available to him under the law.

(*MUZAMIL AKHTAR SHABIR*)
JUDGE

Approved for reporting

JUDGE

*Naveed **