# IN THE HIGH COURT OF SINDH
# AT HYDERABAD

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| C.P. No.S-128 of 2020 | : | Mst. Aisha Kanwal |
| For the petitioner | : | Mr.Yawar Qureshi, Advocate. |
| Dates of hearing | : | 16.11.2023. |
| Date of announcement | : | 16.11.2023. |

## O R D E R

**Agha Faisal, J**. This matter has been pending on the docket since 2020. Briefly stated, Family Suit No.117/2016 was filed by present petitioner before learned Civil/Family Judge V Hyderabad for dissolution of marriage, recovery of dower, dowry articles, bridal gifts and maintenance.Vide judgment dated 02.02.2019 the suit was decreed in favour of petitioner.In addition to the other relief granted, the marriage was dissolved on the ground of cruelty.

In Family Appeal No.20 of 2019, the VI Additional District Judge Hyderabad passed judgment dated 03.12.2019 and while maintaining the judgment of the trial Court in other respects *only*modified the dissolution to be that on the basis of Khula. The operative part is reproduced herein below:

> "So for the ground of cruelty is concerned, it has been provided under Section 2(VIII) of the Dissolution of Muslim Marriages Act 1939 in which it has been provided that if the husband habitually assaults her and makes her life miserable by till treatment, the husband associated with women of ill repute or lead an infamous life, attempt to force her to lead an immoral life, dispossess of her property or prevents her exercising her legal right over it, obstructs her in the observations of her religious affairs, does not treat her equitably in case of more wives or any other ground recognized as valid for the dissolution of marriage under Muslim law. First of all, no such statement is made in plaint of the Suit with clarity nor any proof is produced by her attorney and mother. Further present is the case in which appellant/plaintiff herself admitted that she was getting education abroad along with her son and certainly she went there with the consent of the appellant and this statement alone is sufficient that appellant/defendant kept her free. Further the respondent did not appear in Court and adduce evidence in person and get her statement recorded to prove the allegation of cruelty. No doubt, her attorney and mother appeared but on the basis of their evidence, her statement regarding allegation of cruelty leveled against appellant could not be said to have been proved. Thus, the learned trial Court erred in law by not appreciating such aspect of the matter. Therefore, the judgment and decree regarding dissolution of marriage on the ground of cruelty requires modification. Same view is taken in the law reported as 2015 SC 804 (Supreme Court of Pakistan) in which it has been held that when cruelty is not proved, the marriage should be dissolved on the basis of Khulla and wife has to forego the dower amount. To my humble opinion, the judgment to the extent of issues No.s3 and 5 requires interference of this Court while remaining issues have been discussed on the basis of proper appraisal of evidence and the same do not call for interference of this Court. The arguments advanced by the learned counsel for appellant/defendant except issue No.3 and 5 have no force in them while the authorities (supra) relief upon by him, to my humble opinion are distinguishable except the case laws reported as PLD 2019 SC (AJNK) 21. Likewise, the argument of learned counsel for respondent as to issues No.3 and 5 are devoid of substance and the case laws replied upon by him, to my humble opinion are distinguishable from the facts and circumstances regarding issues No.3 & 5. The point under discussion is answered according.

The present petition assails the appellate judgment and submits that the modification, in so far as the ground of dissolution is concerned, was not merited upon due consideration of evidence. At the very onset, learned counsel was asked to identify any jurisdictional defect in the judgment impugned, however, the response received was in the negative. Instead, it was averred that the evidence had not been appreciated in its proper perspective since there is no further provision of appeal, hence, the exercise may be conducted *de novo* in this writ petition.

The narrative contained in the aforementioned excerpt could not be controverted by the petitioner's counsel. A perusal of the pleadings and record, with the assistance of the counsel, could not displace the observations rendered by the appellate court.

It is settled law that the ambit of a writ petition is not that of a forum of appeal, nor does it automatically become such a forum in instances where no

further appeal is provided[1], and is restricted *inter alia* to appreciate whether any manifest illegality is apparent from the order impugned. It is trite law[2] that where the fora of subordinate jurisdiction had exercised its discretion in one way and that discretion had been judicially exercised on sound principles the supervisory forum would not interfere with that discretion, unless same was contrary to law or usage having the force of law. The impugned judgment appears to be well-reasoned and the learned counsel has been unable to demonstrate any manifest infirmity therein or that it could not have been rested upon the rationale relied upon.

In so far as the plea for *de novo* appreciation of evidence is concerned, it would suffice to observe that writ jurisdiction is not an amenable forum in such regard[3].

The Supreme Court has recently had occasion to revisit the issue of family matters being escalated in writ petitions, post exhaustion of the entire statutory remedial hierarchy, in *HamadHasan*[4]and has deprecated such a tendency in no uncertain words. It has *inter alia* been illumined that in such matters the High Court does not ordinarily appraise, re-examine evidence or disturb findings of fact; cannot permit constitutional jurisdiction to be substituted for appellate / revisionary jurisdiction; ought not to lightly interfere with the conclusiveness ascribed to the final stage of proceedings in the statutory hierarchy as the same could be construed as defeating manifest legislative intent; and the Court may remain concerned primarily with any jurisdictional defect. Similar views were earlier expounded in *Arif Fareed*[5].

It is the deliberated view of this Court that the present petition does not qualify on the anvil of *HamadHasan* and *Arif Fareed*. Therefore, in *mutatis mutandis* application of the ratio illumined, coupled with the rationale delineated supra, this petition is found to be misconceived, hence, hereby dismissed along with listed application.

Judge

*A.Rasheed/stenographer*

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[1]Per *Ijaz ul Ahsan J* in *Gul Taiz Khan Marwat vs. Registrar Peshawar High Court* reported as *PLD 2021 Supreme Court 391*.

[2]Per *Faqir Muhammad Khokhar J.* in *NaheedNusrat Hashmi vs. Secretary Education (Elementary) Punjab* reported as *PLD 2006 Supreme Court 1124*; *Naseer Ahmed Siddiqui vs. Aftab Alam* reported as *PLD 2013 Supreme Court 323*.

[3]*2016 CLC* 1; 2015 *PLC 45*; *2015 CLD 257*; *2011 SCMR 1990*; *2001 SCMR* 574; PLD *2001 Supreme Court 415*.

[4]*Per Ayesha A. Malik J* in *M. Hamad Hassan v. Mst. IsmaBukhari&Others*reported as *2023 SCMR 1434*.

[5]*Per Amin ud Din Ahmed J*in *Arif Fareed vs. Bibi Sara&Others* reported as *2023 SCMR 413*.