

IN THE PESHAWAR HIGH COURT, PESHAWAR.

W.P.No. 3349-P /2014.



Mst. Gulalai wife of Major Fakhar Jehan and
daughter of Javed Shah Khan resident of
Mohallah Rustam Khel, Mardan, presently residing
at Butim University Quetta Baluchistan....
... .. Petitioner.

Versus

1. Major Fakhri Jehan son of Shah Jehan resident
of Mohallah Baqal Khel village Garhi Ismailzai
Tehsil and District Mardan, presently Record Wing Punjab
Regemental Centre, Mardan.
2. Judge Family Court, Mardan,
3. Additional District Judge-III, Mardan,
4. Additional District Judge-VIII, Mardan....
5. Senior Civil Judge, Mardan. Respondents.

Re-Filed today.

06 NOV 2014

Incharge,
Peshawar High Court Sub-Registry,
Mardan.

Writ petition under Article 199
of the Constitution of Islamic
Republic of Pakistan, 1973 to the
effect that (1) All the proceedings
before Respondent No. 2 and their
order dated 22.7.2014 passed in
Family Case No. 508/FC whereby the
application of petitioner for returning
the plaint of respondent No. 1, in respect of
Restitution of Conjugal rights and
rights of visitation of minor son

Filed today.

24 OCT 2014

Incharge,
Peshawar High Court Sub-Registry,
Mardan.

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JUDGMENT SHEET
PESHAWAR HIGH COURT, PESHAWAR
JUDICIAL DEPARTMENT

Writ Petition No.3349-P/2014

JUDGMENT

Date of hearing..... 23-01-2015

Petitioner(s) (By)..... Mr. Qamar Zaman, Tangi, Advocate

Respondent(s) (By)..... (in person)

MUHAMMAD DAUD KHAN, J.- Through this constitutional petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, Mst. Gulalai, the petitioner sought declaration to the effect that all the proceedings done and orders passed by the learned courts below (respondents No. 2 to 5) are without jurisdiction, coram-non-judice and have no legal effect, hence liable to be cancelled and respondent No.2/Judge Family Court, Mardan be directed to return the plaint of respondent No.1.

2, Major Fakhri-Jehan, respondent No.1 filed a suit for restitution of conjugal rights etc along with

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application for seeking visitation of his son against the petitioner Mst. Gulalai before the Judge Family Court, Mardan (respondent No.2). The petitioner through her attorney contested the suit by filing written statement wherein she questioned the territorial jurisdiction of the Court. During pendency of the suit, respondent No.1 made application for visitation of his minor son, which was allowed by the learned Judge Family Court, Mardan vide order dated 8.2.2014. Feeling aggrieved, the petitioner filed an appeal before the learned Additional District Judge-III, Mardan but the same was dismissed vide order dated 26.3.2014 by holding that the order passed by the Judge Family Court was an interlocutory order and not a "decision" within the meaning of Section 14 of the West Pakistan Family Courts Act, 1964 (hereafter referred to as the Family Courts Act). Meanwhile, right of defence of the petitioner was also struck off by the learned trial Court vide order dated 21.4.2014 which was

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challenged by the petitioner in appeal before the learned Additional District Judge-VIII, Mardan and got same fate vide order dated 31.5.2014 by holding the same proposition that this order is also interlocutory in nature and cannot be challenged in appeal under Section 14 of the Act (ibid). Thereafter, on 25.6.2014, the petitioner filed a separate application before the learned Judge Family Court,, Mardan on the ground that this Court has got no territorial jurisdiction to entertain the suit filed by respondent No.1 and the same be returned to him but the said application was also dismissed vide order dated 22.7.2014. Hence, the instant Writ Petition.

M.D. and


3. Arguments of Mr. Qamar Zaman Tangi, Advocate, representing the petitioner and Major Fakhr-i-Jehan, respondent No.1 in person were heard and perused the available record.

4. The pivotal question that needs to be dealt with by us is the right of visitation of the minor and

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territorial jurisdiction where the suit and application filed. For comprehending and resolving the proposition of "territorial jurisdiction" involved in the matter, it is necessary to go through the factual background of the case. The parties were married on 4.3.2011 at Village Garhi Ismail Zai Tehsil & District Mardan and just after marriage, they left Mardan for Quetta where respondent No.1/husband serving as Major in Pakistan Army while the petitioner/wife joined service as Lecturer in Butim University Quetta and from their wedlock, a baby was born in the year, 2013. Respondent No.1 gave the name Makal Fakhar while the petitioner gave the name Muhammad Ibrahim respectively. After some time, the relations between the parties became strained. In the meanwhile, the respondent No.1/husband was transferred to Mardan while the petitioner was still residing at Quetta along with her minor son and continuing her service as Lecturer in the said Institution till now. This estranged condition

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5. To resolve the controversy between the parties regarding territorial jurisdiction, it is abundantly and unequivocally clear that section 5 of the Family Courts Act, 1964 conferred exclusive jurisdiction on Family Court to entertain, hear and adjudicate upon the matter specified in Part-I of the Schedule to the Act. It may be pertinent to refer here that if the original Act 1964 is examined, the same provides nine items, which reads as under:

(PART 1)

1. *Dissolution of marriage (including Khula).*
2. *Dower.*
3. *Maintenance*
4. *Restitution of conjugal rights.*
5. *Custody of children (and the visitation rights of parents to meet them).*
6. *Guardianship.*
7. *(Jactitation of marriage).*
8. *Dowry*

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9. *Personal property and belongings of a wife.*

6. Vide Ordinance No. LV of 2002 dated 1.10.2002, an amendment has been brought in Section 7 of the Family Courts Act, 1964, whereby a proviso is added in its subsection (2), which reads as under:-

“Provided that a plaint for dissolution of marriage may contain all claims relating to dowry, maintenance, dower, personal property and belongings of wife, custody of children and visitation rights of parents to meet their children”.

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Besides, for the purpose of inter alia the territorial jurisdiction of Family Court, the West Pakistan Family Court Rules, 1965 were enforced, rule-6 whereof provides that:

“The Court which shall have jurisdiction to try a suit will be that within the local limits of which:

(a) The cause of action wholly or in part has arisen, or

(b) Where the parties reside or last resided together;

Provided that in suits for dissolution of marriage or dower, the Court within the local limits of which the wife

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ordinarily resides shall also have jurisdiction”.

From the combined study of sections 5, 7(2), Part-I of the Schedule of the Act and Rule-6 thereunder, it transpires that there are three factual eventualities which are relevant for the purpose of determination of “territorial jurisdiction” of Family Court. Firstly, where the cause of action wholly or in part arisen. Secondly, where the parties reside or last resided. Thirdly, suit for dissolution of marriage or dower filed within the local limit where the wife ordinarily resides. In the instant case, the petitioner resides at Quetta along with her minor son and serving as Lecturer in Butim University, Quetta till now, thus, keeping in view of above stated sections of the Family Courts Act, 1964, jurisdiction for the purposes of guardianship/custody disputes is conferred upon the Family Court, where the wife resides.

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7. In similar circumstances, the apex Court in the case of Major Muhammad Khalid Karim vs. Mst. Saadia Yaqub and others (PLD 2012 SC 66)

has held that:

“According to Rule 6(a) of the Family Court Rules 1965, there are three factual eventualities which are relevant for the purposes of the determination of the territorial jurisdiction of the Family Court; firstly, where the cause of action wholly or in part has arisen, meaning thereby, in the custody or guardianship disputes if the minors were with the mother and they have been illegally and improperly removed and taken away that from the place where they were living with her (or vice versa for father as well), the cause of action shall be said to have arisen at such place, otherwise the cause of action shall be deemed to have arisen where the minors are residing; secondly, under Rule 6(b) where the parties reside or last resided; thirdly as per proviso to Rule 6, in a suit for dissolution of marriage or dower where the wife ordinarily resided. And in view of the addition of proviso to section 7(2) of the Act 1964, which was introduced on 1.10.2002 if in a suit for the dissolution of marriage join other causes of action mentioned in the said proviso, such shall also fall in the last category, otherwise not”.

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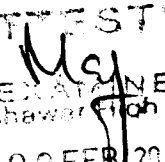
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8. Even otherwise, Section 9(1) of the Guardians and Wards Act, 1890, provides that an application for guardianship of the person of the minor should be made to the District Court having jurisdiction in the place where the minor ordinarily resides. Wisdom can be taken from the case of Mst. Naz Bibi vs. Khuda Bukhsh and another (1992 CLC 104).

9. In the instant case, though the learned courts below have taken cognizance in the matter and passed the impugned orders but the same are against the provisions of law, hence, are liable to be struck down. In this regard, in the case of Abdul Matloob vs. Zarqa Kalsoom and others, (2003 CLC 1458), it was held that:

"No Court can take away the jurisdiction which is given to a Court by law and, no Court is competent to pre-empt legal jurisdiction of a competent Court under the law".

In view of the above, this Writ Petition is allowed, the orders passed by the learned courts

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below (respondents No. 2 to 5) are without jurisdiction and coram-non-judice and respondent No.2/Judge Family Court is directed to return the plaint to the respondent No.1 for presentation before appropriate forum.

ex parte Ahmed Seth - 5
ex parte Muhammad Dawud Khan - 5

Announced.

Dated: 23.1.2015

JUDGE

M. J. Khan
JUDGE

Nawab Shah

A. Khan
May 02/2/15
 Peshawar
 Authorised Under
 The Qanun-e-Shahadat Order 1984
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