



Family Courts in Pakistan: Evaluating Jurisdictions and Powers

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Abstract

Family law in Pakistan underwent a fundamental change when the Family Courts Act, 1964 was enacted and family matters were entrusted to family courts instead of ordinary civil courts. Since then the family courts have been administering family law to provide 'better remedies' to women and children. This paper aims to highlight the objectives of enacting Family Courts Act 1964 and how does it regulate its own proceedings under the judicial structure. It is significant to examine that the provisions of (Civil Procedure Code, 1908) CPC are generally not applicable to the trials before family courts, however usually proceedings are more or less the same; yet, family courts have special powers to discover the possibilities of amicable settlement of family disputes. This paper investigates various procedures in several family issues like a suit for maintenance, dissolution of marriage, a suit for dower and other dowry articles, inheritance and custody of children.

It also interrogates that how far the objectives of the said law are achieved and stresses that the milieu of the courts should also be affable for the visit of the child in the best interest and welfare of children and women.

Keywords:

Family Law, Woman, Family Courts, Child, Right, Judicial System, Pakistan.



I. Introduction:

With the enactment of Family Courts Act, 1964, fundamental changes have been made in family law of Pakistan. Every litigant of family disputes as well as the advocate is well known about the facts that all marital issues and controversies were assigned to civil judges of an ordinary district courts instead of separate family courts. Years before another development has been made by the legislature to arrange a separate court in each district court for the best interest of families but in many areas still civil courts are dealing the marital disputes. Family courts deal with the dispute of spouses in several matters including validation of marriage, provision of dower, determining dower amount, woman's right to maintenance, divorce, khul', custody of a child and other marital disputes connected to marriage and divorce. Family courts work for the protection of the core objectives of establishment of such courts in provision of a speedy justice to women and children in their disputes. The fact is that family courts are still working under the aegis of district courts and purpose of enacting the law as well as establishment of the court is not fulfilled. Being in the profession I perceived the flaws of such courts particularly when children are visiting for meeting their parents after their separation, the strange milieu of the courts directly effects the personal development of the children. Family law is considered a personal law and it must be dealt personally and to be avoided its discussion publically as much as possible. The procedure of the family court is more flexible as compared to civil courts but there is a dire need to fulfill the objectives of the law in its true sense for the administration of justice.

II. The Nature of the Family Courts

In Pakistan, the family courts were constituted under the Family Courts Act, 1964 (FCA), which has changed the forum, altered the method of trial and empowered the court to grant "better remedies" to women and children. The government is empowered to establish one or more family courts in Federal area or each District and appoint a competent judge for each court. The Preamble to the FCA reads:

"Whereas it is expedient to make provision for the establishment of Family Courts for the expeditious settlement and disposal of disputes relating to marriage and family affairs and for matters connected therewith."¹

It is also pertinent to mention that at least one female judge is to be appointed in each district upon the request of government, federal or provincial. The government can appoint many female judges in consultation with the High Court if necessary.² With respect to qualifications of a family court judge; any person fulfills the criterion of a civil judge, district judge or additional district judge be appointed as family court judge.³ Beside from educational qualifications and competency, there is a dire need that a judge has to be a Muslim especially in marital disputes and controversies among the Muslim spouses.⁴ By virtue of section 4 of the FCA, district judges, additional district judges and civil judges may be appointed as judges of the family courts.

Further, by virtue of the Family Courts Rules, 1965, all the civil judges have been granted the same powers as the family court. Consequently, in every district, every civil judge is a judge of the family court by virtue of being a civil judge and

can hear and decide any family case entrusted to the civil judge by the senior civil judge or the district and sessions judge as the case may be. Today, there is no appointment of family court judges by the provincial government. Instead, district judges either appoint one or more courts to deal exclusively with family cases or the senior civil judge confers every civil judge in the district with family court jurisdiction.

In a Constitutional Petition before the Karachi High Court,⁵ it was suggested by the Court to the government of Sindh that the word “Civil Judge” in section 4 of the Family Court Act, 1964, includes 2nd Class as well as 3rd Class Judge, who serve as Family Judges. As Constitutional jurisdiction is invoked in large number of cases against the orders of Family Courts, therefore, such cases in the Family Court be dealt with by Senior and more experienced Judges as compared to the 2nd or 3rd Class Civil Judge and that the family case are most sensitive.⁶ However, neither the High Court nor the legislature has enforced this suggestion and family cases are being heard by all categories of civil judges. Further, if this advice was taken it would create administrative problems for implementing section 3 of the FCA with respect to appointing women as family court judges. This is because it will be many years before new female recruits to the judiciary obtain the rank of Civil Judges of the First Class. The provisions of the Family Courts Act make it clear that the intention of the law is to set up courts and entrust matters to them in their capacity as courts and not as *persona designata*. A family Court is, therefore, a court of law as contemplated in Article 102 and Article 242 of the Constitution of 1962.⁷

The provisions of the CPC and the Qanun-e-Shahadat Order, 1984(QSO), do not apply to the family courts under section 17 of the FCA to proceeding before the Family Courts, which allows them to decide matters expeditiously and avoid technicalities.⁸ Although family courts are civil courts and disputes before them are civil disputes.⁹ Actually the exclusion of the provisions of CPC and QSO would not make any change to the character of the Family Court as civil court. Family Courts are special courts and can regulate themselves through procedure laid down in the Family Courts Act, 1964, which deviates from the procedure prescribed by CPC and QSO.

However, family courts have to deal with matters related to guardianship under the Guardian and Wards Act, 1890, which may call for them to follow the provisions of the CPC which would ultimately defeat section 17 of the FCA. To tackle this situation, the Lahore High Court has held that this situation cannot be so interpreted as to bring the CPC again, through a back door, to take its old place in guardianship proceedings. This will amount to repealing section 17 of the FCA.¹⁰ If the same judge is exercising the powers of both the family Court and Civil Court, the case filed before judge by the civil court should have been treated as one filed in the family court and the case should have proceeded accordingly.¹¹

III. Jurisdiction of the Family Courts in Pakistan

The jurisdiction of family court in several disputes between families is prescribed under Part I of the Schedule and is subject to provisions of Muslim Family Law Ordinance 1961 (MFLO) and Conciliation Courts Ordinance 1961 (CCO). The High Court with the approval of government can amend, change, repeal or come

with an alternate of any provision in the Schedule.¹² In the Schedule of family court Act the exclusive jurisdiction of the Family Court is mentioned in following matters:

- a) Dissolution of marriage including *Khula*
- b) Dower
- c) Maintenance
- d) Restitution of conjugal rights
- e) Custody of children and the visitation rights of parents to meet them
- f) Jactitation of marriage
- g) Dowry
- h) Personal property and belongings of wife
- i) Guardianship
- j) The personal property and belongings of a wife and a child living with his mother.
- k) Any other matter arising out of *Nikahnama*.
- l) Offences specified in Part II of the Schedule, where one of the spouses is victim of an offence committed by the other.¹³

With regard to the jurisdiction of family court, the High Court of Peshawar stated that It is abundantly and unequivocally clear that section 5 of family Court Act 1964 conferred exclusive jurisdiction on family court to entertain, hear and adjudicate upon the matter specified in Part-I of the Schedule to the Act. It may be pertinent to refer here that if the original Act 1964 is examined, the same provides nine items, already mentioned above. An amendment has been brought in Section 7 of the Family Courts Act 1964, whereby a proviso is added in its sub-section (2) which reads as under:

“Provided that a plaint for dissolution of marriage may contain all claims relating to dowry, maintenance, dower, personal property and belonging of wife, custody of children and visitation rights of parents to meet their children.”¹⁴

Beside this, the court further elaborates the territorial jurisdiction of Family Court, in the light of Rule 6 of West Pakistan Family Court Rules 1965 and section 5, and 7 (2) of the Family Court Act 1964 along with Part-I of the Schedule of the Act, It is crystal clear that there are three factual eventualities which are relevant or the purpose of determination of “territorial jurisdiction” of family court. Firstly, where the cause of action wholly or in part arisen. Secondly, where the parties resides or last resided. Thirdly, suit for dissolution of marriage or dower filed within the local limit where wife ordinarily resides.¹⁵ Family Courts have unlimited pecuniary jurisdiction. They are not ordinary courts whose jurisdiction is limited by the West Pakistan Civil Court Ordinance 1962.¹⁶

The place of sitting of family court can be any place within the district or within the area for which it is established and it is not necessary for the court to sit at the district headquarter only. When a plaint is presented to a court having no jurisdiction, it is to be returned to be presented to competent court and the court returning the plaint shall endorse upon it the date of its presentation and its return along-with the name of the party presenting it and a brief statement of the reasons for returning.¹⁷ The court in whose local limits cause of action arose either wholly

or partially or where the parties reside or last resided together has the jurisdiction to hear the suit.¹⁸ However, in cases of dissolution of marriage and dower the court within the local limits of which the wife ordinarily resides has the jurisdiction.

IV. Powers of Family Courts in Pakistan

Apart from jurisdiction of the Family Court, it also has several powers as mentioned below:

1. It has some powers of a Judicial Magistrate of 1st Class.¹⁹
2. Family Court may pass an interim order to preserve and protect any property in dispute.²⁰
3. Family court is deemed to be a District court for the purposes of Guardian and Wards Act, 1890.²¹
4. In case the plaintiff or his pleader makes default in appearing before the court, the suit may be dismissed in default,²² which may be restored upon application with sufficient grounds within 30 days of the dismissal in default.²³
5. Family court can also allow the inspection of records upon application of any party, on payment of prescribed fee.²⁴
6. Family court can also issue commission to;
 - a) Examine any person
 - b) Make a local investigation
 - c) Inspect any person
 - d) Inspect any document²⁵

V. Procedure in Family Courts:

The procedure that has to be followed in family issues, controversies, disputes by a Family Court from instituting a suit till issuing a decree is as under:

First, the plaint has to be presented before the family Court. The plaint is to contain all material facts, give number of witnesses intended to be produced in support, the names and addresses of witnesses and brief summary of the facts, which such witnesses will depose.²⁶ If the plaint is for dissolution of marriage, it also 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.²⁷

The plaintiff has to rely upon a document that is in his possession and could be produced in the court when the plaint is presented. He can also rely on a document which is not in his possession or power due to some genuine reasons; he can enter such relevant documents in a list to be appended to the plaint by mentioning reasons of relevancy of the document.²⁸ It is mandatory for the plaintiff to accompany as many duplicate copies of plaint and documents as there are defendants in the suit for service upon the defendants.²⁹ When the plaint has presented before the court, there is a duty of the court to fix a date of the case not exceeding fifteen days for the appearance of the defendant.³⁰ For the purpose of speedy court system an amendment made in section 7 (5) as to read:

“A Family Court shall conduct hearing of the suits as expeditiously as possible and shall not adjourn hearing for a period exceeding 7 days and shall dispose off the suit with in a

period of 120 days from the date fix by the court for the appearance of the defendant.”³¹

The court issues summons to the defendant and within 3 days of the presentation of plaintiff and send a notice to each defendant through registered post, acknowledgement due or any other mode like courier, registry etc. with a copy of plaintiff and other relevant documents to be attached.³² Another copy of notice shall be sent to the Chairman of the union council within whose jurisdiction the defendant reside. The expenses of such service are to be borne by the plaintiff. ³³ The manner of service of summons is the same as provided under CPC 1908. ³⁴

Both parties have to appear on the fixed date before the court and defendant has to file written statement as well along-with list of witnesses with precise evidence of each witness. The copies of all such documents with written statement shall be handed over to plaintiff or his agent or advocate. If a defendant did not appear in the court on the date fixed, the court has to explore, whether summons were duly served or not? In the first case, court may proceed ex-parte and in the latter case, it shall issue a fresh summon and notice. However, where court adjourns the hearing of the suit ex-parte, and on next hearing if defendant appears at such new date with good and reasonable cause for non-appearance, the court has power to allow him to answer, upon such terms as the court deems fit.³⁵

The court has the power to direct whole or any part of the proceedings under it to be held in camera. This may also be done upon request of both parties.³⁶ If family court passed ex parte decree in any case against a defendant under the Family Court Act, 1964 ex parte, he may apply through application in writing within 30 days of the notice of decree to family court to set aside the order, with sufficient and reasonable cause for non-appearing and in such a case, upon satisfaction, the family court may set aside the decree and fix a new date of hearing on such terms as to costs as it deems fit.³⁷ After filing a written statement, the court fixes a date as early for a pretrial hearing of the case on such date. It also examines the plaintiff and written statement and evidences filed by both parties. It ascertains the points at issue and attempt to affect a compromise or reconciliation between the parties. In case no reconciliation is possible, the court frames the issues and fixes a date for hearing and recording of evidence.³⁸

The court examines the witnesses and these witnesses give their evidences in their own words on a date fixed for recording evidence, however, further examination, cross examination and reexamination is allowed. Family court also has power to forbid any indecent, scandalous or frivolous question and may also ask any question from the witness to further elaborate his point. Court also has power to take evidence in shape of affidavit. Family court may issue summons to witnesses.³⁹ The evidence shall be taken down in writing in shape of affidavit in the language of the court by the Presiding Officer of the court either by himself or in his presence; this shall also be signed by such officer. If it is written in his presence, he shall make a note to that effect and state the reasons for doing so. In case the evidence is taken in English, the court will note down in that language unless the parties request it to be written in other language, and in that case an authenticated translation of such evidence in the language of the court shall form the part of the court record. The presiding officer also has the power to make a

memorandum of the substance of the evidence given by the witness in case evidence is not taken down verbatim, but in such case the presiding officer is bound to write the memorandum in his own hand and sign the same. After recording of evidence it is mandatory to read over the same to the witness and if necessary corrections can be made accordingly.⁴⁰ In case of corrections, the presiding officer has to make a memorandum in this regard and write down the objections along-with his remarks.⁴¹

The court will hear the counsels and make another effort to affect a compromise between the parties after closure of evidence, if no such conciliation is possible, it shall announce its judgment and give a decree accordingly.⁴² Every judgment or order by family court is to be written by the presiding officer or from the dictation of such officer either in English or in language of the court. It is to be dated and signed by the judge and delivered in open court. This order contains the reasons for the decision and the points which court had to decide.⁴³ On passing the judgment a decree is to be drawn up in Form I and is to be signed by the judge. It shall also bear the seal of the court.⁴⁴ It is also the duty of the court to maintain a register of decrees and orders under the Code of Civil Procedure 1908.⁴⁵

The court is bound to dispose of the case within six months from the date of institution. If case is not concluded within the prescribed period, any party can make an application to the High Court for necessary direction in this regard.⁴⁶ After passing decree, family court enters its particulars in prescribed register. It can also record any money or property paid or handed over in its presence and in case nothing is paid within the time specified by it, the same can be recovered as arrears of land revenue. Court also has power to direct the payment of money into installments. Each decree is to be executed by the same court which passed it or any civil court as the district judge may direct. It should be noted that in case of execution of any decree by the family court, it would act a civil court, having all the powers or execution of a civil court.⁴⁷

A decision given or decree passed by a family Court shall be appealable to Appeal the High Court where family court is presided over by a district judge or additional district judge and to district judge. In following cases no right of appeal is given from a decree passed by a Family Court:-

- (a) Dissolution of marriage, except the reasons mentioned in section 2 (d) and (viii) of DMMA 1939.
- (b) Dower or dowry not exceeding Rs. 10,000/-
- (c) Maintenance not exceeding Rs. 1000/- or less per month.⁴⁸

As mentioned above that an appeal under section 14 against the decree or decision passed by the Family Court shall be preferred to the High Court within 30 days of the passing of the decree or decision and the time period may be extended for sufficient cause by the High Court.⁴⁹ The appeal is to be in writing and state the grounds on which decree or order is challenged and it contains the name of parties, their description and addresses along with signatures of appellant or his counsel.⁵⁰ It is also necessary to attach certified copies of decree of order as the case may be.⁵¹ The Appellate court has to dispose of the appeal of family disputes within a period of four months.⁵² There is no right of appeal or revision against an interim order passed by a family court.⁵³ And there is no scope for review or

revision against the order of family court.⁵⁴ It must be noted that no 2nd appeal is allowed⁵⁵ and only in extraordinary circumstances writ petition can be filed.

The High Court or the District Court as the case may be can transfer the cases either via *suo moto* or on the application of any party by an order in writing. It is not necessary to commence the proceedings before the succeeding judge *de novo* unless the judge for reasons to be recorded in writing directs otherwise.⁵⁶ Nevertheless, as it is stated earlier that family courts have been created as special courts for deciding the matters mentioned in West Pakistan Family Courts Act 1964. The provisions of CPC 1908 and QSO 1984 are generally not applicable except section 10 and 11 of CPC⁵⁷ to the trials before such courts in order to avoid technicalities and these courts are flexible and free to adopt their own procedure for the administration of justice. These courts are given a real inquisitorial jurisdiction by introducing a special procedure including an obligation to discover the possibilities of amicable settlement. In short one can say that FCA 1964 has changed the forum, altered the method of trial and has empowered the family court to grant better remedies to the litigants especially women and children .

VI. Conclusion:

Pakistani Judicial system is structured in British colonial period with minor changes here and there. Judiciary started working in their respective premises of Pakistan including all the provinces and federal courts were established in 1949. The present court system is divided into three; constitutional courts, district courts and administrative tribunals and special courts. Family courts work under the shadow of district courts, although, it is established under separate Family Court Act, 1964 and continued working under Family Court Rules, 1965. Family matters and disputes are dealt under the Family Courts Act, 1964 in the Family Courts of Pakistan in every district court. In family courts, marital disputes and controversies among the spouses are dealt such as validity of marriage, provision of dower, right to maintenance, separation, unilateral divorce, *khul'* and custody of a child. In Pakistani judicial system, establishment of family court is considered a fundamental change to resolve the personal disputes among the spouses. The foremost and essential purpose of the establishment of Family Courts in each district was to take care of the women and children by providing them justice immediately without any delay. I pose a question to conclude this paper how far the objective of the said law is achieved or not? I recommend that family courts should be established separately like other administrative tribunals and to be considered a special court. The environment of the courts should be segregated for the decorum of the families whose domestic disputes should not be exposed publically. It also emphasizes that the milieu of the courts should also be affable for the visit of the child for the best interest and welfare of children and women.



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