**IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD**

***Constitutional Petition No.S-422 of 2017***

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| *Date of Hearing:* | *11.08.2017.* |
| *Date of Judgment:* | *11.08.2017.* |
| *Petitioner:* | *Through: Mr. Mohsin Raza Gopang, Advocate* |
| *Respondent No.1:* | *Through: Mr. Tahir Nisar Rajput, Advocate* |
| *For State:* | *Mr. Choudhry Bashir Ahmed Gujjar, Assistant Advocate General, Sindh.* |

*J U D G M E N T*

***ARSHAD HUSSAIN KHAN, J:***- The petitioner through the instant constitutional petition has challenged the concurrent finding of facts by the learned courts below and sought relief as follow:-

> *"Under the circumstances mentioned above the petitioner prays as under:*
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> *1. That, this Honourable Court may be pleased to set-aside judgment dated 27.02.2017 passed by respondent No.3/Learned IVth Additional District Judge, Hyderabad and set-aside the judgment dated 26.10.2016 passed by the respondent No.2/Family judge, Hyderabad.*
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> *2. Any other relief deemed fit, just and proper by this Honourable Court may be granted to the Petitioner."*

2. Brief facts arising out of the present petition are that respondent No.1 Mst.Iffat Ali (plaintiff in Suit No.18 of 2016) was married with petitioner Hakim Ali (defendant in Suit No.18 of 2016) on 06.06.2012 against the dower of Rs.25,000/-; that respondent No.1 at the time of marriage, was given dowry articles, that is, T.V, washing machine, sewing machine, iron, juicer blender, refrigerator and bedroom set, almirah, sofa set, dining table, total worth Rs.300,000/- besides one golden earrings and men's ring weighing 05 *Tolas* worth Rs.200,000/- by her parents. Out of the said wedlock, two children namely Maqsoom Ali (son) and Waniya (daughter) were born; that at the time of second pregnancy the respondent No.1 stayed at her parents' house for delivery purpose and during her stay the petitioner kidnapped the sister of the petitioner namely Mst.Bushra and forcibly performed *Nikah* without her will and wish by putting her signature on *Nikahnama*. Due to this immoral act the father

of respondent No.1 lodged FIR against the petitioner for offence under Section 365-B & 34 PPC and the respondent no.1 filed Family Suit No.18 of 2016 for Dissolution of Marriage by way of *Khula* and return of dowry articles.

The petitioner contested the said family suit,however, the same was decreed in favour of respondent No.1 on 26.10.2016. Subsequently, the petitioner challenged the said judgment and decree in family Appeal No. 102 of 2016, which was dismissed by learned IVth Additional District Judge, Hyderabad vide its order dated 27.02.2017. The petitioner assailed the above said judgments in the present constitutional petition.

3. Upon notice of the present petition, the Counsel for respondent No.1 filed v*akalatnama* and contested the matter.

4. During the course of arguments, the learned Counsel for the petitioner has contended that the judgments impugned in the present proceedings are against the facts and law and suffer from material illegalities and irregularities and hence the same are not sustainable in law and liable to be set-aside. It is also contended that both the learned Courts below have failed to take into consideration the contradictory statements made by respondent No.1 and her witnesses in respect of list of dowry articles and income of the petitioner. Further contended that the learned Courts below have also failed to take into account that the petitioner is a poor person and working as Peon in Government Department and despite such fact granted huge maintenance in favour of respondent No.1 for minor children. It is also contended that the learned Courts below have failed to appreciate the facts and passed the impugned judgments by misreading and non-reading the evidence, hence the same are not sustainable in law being passed in exercise of jurisdiction not vested in them. Lastly argued that the petitioner having no other efficacious and alternate remedy, filed the present petition and for the above reasons, the judgments impugned are liable to be set-aside.

5. Conversely, learned Counsel for respondent No.1 during the course of his arguments, while supporting the impugned judgments, has denied the allegations leveled in the petition. It is also argued that the impugned judgments are based on evidence and the law. Furthermore, the petitioner has failed to point out any illegality and/or irregularity in the concurrent finding of facts by the learned Courts below, which could warrant interference by this Court in the constitutional jurisdiction, hence the petition is liable to be dismissed.

6. I have heard the learned Counsel for the parties and with their assistance perused the material available on record and the law involved in the case.

7. From the perusal of the record, it appears that the learned Trial Court out of the pleading framed the following issues:-

> *"1. Whether Plaintiff is entitled for the maintenance, if yes for what period and at what rate?*
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> *2. Whether the plaintiff is entitled for return of the dowry articles? If yes in what shape?*
>
> *3. Whether the plaintiff is entitled for maintenance of minors namely Maqsoom and Waniya? if yes, for what period at what rate?*
>
> *4. What should the decree be?"*

and after recording evidence and hearing the learned Counsel for the parties, passed the judgment and decree dated 26.10.2016. Relevant portions whereof for the sake of ready reference are reproduced as under:-

> "*ISSUE NO.2*
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> *9. It was burden on the plaintiff to prove above issue and she examined herself and two witnesses in support. She claimed that, she was given dowry articles of Rs.500,000/- but she failed to file any purchasing receipt or dowry list. However, plaintiff mentioned articles in Para No.6 of the plaint and her version is well supported by the witnesses regarding delivery of articles. On other hand, defendant has taken different stances on different stages. Defendant denied the dowry articles in his written statement but during his evidence he deposed that, plaintiff brought nominal dowry articles. However, as per plaint, plaintiff was given 5 tola gold but when plaintiff and her witnesses entered into witness box they deposed that, 3 tola gold ornaments were given to plaintiff. Plaintiff has not produced any purchasing receipt of gold, she also failed to produce any cogent evidence that, when she kept her jewelry with the defendant nor there is anything on record to show that the defendant or his family snatched jewelry from the plaintiff. Customarily, jewelry remains in the custody of lady. Nonetheless, remaining articles in the list are ordinary items which are given to the bride by her parents.Whereas, the argument of learned counsel for defendant is concerned that plaintiff has not produced purchasing receipts or dowry list, I find such argument devoid of force as in our society, it is not possible for any bride/wife to keep the record of purchase receipts, prepare the list of dowry articles, and obtain signatures from bridegroom/husband side, mothers start collecting, purchasing and preserving of articles for her daughter, when she starts growing. It is also a tradition that in-laws of any bride/wife are extended esteem respect and it is considered an insult to prepare the dowry list for the purposes of obtaining signature from them. Reference can be made to 2013 CLC 1780. In above circumstances, in my humble view, plaintiff is entitled for recovery of the dowry articles as per Para No.6 of the plaint except gold ornaments. Issue replied accordingly.*

*ISSUE NO.3.*

*10. It is an admitted fact that the defendant is the father of the minors namely minors Maqsoom and Waniya who are living with the plaintiff. The father is legally and morally bound to maintain his child. It is the duty of the court to find out from the evidence on record as to what are the requirements of the minor for the purpose of his subsistence which meant to support his daily life requirements include food, clothing, lodging, education, medical care and some amount for extracurricular activities of the minor etc. The criteria for determining the quantum of maintenance is the income and status of the father as well as the social standing of the parties. A father cannot be absolved of his liability to maintain minor child on any excuse. Plaintiff alleged that, defendant has monthly income of Rs.25000/- but her witnesses deposed totally diverse. On other hand, defendant produced salary slip and during course of argument defendant counsel contended that, defendant has obtained loan but it is also come on record that, defendant has tire puncture shop which is also confirmed by the defendant witnesses. Further, plaintiff has not deposed the detail of expenses required for the minors. It is also admitted position that, minor Maqsoom Ali is living separately since 15.07.2015 and Waniya born on 15.09.2016 but defendant failed to prove that he has provided the maintenance amount. In such circumstances, I am of the humble view that the both minor children namely Maqsoom Ali is entitled for maintenance at the rat of Rs.2500/- per month from 15.07.2015 and minor Waniya at the rate of Rs.2000/- from her date of birth till their legal entitlement with 10% increase per annum. Issue replied accordingly.*

*ISSUE NO.4.*

*11. In the light of discussion above suit of the plaintiff is decreed and plaintiff is entitled for maintenance from 15.07.2015 till completion of her Iddat period at the rate of Rs.5000/- per month and both minor child Maqsoom Ali is entitled for maintenance at the rate of Rs.2500/- per month from 15.07.2015 and minor Waniya at the rate of Rs.2000/- from her date of birth till their legal entitlement with 10% increase per annum. Plaintiff is also entitled for recovery of the dowry articles as per Para No.6 of the plaint except gold ornaments. There is no order as to costs."*

***[Underlining is add emphasis]***

8. The petitioner preferred appeal against the said judgment and decree in Family Appeal No. 102 of 2016 before the learned IVth Additional District Judge, Hyderabad, who vide its judgment dated 27.02.2017, while upholding the judgment and decree of the learned trial court, dismissed the appeal of the petitioner. Relevant portions of the judgment of lower appellate Court for the sake of ready reference are reproduced as under:-

*"12. The claim of respondent/plaintiff in her plaint as well as in her evidence is supported by her witnesses namely Pervaiz Iqbal and Rana Muhammad Saeed. She deposed that at the time of her marriage with appellant/defendant, her parents had given dowry articles including gold ornaments. She claimed that the dowry articles worth Rs.500,000/- were given to her. From the perusal of record, it appears that the respondent/plaintiff did not produce the receipts of purchasing the gold ornaments or list of dowry articles. But in Para No.6 of plaint, the respondent/plaintiff had specifically mentioned the dowry articles given to her by parents at the time of marriage. The version of the respondent/plaintiff had also been supported by her witnesses namely Pervaiz Iqbal as Ex.26 and Rana Muhammad Saeed as Ex.27. The*

*appellant/defendant admitted that the plaintiff brought nominal dowry articles but in written statement the appellant/defendant had totally denied the version of respondent/plaintiff regarding dowry articles. According to respondent/plaintiff in her plaint, she was given 05 Tolas of Gold but in evidence her witness had deposed that 03 Tolas of Gold was given to respondent/plaintiff. Thus, the learned trial Court has rightly observed that the appellant/defendant or his family members had snatched the gold ornaments from respondent/plaintiff and that the jewelry always remains in custody of lady and not in custody of husband. I, therefore, do not find any reason to interfere with the observation made by learned trial Court with regard to entitlement of respondent/plaintiff for recovery of dowry articles as per Para No.6 of plaint except gold ornaments.*

*13. So far the maintenance of respondent/plaintiff and her minor children is concerned, it is an admitted fact that the appellant/defendant divorced the respondent/plaintiff and he himself left the respondent/plaintiff at her parent's house on 15.07.2015 for delivery of second child. The version of the respondent/plaintiff is that the appellant/defendant had not provided maintenance to her. The appellant/defendant had not been able to prove that he ever paid maintenance to the respondent/plaintiff in accordance with column No.17 of Nikahnama wherein the appellant/defendant had undertaken to pay Rs.5000/- pr month to the respondent/plaintiff. The appellant/defendant had not been able to prove that he had paid maintenance to the respondent/plaintiff. On the contrary, he left the respondent/plaintiff in the house of her parents and contracted second marriage with Mst.Bushra, real sister of respondent/plaintiff and subsequently divorced the respondent/plaintiff. According to injunction of Islam, the wife is entitled for maintenance of Iddat period also, in case husband pronounces her divorce. Hence, the period for maintenance granted by learned trial Court to the respondent/plaintiff i.e. from 15.07.2015 till expiry of Iddat period at the rate of Rs.5000/- per month is correct.*

*14. Admittedly, the appellant/defendant is real father of minor children namely Maqsoom Ali and Waniya and they are living with their mother (respondent). Therefore, the father of minors is legally and morally bound to provide all the necessities of life to his child and it has come on the record that Maqsoom Ali is living with his mother separately from the appellant/defendant since 15.07.2015 and the appellant/defendant did not provide maintenance for him, whereas minor Waniya born on 15.09.2016 but the appellant/defendant had not provided maintenance for baby Waniya. Under such circumstances, I am of the considered view that the rate of maintenance for minor Maqsoom Ali at Rs.2500/- per month from 15.07.2015 and Rs.2000/- for minor Waniya per annum has rightly ascertained by learned trial Court after observing the monthly income of appellant/defendant.*

*15. In view of the above, I do not find any reason to interfere with the judgment and decree dated 26.10.2015 passed by learned Family Judge, Hyderabad, which is accordingly maintained and Family Appeal in hand is dismissed with no order as to costs."*

***[Underlining is add emphasis]***

9. From the perusal of the pleadings and the judgment impugned herein, it appears that the grounds/objections raised by the petitioner in the present petition, more or less, are the same which were raised before the lower appellate Court, and the said objections appears to have been dealt

exhaustively by the learned IVth Additional District Judge, Hyderabad, in the impugned judgment.

10. From perusal of present petition, it appears that petitioner through the present petition has sought reappraisal of the evidence by this Court to arrive at the conclusion other than what has been arrived at, concurrently, by the learned Courts below. It is a settled proposition of law that where there are concurrent findings of facts recorded by the Courts below against the petitioner, this Court under its constitutional jurisdiction cannot reappraise the entire evidence in the matter, as such, jurisdiction besides being discretionary in nature is very limited and not plenary in nature. Furthermore, powers of the High Court in constitutional jurisdiction are not analogous to those of an Appellate Court. High Court in its extraordinary jurisdiction can neither substitute finding of fact recorded by Family Court nor give its opinion about adequacy or quality of evidence. Constitutional jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, can only be exercised if the lower Court has exceeded in its jurisdiction or acted without jurisdiction. When a Court possesses jurisdiction, finding of fact recorded by it cannot be disturbed merely on the ground that another view is possible on the same evidence unless that finding is based on no evidence, is fanciful or arbitrary.

11. Appraisal of evidence, assessment of its evidentiary value, drawing of inference therefrom and to determine the amount of maintenance is the function of the Family Court, which is vested with exclusive jurisdiction to decide such matters. In exercise of extra-ordinary jurisdiction under Article 199 of the Constitution, this Court even cannot correct the errors of facts committed by the subordinate Court during proceeding of a Family Case, as for that purpose adequate mechanism has already been provided by relevant law by way of appeal, and that appropriate remedy has already been utilized by the petitioner and the controversy must come to an end.

12. Perusal of impugned judgments, it shows that the findings are based on evidence and are also supported by plausible reasoning. No material piece of evidence appears to have been overlooked or misread. Keeping in view the prevailing cost of living; maintenance allowance of Rs.2500/- for minor son and Rs.2000/- for minor baby with 10% increase per annum can hardly be deemed as exorbitant or excessive.

13. The upshot of the above is that in the instant case the two Courts below have given concurrent findings of facts against the petitioner, against which the petitioner has not been able to bring on record any concrete material or

evidence, whereby, such finding could be termed as perverse or having a jurisdictional defect or based on misreading of fact. In the circumstances, no case for interference is made out, hence the present constitutional petition is liable to be dismissed.

14. Foregoing are the reasons for my short order dated 11.08.2017, whereby this constitutional petition was dismissed.

*JUDGE*

Shahid