

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

CASE NO. : W.P. NO.1968-2016

Muhammad Azam Khan Hoti (deceased) through Mst. Humaira Azam Hoti
Vs.
Mst. Shamim Akhtar Kiyani etc.

CASE NO. : W.P. NO.1969-2016

Muhammad Azam Khan Hoti (deceased) through Mst. Humaira Azam Hoti
Vs.
Mst. Shamim Akhtar Kiyani etc.

Petitioner by : In person
Respondents by : Mr. MNA Rehan, Advocate
Date of hearing : 21.06.2023

AAMER FAROOQ C.J. The present judgment shall decide instant writ petition as well as W.P. No.1969-2016, as common questions are involved.

2. The predecessor-in-interest of the petitioner namely Muhammad Azam Khan Hoti filed a suit for jactitation of marriage against respondent No.1 Respondent No.1 also filed a suit against the deceased seeking recovery of maintenance with costs. Another suit was also filed by one Shah Nawaz against respondent No.1 on the ground that she is his lawful wedded wife hence conjugal rights be restored. The suit for jactitation of marriage was filed by the deceased on the premise that Mst. Shamim Akhtar is not his wife, as he never contracted marriage with her; whereas respondent No.1 filed a suit on the basis that she and deceased were married and she instituted a suit for maintenance by way of settlement deed, in which, certain amount was to be paid to her, however, despite the same, amount has not been paid, therefore, the suit. Three suits were consolidated and were decided through a consolidated judgment dated 29.10.2015 by the Judge, Family Court, West-Islamabad, whereby the suit titled 'Shah Nawaz Vs. Mst. Shamim Akhtar', was dismissed; likewise, the suit filed by the deceased for jactitation of marriage, was also dismissed, whereas suit filed by respondent No.1 against the deceased, was decreed in her favour. Appeals were preferred before the District Judge against the impugned judgment dated 29.10.2015.

During pendency of the appeals, Shah Nawaz withdrew his appeal, however, appeals filed by the deceased, were also dismissed by the appellate court vide judgment dated 26.02.2016. It is pertinent to state here that during pendency of the proceedings, Muhammad Azam Khan Hoti passed away and was succeeded by Mst. Humaira Afzal Hoti (the present petitioner) as well as respondents No.2 to 5. The dismissal of the appeals was challenged by the petitioner by way above mentioned writ petitions for decree of the suit in favour of respondent No.1 and dismissal of the claim of the deceased regarding jactitation of marriage. Other legal heirs of the deceased namely respondents No.2 to 5 filed a separate writ petition (W.P. No.2040-2016), which subsequently, was withdrawn and was dismissed as not pressed.

3. The petitioner, in person, contended *inter alia* that the deceased was never married to respondent No.1 and that dismissal of the suit of the deceased and acceptance of the suit filed by respondent No.1 is based on misreading and non-reading of evidence. It was submitted that both the courts i.e. trial court as well as appellate court have dealt with the Issues No. 2 & 4 incorrectly and the findings are based on conjectures and surmises. It was submitted that respondent No.1, during course of proceedings, contradicted her version and also had no proof of divorce by one Muhammad Ayub, hence her marriage with him, was still intact when allegedly she married the deceased. It was further contended that respondent No.1 has not denied the claim of Shah Nawaz with respect to his Nikah with which was duly exhibited as Exh.DW-5/1 on 16.09.2014; moreover, in her affidavit Exh.P1, she has suggested that her Nikah was registered with Union Council-23 on 13.02.2022, but said fact has not been corroborated and negated the statement of Muhammad Saeed (PW-1), who is Secretary, Union Council-23. It was contended that the impugned judgments are against the facts and law; that Dr. Naseem Ashraf (PW-8) has admitted that Exh.P-3 has not been prepared by him. It was submitted that photographs exhibited do not show that respondent No.1 contracted Nikah with the deceased. It was submitted that this is the sole reason that deceased, during his life time, instituted proceedings for jactitation of marriage denying the factum of marriage between him and respondent No.1. It was submitted that there are many contradictions in the statements of the witnesses led by respondent No.1. It was contended that trial court

has wrongly relied upon the statement of Tasleem Akhtar, allegedly stated to be the sister of Muhammad Ayub.

4. On the other hand, learned counsel for respondent No.1 submits that instant writ petitions are not maintainable inasmuch as some of the legal heirs of the deceased have already withdrawn their claim against respondent No.1. It was contended that even-otherwise, the judgments and decrees passed by trial court and appellate court do not suffer from any error of law or fact warranting interference; that the claim has been duly proved by respondent No.1 through cogent evidence and there is no contradiction as far as the witnesses are concerned.

5. Submissions made by the parties have been heard and the documents, placed on record, examined with their able assistance.

6. The controversy, raised in the above writ petitions, has been mentioned herein-above.

7. As noted, the petitioner is aggrieved of dismissal of the suit by the deceased for jactitation of marriage and decree of the claim in favour of respondent No.1.

8. The concept of 'suit for jactitation of marriage' was explained by the Supreme Court of Pakistan in case reported as Muhammad Azam Vs. Muhammad Iqbal and others (PLD 1984 Supreme Court 95), wherein it was observed as follows:-

"The term 'jactitation' mentioned at item No. 7 of the Schedule was added thereto by an amendment made in 1969. It came up for interpretation and consideration before superior Courts in several cases. In Mst. Arnina Begum v. Ghulam Nabi and 2 others (PLD 1974 Lah 78), jactitation of marriage was held to mean literally "false pretence" of being married. It was further held that the suit in regard thereto could not be confined to a declaration that there was no marriage. There can be different types of suit in the field of jactitation and it would include also a suit for declaration that a person posing himself to be a spouse (husband or wife), was doing so falsely. In other words any assertion by a party regarding marriage and its denial can be brought before the Family Court through a suit for jactitation of marriage. It was also held that such suits which are based on the denial of the defendant regarding marriage are not now cognizable by a civil Court on account of section 5 of the Family Courts Act. Similarly in Tajoo v. Mst. Sattaran (PLD 1974 Lah 105), it was observed that a suit for declaration that the defendant is not the husband or wife of the plaintiff but the defendant alleges so is a suit for jactitation of marriage and was entertainable in a Family Court. In Mst. Zohran Bibi v. Manzoor Ahmad and 2 others (PLD 1975 Lah. 318), it was held that the Family Courts Act laid stress on

expeditious settlement in disposal of matrimonial disputes. Regarding jactitation of marriage it was observed that in a suit where it was asserted that the defendant (plaintiff's wife) had been divorced through an effective Talaq and that she could no more claim to be married to the plaintiff in an existing wedlock, was a suit for jactitation of marriage and was exclusively triable by a Family Court. The judgments in that case of the Civil Court and its appellate Court (on the civil side although presided over by the same person who was empowered to act as Family Court but) without the consciousness of the law contained in the Family Courts Act, were set aside as without jurisdiction. In *Mst. Sakina and 2 others v. Nasir Ali* (4), a somewhat contrary view was expressed namely that although a suit for jactitation of marriage could be filed in a Family Court and it could grant a declaration whether matrimonial relationship existed between contestants but when the parties other than husband and wife raise such a claim, the suit will have to be filed before a civil Court under section 54 of the Specific Relief Act ; mainly because, the prohibitory decree would be claimed under the said law and that the Family Court was not competent to grant the same. In that case in a suit before a civil Court the persons who were alleging themselves spouses inter se and also others who supported them were jointly sued for a relief in the nature of jactitation of marriage. The civil Court held that it was not competent and that it fell within the jurisdiction of the Family Court. The first appellate Court upheld the decision and the High Court notwithstanding the expression of the aforementioned opinion upheld the decision of the two lower Courts. It was not clarified as to whether two different forums would be able to decide the same subject-matter involving same issues although the main defendant would be the same. A more clear enunciation of law in this behalf can be found in *Nazar Qasim v. Mst. Shaista Parveen* (1979 C L C 462). A suit for jactitation of marriage was held to imply the object to perpetually silence a false allegation or claim of marriage. In this case in a suit for jactitation of marriage consequential relief was sought for the cancellation of a Nikahnama as forged one. It was held that it did not change the character of the suit which remained as for jactitation of marriage and its trial by- a civil Court was barred. Reliance in this case was placed on *Mst. Fahmida Bibi v. Mukhtar Ahmad and another* (P L D 1972 Lah 694) wherein it was held that it is a well-settled law that though a Court may not have jurisdiction to entertain a suit in respect of certain matter yet it is competent for the Court to entertain a plea based on that, in defence when the determination of that question is necessary for the decision of the suit itself which is within its exclusive jurisdiction. Accordingly a Family Court could not refuse the decision on similar questions if raised before it by any party. Thus an issue regarding jactitation of marriage, could be competently raised before the Family Court even by a defendant, when it is not the subject-matter of the suit filed by the plaintiff. It is in this wide context that in the case of *Manzoor Ahmed v. Muhammad Nawaz Siddiqui and 5 others* (PLD 1975 Lah. 739), Karam Elahee Chauhan, J. as he then was, observed and held that the existence of a wedlock at the time of suit is not necessary for claiming the dower because an ex-wife who is divorced having contracted a second marriage and children from that wedlock, cannot be estopped for a Waiving her dower money from her ex-husband if she files a suit before Judge Family Court. In that respect she cannot be told that "since your wedlock with the ex-husband at the time of the suit is no longer subsisting, therefore, your claim has ceased to be a dower-claim and cannot be gone into by Judge, Family Court". The nature of the claim is one thing but the time at which it is being claimed is another thing. Since the nature of the claim both in the case of an ex-wife or heirs of an ex-

wife is essentially the recovery of "dower" that remains so always and the mere fact that it is being claimed by the heirs of the deceased wife does not detract anything from its real character. The various items of the Schedule referred to the true nature of the subject-matter of a suit and not the persons who may file or institute it.

From these weighty observations it can safely be concluded that a suit, regardless of its timings can be filed by a person other than the spouses involved in the jactitation of marriage. And so can a suit be filed by the spouses, against third party, with a view to prevent them from denying their marriage"

9. The question pertinent in the above position of law and facts is that whether the petitioner has the *locus standi* to initiate writ petitions and pursue the same, finds support from the judgment reported as Irshad Ahmad Vs. Muhammad Sharif and another (2003 YLR 2290), in which, it was observed that the matter could only be brought by the spouse before the Family Court, otherwise the court of plenary jurisdiction, has the jurisdiction in the matter. Similar observations were made in case reported as Liaqat Ali Vs. Additional District Judge, Chunian, District Kasur and others (2008 SCMR 519).

10. The findings of trial court and the appellate court are concurrent in nature and generally no interference is to be made in the same unless it is based on misreading or non-reading of evidence. Reference is made to Muhammad Habib Vs. Mst. Safia Bibi (2008 SCMR 1584). The examination of the judgments by trial court as well as appellate court shows that they have passed the same after discussing evidence led by the parties and no substantial contradiction exists in this regard, hence it cannot be taken that there is any misreading or non-reading of the evidence. The judgments handed down are well-reasoned and do not suffer from any error of law or fact. This Court, in its jurisdiction under Article 199 of the Constitution, cannot reappraise the evidence and only has to see, if there is any misreading or non-reading of the evidence. As already observed, there is no misreading or non-reading of the evidence either by the trial court or the Appellate Court warranting interference. Moreover, the impugned judgments do not suffer from any error of law or of jurisdiction.

11. The fact that with respect to the claim of maintenance, some other legal heirs have withdrawn their claim does not *per se* jeopardize *locus standi* of petitioner to agitate the matter, as it is trite law that every legal heir is a co-sharer hence, in her

capacity as co-sharer, the petitioner was well within rights to institute proceedings and press the same. Reference is made to cases reported as Faiz Ullah Vs. Dilawar Hussain (2022 SCMR 1647) and Mst. Raj Begum (Deceased) Vs. Mst. Ajaib Jan (Deceased) (2022 SCMR 1394).

12. For what has been stated above, instant petitions are without merit and are accordingly dismissed.

(CHIEF JUSTICE)

Announced in Open Court on 29.01.2024

(CHIEF JUSTICE)

Zawar