ORDER SHEET

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

C.P.NO.S-279 of 2015

DATE	**ORDER WITH SIGNATURE OF JUDGE(S)**

Date of Hearing : 20.02.2018.
Date of Order : 20.02.2018.

Mr. Arbab Ali Hakro, Advocate for petitioner.
Mr. Imtiaz Ali Abbasi, Advocate for respondent No.1.

O R D E R

AGHA FAISAL, J: The subject petition was presented on 11.04.2015, seeking the following relief:

> *"(a) To declare that the judgment and decree dated 09.08.2014 passed in Family Suit No.167/2013 by Family Court/respondent No.3 and judgment and decree dated 11.03.2015 passed in Family Appeal No.17/2014 by respondent No.2 dismissing the appeal and maintaining the decree of Family Court are illegal, void, without lawful authority and jurisdiction and may be set aside by allowing the petition.*
>
> *(b) To direct the respondent No.1 to return the dower amount and other dowry articles received by her from petitioner as shown in written statement and evidence of the petitioner.*
>
> *(c) Cost of the petition may be borne by the respondent No.1.*
>
> *(d) Any other relief deemed just and proper may be granted."*

2. Brief facts of the matter at hand are as follows:

(i) That the respondent No.1 filed a suit for dissolution of marriage, recovery of dower and dowry articles before the learned Family Judge, Shaheed Benazirabad, being Family Suit No.167 of 2013.

(ii) The said family suit was decreed in favour of the respondent No.1, vide judgment dated 09.08.2014

and the operative part of the same is reproduced herein below:

> *"For the reasons discussed above, this court is of the considered view that plaintiff is entitled to return of the dowry/Jahez Articles not stricto senso but with necessary wear and tear of transportation and use according to the list as lying with defendant or their equivalent value at the rate of Rs.450000/- (Rupees Four Lacs and Fifty thousand), which includes the value of the car given to plaintiff by her parents and which is appropriated by the defendant to his own use. [2002 CLC] since the dowry articles are exclusive in the ownership of wife and recoverable even after the death of the husband then whosoever is in possession of these articles may be impleaded. Defendant is directed to return Jahez articles and gold ornaments or equivalent amount thereof within thirty days of passing of decree. [2003 YLR 365] it is recently held by Lahore High Court that defendant can opt to deliver such articles or pay value thereof. Further concluded that as the plaintiff has already obtained Khulla through this court in lieu of her dower amount so she has to forgo her dower amount of Rs.200000/- (Rupees Two Lacs). Plaintiff is not entitled to claim her dower amount. Her prayer for dower amount is hereby declined. Hence, the suit is partly decreed with no order as to costs".*
>
> *(*Underlining added for emphasis.*)*

(iii) The petitioner then filed an appeal before the Court of the learned 3rd District & Sessions Judge, Shaheed Benazirabad, being Family Appeal No.17 of 2014. The said appeal was dismissed by the learned Appellate Court vide its judgment dated 11.03.2015 and the operative part of the same is reproduced herein below:

> *"Trial Court has properly appreciated the evidence led by both the parties at trial Court and concluded its finding with regard to recovery of jahez articles for both the parties cohabited for the considerable period and it is also natural phenomenon that with the passage of time articles while using the house get diminished in its value and often misplace.*

> *Therefore, the findings of the trial Court for the return of jahez articles to Mst. Farsa or to pay Rs.450,000/- approximately in lieu of jahez articles is suitable finding which cannot be interfered with the appellate stage. In my humble opinion that learned trial Court has passed proper judgment and decree which does not require any interference hence instant appeal is hereby dismissed with no order as to costs. Case laws relied upon by learned counsel of appellant are distinguishable from the facts and circumstances of the instant case. Office is directed to send the copy of this judgment to concerned trial court alongwith R and Ps for compliance".*

(iv) The petitioner being aggrieved by the two aforesaid judgments of the aforementioned Courts has preferred the subject petition.

3. The first issue raised by the learned Counsel for the petitioner was that the learned trial Court had no territorial jurisdiction to entertain the family suit and in regard thereto drew the Courts attention to the reasoning provided by the learned trial Judge in the judgment dated 09.08.2014, the contents whereof are reproduced herein below:

> *"This issue has already been decided in affirmative through a separate order after framing preliminary issues on the point of jurisdiction vide order dated 10.12.2013 and needs no more repetition and elaboration."*

4. On a previous date of hearing, being 15.02.2018, a question was put to the learned Counsel for the petitioner that since the aforesaid paragraph pertains to an order which was other than in the judgment itself, then why was the same not filed with the memorandum of petition. Upon having received no satisfactory reply this Court had ordered the production of the same and it was only then that the order dated 10.12.2013 was provided to the Court, vide statement dated 20-02-2018, during the course of arguments today. The said statement, along

with the relevant order was taken on record and the contents thereof are reproduced herein below:

> *"Through this order I intend the preliminary issue framed on the joint request of both the parties as to the maintainability of the instant suit within the jurisdiction of this court.*
>
> *Heard both the sides and perused the material available ever carefully. The learned counsel for the plaintiff advanced the argument that the plaintiff is the resident of Nawabshah and the marriage of the parties also was solemnized at Nawabshah, moreover the permanent place as per her CNIC is also Nawabshah, hence the court at Nawabshah has the jurisdiction to maintain the instant suit. He further argued that the part of the instant suit has already been decided by way of dissolving the marriage on the basis of Khulla at pre-trial stage so no question of bifurcating the suit in two parts on the h point of jurisdiction arises. In support of his argument he cited the case law viz. PLD 2011 Lahore 569.*
>
> *Learned Counsel for defendant opposed the argument advanced by the plaintiff side.*
>
> *He argued that as the plaintiff and defendant had already shifted to Karachi after marriage and plaintiff is doing job in Karachi and cause of action arose at Karachi so this court has no territorial jurisdiction to entertain the suit.*
>
> *After having heard both sides and perusing the record and material available I am of the view that as the plaintiff is the permanent resident of Nawabshah and she is holding her CNIC of Nawabshah. Her marriage also took place at Nawabshah. There is a plethora of case law in which it is settled principle that suit for dissolution can be filed even on the basis of temporary residence. Moreover the marriage between the parties has already been dissolved by way of khulla by this court. So no question of jurisdiction arises at this stage. Hence the suit is maintainable within the territorial jurisdiction of this court."*

5. The learned Counsel argued that the issue of jurisdiction has been wrongly decided by the learned trial Judge and further that the same was wrongly upheld by the learned Appellate Judge in the judgment dated 11.03.2015.

6. The learned Counsel referred to Section 5 of the Family Court Act, 1964, and stated that the same conferred jurisdiction upon the Family Court to hear such kind of matters which are subject matter of the dispute herein. The relevant contents are reproduced herein below:-

> *"**5. Jurisdiction.**---[(1)] Subject to provisions of the Muslim Family Laws Ordinance, 1961, and the Conciliation Courts Ordinance, 1961, the Family Courts shall have exclusive jurisdiction to entertain, hear and adjudicate upon matters specified in [Part I of the Schedule]*
>
> *[(2)] Notwithstanding anything contained in the Code of Criminal Procedure 1898 (Act V of 1898), the Family Court shall have jurisdiction to try the offences specified in Para II of the Schedule, where one of the spouses is victim of an offence committed by the other."*
>
> *(3) The High Court may with the approval of the Government, amend the Schedule so as to alter, or add any entry thereto.]*

7. The learned Counsel then adverted to Section 6 of the West Pakistan Family Courts Rules, 1965, which is reproduced herein below, and stated that pursuant thereof the learned Trial Court had no jurisdiction to entertain the family suit of the respondent No.1.

> *"6. 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 resided together:*
>
> *Provided that in suits for dissolution of marriage or dower, the court within the local limits of which the wife ordinarily resides shall also have jurisdiction."*

8. The proviso of the aforesaid rule was pointed out by the Court to the learned Counsel for the petitioner, to which the learned Counsel stated that the same was inapplicable to the present situation. However, no reasoning for the said assertion was laid before the Court.

9. The learned Counsel stated that the learned trial Court had unlawfully assumed territorial jurisdiction in the matter and therefore the

judgment passed therein was nullity in law and hence so was the judgment in appeal.

10. The learned Counsel stated that the case was one of misreading/non-reading of evidence.

11. The learned Counsel stated that the petitioner was entitled to the return of numerous articles including, without limitation, the bridal gifts that were given to the respondent No.1.

12. The learned Counsel referred to the case of *ASIF RAFIQUE V/S. MST. QURATULLAIN & 03 OTHERS,* reported as *2016 MLD 425* in support of his contention that the High Court in matrimonial matters could exercise constitutional jurisdiction in rare circumstances.

13. The learned Counsel also referred to a judgment of the Baluchistan High Court in the case of *HAMID ALI V/S. MST. FARZANA AND OTHERS,* reported as *2013 YLR 1509* in support of his contention that this Court had jurisdiction to grant the relief being sought by the petitioner.

14. The learned Counsel also relied upon a judgment of this Court in the case of *SAIMA TABBASUM V/S. SYED ALI ASIF AND 02 OTHERS,* reported as *2010 YLR 2325* and stated that the same also supported his case.

15. In reply the learned Counsel for the respondent No. 1 stated that there are concurrent findings of the trial Court and the Appellate Court in which the claim of the respondent No.1 has been upheld, to the extent specified therein.

16. The learned Counsel for respondent No.1 took the Court through the judgments of the trial Court and the Appellate Court in considerable detail and demonstrated that the evidence in the matter had been carefully considered and discussed threadbare and that the conclusion was only arrived at thereafter.

17. The learned counsel for the responded No.1 raised a serious allegation of concealment having been perpetrated upon this Court by the petitioner.

18. It was stated that not only was the order, wherein the issue of jurisdiction was decided by the trial court on 10.12.2013, not filed before this Court and only produced when a specific order to that effect was issued by the Court but that the petitioner has also concealed the fact that the same order was in fact challenged in appeal by the petitioner and the said appeal was dismissed by the learned Court of 3rd District & Sessions Judge, Shaheed Benazirabad, vide order dated 15.05.2014.

19. The learned Counsel for the respondent No.1 submitted a certified copy of the aforesaid order dated 15.05.2014 to the Court and the same was taken on the record. The contents of the said order are reproduced herein below:

> *"By this order, I intend to dispose of above appeal preferred being aggrieved and dissatisfied by the order dated 10.12.2013 passed by learned Family Judge, Nawabshah decided the issue of jurisdiction and maintainability of the suit in F.S No.167/2013 Farsa Vs. Kamran Ali.*
>
> *Brief facts of the appeal are that, respondent Mst. Farsa filed suit for dissolution of her marriage with appellant before learned Family Judge, Nawabshah. The marriage of appellant and respondent has already been dissolved by way of Khulla by court of learned Family Judge, Nawabshah. Learned trial court has decided the issue of maintainability of the suit and passed an order dated*

10.12.2013 in which he maintained the suit of respondent. Therefore, appellant has preferred instant appeal.

I have heard learned counsel for appellant and learned counsel for respondent and have perused the record and proceedings of the case.

Learned counsel for the appellant has argued that impugned order passed by lower court is against facts and law and equity and learned trial court has not appreciated the material available on record. The order is slip short manner without providing sufficient opportunities of being heard. That respondent has got no house at Nawabshah, but she has got no residence at Nawabshah. That respondent has got permanent job at Karachi in PIA where she has got residence, therefore, this court has got no jurisdiction to adjudicate upon the matter.

On the other hand, learned counsel for respondent has argued that learned trial court has rightly passed order and has properly appreciated the material available on record. That impugned order passed by trial court is based cogent reasons. That allegations leveled and assertions made by appellant in memo of suit are false and baseless and respondent is resident of Nawabshah and her CNIC also shows her address at Nawabshah. According to plaint of suit the marriage of plaintiff was solemnized in Nawabhsh. Moreover, the marriage of parties has already been dissolved by way of Khulla by learned Family Judge, Nawabshah and suit is still pending adjudication.

It is the case of appellant that respondent filed suit for dissolution of marriage with appellant before court of Family Judge Nawabshah whereupon appellant raised objection on the maintainability of suit on the ground that plaintiff/respondent is not resident of Nawabshah and she is an employee of PIA and residing at Karachi, therefore, the suit of plaintiff is not maintainable but learned trial court has not considered his objection and passed order dated 10.12.2013 and appellant has filed instant appeal and prayed to set a side of the order of trial court.

Section 6 of West Pakistan Family Courts Rules, 1965 is hereby re-produced for sake of convenience.

> *6. 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 resided together:*
>
> *Provided that in suits for dissolution of marriage or dower, the court within the local limits of which the wife ordinarily resides shall also have jurisdiction.*

> *It is settled principle of law wife, has four options to institute suit for dissolution of marriage or dower in court (a) where cause of action wholly or partially arose (b) she resides or her husband resides. Address given in Nikahnama or address given in the title of suit would be immaterial for purpose of instituting a suit for dissolution of marriage.*
>
> *The record shows that appellant filed a suit for dissolution of marriage and such marriage between parties has already been dissolved by the way of KHULLA by learned trial court. Respondent is an employee of PIA and residing at Karachi for the purpose of job which is transferable. According to CNIC of respondent, she is actually resident of Nawabshah and according to record her marriage was solemnized in Nawabshah and more so, cause of action has arisen in Nawabshah within the jurisdiction of learned trial court where she ordinarily resides. In my humble opinion, the learned trial court has passed a legal order in accordance with law and has applied proper application of judicial mind, hence same requires no interference. Therefore, instant appeal is hereby dismissed with no order as to costs. Copy of this order be sent to the trial court for information and compliance".*

20. Learned Counsel for the respondent No.1 further stated that the writ jurisdiction of this Court is discretionary and one of the precepts governing the exercise of such jurisdiction is that the petitioner must have approached the Court with clean hands. According to the learned Counsel for the respondent, it was demonstrated from the record that the same was clearly not the case in this petition.

21. The learned Counsel for the respondent No.1 adverted to each of the allegations of fact made by the learned Counsel for the petitioner and drew the Court's attention to the specific passages of the judgments of the trial Court and Appellate Court wherein the same had been extensively considered and conclusively dispelled.

22. The learned Counsel also stated that this being constitutional petition, therefore, the same had to be argued on points of law and not in the manner in which a Court proceeds while hearing an appeal.

23. The learned Counsel for the respondent No.1 also placed on record a copy of the plaint in Family Suit No.990 of 2017 filed by one Mst. Isran daughter of Muhammad Wazeer against the present petitioner, wherein the said plaintiff stated that she was married to the present petitioner and sought relief, which was similar to that which had been sought against the petitioner by the respondent No.1 before the learned trial Court.

24. The learned Counsel for the respondent No.1 further stated that the objective of placing this plaint on record was to demonstrate that the petitioner is in the habit of mistreating his wives and misappropriating the assets belonging thereto.

25. After having heard the submissions of the learned Counsel for the parties and having had the benefit of review of the relevant record, this Court shall address the issues raised in seriatim:

(a) It is the considered view of this Court that the petitioner appears to have actively concealed the order passed by the learned trial Court with respect to the jurisdiction dated 10.12.2014 and more so the order that upheld the same dated 15.05.2014.

(b) The learned Counsel for the petitioner was confronted with this alleged perfidy and he initially stated that the order in appeal was not within his knowledge and subsequently stated that the same was not assailed at the relevant time as the petitioner had reserved the right to do so at the latter time.

(c) This conduct of the petitioner does not merit the appreciation of this Court and could well be treated as a ground for declining to exercise the writ jurisdiction in the said matter.

(d) The issue of territorial jurisdiction of the learned Trial Court has been dealt with appropriately by the learned trial Court and has been addressed in detail by the learned Appellate Court in the order dated 15.05.2014. It stands admitted on record that this order in appeal was never assailed by the petitioner, hence the same has attained finality.

(e) The factual aspects raised regarding dowry articles and the return of items including bridal gifts have been exhaustively addressed in the judgment of the trial Court and subsequently in the judgment of the Appellate Court. It is evident from a perusal thereof that *prima facie* the observations delineated in the concurrent judgments do not suffer from any misreading or non-reading of evidence and/or any other infirmity whatsoever.

(f) The case of *ASIF RAFIQUE V/S. MST. QURATULLAIN & 03 OTHERS,* reported as *2016 MLD 425* states that this Court could exercise constitutional jurisdiction in rare circumstances if the findings recorded by the Courts below are arbitrary and suffering from the vice of misreading or non-reading of evidence. In this matter, it is the considered view of this Court that the concurrent findings suffer from no such infirmity and that the petitioner has failed to plead any rare circumstance, which would attract the jurisdiction of this Court, therefore, with respect the cited judgment is distinguishable herein.

(g) The Baluchistan high Court judgment in the case of *HAMID ALI V/S. MST. FARZANA AND OTHERS,* reported as *2013 YLR 1509,* enunciates the principle that a High Court may assume the jurisdiction if the Courts below were the inappropriate forums of territorial jurisdiction. With respect, this judgment is

also distinguishable in the present case as not only was the issue of territorial jurisdiction deliberated at length by the learned trial Court and Appellate Court but that the order passed therein were not subjected to any further challenge and hence attained finality.

(h) It is uncertain as to why the learned Counsel for the petitioner chose to rely upon the case of *SAIMA TABBASUM V/S. SYED ALI ASIF AND 02 OTHERS,* reported as *2010 YLR 2325,* as the same contrarily appears to support the contentions of the respondent No. 1, that the allegations and assertions of the petitioner are not supported by any corroboration in the record. The relevant portion of this judgment is reproduced herein below:

> *"From the perusal of the above, it would transpire that no documentary evidence was brought on record by the petitioner to substantiate her claim with regard to dowry/belonging articles. She has only stated in her examination-in-chief that 62 articles were lying in the flat and she further added that her passport has been withheld by respondent No.1. The details of articles were not provided by the petitioner nor any documentary evidence was brought on record in respect of dowry or belonging articles. There was nothing on record before the learned trial Judge to decree the suit, hence learned counsel for the petitioner is not right in contending that material evidence has been over looked. The perusal of above quoted evidence shows that the findings recorded by the learned Family Judge are in accordance with the evidence on record. The second contention of learned counsel for the petitioner that statement made on oath by the plaintiff/petitioner should have been accepted by the Courts below and the suit should have been decreed. Even if the above quoted piece of evidence is accepted no other conclusion can be drawn other than the conclusion arrived at by the Courts below nor any illegality in the impugned judgments has been shown."*

(i) In view of the above discussion, it would appear that the cited judgments actually fall into the category of authorities approving of the dismissal of the present petition.

26. It is the view of this Court that the petitioner has been unable to point out any justifiable infirmity in the judgments of the learned trial Court and that of the learned Appellate Court. On the contrary, the respondent No.1 has been able to demonstrate that not only are the aforesaid judgments in consonance with the law but that the conduct of the petitioner before this Court disentitles him from any discretionary relief.

27. In view of the foregoing, the present petition merits no consideration and accordingly the same was ordered to be dismissed vide the short order dated 20.02.2018, which reads as follows:

> *"Heard the learned Counsel on length. For the reasons to be recorded later on, the present petition and the listed application are dismissed."*

28. These are the reasons for the short order, dated 20-02-2018, wherein the instant petition was dismissed.

JUDGE

Shahid