

**SUPREME COURT OF AZAD JAMMU AND  
KASHMIR**

[Appellate Jurisdiction]

**PRESENT:**

Mohammad Azam Khan, C.J.  
Raja Saeed Akram Khan, J.

1. Civil Appeal No. 123 of 2016  
(PLA filed on 12.3.2016)
2. Civil Misc. No. 107 of 2016  
(Filed on 23.4.2016)

Mohammad Yaseen s/o Mohammad Hussain,  
caste Mughal, r/o Lower Chahwala, Tehsil  
Cherhoi, District Kotli.

.... APPELLANT

**VERSUS**

1. Mst. Saima Kousar w/o Mohammad  
Yaseen.
2. Muhammad Ehsan,
3. Muhammad Safian,
4. Muhammad Amman, sons of Mohammad  
Yaseen (minors), caste Mughal, r/o Lower  
Chahwala, present P/O Damas vilalgae  
Chak Kotli Sholana, Tehsil Cherhoi, District  
Kotli.

..... RESPONDENTS

(On appeal from the judgment of the Shariat  
Court dated 24.2.2016 in Civil Appeal No. 74 of  
2015)

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FOR THE APPELLANT: Mr. Riaz Naveed Butt,  
Advocate.

FOR THE RESPONDENTS: Mr. Fiaz Haider Nawabi,  
Advocate.

*Date of hearing:* 23.12.2016.

**JUDGMENT:**

**Mohammad Azam Khan, C.J—** The appellant and respondent No.1 are the husband and the wife while respondent No.2, 3 and 4 are the children of the appellant and respondent No.1. Respondents filed a suit for maintenance charges in the Family Court Charhoi on 16<sup>th</sup> July, 2014, alleging therein that marriage between the appellant and plaintiff-respondent No.1 was solemnized on 18<sup>th</sup> April, 2004. Relations between the parties remain cordial for a period of three years. During this period, three sons, respondents No. 2, 3 and 4, born out of the wedlock. It is alleged by the plaintiff No.1 that attitude of the defendant-appellant, herein,

was hostile. He ousted the plaintiffs from his house in 2009. He has not paid maintenance charges since 2009. She alleged that she filed a suit for maintenance charges on 14<sup>th</sup> February, 2014. The defendant-appellant, herein, compromised through notables (پنجابیت). Plaintiff-respondent No.1, withdrew the suit for maintenance on 3<sup>rd</sup> July, 2014. In (پنجابیت) the defendant-appellant, herein, agreed to pay the maintenance charges. In fact, the defendant-appellant, herein, compromised only for avoiding the Court order for maintenance charges. She, along with minors, went to the house of the defendant. Only after 7 days, on 11<sup>th</sup> July, 2014, the defendant after mercilessly beating her, threw her with the children out of the house. She remained hospitalized and also filed a report before the Police. She prayed for payment of maintenance charges for herself and for the minors from 2009 @ 6000/- per head per month. After necessary proceedings, the Family Court, Charhoi, decreed the suit and ordered

that the defendant shall pay the maintenance charges to the plaintiffs from January, 2009, till filing of the suit vis-à-vis 19.7.2014 @ Rs.3000/- per head per month and future maintenance charges from 16<sup>th</sup> July, 2014, shall be paid @ Rs.5000/- per head per month. The appellant challenged the judgment and decree of the Family Court in the Azad Jammu & Kashmir Shariat Court. The Shariat Court, through the impugned judgment dated 24<sup>th</sup> February, 2016, dismissed the appeal, hence, this appeal by leave of the Court.

2. Mr. Riaz Naveed Butt, Advocate, the learned counsel for the appellant, argued that the judgment of the High Court is against law and the record. Plaintiff-respondent No.1, herein, in her suit has alleged that she was ousted from the house on 11<sup>th</sup> July, 2014. It means she was living in the house of the husband till that date and the Family Court had no jurisdiction to pay the maintenance charges for the period she was living in the house of

husband. The Family Court as well as the Shariat Court failed to consider this important aspect of the case. The learned counsel further argued that previous suit was withdrawn by plaintiff-respondent No.1, herien, herself and after withdrawal of the previous suit, fresh suit is not maintainable.

3. While controverting the arguments, Mr. Fiaz Haider Nawabi, Advocate, the learned counsel for the respondents, submitted that the judgment of the Family Court as well as the Shariat Court is perfectly legal. Both the Courts below have recorded the concurrent findings after appraisal of the evidence and concurrent findings of the fact recorded by two Courts below cannot be disturbed by this Court in the appeal. The learned counsel argued that plaintiff No.1, in her suit, specifically alleged that she was ousted from the house in the year 2009. She remained in her parents' house and was also maintained along with children by her parents. She filed a suit for maintenance charges for

herself and for the minors, but the defendant with ulterior motives, only for the purpose that plaintiff shall withdraw the suit, entered into compromise through (پنچابیت) of the notables that the plaintiff and the minors shall live in his house and on this pretext got the suit for maintenance charges withdrawn by the plaintiffs and agreed to pay the maintenance charges. Only after a period of one week after mercilessly beating the plaintiff No.1, the defendant ousted the plaintiff from his house along with the minors. The learned counsel argued that a criminal case was registered against the appellant and his father. Tehsil Criminal Court Charhoi, has convicted the father of the appellant while the appellant is absconder in the said criminal case. There is no error in the judgment of the Courts below. The appeal merits dismissal. He requested for dismissal of the appeal with costs.

4. We have heard the learned counsel for the parties and also perused the record. Before dilating upon the facts of the case, we may

observe here that this Court in the case reported as *Mst. Amreen vs. Muhammad Kabir* (2014 SCR 504) has categorically laid down that when the wife successfully proved that she was forced to abandon the house of her husband then she is entitled to maintenance charges. Cruel attitude was also considered by the Court in this judgment. In para 17, it was observed as under:-

“17. Thus it can safely be concluded that it is the duty of the husband to maintain a wife till she is faithful to him and ready to live with him in his house and perform her part in this respect but if a wife abandons the residence of his husband voluntarily without any reason and is not ready to live with him as his wife then she is not entitled to past or future maintenance. It is further observed that if a wife is ousted from the house by husband or she is forced to leave the house of her husband due to cruelty physical or mental by the husband or other inmates of his family, she is entitled for maintenance charges.”

Thus, it is the duty of the husband and father to maintain the wife and children under the injunctions of Islam.

5. Whether withdrawal of a suit for maintenance charges in the result of compromise operates as res-judicata and new suit for maintenance charges for the previous period is maintainable or not, is an important question. Section 17(1) of the Family Courts Act, 1993, postulates that Civil procedure Code shall not apply to the proceedings before the Family Court. For proper appreciation, Section 17(1), is reproduced as under:-

“17. Provisions of Evidence Act and Code of Civil Procedure not to apply:-  
 (1). Save as otherwise expressly provided by or under this Act, the provisions of the Qanoon-en-Shahadat as in force in Azad Kashmir and the Code of Civil Procedure 1908 shall not apply to proceedings before any Family Court.  
 2. ....”

A plain reading of the section makes it clear that provisions of Civil Procedure Code are not applicable. The principal of res-judicata is embodied in Section 11, C.P.C. C.P.C. is not applicable to the proceedings before the Family Courts, the principal of res-judiciata is also not applicable. Whether general principals of res-



judicata are applicable. The matter came under the consideration of the superior Courts and the coconscious of the authorities is that if the case is finally determined between the parties then the general principles of res-judicata are applicable but where a party withdraws a suit in the result of compromise and has not abandoned the claim then the party has a right to file fresh suit. It was observed by this Court in an unreported judgment titled as *Mst. Noshia Parveen vs. Tariq Pervaiz* (Civil Appeal No. 55/1998 decided on 15.6.1998) as under:-

“7. So far as the question of res judicata is concerned, it may be stated that even in case of statutory res judicata envisaged under section 11 of the C.P.C., it is necessary that a point in issue in the subsequent proceedings should have been finally adjudicated upon and decided by a Court or Tribunal in the earlier proceedings. In the instant case, as has been indicated above, the question as to whether the dower amount was due to the plaintiff-appellant or not was not finally decided one way or the other, the suit was dismissed merely on the statement on behalf of the plaintiff-appellant. Therefore, it is not correct to suggest that as previous suit for recovery of the dower amount was dismissed in the circumstances stated

above, the subsequent suit was barred by *res judicata*. It may be pointed out here that there are other provisions in the C.P.C. in which the withdrawal of the suit without permission to re-institute the same can bar a subsequent suit, such as, Order XXIII, rules 1 and 2. But as C.P.C. does not apply to the proceedings before the Family Courts, that would not help the case of the respondent.”

In the case reported as *Muhammad Shafique and 4 others vs. Muhammad Rafique and another* (2012 YLR 2801), it was observed as under:-

“... The judgments relied upon by the learned Addl. District Judge, Lahore are to the effect that in the first instance the earlier suit was not withdrawn unconditionally and that it was withdrawn on the basis of a compromise having been effected between the parties and such a withdrawal of the suit does not operate as a *res-judicata* nor is hit by the provisions of Order XXIII, Rule 1 of C.P.C.”

Similarly, in the case reported as *Talib Hussain vs. Addl. District Judge Arifwala and 2 others* (PLJ 2001 Lahore 292), while dealing with the proposition, the Court held as under:-

“..Similarly, there is nothing in the said judgment to show as to whether the petitioner (defendant in the suit) had so voluntarily closed his evidence or that the evidence was closed by invoking the said provision

of law. To my mind for all purposes the said judgment is not a judgment finally deciding a lis between the parties by an adjudication within the meaning of Section 11 C.P.C. At the most it was a dismissal by withdrawal of the suit. Now the rigours of CPC and the Qanun-e-Shahadat Order are not applicable to the proceedings under the Family Court Act except to the extent provided in section 17 thereof. The withdrawal of suit would not, therefore, constitute any bar to the filing of a fresh suit.”

Saima Kousar withdrew the suit in the result of compromise. The plaintiffs have not abandoned their claim of maintenance charges. Soon after withdrawal of the previous suit, fresh suit was filed on the ground that the defendant entered into compromise only to defeat the suit filed by the plaintiffs-respondent, herein. The plaintiffs-respondents, herein, have neither abandoned their claim nor the suit was finally adjudicated, therefore, the res-judicata is not applicable in the case.

6. Leave was granted to consider the effect of the version of the plaintiff in the plaint and the statement of plaintiff No.1 that the plaintiffs were not maintained by the appellant since 2009 and

after compromise they were ousted from the house of the defendant on 11<sup>th</sup> July, 2014. Whether the plaintiffs can claim maintenance charges since 2009.

7. The plaintiff-respondent, herein, claims that she was ousted from the house in the year 2009. The husband failed to pay the maintenance charges to the wife and the minor children, whereupon, she filed a suit for maintenance charges in the Family Court, Charhoi on 4<sup>th</sup> February, 2014. The defendant-appellant, herein, to defeat her suit, made a compromise through (پنچاپیت) of the respectable that he will pay the maintenance charges and took her along with the children to his house but only after a period of one week, after mercilessly beating, ousted her along with the minor children. To this effect, a report was made at the Police Station Charhoi. She also appeared as witness and supported her version taken in the plaint that she remained in the house of her parents since 2009 to 3<sup>rd</sup> July, 2014. Her this

statement was not challenged in the cross-examination. The Family Court and the Shariat Court have recorded concurrent findings of the fact that the plaintiff-respondent No.1, herein, along with the minors, was ousted from the house by the defendant-appellant, herein, after mercilessly beating her. The defendant-appellant, herein, has not paid maintenance charges to the plaintiffs from 2009 to 2014. The finding is based on evidence. There is no misreading and non-reading of record. The Courts below have also recorded the finding that it is proved that the plaintiff-respondent, herein, filed a suit for maintenance charges on 4<sup>th</sup> February, 2014. The defendant in the guise of compromise got withdrawn the suit for maintenance charges and promised to pay the maintenance charges regularly. He took the plaintiffs to his house but only after a period of one week, the defendant after mercilessly beating plaintiff No.1, ousted her along with the children from the house. It is proved that a

criminal case was registered against the appellant and his father.

8. The version of the plaintiffs in the plaint that the plaintiffs were ousted from the house on 11<sup>th</sup> July, 2014, cannot be read in isolation. The contents of the whole plaint have to be read. Thus, it is concluded that the plaintiffs are entitled for maintenance charges from January, 2009, as is ordered by the Family Court and affirmed by the Shariat Court. The judgment of the Shariat Court is perfectly legal. The appeal merits dismissal. The same is hereby dismissed with no order as to costs.

CHIEF JUSTICE  
Mirpur.  
.1.2017.

JUDGE