

Form No.HCJD/C-121
ORDER SHEET
LAHORE HIGH COURT LAHORE.
JUDICIAL DEPARTMENT

W.P. No.10894 of 2016.

Muhammad Ramzan Shahid. Versus Additional District Judge Samundri etc.

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19.01.2017. Sheikh Sakhawat Ali, Advocate for the petitioner.
Mr. Khalil Ahmad Man, Advocate for respondent
No.3.

Tersely, respondent No.3 filed a composite suit for dissolution of marriage; return of dowry articles and maintenance, on 13.01.2010 which was contested by the petitioner. Upon conclusion of proceedings the learned Judge Family Court, Samundri (respondent No.2) vide judgment & decree dated 14.02.2011 dissolved marriage between the parties subject to return of Rs.60,000/- by respondent No.3 to the petitioner. Further, respondent No.3 was also held entitled to receive Rs.1,25,000/- as price of dowry articles in addition to maintenance for the Iddat period at the rate of Rs.2,000/- per month. The judgment & decree, dated 14.02.2011, passed by respondent No.2, was assailed by both sides by way of filing independent appeals which were decided by the learned Additional District Judge, Samundri (respondent No.1) vide consolidated judgment dated 09.07.2011. Respondent No.1, while dismissing the

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appeal filed by the petitioner, partially accepted that of respondent No.3 and set-aside verdict of respondent No.2 *qua* return of Rs.60,000/- by respondent No.3 to the petitioner in lieu of Khulla and enhanced the alternate price of dowry articles from Rs.1,25,000/- to Rs.1,50,000/-. As no party further assailed judgment dated 09.07.2011 passed by respondent No.1 the same attained finality and during the course of execution proceedings respondent No.3 made a statement, on 01.03.2014, regarding satisfaction of the decree whereupon execution petition was disposed of.

2. In addition to above suit, on 30.07.2011, respondent No.3 filed another suit for recovery of gold ornaments weighing 13 tolas (gold bangles weighing 6-tolas, big gold bangles [Karre] gold weighing 6-tolas and one tola in the shape of ear ring) or Rs.6,50,000/- as price thereof which was contested by the petitioner. Rana Shahzad Ashraf, Judge Family Court, Samundri, vide judgment & decree dated 30.06.2014 decreed that the said suit of respondent No.3. Against judgment & decree dated 30.06.2014 the petitioner filed an appeal which was

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dismissed by Mr. Imtiaz Nadeem, Additional District Judge, Samundri vide judgment dated 18.02.2016.

3. Besides above suit, respondent No.3, on 31.07.2012, also filed another suit for recovery of personal belongings or in alternate Rs.21,19,000/- as price thereof which was dismissed by Rana Shahzad Ashraf, Civil Judge, Samundri vide order dated 09.01.2014 against which respondent No.3 filed an appeal which was dismissed by Mr. Imtiaz Nadeem, Additional District Judge, Samundri vide judgment dated 18.02.2016. The petitioner through the instant petition has impugned aforesaid judgments & decrees dated 14.02.2011 and 18.02.2016.

4. Learned counsel for the petitioner submits that as the earlier suit filed by respondent No.3 for recovery of dowry articles was decided by the court of competent jurisdiction, the subsequent suits were not maintainable; that according to Order II rule 2 CPC, respondent No.3 was bound to lay her claim before the court in entirety but having not done so the subsequent suits were hit by the principle of constructive *res-judicata*; that astonishingly the learned Judge, who dismissed the suit filed by

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respondent No.3 for personal belongings, accepted that filed by her for recovery of gold ornaments. In support of his contentions learned counsel has relied upon the cases reported as Muhammad Saleem and others v. Rashid Ahmed and others (2004 SCMR 1144), Malik Hashim Amir Khan v. Mst. Saadia Tabassum and another (2015 MLD 89) and Mumaraz Khan v. Rakhshanda Bibi (2012 CLC 517).

5. Learned counsel representing respondent No.3, while defending impugned judgments & decrees, states that as the provisions of CPC are not applicable in family suits, the principle of *res-judicata* is not applicable in the suit filed by respondent No.3; that respondent No.3 claimed dowry articles which were given to her in *Bari* which was not the subject of two other suits thus the same was not hit by the principle of *res-judicata*; that according to the Schedule attached with the West Pakistan Family Courts Act, 1964, nine types of suits can be filed before the Family Court and one does not exclude the other; that during the course of cross-examination DW-1 admitted that the articles given to respondent No.3 in *Bari* were taken back by the

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petitioner, thus, respondent No.3 was well within her rights to claim their recovery; that as in none of the earlier suits respondent No.3 laid claim for return of 13-tola gold ornaments, her claim was rightly accepted by the courts below and that concurrent findings of facts recorded by the courts below cannot be upset by this Court in exercise of its Constitutional jurisdiction.

6. I have heard learned counsel for the parties at considerable length and have also gone through the documents annexed with this petition as well as the case-law cited at the bar.

7. Firstly taking up the question regarding applicability of principle of *res-judicata* in family suits, I am of the view that to decide the said controversy a perusal of section 17(1) of the West Pakistan Family Courts Act, 1964, is of vital importance which for convenience of reference is reproduced herein below: -

“17. *Provisions of Evidence Act and Code of Civil Procedure not to apply.*—
(1) *Save as otherwise expressly provided by or under this Act, the provisions of the Qanun-e-Shahadat, 1984 (P.O. No. 10 of 1984), and the Code of Civil Procedure, 1908, except sections 10 and 11 shall not apply to proceedings before any Family Court in respect of Part I of Schedule.*”

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According to the afore-quoted section the provisions of Qanoon-e-Shahadat Order 1984 and CPC are not applicable except sections 10 & 11 CPC. Section 11 CPC deals with *res-judicata*, thus, one thing is clear that principle of *res-judicata* is also applicable to family suits.

8. A perusal of first suit filed by respondent No.3 shows that she prayed for dissolution of marriage in addition to recovery of dowry articles and maintenance. In the plaint of her first suit she made a reference to certain things given by her parents in addition to the list attached with the suit. In the list of dowry articles, besides other items, she also referred to gold ornaments at serial No.48 of the list of dowry articles with the clarification that the same were given by her cousins at the time of marriage. Further, to the extent of Articles 47 & 49 she did not clarify as to from whom she received the same. According to the contents of Mark-A, produced during the course of hearing of the first suit filed by respondent No.3, 15-tola gold ornaments given by the parents of respondent No.3 were also incorporated. Respondent No.3 in her subsequent suit for return of personal belongings prayed for return of

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her personal belongings in the shape of gold ornaments (cousins) 6-tola available at serial No.67 and gold ornaments worth Rs.3,00,000/- at serial No.85 of the list of dowry articles produced in the first suit. If for the sake of academic discussion, plea raised by respondent No.3 that as in the first suit respondent No.3 did not lay any claim for return of gold ornaments, is presumed to be correct even then there is no explanation on the part of respondent No.3 for not claiming the gold ornaments subject matter of her third suit. More importantly, in her suit filed on 30.07.2011 respondent No.3 in Para No.7 thereof has *inter-alia* averred as under: -

The contents of above-quoted para leaves no ambiguity that at the time of filing of suit for recovery of gold ornaments she was fully aware about the said claim in her earlier suit.

9. With a view to cross the barrier of *res-judicata* learned counsel for respondent No.3 has referred to Schedule to the West Pakistan Family Courts Act, 1964 according to which claims

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regarding dissolution of marriage; dower; maintenance; restitution of conjugal rights; custody of children; guardianship; jactitation of marriage; dowry; personal property and belongings of wife and a child living with her and any other matter arising out of Nikah Nama are amenable to the jurisdiction of the Family Court. There is no cavil with the preposition that a wife can file multiple claims before the Family Court, however, once she has filed a suit regarding specific subject matter she cannot be allowed to file a subsequent suit for the self-same relief.

10. Learned counsel for respondent No.3 has vociferously argued that as gold ornaments claimed by respondent No.3 in her suit for recovery of gold ornaments were part of *Bari* same having not been claimed by her earlier, principle of *res-judicata* was not applicable. In this regard, I am of the view that during the course of hearing of her first suit she produced list of dowry articles wherein 15-tola gold ornaments were incorporated with clear cut note that same were given by her parents. The omission of words *Bari* does not make any difference at all. Even otherwise, according to section 7 of the West

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Pakistan Family Courts Act, 1964, a facility of composite suit for dissolution of marriage alongwith other ancillary claims including personal property and belongings has been catered for. Though it is not mandatory for the wife to claim all said reliefs in one suit but when a wife fails to lay claim in entirety in the second suit the principle of constructive *res-judicata* comes into play against any subsequent suit on the same subject.

11. A cursory glance over the statement made by PW-1 shows that though the petitioner voluntarily stated that gold ornaments weighing 1½ tola were given to respondent No.3 as *Bari* but he never stated that gold ornaments weighing 13-tolas were given in *Bari*. Further second part of voluntary statement of DW-1 regarding gold ornaments weighing 8½ tola could not be considered as *Bari* as he differentiated the portion of gold ornaments which were given as *Bari* and those which were given as gift. Further, he specifically denied suggestion that gold ornaments weighing 12-tolas were with him.

12. Insofar as portion of statement of the petitioner regarding receipt of 10-tola gold ornaments

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against Khula is concerned, suffice it to note that Khula relates to amount of dower mentioned in Nikah Nama. As findings of respondent No.2 regarding return of Rs.60,000/- by respondent No.3 to the petitioner were set-aside by respondent No.1 while deciding the appeal filed by the petitioner, the said fact cannot be made subject matter of any subsequent proceedings especially when execution petition was disposed of in view of the statement of respondent No.3 that the decree was satisfied.

13. It is very alarming to note that suit for return of personal belongings, filed by respondent No.3 was dismissed by Rana Shahzad Ashraf, the then learned Judge Family Court, Samundri, on 09.01.2014 holding that the same was not maintainable. The same Presiding Officer, while accepting the suit for recovery of gold ornaments, on 30.06.2014, did not visualize the fact that he himself earlier turned down request of respondent No.3. Likewise the appeal filed by respondent No.3 against order dated 09.01.2014 was dismissed by Mr. Imtiaz Nadeem, learned Additional District Judge, vide judgment & decree dated 18.02.2016 but the same Presiding Officer while hearing the appeal against judgment & decree

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dated 30.06.2014 upheld the findings of the courts below regarding entitlement of respondent No.3 to recover gold ornaments weighing 13-tolas vide judgment & decree dated 18.02.2016. Moreover, in judgment rendered in Family Appeal No.14/13 of 2015 date of judgment of Judge Family Court is mentioned as 30.06.2015 whereas same was 30.06.2014 and secondly though judgment was announced on 18.02.2016 but the date of announcement has been incorporated as 18.02.2015. The said pathetic state of affairs speaks volumes about inefficiency and lack of judicial acumen on the part of the above-named Judicial Officers.

14. A close examination of the suit filed by respondent No.3, on 30.07.2011, shows that she claimed recovery of gold ornaments weighing 13-tolas without specifying in the heading of the suit regarding its nature. Rana Shahzad Ashraf, the then Judge Family Court, Samundri, while passing judgment & decree, dated 30.06.2014, treated it as a suit for recovery of dower. It is very strange to note that how he imported the term dower of his own. Moreover, while dealing with Issues No.1, 3 & 5 the said Presiding Officer has observed that—

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“*****However, the copy of the list Mark-A is available on the file which reveals that the plaintiff had claimed 15-tola gold ornaments given to the plaintiff by her parents.”

In view of afore-quoted conclusion, the judgment & decree passed by the learned Judge Family Court, Samundri, cannot remain in field for a moment. Further, the appellate Court instead of applying its independent mind toed the line of the Court of first instance.

15. While justifying his findings under Issues No.1, 3 & 4 Rana Shahzad Ashraf, Judge Family Court, Samundri has made a reference to the fact that as father of the present petitioner admitted claim of respondent No.3 regarding snatching of gold ornaments weighing 13-tolas by the petitioner at the time of her ouster from the house she was entitled for recovery of the same. The said findings of the learned Judge Family Court did not coincide with the statement made by DW-1 in the suit wherein judgment & decree dated 30.06.2014 was passed.

16. Another important facet of the instant matter is that not only two different suits *qua* somewhat identical relief between the same parties were dealt with by the learned Judge Family Court, Samundri

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separately but also the appellate Court decided the appeals though separate judgments of even date viz. 18.02.2016 but did not try to consolidate them. Prima-facie, Rana Shahzad Ashraf, the then Judge Family Court, Samundri and Mr. Imtiaz Nadeem, the then Additional District Judge, Samundri, heard and decided suits as well as appeals separately just to accommodate respondent No.3 by avoiding application of principle of *res-judicata*.

17. For what has been discussed above, instant petition is **accepted** and impugned judgments & decrees passed by the courts below are set-aside. As a result, suit filed by respondent No.3, out of which the present petition has stemmed, shall stand dismissed. The petitioner is also held entitled for **costs throughout**.

18. Before parting with this order, as glaring illegalities and lack of legal acumen has been noted on the part of Rana Shahzad Ashraf the then Civil Judge/Judge Family Court, Samundri and Mr. Imtiaz Nadeem the then learned Additional District Judge, Samundri, Office is directed to place copy of this order on their personal files in addition to putting the

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matter before the Hon’ble Chief Justice (competent authority) for initiation of departmental proceedings against them. The Registrar of this Court shall ensure compliance of this order.

(Shujaat Ali Khan)
Judge

Approved for Reporting.

Judge