JUDGMENT SHEET
PESHAWAR HIGH COURT, PESHAWAR
(*Judicial Department*)

W.P No. 4066-P/2021
With Interim Relief

Ziarat Gul.....(Petitioner)

vs

Mst. Yasmin and another.....(Respondents)

Present: Mr. Muzammil Khan, Advocate alongwith petitioner in person.

Ms. Shakeela Zaman, Advocate alongwith the respondent/wife in person.

Date of hearing: 21.07.2022

JUDGMENT

MUHAMMAD IJAZ KHAN, J.- Through the instant writ petition, petitioner has challenged the order of learned Judge Family Court dated 17.09.2021, whereby the application filed by the respondent/wife for dissolution of her marriage was accepted and marriage between the spouses was dissolved.

2. Precisely the facts of the case are that respondent/wife has filed a suit for the dissolution of her marriage on the ground of cruelty or in the alternative on the ground of *Khula*, recovery of dower comprising of 03 tolas gold or its market value, return of dowry articles as per the list appended with the plaint or its market value amounting to Rs. 37,800/- and payment of past as well as future maintenance

amount @ Rs. 5000/- per month till completion of her *iddat* period.

3. The petitioner/husband was summoned, who put his appearance and as per the mandate of law, pre-trial reconciliation proceedings were held, however, the respondent/wife due to the cruel attitude of the petitioner/husband stated that she is not ready to live with the petitioner/husband anymore.

4. During pendency of the proceedings in the main suit, the respondent/wife submitted an application purportedly under the proviso of Section 10 (4) of The West Pakistan Family Courts Act, 1964 (hereinafter referred as **Act of 1964**) for the dissolution of her marriage on the ground of *Khula* leaving aside the other controversies/disputes between the parties to be adjudicated upon by the learned Judge Family Court in the due course of law. This application was duly contested by the petitioner/husband, however, the same was allowed vide the impugned order dated 17.09.2021 and as such marriage between the spouses was dissolved. Petitioner has now challenged the aforesaid order before this Court through the instant writ petition.

5. When this case was taken up for hearing, the respondent/wife was summoned personally to

appear before this Court vide order dated 20.10.2021. Today she alongwith her counsel put appearance before this Court and on queries of this Court, she thricely showed her unwillingness to live anymore with the petitioner/husband as his wife due to his inhuman, harsh and cruel conduct, therefore both the learned counsel representing the parties were directed to argue the case on merit.

6. Accordingly, arguments of both the learned counsel for the parties were heard in detail and the record perused with their able assistance.

7. The record appended with this petition reveals that the respondent/wife has filed a suit for the dissolution of her marriage on the ground of cruelty, recovery of her dower, recovery of dowry articles and payment of maintenance amount. All her assertions made in the plaint have seriously been controverted and disputed by the petitioner/husband in his written statement, therefore the learned Judge Family Court has framed issues and both the parties are yet to produce their respective evidence in support of their pleas, however, in the meanwhile the respondent/wife has submitted an application for the dissolution of her marriage purportedly under the proviso of Section 10 (4) of The Act of 1964, which her application has been

allowed by the learned Judge Family Court through the impugned order dated 17.09.2021.

8. As the impugned order has been passed at the initial stage of the proceedings, therefore at this stage the only question before this Court is that as to whether the Judge Family Court has the power to dissolve the marriage of the spouses in the middle of the proceedings when there are other serious controversies/disputes involved in the *lis*? In order to address this legal aspect of the case, it would be relevant to reproduce proviso to Section 10 (4) of The Act of 1964, which is as under:-

> **"10. Pre-trial proceedings.—**
>
> **(1).....**
>
> **(2).....**
>
> **(3) .....**
>
> **(4) If not compromise or reconciliation is possible the Court shall frame the issues in the case and fix a date for the recording of the evidence.**
>
> **Provided that notwithstanding any decision or judgment of any Court or tribunal, the Family Court in a suit for dissolution of marriage, if reconciliation fails, shall pass decree for dissolution of marriage forthwith and also restore the husband the Haq Mehr received by the wife in consideration of marriage at the time of marriage."**

Though the aforesaid proviso declares that on seeking *Khula*, the respondent/wife has to return the dower to petitioner/husband, however, it may be noted

that the respondent/wife would only be liable to return the paid dower to the petitioner/husband, if she on her own sweet will and without any fault attributable to the petitioner/husband is seeking *Khula* but the contents of the pliant would transpire that she has been compelled to seek *Khula* due to the cruel conduct of the petitioner/husband and as such she has opted to go for the dissolution of her marriage and thus, she will not only be entitled for the dissolution of her marriage but she will also be entitled to retain the paid dower and to claim the unpaid dower, if any, therefore the learned Judge Family Court has rightly dissolved the marriage between the spouses vide impugned order and has asked them to produce their respective evidence with respect to the remaining controversies/ disputes.

9. The aforesaid proviso to Section 10 (4) of The Act of 1964 would show that it is within the domain and jurisdiction of the Judge Family Court to dissolve the marriage at any stage of the proceedings, when once efforts for pre-trial reconciliation fails and as such she has acted within her domain and jurisdiction, therefore no exception could be taken of the impugned order passed by the learned Judge Family Court.

10. A larger Bench of this Court has exhaustively elaborated the scope, object and extent of the proviso to Section 10 (4) of The Act of 1964 in the case of **Dr. Fakhr-ud-Din vs. Mst. Kausar Takreem and another** reported as ***PLD 2009 Peshawar 92***, where it has been held that the terms/words "Haq Mahr received by the wife in consideration of marriage at the time of marriage" are of considerable importance. The word "received" means that the payment of dower has either been established or its payment has been admitted by the wife at the time of granting such a decree. Only in that case, the Family Court has to simultaneously direct the restoration of dower to the husband. This condition, no doubt, is mandatory but is subject to proof. Now the question the Court is confronted with is as to what kind of procedure the Family Court has to adopt in case the payment of dower to wife becomes a contested issue. Whether the Family Court has to defer the grant of decree till the time such issue is resolved/determined after holding full dress trial forcing the spouses to live in hateful union crossing the limits ordained by Almighty Allah or it may grant a conditional decree. In our view, much restricted interpretation of the proviso would certainly render it ineffective and of no utility. The obvious object and intent of the legislature would

thus be defeated and family life of the spouses would remain detestable ensuring devastating effects on the society like a hell fire. Such a course would be in derogation of the injunctions of Islam. The impossible could not be made possible. It was further held that the dower is a consideration for marriage contract, on its dissolution the contract stands rescinded and then the consideration paid remains un-discharged debt liability would be subject to proof, the burden of which is undeniably on the husband to discharge by adducing evidence to that effect unless it is shown to have been paid either in the dower deed or in the "Nikah Nama". If the Family Court defers the grant of decree because the payment of dower is a point of contest, it has to revert back to the old fashion of trial where both the parties would lead evidence, such process, in all probabilities, would consume sufficient time. Thus the purpose intended to be achieved through the proviso would be defeated. Similarly, in the case of **Karimullah vs. Mst. Shabana and 2 others** reported as ***PLD 2003 Peshawar 146***, it was clarified that in case where the wife has been compelled to seek *Khula* due to the cruel conduct of the husband, then in such an eventuality, she will not only be entitled for the dissolution of her marriage on the basis of *Khula* but she will also be entitled to retain the paid dower and to

claim the unpaid dower, therefore in view of the settled law, the learned Judge Family Court has acted within her jurisdiction and domain.

11. Since, the petitioner/husband through the instant writ petition has sought the issuance of writ of certiorari to declare the impugned order passed by the learned Judge Family Court as illegal and to set it aside, therefore he was required to show that the impugned order has been passed without jurisdiction, or is the result of excess of jurisdiction or improper exercise of jurisdiction, however, learned counsel for the petitioner could not point out any such legal disability in the impugned order, therefore the same could not be interfered in the writ jurisdiction. In the case of **Amjad Khan vs. Muhammad Irshad (deceased) through LRs** reported as ***2020 SCMR 2155***, the Hon'ble Apex Court has held that it is by now a settled principle of law that the High Courts must not exercise their constitutional jurisdiction in order to interfere with the discretion exercised by lower Courts unless the same suffers from jurisdictional, factual or legal errors. In other words, such interference would be justified in cases where the impugned order has been passed without jurisdiction or is based on misreading or non-reading

of evidence, or is not in accordance with the law. If none of these errors is present, the High Courts must not exercise their constitutional jurisdiction to interfere with the findings of lower Courts merely because it reached a different conclusion as to the controversy than the latter. Similarly, in the case of **Mst. Mobin Fatima vs. Muhammad Yamin and 2 others** reported as ***PLD 2006 Supreme Court 214***, the Hon'ble Apex Court has also held that the High Court, no doubt, in the exercise of its constitutional jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 can interfere if any wrong or illegal conclusions are drawn by the Courts below which are not based on facts found because such an act would amount to an error of law which can always be corrected by the High Court.

12. For what has been discussed above, the instant writ petition being bereft of any merit is hereby dismissed.

Announced
Dt: 21.07.2022

JUDGE

JUDGE