SUPREME COURT OF AZAD JAMMU AND KASHMIR
[Shariat Appellate Bench]

PRESENT:
Ch. Muhammad Ibrahim Zia, C.J.
Ghulam Mustafa Mughal, J

Civil Appeal No.294 of 2018
(PLA Filed on 23.05.2018)

Shahzad Rauf s/o Sardar Abdul Rauf, caste Sudhan r/o Gorah-Dewan, Tehsil Pallandri, District Sudhnoti.

……APPELLANT

VERSUS

Mst. Shabana Yaseen d/o Manzoor Khan, Caste Sudhan r/o Chanday-Namorah, Rawalakot, Tehsil Rawalakot, District Poonch.

…..RESPONDENT

[On appeal from the judgment of the Shariat Appellate Bench of the High Court dated 05.04.2018 in Family Appeal No.50/2017]

FOR THE APPELLANT: Syed Habib Hussain Shah, Advocate.

FOR THE RESPONDENT: Mrs. Zobia Badar, Advocate.

Date of hearing: 05.12.2018

JUDGMENT:

Ch. Muhammad Ibrahim Zia, C.J.– The captioned appeal by leave of the Court has been

filed against the judgment passed by the Shariat Appellate Bench of the High Court *(hereinafter to be referred as High Court)*, whereby the appeal filed by the appellant, herein, has been dismissed.

2. The respondent, herein, filed four suits; first for dissolution of the marriage, second for recovery of the maintenance allowance @ Rs.15,000/- per month, third for recovery of the dower amount to the tune of Rs.600,000/- and fourth for recovery of the dowry articles or in alternate the amount of Rs.89,135/-, in the Court of Senior Civil Judge/Judge Family Court, Rawalakot on 22.11.2012. A counter suit for restitution of conjugal rights was also filed by the appellant, herein, in the same Court. The learned trial Court vide judgment and decree dated 21.07.2014 passed the decree for dissolution of marriage on the ground of cruelty. A decree for dower amounting to the tune of Rs.600,000/-, a decree for recovery of dowry articles to the tune of Rs.89,135/-, and a decree for maintenance allowance amounting to Rs.75,000/- was also passed in favour of

respondent, herein and her minor son. The respondent filed three separate applications for execution of the decrees before Senior Civil Judge, Rawalakot empowered as Judge Family Court on 12.09.2014. However, subsequently on establishment of separate family Courts the same stood transferred on 22.02.2017 to the Family Court. After necessary proceedings, the learned trial Court through order dated 28.09.2017 fixed monthly installment of Rs.50,000/- for payment of decretal amount of dower, dowry and past maintenance allowance, whereas, the maintenance allowance of minor was fixed as Rs.3,000/-. Feeling aggrieved, the appellant, herein, filed an appeal before the High Court which has been dismissed through the impugned judgment dated 05.04.2018, hence, this appeal by leave of the Court.

3. At the leave stage, in compliance of direction of this Court, the appellant deposited Rs.60,000/- out of the decretal amount whereupon the leave was granted.

4. Syed Habib Hussain Shah, Advocate, the learned counsel for the appellant after narration of necessary facts submitted that the impugned judgment of the learned High Court is against law, facts and principle of administration of justice. The main reason mentioned in the impugned judgment is that the Family Court has fixed the installments of the decretal amount, thus, it is an interlocutory order and not appealable, whereas, according to the statutory provisions of the Azad Jammu and Kashmir Family Courts Act, 1993 the right of appeal is provided against the decision as well as decree and when the matter is conclusively resolved by the Family Court it amounts to decision. As the learned Family Court has decided the execution application, thus, it is a decision and not an interlocutory order. Therefore, on this sole ground the impugned judgment is not maintainable. On merits, he argued that although the decrees were not passed in accordance with law, however, the same have attained finality. According to facts the total payable decretal amount is more than one million

rupees and in addition to this the appellant has to pay the monthly maintenance allowance. The Family Court has fixed Rs.50,000/- monthly installment of the decretal amount excluding the monthly maintenance allowance which is beyond the capacity of the appellant. According to the law, it was enjoined upon the Family Court to exercise its powers equitably and fix the installments which could be possible for the appellant to pay. The appellant is a poor person having no source of income but despite this while obeying the Court order he has already paid more than Rs.1,00,000/-. His salary is his sole source of income. He is a private servant and earns only Rs.10,000/- per month. Therefore, for ends of justice fixation of reasonable installments is necessary. He referred to the cases reported as *Noreen Akhtar vs. Liaquat Hussain* [2004 SCR 143], Muhammad Ramzan vs. Rukhshana Kausar and another [2006 SCR 104], *Ali Haider and others vs. Syed Muhammad Ashgar Shah* [2014 SCR 1004] and *Muhammad Zaheer-ud-Din Babar vs. Mst. Shazia Kosuar* [2015 SCR 621],

and submitted that while accepting this appeal and recalling the impugned judgment the reasonable installments be fixed.

5. Conversely, Mrs. Zobia Badar, Advocate, the learned counsel for the respondent forcefully defended the impugned judgment and submitted that the decrees have attained finality. The respondent has sufficient source of income as he is earning more than Rs.1,50,000/- per month. He has misstated that his total income per month is Rs.10,000/-. The judgment of the High Court is quite in accordance with law. The order passed by the Family Court is an interim order and no remedy of appeal against such order is available, thus, this appeal has no substance and the same is liable to be dismissed.

6. We have heard the learned counsel for the parties and examined the record made available. The careful examination of the impugned judgment of the High Court reveals that the main reason for dismissal of the appeal is incompetency of the appeal against the interlocutory order of the Family

Court. The learned High Court has observed that the order passed by the Family Court is an interim order, hence, not appealable. For proper perception of the matter we would like to reproduce here section 14 of the Azad Jammu and Kashmir Family Courts Act, 1993 which is reproduced as under:-

> "14. Appeals – (1) Any party aggrieved by a decision or a decree passed by a Family Court under this Act may, within thirty days of the date of such decision or decree, prefer an appeal to the Shariat Court.
> (2) …………….
> (3) …………….
> (4) …………….
> (5) ……………..."

The appreciation of the statutory provisions reveals that the right of appeal is provided both against the 'decision or decree' passed by the Family Court. The perusal of the record reveals that the respondent filed three separate execution applications on 12.09.2014. The learned Family Court conducted the proceedings, however, for one or other reasons, specially, due to pendency of appeal upto this Court which was disposed of on 19.05.2017, the execution proceedings could not be completed till 28.09.2017.

It also appears that initially execution applications were filed before Senior Civil Judge, Rawalakot designated as Family Judge, however, subsequently these applications were transferred on 22.02.2017 to the Additional District Judge/Family Court. After conducting the necessary proceedings, the execution applications were finally disposed of through consolidated decision dated 28.09.2017. Thus, according to the nature of the decision we are unable to concur with the opinion of the learned High Court that it is an interim order rather the applications have been conclusively decided, hence, this final disposal of the matter in issue cannot be treated as an interim order. Whereas, the record shows that the interim orders from 30.10.2014 to 27.09.2017 are the part of file of Family Court. Thus, the main reason which prevailed with the learned High Court, in our opinion, is not valid, therefore, dismissal of the appeal on this ground is not warranted. Our this view finds support from the case reported as *Muhammad Zaffar Khan vs. Mst. Shehnaz Bibi & others* [1996 CLC 94] wherein the

terms "decision" and "interim orders" have elaborately been defined. It will be useful to reproduce here the relevant portion of the judgment which reads as follows:-

> `"8. Regarding the first question, I am of the opinion that every order passed by a Family Court during the pendency of a suit cannot be treated interlocutory, unless the nature of such order reflects so. To test whether an order passed on any application by a Family Court be treated interlocutory or not the Appellate Court must find out what possible orders could be passed by the Judge Family court on such applications. If the nature of an order appears to be final then it may not be treated interlocutory. For example, if any of the contesting parties moves an application praying therein that the Court has no territorial jurisdiction to proceed with the case, therefore the family suit be dismissed or the plaint be returned to the plaintiff for filing the same in the Court of competent jurisdiction then the Judge Family Court, after receiving such application has these options i.e., (i) to allow the application, (ii) dismiss the application, or (iii) to defer the application for the time being by passing any order other than allowance or dismissal:
>
> (a) In case the Judge Family Court allows the application, the family suit would be dismissed if the plaint is considered by the Court not to be returned on the ground that C.P.C. cannot be invoked to return the plaint. It is thus evident that this type of order is final in its nature. In this

option order passed on the application moved by any of the contesting parties cannot be treated "interlocutory".

(b) In the family Court dismisses the application, as was done in the petitioner's case, even then it is evident that the Family Court has finally decided the question of jurisdiction which cannot be raised again during subsequent proceedings before the Court except in appeal. If any point becomes appealable after the disposal of any suit then it is strange that the said point if finally decided during the pendency of the suit, be treated interlocutory. Therefore, I am of the opinion that order of dismissal in these circumstances also possesses the characteristics of finality in its nature.

(c) If the Court neither allows nor dismisses the application on the point of jurisdiction for the time being and orders only to frame an issue on that point to be decided at the initial stage as preliminary issue or at the time of final disposal as one of the issues of the suit, then such an order may be treated interlocutory because the issue raised in the application has not been finally decided.

According to my point of view keeping the issue of jurisdiction pending till the final disposal of the case is against the principles of natural justice, Courts are required to decide such an issue in its initial stage as and when the same is raised provided it has force in it. For example, if an application in a civil suit is moved under order VII, Rule 11, C.P.C., it

should be decided first before proceeding a step further.

In the light of above discussion, I am of the view that if an order of dismissal or allowance passed on an application in respect of any issue has finally decided the said issue, then such an order possesses the characteristic of finality notwithstanding to the pendency or final disposal of the case on the basis of that order and an appeal against such an order would be maintainable. If no final order regarding an issue has been passed on an application and the point raised by any party has been deferred for the time being, then such order, can be treated as "interlocutory".

It may not be out of place to mention that the words "Interlocutory" in the dictionary meaning means "not final or definitive", pronounced during the course of suit pending final decision as "an interlocutory divorce deed (Websters' New Universal Unabridged Dictionary). Therefore, an order passed on an application cannot be treated interlocutory if the Court has given final or definitive decision on an issue relating to the maintainability of a suit or the jurisdiction of the Court.

In this regard I would also like to refer the concept of "Interlocutory" from Wharton's Law Lexicon (Fourteenth Edition) which appears on page No.529 as under:-

> "Interlocutory.—An interlocutory order or judgment is one made or given during the progress of an action, but which does not finally dispose of the rights of the parties."

Similarly section 94, C.P.C. also provides some help to understand the real import of an interlocutory order. Section 94, C.P.C. runs as under:-

> '94. Supplemental proceedings.—In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed.
>
> (a) issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to the civil prison;
>
> (b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the Court or order the attachemtn of any property;
>
> (c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold;
>
> (d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property;
>
> (e) make such other interlocutory orders as may appear to the Court to be just and convenient.

(Underlining is my own).

The above-quoted clause (e) gives clear impression that any such

interlocutory orders can be passed as may appear to the Court to be just and convenient in order to prevent the ends of justice from being defeated. As the question of jurisdiction finally decides the right of the contesting parties as well as of the court regarding continuance or ending of proceedings of any case in a Court and moreover such an order is not passed to prevent the ends of justice from being defeated, therefore, I am of the view that and order passed on the point of jurisdiction of the Court, if decided finally and not deferred, can never be treated as interlocutory order.

On the basis of this proposition an order of dismissal (as in the present case) or allowance of an application on the point of jurisdiction, in my opinion, is not an interlocutory order, therefore, an appeal against such order under section 14(1) of Family Courts Act, 1964 would be maintainability provided the same Is not hit by section 14 (2) of the said Act.

8. This proposition also embraces the view that expression "a decision given" appearing in section 14 of the Act has to be construed under the rule of ejusdem generis to provide appeals only against orders which are final in their nature and not interlocutory. If the case of present petitioner is tested on the basis of this proposition, then it radiates that as the Judge, Family Court, had finally decided the question of jurisdiction and as the said application was not hit by section 14(2) of the Act, therefore, appeal against the said order under section 14(1) of the Act was maintainable.

In alternate, if it is presumed that neither the order was appealable nor other

remedy was available under law against that order of the Family Court, then the aggrieved party would be left with no other alternate but to invoke Constitutional jurisdiction provided the impugned order was passed without jurisdiction and/or was illegal. In the light of above discussion, the question which gained importance before this Bench in this case is whether dismissal of application on the point of jurisdiction by the Judge, Family Court on merits and dismissal of appeal by the Appellate Court on technical ground can attract the Constitutional Jurisdiction of this Court or not?

The answer returns in positive. My reasons for holding so are as under:-

If the order of the learned Additional District Judge (south), Karachi is set aside and the matter is remanded back to that Court to decide the same by afresh by treating the impugned order of the Family Court appealable and as a result of remand if the Appellate Court upholds the order of Judge, Family Court on merits, then the petitioner will against rush to the high Court to invoke the Constitutional jurisdiction against the order of the Appellate Court. It is, thus, obvious that it shall cause further delay in disposal of the family suit which is against the spirit of the Preamble of the Act as pointed out in the foregoing lines."

This principle has also been followed in the case reported as *Muhammad Zaman vs. Uzma Bibi & others* [2012 CLC 24] and in this regard there is a chain of authorities of the superior Courts including

the case reported as *Hafiz Abdul Waheed vs. Mrs. Asma Jehangir & another* [PLD 2004 SC 219]

7. Yet there is another aspect of the matter that in view of peculiar facts and circumstances of this case whether the matter should be sent to the High Court for reconsideration or to the Family Court. The examination of the record reveals that the decrees have already attained finality, however, the only proposition to be attended is fixation of reasonable installments for payment of decretal amount. Despite utmost attempt we have failed to find any such material from the record to determine this proposition by ourselves. Both the parties have not brought on record any detail in this context. The appellant claims that he is only earning Rs.10,000/- per month, whereas, the respondent claims that he is earning Rs.1,50,000/- per month. The learned Family Court while deciding the original suit has also not brought on record any material which could be helpful in this regard. It has only been mentioned that the maintenance has to be

awarded keeping in view the sources and capacity of the person. According to the principle of law, in such like matters the financial condition of the judgment-debtor is also one of the consideration as laid down in the cases reported as *Muhammad Zaheer-ud-Din Babar vs. Mst. Shazia Kosuar* [2015 SCR 621] and *Ali Haider and others vs. Syed Muhammad Ashgar Shah* [2014 SCR 1004]

8. No doubt in this case the amount of maintenance allowance is Rs.3,000/- per month which is reasonable and the appellant is duty bound to pay the same, however, to the extent of rest of the decretal amount according to ordinary law the judgment-debtor is bound to pay the same or the same can be recovered from his property but in the family matters the legislature has authorized the Family Court under the provisions of sub-section (5) of section 13 of the Azad Jammu and Kashmir Family Courts Act, 1993 to fix the installments as deemed fit. In this state of affairs, in our considered view, the Family Court should have attempted to bring on record some evidence or material on the

basis of which the justified installments could be fixed for ends of justice. In this scenario, we deem it just to remand the matter to the Family Court for providing opportunity to the parties to bring on record the material helpful to the Court for fixation of the reasonable installments. However, till that the appellant is directed to regularly pay Rs.3,000/- maintenance allowance per month and Rs.10,000/- as monthly installment of other decretal amount. However, the installment of Rs.10,000/- is transitory subject to adjustment of the installments to be determined by the Family Court.

This appeal stands accepted in the above terms with no order as to costs.

CHIEF JUSTICE JUDGE

Muzaffarabad,
11.12.2018