

**JUDGMENT SHEET
PESHAWAR HIGH COURT,
PESHAWAR.**

(Judicial Department)

W.P No. 4515-P/2015 with CM No.561/2016.

Date of hearing:..... 20.1.2017.

Petitioner (s) Mian Iftikhar Jan, Advocate.

Respondent (s) Mr. Khan Ghawas Khan, Advocate.

SYED AFSAR SHAH, J.- Since there is close unanimity in **“W.P No. 4515/2015 titled Mst. Zeenat Bibi vs. Fazal Haq”** and **“W.P No. 3518-P/2015 titled Fazal Haq vs. Mst. Zeenat Bibi etc”**, therefore, these are being disposed of by way of this single judgment.

2. Briefly stated facts of the instant petitions as spelt out from the record are that on 5.10.2012 Mst. Zeenat Bibi resident of Bara Banda, Nowshera, the petitioner-plaintiff filed a suit against Fazal Haq, respondent-defendant, for recovery of dower, maintenance allowance and dissolution of marriage on the grounds of cruelty and second marriage with added prayer of recovery of gold ornaments.

3. When put on notice by learned Judge, Family Court at Nowshera, Fazal Haq, the defendant (petitioner in the connected petition) submitted his written statement raising so many objections, both legal and factual.

4. From the divergent pleadings of the parties, learned Judge, Family Court framed/recorded nine (09) issues including the relief, whereafter, parties to the *lis* produced their evidence for and against and it was on 9.9.2014 when learned Judge, Family Court allowed the suit of the petitioner in the following terms:-

- i. Recovery of dower as per the kabeen nama,
- ii, Maintenance allowance @ Rs. 2000/- since 3.4.2012 till expiry of period of Iddat;
- iii. Dissolution of marriage against the defendant while rest of her suit stands dismissed.

5. Aggrieved from the judgment/decree of the learned lower Court, Fazal Haq, the defendant, filed appeal in the Court of learned Additional District Judge-II, Nowshera. During the proceedings conducted in the learned appellate Court, he also moved two applications, i.e., one for opinion of finger expert while the other one was for placing on record the copies of Jamabandi pertaining to mauza Sheikh Yousaf, Mardan. The learned appellate forum, vide his judgment dated 3.11.2015, by allowing appeal of the appellant, set aside the judgment/decree rendered by Judge, Family Court and as a consequence thereof remitted the case back to the learned lower Court for its decision afresh.

6. Aggrieved from the judgment of the learned appellate forum, both the parties, Mst. Zeenat Bibi and Fazal Haq, have come to this Court by filing separate writ petitions

under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973.

7. Arguments heard and record perused.

8. In the circumstances, the question which falls for determination before this Court is to see as to whether the case was calling for remission or otherwise. If one goes through the impugned judgment, one could reach to an irresistible conclusion that the learned appellate forum has remitted the case mainly on the ground that there is no specific issue in respect of the dower deed and, again, the learned trial Court has failed to appreciate the evidence properly.

Perusal of the record would show that Mst. Zeenat Bibi, the petitioner, has set up her claim in respect of the dower on the basis of 'qabeen nama', copy of which is available on record. So far as the record of the case is concerned, the learned trial court has framed a proper issue on the subject matter, which for convenience is reproduced below:-

“What was the dower fixed at the time of marriage and whether paid?”

Simple is that there is proper issue that what was the dower and whether it is paid. In the circumstances, the learned appellate forum by holding that a proper issue has not been framed in respect of the dower has landed into the field of error in that the issue that what was the dower, is for the petitioner to prove and in which respect she has placed on record

a “qabeen nama”, the sanctity of which shall be looked into by the appellate forum on its own end.

Needless to say that even if no specific issue has been framed on a particular matter, (which is not the case here), but evidence has been led in that behalf, the Court should go for resolution of the controversy on the evidence already adduced by the parties.

9. Moreover, the “qabeen nama” is stated to have been scribed in presence of three marginal witnesses. They all have been examined by the petitioner in support of her stance in as much as subjected to lengthy and taxing cross examination by the other side. Over and above, notary public, stamp vendor and its scribe have also been examined, meaning thereby, that the evidence available on record is sufficient enabling therein the appellate forum to pronounce judgment as envisaged in Order XLI Rule 24 of the Code of Civil Procedure, which says that where the evidence upon the record is sufficient to enable the appellate court to pronounce judgment, the forum may go for appraisal of the evidence. The purpose behind the provisions of law as enshrines in Rule 24 of the Order, referred to *ibid*, is to minimize the possible hardship of the litigant and to avoid unnecessary delay in disposal of cases by remitting to the lower court.

10. In the connected writ petition, the main objection of the learned counsel for the petitioner, Fazal Haq, is the territorial jurisdiction. The learned counsel was of the view that

the case should have been field at Mardan. I think he has misconceived the situation in that provisions of Section 16 to 20 of the Code of Civil Procedure have been excluded from the proceedings before family Court, meaning thereby, the question of territorial jurisdiction would never arise provided the family Court where the wife ordinarily resides shall have the exclusive jurisdiction over all such matters fall in the schedule. In other words, the Court within local limit of which the wife ordinarily resides alone had the exclusive jurisdiction to deal with all the matrimonial disputes as in the instant case and such being the position the objection of the learned counsel for petitioner in the connected writ petition dashed to the ground.

11. In view of the above, the writ petition bearing No. 4515-P/2015 titled Mst. Zeenat Bibi vs. Fazal Haq is allowed, the impugned judgment is set aside and since the learned appellate forum has not decided the matter on merits, therefore, the case is remitted to the court of learned Additional District Judge-III, Nowshera, with the direction to decide it alongwith the applications in light of the evidence available on record.

The writ petition bearing No. 3518-P/2016 in the light of above discussion is dispose of accordingly.

The parties are directed to appear before the learned appellate Court on 11.2.2017.

Announced.
Dt. 20.1.2017.

J U D G E

M.ZafraI