SUPREME COURT OF AZAD JAMMU AND KASHMIR

[Appellate Jurisdiction]

PRESENT:
Kh. Muhammad Nasim. J.
Raza Ali Khan, J.

Civil Appeal No. 476 of 2020
(PLA Filed on 7.9.2020)

Muhammad Arif s/o Qismat Ullah r/o Shumali Bugna, presently W-564, Street No. 3 Scheme Three Rawalpindi.

.... APPELLANT

VERSUS

1. Nasreen Akhtar d/o Muhammad Suleman, caste Awan r/o Khairian Tehsil and District Muzaffarabad.
2. Director Religious Affairs, Lower Chatter Muzaffarabad.

..... RESPONDENTS

(On appeal from the judgment of the High Court dated 12.8.2020 in Family Appeal No. 106 of 2020)

APPEARENCES:

FOR THE APPELLANT: Ch. Shoukat Aziz, Advocate.

FOR THE RESPONDENTS: Mr. Shahid Ali Awan, Advocate.

Date of hearing: 1.9.2021

JUDGMENT:

Raza Ali Khan, J.— The captioned appeal by leave of the Court arises out of the judgment dated 12.8.2020 passed by the High Court of Azad Jammu & Kashmir in family appeal No. 106 of 2020.

2. The brief facts forming the background of the captioned appeal are that the private respondent, herein, filed a suit for recovery of the dower before the Judge Family Court, Muzaffarabad. The learned Judge Family Court, after due process of law, decreed the suit in favour of the respondent vide judgment and decree dated 21.4.2017. Feeling aggrieved from the said judgment and decree, the appellant, herein, filed an appeal before the Shariat Appellate Bench of the High Court of Azad Jammu & Kashmir on 21.3.2018, which was dismissed by the learned High Court on the ground of limitation vide order dated 16.5.2019. the order dated 16.5.2019 was further assailed by the appellant, herein, before this Court on

12.7.2019 through a petition for leave to appeal, which was dismissed vide order dated 17.1.2020. It transpired that during the execution proceeding, the learned trial Court ordered the appellant, herein, to transfer the land alongwith the house consisting of two rooms, kitchen and washroom, measuring 10 marla, in lieu of the dower vide order dated 3.3.2020. The appellant, herein, felt aggrieved and filed an appeal before the High Court of Azad Jammu & Kashmir on 18.3.2020, which has been dismissed through the impugned judgment dated 12.8.2020.

3. Ch. Shoukat Aziz, the learned Advocate appearing for the appellant argued that the impugned judgment of the learned High Court is against law, facts and the record, hence, is not maintainable. He further argued that the order dated 3.3.2020, passed by the learned Judge Family Court is not an interim order rather the same is a final order and according to section 14(1) of the Family Courts

Act, 1993, the appellant rightly filed appeal before the Shariat Appellate Bench of the learned High Court but the Shariat Appellate Bench of the learned High Court wrongly held that the same is an interim order. The learned Advocate further argued that the order dated 3.3.2020, passed by the learned Judge Family Court is against the compromise effected between the spouses as in the compromise it is nowhere mentioned that the appellant shall transfer the land and the house in lieu of dower to the private respondent, herein, therefore, the same was liable to be set aside, but the learned High Court has not taken into consideration this aspect of the case while handing down the impugned judgment. The learned Advocate further argued that the learned Judge Family Court misread and non-read the record as well as the documentary evidence as according to documentary evidence Rs.50,000/- was fixed as dower, out of which Rs.37300/- was paid in shape of the gold ornaments, as such the

remaining amount of the dower comes to Rs.12700/-, therefore, the order of the learned Judge Family Court was against the record, but the learned High Court has over-looked this aspect of the case as well. The learned Advocate further argued that the respondent committed fraud by tempering the Nikah Nama, hence, the matter required detailed probe, but the learned Judge Family Court without conducting any inquiry and discussing the merits of the case delivered the order on technical ground and the learned Judge in the High Court also not adhered to this aspect of the matter and dismissed the appeal for erroneous reason without touching the merits of the case.

4. Mr. Shahid Ali Awan, the learned Advocate appearing for the private respondent defended the impugned judgment and argued that both the Courts below have rightly passed the judgments after due appreciation of the available record. He further argued that the learned Family Court passed an interlocutory

order and according to Family Courts Act, 1993, no appeal against an interlocutory order can be filed. He further argued that the order of the Family Court dated 3.3.2020 has been passed in execution proceedings and as per law the decree has to be executed as it is and the judgment debtor is not allowed to reopen the case in execution proceedings. Moreover, the controversy involved in the case has attained finality, as earlier the appellant challenged the judgment and decree dated 21.4.2017, before the learned High Court and then before this Court, therefore, the appellant is not entitled to reopen the case in a fresh round of litigation. The learned Advocate further argued that the judgment and decree dated 21.4.2017, passed against the appellant and his father but appellant's never challenged the same, hence, the decree to this extent has attained finality. The learned Advocate contended that the compromise decree has been passed on the statement of the appellant and now is estopped by his conduct and also not

legally competent to challenge the same before any forum. The learned Advocate further argued that the appellant is dragging the lady respondent in frivolous litigation with mala-fide intention, therefore, the appeal filed by the respondents may be dismissed.

5. We have heard the learned Advocates representing the parties and have gone through the record of the case made available. From the perusal of the record, it reveals that the respondent, herein, filed two suits; one for recovery of dower amounting to Rs.50000/- in form of gold ornaments and 10 marla land along with a house consisting of two rooms and bath etc. (worth Rs.15,00,000/-); second for maintenance charges amounting to Rs.108000/- from 1st June, 2015, onward before the Judge Family Court, Muzaffarabad. The appellant, herein, also filed a counter suit for restitution of conjugal rights before the same Court. During the pendency of the suits, both the parties got recorded their statements and entered into a

compromise. The learned Judge Family Court in light of the statements of the parties passed a compromise decree on 21.4.2017. The appellant, herein, filed an appeal before the Shariat Appellate Bench of the learned High Court on 21.3.2018, after a period of 11 months against the said decree, which was dismissed vide order dated 16.5.2019 on the ground of limitation. The order dated 16.5.2019 was further assailed by the appellant, herein, before this Court on 12.7.2019, through a petition for leave to appeal, which was dismissed vide order dated 17.1.2020, as such the first round of litigation came to an end. In the meantime, during execution proceedings, the learned Judge Family Court ordered the appellant, herein, to transfer 10 marla of land along with the house consisting of two rooms, kitchen etc. in lieu of dower to the respondent vide order dated 3.3.2020. The appellant, herein, challenged this order before the learned High Court, which has been dismissed through the impugned order. The

contention of the learned counsel for the appellant that the order dated 3.3.2020 is not an interim order rather it is a final order and the learned High Court has erroneously dismissed the appeal filed by the appellant, herein, on this ground through the impugned judgment. We agree with the argument of the learned counsel for the appellant to this extent, as in the case in hand the consent decree was passed on 21.4.2017 and this order was challenged up to this Court in the first round of litigation. Subsequently, the execution proceeding was started and conclusively decided vide order dated 3.3.2020 thus, according to the nature of the decision this final disposal of the matter in issue cannot be treated as an interim order. The proposition came under consideration of this Court in the case reported as *Shahzad Rauf vs. Mst. Shabana Yaseen* (2018 SCR 908), wherein this Court has elaborately defined the terms “decision” and “interim order”. The relevant

portion of the cited case is reproduced as under:-

> "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.

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]"

Thus, in light of the above reproduced case law, it can safely be said that the order dated 3.3.2020 is a final one, hence, we are unable to concur with the opinion of the learned High Court to this extent.

6. It may be stated that the learned High Court has not only dismissed the appeal on the sole ground that the order dated 3.3.2020, is an interim order rather the merits of the case have also been discussed by the learned High Court in the impugned judgment. For proper appreciation, the operative part of the impugned judgment is reproduced as under:-

> "5. Even otherwise, it may be stated here that the original decree was passed on 21.4.2017. Although the appellant has challenged the same before this Court, however, the same was also dismissed by this Court on the ground of limitation and same was upheld by the apex Court thus, the original decree has attained finality. It is to be noted that the decree to be executed is a consent decree and was passed by the trial Court after recording the statement of the judgment debtor appellant herein and in his statement before the Court he promised and admitted the mentioned rooms as dower. So he cannot be allowed to turn around at the time of its

> execution particularly when the same got finality by the order of the Apex Court of AJ&K."

In our considered view, the above reproduced finding recoded by the learned High Court on merit are quite in accordance with law and the record as in the earlier round of litigation the order dated 21.4.2017 passed by the learned Judge Family Court was challenged up to this Court and this Court upheld the same through the order dated 17.1.2020. For proper appreciation, the operative part of the earlier order of this Court is reproduced as below:-

> "I have considered the arguments of the learned counsel for the parties and examined the record made available. The arguments advanced on behalf of the petitioner are not consistent with the record. The record produced by the petitioner himself reveals that before the Family Court, the parties entered into a compromise. The petitioner got his own statement recorded which is Annexure "PB", wherein, it is categorically undertaken that he will pay the dower to the respondent as entered in the Nikah Nama. On the same day, the judgment and decree was passed, whereas, the petitioner filed an appeal before the Shariat Appellate Bench of the High Court on 21.3.2018 i.e. almost after passage of 11 months' period, thus, the Shariat Appellate Bench of the High Court, has rightly dismissed the appeal

> being time-barred through the impugned judgment…"

7. It may be observed here that the order dated 3.3.2020 is not the outcome of some new litigation rather the same has been passed for execution of the consent decree of the Family court passed vide order dated 21.4.2017 in light of the statement of the appellant and the respondent as well and the same has attained finality, therefore, the order dated 3.3.2020 passed by the learned Judge Family Court is quite in accordance with rule of law enunciated by this Court in the case reported as *Azmat Bi & another vs. Muhammad Laal* (2008 SCR 300), whereby it has been observed as under:-

> "…Once a decree has been passed by a Court having jurisdiction and the same having attained finality it has to be executed in letters and spirit…"

8. The argument of the counsel for the appellant that the respondent has tampered the marriage certificate and inserted some words by herself, may be correct, but this objection is an afterthought and cannot be taken into consideration now as the decree dated 21.4.2017

has attained finality, which has now become past and closed transaction, hence, the same cannot be allowed to be reopened. The appellant, if had any grievance at that time, he was at liberty to raise this objection, which has not been done. Moreover, the appellant himself while getting his statement recorded undertook that he will pay the dower to the respondent as entered in the Nikah Nama as has been observed by this Court in paragraph No.6 of the Court order dated 17.1.2020 reproduced hereinabove. Except to the extent of our findings as mad in the preceding paragraph No.6, the appellant has failed to satisfy the Court that any violation of law is committed or the impugned judgment suffers from any illegality or infirmity of law.

In view of the above discussion, the appeal is found to have no substance in it and we have no reason to differ with the findings recorded by the High Court as such the appeal is dismissed. No order as to costs.

JUDGE JUDGE

Muzaffarabad.
6.9.2021

Muhammad Arif **vs**. Nasreen Akhtar & another

ORDER:

Judgment has been signed. It shall be announced by the Registrar after notice to the learned counsel for the parties.

JUDGE JUDGE

Muzaffarabad.
6.9.2021.