ORDER SHEET

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

C.P No.S-133 of 2023

Date	Order with signature of Judge

1. For orders on office objections
2. For orders on CMA No.389/2023
3. For orders on CMA No.390/2023
4. For hearing of main case.

03.11.2023

Mr. Abdul Mujeeb Shaikh, Advocate for the Petitioner

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ARBAB ALI HAKRO, J: Through this constitution petition, Petitioner impugns the Order dated 10.04.2023, in Family Suit No. 128/ 2021 passed by Civil Judge & Judicial Magistrate-I, Rohri (**"the trial Court"**), whereby dismissing the application filed by the Petitioner under Section 9(6) of Family Court Act, 1964 ("**the Act of 1964"**).

2. Precise facts as narrated, Respondent No.1 filed suit for maintenance and recovery of articles against the Petitioner. It is averred that the Respondent had married with Petitioner on 02.09.2018, in accordance with the principles of Shariat-e-Muhammadi and the Rukhsati ceremony occurred. Haqmahar (dowry payment) of 2 and a half tola gold was agreed upon. The Respondent claimed to have received particular dowry articles, including gold ornaments, from her parents at the time of Rukhsati. It was further stated that said articles were then subsequently shifted to the residence of the Petitioner. It has been asserted that the Petitioner got second marriage, and this behaviour has resulted in the Petitioner mistreating the Respondent. The Petitioner was given three talaqs on 03.10.2020; hence; as a result, the Respondent has initiated legal action, seeking recovery of dower and dowry Articles along with maintenance.

3. Learned trial Court decreed the suit for maintenance of her iddat period @ Rs.3000/- per month; besides, Rs.3000/- is fixed for the maintenance of her minor girl Ume-Farwa from the date of filing

of the suit till her disqualification or marriage which be earlier with 10% increase per annum. Plaintiff (Respondent) was also entitled for the return of dowry articles as mentioned in the list or its 70% price as per current market value; besides, entitled for payment of dower amount of two and half tola gold or its price as per market value.

4. Learned Counsel for the Petitioner contends that the trial Court committed gross negligence while passing the impugned Order in a hasty manner without applying its judicious mind as *ex-parte* judgment and decree were passed in favour of Respondent without affording proper opportunity of hearing to the Petitioner and straightaway passed the *ex-parte* judgment and decree, which on the face of it, appears to be subversive of concept of fair trial as prescribed under Article 10-A of the Constitution, which authorizes a right to every person to fair trial. He urged that it is a well-settled principle of law that every matter should be decided on merits rather than technicalities, and no person should be condemned unheard. However, the learned trial Court decided the application under Section 9(6) of the Act of 1964 in a hasty manner without considering the factual and legal position of the case in hand; hence, apparently, impugned Order is not tenable in law and liable to be set aside.

5. I have heard the learned Counsel representing the Petitioner and perused the material available on record minutely.

6. Learned Counsel for the Petitioner, when confronted with the question of maintainability of this Constitutional Petition, has urged that the above-referred Order dated 10.04.2023 is interlocutory in nature and the appeal against the same is barred under sub-Section (3) of Section 14 of the Act of 1964; therefore, Petitioner has approached this Court in its Constitutional Jurisdiction.

7. The question that raises for a determination as to whether the impugned Order, which was passed on Application under Section 9(6) of the Act of 1964, is of the nature of an interlocutory order or

amounts to a "decision given" in terms of Section 14 of the Act of 1964, making the same amenable to the jurisdiction of Appellate Court by way of filling an appeal. To resolve the controversy, it would be conducive and apposite to reproduce the relevant portion of the Order dated 10.04.2023 as under:-

> *"10. It is worth to mention that the Plaintiff/DH filed family Suit No.128/2021, same was decided on 22.11.2021, subsequently the DH/Plaintiff filed execution application same is pending for compliance, but in such period the applicant/JD neither appeared in suit nor filed appeal against the decree but at this stage after passing considerable time filed this application under Section 9(6) of WPFCA, 1964, wherein prayed that the defendant may give chance to defend his right. If for the sake of arguments presumed that the application under Section allowed and applicant/JD allowed to defend the suit, then it means that the DH has to initiate all proceeding from the day first who had already gone through from this process which would be punishment for the decree holder. It is worth to mention that applicant/JD did not provide single penny of maintenance before the Order of attachment of salary which seems to be injustice with DH/plaintiffs who passed all that time while knocking the door of this Court for her legal right.*
>
> *In observance of the principle laid down by the Honourable Apex Courts in above mentioned judgments and after perusing the record available and appreciating the arguments, I am inclined in favor of dismissal of application U/s 9(6) Family Court Act as well as annexed all applications with no order as to costs"*

8. The application under Section 9(6) of the Act of 1964 for recalling the judgment and decree dated 22.11.2021, which was dismissed, shows that the Court has finally decided the prayer, and nothing remains pending relating to the said issue. Section 9(6) of the Act of 1964 provides the remedy to move the application for setting aside *ex-parte* decree. The Family Court, by mandate of the said Section, is obliged to pass an order if the Petitioner is able to satisfy the Court that he was not duly served or was prevented by any sufficient cause for appearing when the suit was heard and called for hearing. The said Section is reproduced hereunder:-

> *"6) In any case in which a decree is passed ex parte against a defendant under this Act, he may apply within [thirty days of the service of notice under sub-section (7) of the passing of the decree] to the Family Court by which the decree was passed for an order to set it aside, and if he satisfies the Family Court that he was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was heard or called for hearing, the Family Court shall; after service of notice on the plaintiff, and on such terms as to costs as it deems fit, make an order for setting aside the decree as against him, and shall appoint a day for proceeding with the suit."*

9. while dismissing the application under S 9(6) of the Act of 1964, the trial court declined to set aside the judgment and decree. In order to determine whether the said Order is appealable, Section 14 of the Act of 1964, which provides the remedy of appeal, is reproduced as under:-

> *"14. 1) Notwithstanding anything provided in any other law for the time being in force, a decision given or a decree passed by a Family Court shall be appealable*
>
> *a) to the High Court, where the Family Court is presided over by a District Judge, an Additional District Judge, or a person notified by Government to be of the rank and status of a District Judge or a Additional District Judge, and*
>
> *b) to the District Court, in any other case.]*
>
> *2) No appeal shall lie from a decree passed by a Family Court---*
>
> *a) for dissolution of marriage, except in the case of dissolution for reasons specified in clause (d) of item (vii) of Section (2) of the Dissolution of Muslim marriage Act, 1939.*
>
> *b) for dower [or dowry] not exceeding rupees [thirty thousand];*
>
> *c) for maintenance of rupees [one thousand] or less per month.*
>
> *3) No appeal or revision shall be against an interim order passed by a Family Court;*
>
> *4) The Appellate Court referred to in sub-section (1) shall dispose of the appeal within a period of four months.]"*

10. From the perusal of Section 14 of the Act of 1964, it is observed that “a decision given” by the Family Court is appealable. The said decision is not an interim order as directed under Section 3 of Section 14 ibid. Every Order passed in a family suit cannot be treated merely as an interlocutory order. If the said Order finally determines the issue, then such Order possesses characteristics of finality. Notwithstanding the pendency or final disposal of the case on the basis of that Order, the appeal against such Order would be maintainable.

11. The word “decision” covers not only a final judgment but also an interlocutory order; therefore, in such a situation, the appeal would be maintainable while having a look at different meanings and definitions is broad enough to cover both final judgments and interlocutory orders and although it is sometimes limited to sense of judgment and sometimes understood as meaning simply by the first step leading to judgment. Lastly, the word “decision” may include various rulings and orders.

12. It appears that the Order of the trial court is tantamount to declining the prayer for recalling so-called *exparte* judgment and decree, which amounts to a final determination of a claim to that extent and hence cannot be treated as merely an interlocutory order that does not finally determine anything, thus said Order would amount to “a decision given” in terms of Section 14 of the Act of 1964, keeping in view the above-referred position of law that emerges is that appeal under Section 14 of the Act of 1964 is not barred against every interlocutory Order and remedy of appeal unless specifically barred would be available against a decision relating to the right or a remedy provided under the law subject to the condition that finality is attached to such an order or decision and nothing remains to be further decided between the parties on the said issue. In the case of Mian Manzar Bashir and others v. MA. Asghar & Co (PLD 1978

S.C 185), the August Court in a case arising out of the Punjab Urban Rent Restriction Ordinance, 1959. it was held that an order setting aside the ex-parte Order of ejectment was not appealable as it was not definitive, but the Order rejecting the application for setting aside ex-parte ejectment order was appealable as such an order was definitive having a direct bearing on the whole subject of controversy concluded by an earlier order Thus, the contention of the learned Counsel that the Order of rejection of the application for setting aside an ex-parte decree was not appealable cannot be accepted.

13. For the foregoing reasons, it is manifest that the impugned Order passed by the trial Court was appealable; therefore, this Petition *sans merits* is accordingly dismissed in *limine*.

JUDGE

Faisal Mumtaz/PS