

JUDGMENT SHEET
PESHAWAR HIGH COURT, PESHAWAR
JUDICIAL DEPARTMENT

W.P No.1795-P/2018

JUDGMENT

Date of hearing.....28.05-2018.....

Petitioner: (Muhammad Ashar Malik and another) By Mr.
Abdur Rauf Rohaila, Advocate.

Respondents: (Sana Ashar) By M/s. Atif Ali Khan and
Syed Ibrahim Advocates.

QALANDAR ALI KHAN, J.- Muhammad Ashar

Malik and his mother Muqadas Firdous, petitioners,
invoked the constitutional jurisdiction of this Court
under Article 199 of the Constitution of the Islamic
Republic of Pakistan, 1973, with the following
prayers:-

“I. *That the Judge Family Court, Peshawar has no jurisdiction to entertain any application/petition concerning the custody of two minor daughters, Innaya Durkhannai and Innan Gulalalai, born on 19.01.2014 and 03.10.2015 in Karachi and permanently residing therein and cognizance assumed in respect of custody of minors is patently illegal.*

II. That the jurisdiction assumed and cognizance taken by the learned Family Court Peshawar relating to custody of minors having permanent abode at Karachi is unlawful and orders dated 22.11.2017 and handing interim custody through order dated 24.03.2018 have been passed without appreciating of law, in excess of jurisdiction, without lawful authority and liable to be declared unlawful.

III. That the learned trial Court/Judge Family Court is bound to pass speaking orders on all misc. applications pending before her including that of appointment of Medical Board and custody/interim custody of minors and refusal thereof is illegal.

IV. Any other appropriate remedy not specifically mentioned may also be granted.”

2. The facts forming background of the instant writ petition, briefly stated, are that petitioner No.1, Muhammad Ashar Malik (hereinafter referred to as the petitioner), and respondent No.1, Sana Ashar (hereinafter referred to as the respondent), were married to each other on 11.03.2013, where-after they started residing in Karachi and out of the wedlock two daughters, Innaya Durkhannai and Innan Gulalalai were born on 19.01.2014 and 03.10.2015, respectively;

but, there-after, their relations became strained to the extent that the marriage was dissolved on the basis of *Khula* in May, 2017, and respondent No.1/wife left Karachi for Peshawar, without the said two daughters; and served legal notice on 03.08.2017, and also filed suit No.62/FC before the learned Judge Family Court, Peshawar, on 11.09.2017 for custody of minors, recovery of dower, dowry articles and personal belongings. According to the petitioner, the daughters were born and residing in Karachi, therefore, the jurisdiction and prayer made in the plaint relating to the custody of minors was strongly objected to by the petitioner under the relevant provisions of Guardian and Wards Act, 1890, Family Court Act, 1964 and the schedule attached thereto, and Family Courts Rules, 1965. During Court proceedings an oral objection was raised to the jurisdiction of the Judge, Family Court, Peshawar, in respect of custody of minors, which was resolved by the learned Judge, Family Court, Peshawar, vide order sheet dated 22.11.2017 in favour of the Family Court in Peshawar having jurisdiction to

entertain the matter of custody of the minors. Another application for interim custody of minors was also moved which was replied to by the petitioner, wherein, objection with regard to jurisdiction was again raised by him in his reply to the application; but the learned trial Court directed the petitioner to hand over interim custody of the minors to the respondent/plaintiff vide order dated 24.03.2018; hence this writ petition against both the orders dated 22.11.2017 and 24.03.2018 of the learned trial Court on several legal and factual grounds mentioned in the writ petition.

3. In response to pre-admission notice, the respondent appeared alongwith her counsel; and arguments of learned counsel for the petitioner as well as learned counsel for the respondent heard, and record gone through with their valuable assistance.

4. As gleaned from pleading of the parties and the record made available, so far, in the learned trial Court/Judge, Family Court, Peshawar, there are certain admitted facts, which need not be opened for discussion for a decision in the instant writ petition.

The *Nikah Nama* and the marriage registration certificate showed the petitioner/husband a resident of House No.119, Street No.8, Sector J-1, Phase-II, Hayatabad, Peshawar, and the respondent/wife a resident of House No.132, Street No.2, Shami Road, Peshawar Cantt. The plaint in the Family case by the respondent/wife in suit for custody of minors, recovery of dower, dowry articles and personal belongings shows that after marriage, the spouses moved to Karachi, and two daughters were born out of the wedlock, however, during that period relations between them became strained, ending in the divorce of respondent/wife by the petitioner/husband in May, 2017, where-after the respondent/wife returned to the house of her parents in Peshawar.

5. However, the petitioner raised objection to the jurisdiction of Family Court at Peshawar to entertain and adjudicate upon suit of the respondent/wife for custody of minors on the ground that both the spouses last resided in Karachi, where the petitioner was permanently residing alongwith the two minor

daughters. It may, however, be pointed out that despite his claim of a permanent resident of Karachi, nothing was brought on the available record to suggest that the petitioner had abandoned his permanent abode at Peshawar for good and permanently settled in Karachi. Anyhow, on the grounds of ordinary residence of the minors at Karachi and also the fact that the spouses last resided together in Karachi, under section 9 of the Guardians and Wards Act, 1890, and Rule 6 of the West Pakistan Family Courts Rules, 1965, respectively, the petitioner raised objection to the jurisdiction of the Family Court at Peshawar to entertain suit for custody of the minors. In order to augment his objection to the jurisdiction of the Family Court at Peshawar, the learned counsel for the petitioner extensively referred to two judgments of the august apex Court reported as **2001 SCMR 2000 and PLD 2012 SC 66**.

6. It may, however, be observed, at the outset, that in the subsequent judgment of the august apex Court reported as **PLD 2012 Supreme Court 66**, it was held

that for the purposes of determining territorial jurisdiction of Family Court, it was the West Pakistan Family Courts Act, 1964, and rules framed thereunder, which were to be taken into account and not the provision of section 25 of the Guardians and Wards Act, 1890. In the West Pakistan Family Courts Act, 1964, section 5 provides that *“The Family Courts shall have exclusive jurisdiction to entertain, hear and adjudicate upon matters specified in part-1 of the schedule”*, which *inter alia* include custody of children and the visitation rights of parents to meet them as item No.5. The West Pakistan Family Courts Rules, 1965, also makes a provision in respect of jurisdiction of Family Court in Rule 6, laying down that:-

“the Court which shall have jurisdiction to try a suit will be that within the local limits of which:

- (a) the cause of action wholly or in part has arisen, or*
- (b) where the parties reside or last resided together:”*

Provided that in suits for dissolution of marriage or dower, the Court within the local limits of which the

wife ordinarily resides shall also have jurisdiction.”

7. The Ord: LV of 2002 dated 01.10.2002, whereby second proviso was added to section 7 (2) of the West Pakistan Family Courts Act, 1964, introduced the concept of composite suit/plaint by making the provision that:-

“the plaint for dissolution of marriage may contain all claims relating to dowry, maintenance, dower, personal property and belongings of wife, custody of children and visitation rights of parents to meet their children”.

8. Since in the instant case, the plaint did not include prayer for dissolution of marriage; and, instead, the suit was lodged by the respondent/wife for custody of minors, recovery of dower, dowry articles and personal belongings, a question was bound to arise that whether plaint in the instant case would also be covered by the second proviso to section 7 (2) of the West Pakistan Family Court Act, 1964; and, as such, proviso to rule 6 of the West Pakistan Family Courts Rules, 1965, would come to the rescue of the

respondent/wife in the matter of jurisdiction of Family Court at Peshawar to entertain, hear and adjudicate upon suit of the respondent/wife also for custody of the minors. The answer to this question has elaborately been provided in **PLD 2012 Supreme Court 66 (d)**, laying down that jurisdiction would also rest:-

“as per proviso to rule 6 of West Pakistan Family Court Rules, 1965 in a suit for dissolution of marriage or dower where the wife ordinarily resided. And in view of the addition of proviso to section 7(2) of the Act 1964, which was introduced on 1-10-2002 if in a suit for the dissolution of marriage join other causes of action mentioned in the said proviso, such suit shall also fall in the last category, otherwise not”.

The question whether in a plaint other than for dissolution of marriage a prayer can also be made for custody of children, has been further resolved by judgments reported as **PLD 2009 Lahore 484 and 2009 CLC 905 (Lahore)**.

9. Undoubtedly, the respondent/wife ordinarily resides at Peshawar, rather both the parties have their permanent residences at Peshawar, where their

marriage also took place. Therefore, the Family Court at Peshawar has the jurisdiction to entertain, hear and adjudicate upon the suit of the respondent/wife for dower etc including custody of minors in the light of above referred provisions of law and judgments of the august Superior Courts.

10. During their arguments, the learned counsel for the parties focused on the issue and order of the learned Judge, Family Court, with regard to the question of jurisdiction, and no other point was urged, neither the issue of interim custody of the minors was raised for detailed discussion, having been overshadowed by the issue of jurisdiction. Having said that, the writ petition is dismissed, for being devoid of merit.

Announced
28.05.2018

J U D G E

(S.B) Hon'ble Mr. Justice Qalandar Ali Khan.

M.Iqbal