FORM No. HCJD/C-121

ORDER SHEET
IN THE LAHORE HIGH COURT,
MULTAN BENCH MULTAN
JUDICIAL DEPARTMENT

W.P.No.5927 of 2018

Nargis Naureen. **Vs.** Judge Family Court, Multan, etc.

Sr. No. of order/ proceedings	*Date of order/ Proceeding*	*Order with signature of Judge, and that of Parties' counsel, where necessary*
	20.04.2018.	Hafiz Muhammad Naveed Akhtar, Advocate for petitioner. Mr.Aziz ur Rehman Khan, A.A.G. On Court's call.

Through this constitutional petition, the petitioner has called in question the order dated 20.03.2018 passed by learned Family Court, Multan/respondent No.1, whereby the application filed by the petitioner under Order 39 Rule 1 and 2 C.P.C was dismissed.

2. Brief facts of the case are that the petitioner was married to respondent No.2 on 03.12.2015, as a result of wedlock two minor children were born, who are stated to be living with the petitioner. Respondent No.2 Khizar Hayyat (**'respondent'**) divorced the petitioner and thereafter shifted to Canada, where he is presently working. The petitioner filed a suit for recovery of maintenance allowance, compensation of Rs. 200,000/- for

divorcing the petitioner as per entry No. 19 of *Nikahnama* and dower in shape of gold ornaments weighing 10 Tolas and agricultural land measuring 7 Bigha situated in Mauza Garay-Wala, Tehsil and District, Multan and alongwith the said suit filed an application under Order 39 Rule 1 and 2 of the C.P.C seeking the order restraining the respondent from transferring the said property (7 Bhiga land) in any manner whatsoever. The said suit and the application were contested by the respondent and the learned trial court vide order dated 20.03.2018 dismissed the said application. Through this constitutional petition, the petitioner has called in question the afore-referred order of dismissal of her application on the ground that in the *Nikahnama*, the afore-referred land had been given to her as dower and the courts below has not properly appreciated the facts of the case before dismissing the application for temporary injunction filed by her.

3. Heard. Record perused.

4. At the very outset, learned counsel for the petitioner was confronted with the question of maintainability of this constitutional petition, he argues that the afore-referred order is interlocutory in nature and appeal against the same is not provided,

therefore, he has approached this Court in its constitutional jurisdiction to protect the rights of the petitioner. From the suit filed by the petitioner it is observed that the petitioner seeks recovery of 7 Bhiga land as dower and has filed an application under Order 39 Rule 1 and 2 for restraining the respondent from transferring the same in any manner to some other person. It is observed that Civil Procedure Code, 1908 and Qanoon-e-Shahadat Order, 1984 are not applicable to the proceedings before Family Court as provided by Section 17 of the Family Court Act, 1964 (**"Act"**). However, it is by now settled that a party could not be non-suited merely because a wrong provision of law has been cited at the Bar. Reliance is placed on ***The State through Advocate General, Sindh vs. Zahid Ali*** (2007 SCMR 1017). Besides mere wrong citing or relying on wrong provision of law would not be of any consequence for the court to assume jurisdiction, provided the court otherwise had jurisdiction under the Constitution, statue or any other provision of law to pass the order. Reliance is placed on ***Olas Khan and others versus Chariman NAB through Chairman and others*** (PLD 2018 SC 40).

Hence, although wrong provision of law was cited for filing the application for interim relief by relying upon Order 39 Rule 1 & 2 of C.P.C., but the Family Court had got the jurisdiction to grant or refuse interim relief under Section 21-A of the Act, which is reproduced below:-

> ***"S.21-A. Interim order pending suit.--- The Family Court may pass an interim order to preserve and protect any property in dispute in a suit and any other property of a party to the suit, the preservation of which is considered necessary for satisfaction of the decree, if and when passed."***

In view of the above, the application filed by the petitioner for temporary injunction/interim relief was in fact for all intents and purposes an application under Section 21-A of the Act (which is a remedy provided under the law) and the court had jurisdiction to entertain and decide the same. The afore-referred application has been finally dismissed and has resulted into a final decision declaring the petitioner not entitled to interim relief during the pendency of suit for recovery of dower, etc., filed by her. This means that relief claimed by the petitioner under Section 21-A of the Act for preservation and protection of property subject matter of the suit has been finally decided against her by the afore-referred

decision. The question arises whether the impugned order is amenable to the jurisdiction of appellate court by way of filing an appeal. Section 14 of the Act provides as under:-

> ***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."***

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 a decision of interlocutory nature. Every order passed during the pendency of a family suit cannot be treated as an 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 possess 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".

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."

5. 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 the 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 appear, 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 sometimes 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 appeal was competent."***

6. 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 view of the above, without commenting upon the merits of the case, the dismissal of application filed under Section 21-A of the Act is tantamount to declining the relief of preservation and protection of property that may be available to a party (if it was otherwise entitled for the same) during the pendency of

suit, which amount to final determination of claim to that extent and hence, cannot be treated as an interlocutory order that does not finally determine anything. Thus such order would amount to *'a decision given'* in terms of Section 14 of the Act, hence, an appeal against the same would be available before the appellate court. Consequently, this constitutional petition is not maintainable due to availability of alternate remedy and the same is **dismissed** as such. However, before parting with this decision, it is observed that in case an appeal is filed by the petitioner, the appellate court 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.

Judge

Zeeshan Khan/Naveed