

ORDER SHEET  
IN THE HIGH COURT OF SINDH AT KARACHI  
CP No.S-1150 of 2014

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DATE                      ORDER WITH SIGNATURE(S) OF JUDGE(S)  
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1. For orders on CMA No.2198/2015 (U/o.39 Rule)
  2. For Katcha Peshi
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**24.4.2015**

Ms. Saira Shaikh, advocate for Petitioner.  
Mr. Altaf Ahmed Shaikh, advocate for Respondent No.1.

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**Nazar Akbar,J.-** This constitution petition is directed against the order passed by learned XVI Family Court South Karachi in Family Suit No. S-219 of 2014 whereby while granting khula to Respondent No. 1 on failure of reconciliation in pretrial, the learned judge also settled the issue of payment of dower on oath taken by the Plaintiff/Respondent No.1 that she has not received dower amount. The petitioner has challenged that part of the order whereby issue of dower amount has been settled by the Court on oath at the pretrial stage. The Petitioner has challenged the said order on the premise that the learned Family Court had no jurisdiction to pass an order in pretrial to settle the issue of payment of dower as it was pretrial and only khula could have been granted on failure of effort of compromise. Learned counsel for the petitioner has contended that the decision on the question of payment of dower by offering oath to the respondent in the chamber was against the provision of **Article 163(1)** of Qanoon-e-Shahdat Order, 1984. A proper application should have been filed by the Plaintiff / respondent No.1 for settling the issue on oath. The Counsel has also referred to the provision of **Section 10** of the Family Court Act in support of her contention that Court should have not gone beyond the dissolution of marriage by way of Khula. **Section 10** of the Family Court Act, 1964 reads as follow:-

**10. Pre-trial proceeding.**—[(1) when the written statement is filed, the Court **shall** fix an early date for a pre-trial hearing of the case.]

(2) On the date so fixed, the Court **shall** examine the plaint, the written statement (if any) and the précis of evidence and documents filed by the parties and **shall** also, if it so deems fit, hear the parties and their counsel.

(3) At the pre-trial the Court **shall** ascertain the points at issue between the parties and attempt to affect a compromise or reconciliation between the parties, if this be possible.

(4) If no compromise or reconciliation is possible the Court **shall** frame the issues in the case and fix a date for [recording of the] evidence

Provided that notwithstanding any decision or judgment of any Court or tribunal, the Family Court in a suit for dissolution of marriage, if reconciliation fails, **shall** pass decree for dissolution of marriage forthwith and **shall** also restore to the husband the Haq Mehar received by the wife in consideration of marriage at the time of marriage.

Learned counsel for Respondent No.1, Altaf Ahmed Shaikh, in the first place has challenged the maintainability of this petition on the ground that dower amount settled between the parties was Rs.50,000/- and once the issue of dower was settled by the Court, it ought to have been challenged by an appeal in terms of **Section 14(2)(b)** of the Family Court Act, 1964. His other contention was that the Family Court is free to adopt any mode / procedure to “ascertain (all) the points at issue between the parties” and to avoid uncalled for delay in routine court procedure the provisions of the Qanoon-e-Shahdat Order, 1984, and the Code of Civil Procedure, 1908 have been deliberately excluded by the legislature from the proceeding before the Court of a Family Judge. At the same time only four sections of (8 to 11) the Oath Act 1872 have been made applicable by virtue of **Section 17** of the Family Court Act, 1964. Section 14 and 17 of the Act are as follow:-

Section 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 an 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 (a) of item (viii) of section 2 of the Dissolution of Muslim Marriages 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 lie 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**.

**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 [Qanun-e-Shahadat, 1984 (P.O. No. 10 of 1984)], and the Code of Civil Procedure, 1908, [except sections 10 and 11] **shall** not apply to proceedings before any family Court [in respect of Part I of Schedule].

(2) Sections 8 to 11 of the Oaths Act, 1872, **shall** apply to all the proceedings before the Family Courts.

The word “Shall” has been used in almost every provision of the Family Court Act 1964. It gives a sense of urgency and by doing away with the normal procedure of handling civil litigation amongst the parties the law makers have emphasized on an early disposal of disputes between man and wife. The object of the Family Court Act, 1964 is to make all out efforts of compromise and speedily settle family disputes. Even after evidence under **Section 12** of the Act the Court before passing a judgment has to make one more effort of reconciliation as it was attempted at the pretrial stage. The emphasis on compromise both before the trial and even after the trial is concluded in legal sense reflects on the sensitivity of the disputes between man and wife and its adverse effect on the society. The family disputes are not limited to the four walls of a home and between two persons. It disrupts mental fabric of both the parties and therefore its fallout is always dangerous for those who are not even party to it directly. The worst hit by these issues are the children or the parents of the parties.

Therefore the powers of Family Court in terms of **Section 10(2) and (3)** read with **Section 17** of the Act are not limited to any particular stage of proceedings for settlement of any “**ascertained issue**” between the parties. Mere use of the word “pretrial” would not mean trial has not started. Interestingly enough in **Section 10** of the Act, the “pretrial” stage is after the written statement is filed by the Defendant. The Family Court Act, 1964 is designed for speedy settlement of family disputes to save not only the parties from delay in disposal of their issues but also to control the damage to the society which generally is natural on disintegration of families.

In view of the above legal position, I am not inclined to hold that the Court had no jurisdiction to decide the issue of dower amount in pretrial. Even otherwise it was a question of dower amount and if it was not settled by the court in accordance with law it should have been challenged in accordance with law. It was an appealable order under **Section 14(2) (a)** of the Family Court Act, 1964 as rightly pointed out by the counsel for respondent No.1. The dower amount was admittedly Rs. 50,000/= and the Petitioner/Defendant in his written statement has specifically stated that he has paid dower amount in the shape of ornaments weighing 09 tola gold which he claimed was in possession of the Plaintiff/Respondent No.1. Nevertheless, the petitioner has immediately challenged the impugned order through the instant petition under the bona fide believe that order passed in pretrial is generally an order in the nature of preliminary decree and therefore not appealable. May be on account of the fact that the learned Family Judge has disposed of issue of dower at the pretrial stage without framing an specific issue on the point of payment of dower, the petitioner was misled that the impugned order was not appealable therefore, instead of filing an appeal the petitioner has chosen the forum of constitution petition as if no remedy was available. This constitution petition was filed within a period in which the petitioner could have availed opportunity of appeal. Therefore, since the nature of the order impugned is such that the Family court has decided two issues at pretrial stage i.e. issue of dissolution

of marriage in pretrial which was not appealable and the other issue of dower amount which was appealable, the petitioner in approaching this Court under constitutional jurisdiction to assail the finding on the issue of dower at pretrial stage cannot be termed mala fide. Generally courts in a situation like this convert petitions into appeal/revisions or appeals into petitions as the case may be subject to limitation. Learned counsel for respondent No.1 after going through the date of order and the date of presentation of petition conceded that the impugned order has been challenged by the petitioner within the time provided in law for filing of an appeal and he also did not dispute the practice of courts converting proceeding bona fide filed in wrong forum instead of the forum available under the law to give a fair opportunity to the parties to get their grievance decided on merits instead of technical knockout.

In view of the above facts and circumstances, I held that this petition is not maintainable, however the petitioner may file an appeal within **15** days from the date of passing of this order and the time consumed in the proceeding before this court should be condoned by appellate Court and the appeal should be decided on merits within four months' time frame provided in **Sub-section 4 of Section 14** of the Family Court Act, 1964 and without being prejudiced by any observation made herein. The Petitioner shall not be allowed to comment and read out or refer to the finding on this petition during the proceedings of appeal.

The petition with the above observation is disposed of alongwith all pending applications.

JUDGE

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