Judgment Sheet

IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

Writ Petition No.4265 of 2020.

Irfan Mohsin
Versus
Additional District and Sessions Judge & others

JUDGMENT

Date of hearing: 06.03.2024 & 12.03.2024.

Petitioner by: Mr. Ghulam Abbas, Advocate.

Respondents by: Mian Qamar Zaman Mahaar, Advocate.

Shujaat Ali Khan, J: - Through this single judgment, I intend to decide W.P. No. 4265 of 2020 **(this petition)** as well as W.P. No. 12666 of 2020 **(connected petition)** having commonality of law and facts.

2. Unnecessary details apart, the facts as gleaned out from these petitions are that Mst. Naeem Fatima **(hereinafter to be referred as respondent No.1)** and Mst. Qurat Ul Ain Fatima **(hereinafter to be referred as the minor)** filed a composite suit for recovery of their maintenance; recovery of dower amount worth Rs.100,000/- as per entry against column No.14 of Nikah Nama; recovery of Rs.100,000/- as per condition stipulated against column No.19 of Nikah Nama; recovery of

dowry articles worth Rs.200,000/- as per column No.16 of Nikah Nama and delivery charges of the minor worth Rs.50,000/-, against Irfan Mohsin **(hereinafter to be referred as the petitioner)**. The learned Judge Family Court, Depalpur **(learned trial Court)** *vide* judgment and decree, dated 17.05.2019, while dismissing the claim of respondent No.1 for recovery of delivery charges as well as her maintenance, declared her entitled to recover dower amount of Rs.100,000/- in addition to Rs.100,000/- in terms of condition mentioned against column No.19 of Nikah Nama and Rs.150,000/- as price of dowry articles. Further, the minor was held entitled to recover maintenance at the rate of Rs.8,000/- per month from the date of institution of suit till her legal entitlement with 10% annual increase. Aggrieved of the judgment and decree of learned trial Court, the petitioner filed an appeal and the learned Additional District Judge, Depalpur **(learned appellate Court)** *vide* judgment and decree, dated 02.11.2019, while reversing the findings of learned trial Court to the extent of recovery of Rs.100,000/- as per condition mentioned against column No.19 of Nikah Nama, reduced the quantum of maintenance of the minor from Rs.8,000/- to Rs.6,000/- per month and upheld rest of the findings of learned trial Court. Aggrieved of judgments and decrees of learned trial Court as well as learned appellate

Court the petitioner has filed this petition whereas through the connected petition, respondent No.1 has assailed the *vires* of judgment & decree of learned appellate Court.

3. The submissions made by Mr. Ghulam Abbas, Advocate, representing the petitioner, can be summed up in the words that since it was second marriage of respondent No.1 with the petitioner, no dowry articles were given at the time of her marriage; that though in her plaint, respondent No.1 averred that her father, being an agriculturist, was enjoying sound financial position at the time of her marriage but she did not produce any document in that regard, thus, her stance remained unproved; that credibility of the witnesses, produced by respondent No.1, stands shattered from the fact that they claimed that at the time of marriage respondent No.1 was bachelor but as a matter of fact she was divorcee; that since the couple did not shift to the house of the petitioner rather they celebrated first night of their wedding in the house of paternal uncle of the petitioner, no dowry articles were given to respondent No.1 at the time of her marriage; that both the Courts below have relied upon the entries against column No.16 of Nikah Nama to believe that the dowry articles were given to respondent No.1 but said column is meant for anything which is given in the shape of land etc. in lieu of dower in addition to

cash, hence contents of said column were erroneously relied upon by the courts below; that as a matter of fact at the time of marriage, all columns of Nikah Nama were not filled in rather the Nikah Khawan/Registrar got signed and thumb marked the same with blank columns and later on, he, in connivance with the parents of bride, introduced certain conditions which were never settled between the parties; that *malafide* on the part of Nikah Khawan/Registrar is evident from the fact that during evidence he stated in clear-cut words that his licence was never cancelled but the documents produced by the petitioner speak otherwise; that Nikah Khawan/Registrar was summoned by the Court (who was wrongly marked as DW-3 instead of CW) but respondent No.1 did not cross-examine him to unveil the truth simply for the reason that she, being beneficiary of interpolation in the Nikah Nama, was not ready to unearth the truth; that admission on the part of the Nikah Khawan/Registrar that Nikah Nama was deposited with the Secretary Union Council after seventeen days of marriage stands proof of the fact that he tinkered with entries of Nikah Nama from the date of marriage till deposit of the same in the Union Council; that *bona fide* of the petitioner is evinced from the fact that he filed application before the trial court for summoning of the Secretary Union Council as witness but the same was dismissed by learned trial

Court on the ground that after recording statement of Nikah Khawan/Registrar, there was no need for examination of the Secretary Union Council concerned; that since the petitioner has been paying maintenance of the minor without any fail, no ill-will can be attributed to him and that the petitioner is ready to continue payment of maintenance of the minor as per judgment and decree of the learned appellate Court.

4. Conversely, learned counsel appearing on behalf of the respondents, while opposing the submissions made by learned counsel for the petitioner, states that since it was mentioned against column No.16 of *Nikah Nama* that dowry articles worth Rs.2,00,000/- were given to respondent No.1, the petitioner being signatory of said document, could not escape his liability to return the same or to pay its alternate price to respondent No.1; that there is no material difference in entries of *Nikah Namas*, referred by learned counsel for the petitioner, thus, the same cannot be used to the dis-interest of respondent No.1; that when the petitioner himself admitted in evidence that father of respondent No.1 was an agriculturalist by profession, it did not lie in his mouth to claim that her parents did not enjoy sound financial position at the time of marriage; that on the one hand stance of the petitioner is that no dowry articles were given to respondent No.1 but on the other, during cross-examine, he

while taking U-turn stated that the dowry articles, given by the parents of respondent No.1, were returned to her; that the petitioner, being owner of about 800-kanals of land, can afford maintenance of the minor at much higher rate as decreed by learned appellate Court; that since the petitioner was dealt with leniently by the learned trial Court, no further leniency can be shown by this Court in exercise of its constitutional jurisdiction vested under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973; that the petitioner is maintaining children from his first wife in a proper manner and the respondents would be satisfied if similar treatment is given to the minor; that the petitioner while appearing as DW-1 admitted that he put his signatures on the *Nikah Nama* in English, thus, it cannot be believed that such literate person signed the same without entries against all columns of *Nikah Nama*; that a cursory glance over the *Nikah Nama*, referred by learned counsel for the petitioner, shows that nowhere respondent No.1 claimed herself to be a bachelor rather she was mentioned as divorcee in the *Nikah Nama*, thus, the petitioner cannot take premium of any minor discrepancy in the statements of the PWs; that *mala fide* on the part of the petitioner is established from the fact that certain amount on account of maintenance of the minor is due against him and that the quantum of

maintenance fixed by learned appellate Court is hardly sufficient to meet with the expenses of the minor especially her educational expenditures.

5. While exercising his right of rebuttal, learned counsel for the petitioner submits that the intention of the petitioner to produce various copies of *Nikah Nama* is to establish that not only the names of the witnesses were different on all of them but also entries of said *Nikah Namas* were not filled in at the time of marriage rather the same were filled in by the *Nikah Khawan*/Registrar at some subsequent stage in connivance with parents of respondent No.1 and that stance of respondent No.1 that her parents enjoyed sound financial status stands negated from her plea that now-a-days she is earning her bread and butter by working as housemaid in Lahore city inasmuch as according to custom in the locality where the parties are residing, if any daughter is divorced/deserted by her husband, her parents or brothers use to maintain her.

6. I have heard learned counsel for the parties at considerable length and have also gone through the documents, annexed with this petition.

7. Firstly, taking up the question as to whether dowry articles were given to respondent No.1 or not, I have noted that

though in the written statement the petitioner claimed that since it was second marriage of respondent No.1, no dowry articles were given but said stance of petitioner stands negated from the following portion from his affidavit-in-evidence (Exh.D-1):

مدعاعلیہ کی عدم موجودگی میں مدعیہ کے رشتہ داران، بھائی اور والدین مدعاعلیہ کے گھر سے تمام گھریلو سامان چوری کر کے لے گئے۔

Further, with a view to improve his case, the petitioner during his cross-examination introduced a new story that the dowry articles given to respondent No.1 were taken back by her parents. In this regard, following portion from the statement of petitioner can be referred with convenience:-

یہ درست ہے کہ میرے پاس سامان اٹھانے کی بابت کوئی تحریری ثبوت نہ ہے۔ از خود کہا کہ میں اس وقت گھر نہ تھا جب سامان اٹھایا گیا۔

Moreover, Ghulam Nabi (DW-2) in his affidavit-in-evidence (Ex.D-2) averred as under:

مدعاعلیہ کی عدم موجودگی میں مدعیہ، والد مدعیہ و دیگران نے مدعاعلیہ کے گھر سے تمام گھریلو سامان چوری کر لیا اور اپنے جرم پر پردہ ڈالنے کیلئے دعوٰی عنوان بالا دائر کر دیا۔

However, the said witness during his cross examination, while responding to a question relating to return of dowry articles stated as under: -

سامان جہیز میری موجودگی میں مدعیہ کے والدین اُٹھا کے لے گئے تھے۔ سامان جہیز اُٹھانے کی بابت میرے پاس کوئی تحریری ثبوت نہ ہے۔

A conjunctive reading of the afore-quoted portions from the statements of DW-1 and DW-2 renders its crystal clear that dowry articles were given to respondent No.1 notwithstanding the entry against column No.16 of *Nikah Nama*.

8. I am in agreement with the learned counsel for the petitioner that Column No.16 of *Nikah Nama* is meant for mentioning of anything which is given to a bride as part of dower in addition to cash in terms of Column No.13 of *Nikah Nama* but when the petitioner himself admitted that dowry articles, given to respondent No.1, were either stolen by her parents or they received the same back, adverse opinion cannot be formed against respondent No.1 simply for the reason that factum of dowry articles was mentioned against an irrelevant column of Nikah Nama.

9. According to section 6(2A) of the Muslim Family Laws Ordinance, 1961, the Nikah Registrar or the person who solemnizes a Nikah shall accurately fill all the columns of the nikahnama form with specific answers of the bride or the bridegroom. Moreover, according to section 5(5) of the said Ordinance, the form of nikahnama, the registers to be maintained by Nikah Registrars, the records to be preserved by Union Councils, the manner in which marriages shall be registered and copies of nikahnama shall be supplied to the

parties, and the fees to be charged therefor, shall be such as may be prescribed. If Nikah Khawan/Registrar fails to perform his duties diligently instead of taking any action against any party, Nikah Khawan/Registrar should be held accountable as held by this court in the case reported as *Shah Din and others v. The State* (**PLD 1984 LHR 137**) relevant part whereof reads as under:-

> *"7. I feel here mentioning an important point having far reaching consequences. The incidents giving rise to proceedings like the one in hand can be greatly reduced if the Nikah Registrars appointed under the Muslim Family Laws Ordinance, 1961, instead of simply filling the various columns of the Nikahnama, in routine, realize that the duty that they are required to perform is very sacred because rights to succession, maintenance, dower, divorce, legitimacy of children and several other rights flow from a valid marriage. As public servants which essentially they are, they should demonstrate more sense of responsibility before authenticating the Nikah by making proper enquiries as to the competency of the parties to understand the nature of their act, their ages and whether or not they are so acting of their free will and without any compulsion.*
>
> *In our society, the girl is normally given in marriage by her parents and in their absence by the nearest blood relation and that too mostly at her ordinary place of residence. If this solemn ceremony is performed by the persons not answering the above description and at a place other than the ordinary place of residence of the girl in closed doors under mysterious circumstances a heavy duty is cast on the Nikah Registrars to thoroughly confirm and probe into the circumstance under which the marriage is being solemnized before authenticating the same. If they fail, they can, to a grant (sic) extent, be held responsible for the complications that follow in addition, to running the risk of being involved in litigation, both civil and criminal."*

Further, this Court, while highlighting the violation of the SOPs/Policy issued by the Director General, Local Government and its repercussions *inter alia* observed as under:-

> *"5. It may further be appropriate to observe that although in compliance with the above noted directions issued by this Court, the Directorate General LG&CD Punjab, Lahore has issued SOPs vide Notification No.LG&CD/AD(CD)47/2020/Court Cases, dated 27.08.2020, but still the violations of the above noted provisions, directions and SOPs are being made by the Nikah Khawan/Nikah Registrars and others. The Nikah Registrars instead of filling in, each column of the Nikahnama with specific reply/answer of the parties to the marriage, are still continuing with their practice of placing single vertical line against all or more than one column or leaving the columns blank in the Nikah Nama, rendering themselves liable for initiation of proceedings against them under the law. After perusing the Nikah-nama (Annexure-A) appended with the file, it evinces that against most of the columns of the Nikahnama, the Nikah Registrar has opted to place single vertical line and had also left some of the columns blank. He has not accurately fill in the same with requisite/specific reply of bride or the bridegroom, which is clear-cut violation of the aforesaid directions issued by this Court and the SOPs issued by the Directorate General LG and CD Punjab, Lahore. Therefore, the matter is referred to the Chief Officer, Burewala, District Vehari for initiation of penal proceedings against the Nikah Registrar/ delinquent, after affording an opportunity of hearing to him and report thereof shall reach to this Court through D.R Judicial within a period of one month, after receipt of copy of this order."*

Though, the direction/observation of this Court does not admit any kind of ambiguity but even then public-at-large is facing unnecessary litigation on account of inefficiency on the part of

the *Nikah Khawan/Registrar* towards completion of entries in Nikah Nama inviting stern action against the hoodlums.

10. Now coming to the plea of the petitioner that since certain conditions, which were not settled between the parties, were incorporated by the *Nikah Khawan/Registrar* in *Nikah Nama*, I am of the opinion that if the petitioner was of the view that the *Nikah Khawan/Registrar* mentioned un-settled conditions in the *Nikah Nama*, he could conveniently approach the Deputy Commissioner or the authorities of the Local Government concerned for rectification in addition to putting the criminal machinery in motion by filing a complaint before the relevant authority as a *Nikah Khawan/Registrar* falls within the definition of *'public servant'* in terms of section 21 of Pakistan Penal Code. Though learned counsel for the petitioner addressed the Court at certain length but has not referred to any material to show that the petitioner challenged the entries of Nikah Nama before relevant forum, thus he cannot take premium of inaction on his part.

11. Now the next question which boils down for determination by this Court as to whether dowry articles given to respondent No.1 were returned to her by the petitioner or not. Initially, the onus to prove that dowry articles were given to her was on the shoulders of respondents No.1 but when DW-1 and

DW-2 stated that dowry articles, given to respondent No.1, were either stolen or received back by her parents, it was responsibility of the petitioner to prove that dowry articles given to respondent No.1 were returned. While replying to a question as to whether they were equipped with any proof relating to return of dowry articles, DW-1 and DW-2 answered in negative. It is well settled by now that if an oral assertion of a witness is not corroborated by relevant document, it is not safe to rely upon such oral assertion while deciding *lis* between the parties.

12. It is important to mention over here that while entering in witness box as DW-1, the petitioner, during cross-examination, admitted that Muhammad Khan, father of respondent No.1, was an agriculturist by profession. According to the custom prevalent in our society, families having agriculturist background, use to give dowry articles to their daughters at the time of marriage irrespective of the fact as to whether it was her first or second marriage. Further, learned counsel for the petitioner has not been able to convince this Court as to why dowry articles were not given to respondent No.1 rather his stance was that as first wedding night was solemnized in the house of paternal uncle of the petitioner, no dowry articles were given at the time of marriage. In this regard, I do not see eye-

to-eye with learned counsel for the petitioner for the reason that according to own showing of the petitioner he had earlier marriage, thus, spending of first night of marriage in the house of his paternal uncle is understandable, thus, said fact cannot be used to believe that dowry articles were not given to respondent No.1.

13. Now coming to the question regarding the quantum of dowry articles, this Court is of the view that as father of respondent No.1 was owner of reasonable chunk of land at the time of marriage between the parties, it cannot be believed that he was not in a position to give dowry articles worth Rs.2,00,000/- to his daughter. It has also not specifically been denied by learned counsel for the petitioner that there is custom in the locality that daughters are given dowry articles at the time of their marriage. Thus, findings of both the courts below on the point of dowry articles do not warrant any interference by this Court.

14. Now coming to the quantum of maintenance of the minor, I am of the view that when a person enjoys bliss of more than one wife he is bound to maintain his wives and children in a befitting manner. Reliance in this regard can be placed on the case reported as *Mian Arif Mehmood v. Mst. Tanvir Fatima and another* (**PLD 2004 Lahore 316**) wherein the liability of a

husband having more than one wife has been dilated upon in the following manner: -

> *"10. This brings me to the most important question involved in this petition, viz. the quantum of maintenance of Rs.8,000 per mensem awarded in favour of the respondent. Learned counsel for the petitioner has submitted that it is unreasonable. According to him, the intention of the law is to provide maintenance against starvation and consequent vagrancy, and it had never been the intendment of the Legislature to provide anything more than food, clothing and bedding. The contention has no force. Section 9 of the Muslim Family Laws Ordinance, 1961 reads as follows:--*
>
> > *"9.**Maintenance**.--(1) If any husband fails to maintain his wife adequately or where, there are more wives than one fails to maintain them equitably, the wife, or all or any of the wives may in addition to seeking any other legal remedy available, apply to the Chairman who shall constitute an Arbitration Council to determine the matter, and the Arbitration Council may issue a certificate specifying the amount which shall be paid as maintenance by the husband.*
> >
> > *(2) A husband or' wife may in the prescribed manner, within the prescribed period, and on payment of the prescribed fee, prefer an application for revision of the certificate, to the Collector, concerned and his decision shall be final and shall not be called in question in any Court.*
> >
> > *(3) Any amount payable under subsection (1) or (2) if not paid in due time shall be recoverable as arrears of land revenue."*
>
> *A plain reading of section 9 (ibid) means that a husband has to maintain, his wife "adequately" and if he has more wives than one, he must, maintain them "equitably". Therefore, the maintenance should not be bare minimum sustenance allowance but a convenient provision in consonance with what the husband can afford as also what are the needs of the wife. It is not the meeting of the*

mere wants by way of sustenance because in these days of inflationary trend and the constant rise in the cost of living index, it is bound to work hardship on the wife. A person taking on the responsibility of marriage has to maintain his wife, and it is in all cases necessary to ascertain the visible means and the earning capacity of the husband. Therefore, in fixing the maintenance, the Court has to take into consideration not only the needs of the wife but also the paying capacity and circumstances of the husband who is liable to pay maintenance. Whereas to insist upon conformance to the principle of bare minimum sustenance allowance, particularly in a case where the husband is in affluent circumstances, would be not only inequitable but, unjustified, if upon consideration of visible income of the husband, he is found to be able to pay a little more to keep up the wife going on an, even keel, it cannot be said that the Court would thereby be pampering a wife who seeks to live apart from the husband. However, the maintenance allowance should neither be too heavy so as to tempt the wife to stay away from her husband, neither too meager so as to leave her high and dry. In my opinion, the balance has to be struck. The amount of maintenance payable to a wife should not be so small as to simply keep her body and soul together. It has to be an amount which could be enough to keep her at least financially in comfort, particularly in these days of high and rising prices. In regard to determining what is; required by the wife, the Court has to steer clear of two extremes viz. it must not give maintenance to a wife which would keep her in luxury and would make judicial separation profitable, and also impede any future reconciliation. It must also steer clear of the other extreme, viz. penuriousness. Steering clear of these two extremes the Court must see whether the amount to be fixed as maintenance would be liberal or illiberal. If this is kept in view, may be the couple will see the error of their ways and might get reconciled and lead a happy domestic life, unless they have already parted ways, as is the case here.

11. The question of quantum of maintenance is a matter primarily in the discretion of the trial Court which has to take into consideration several factors, like the status of the family, the learning capacity, commitments of the husband, and what is required by the wife to maintain herself. In the present case, the respondent has led

> *evidence to show that the petitioner is possessed of considerable assets and income. Since the petitioner has remained ex parte before the Arbitration Council, there is nothing on record to controvert the evidence adduced by the respondent. Even in his revision petition and the writ petition, the petitioner has not thrown a successful challenge to the evidence produced by the respondent. Moreover, it is not the case of the petitioner that the respondent is a lady who, belongs to a class who go out for work for earning their livelihood. Since the petitioner had not entered appearance before the Arbitration Council and was proceeded against ex parte, there is nothing on record to dislodge the evidence produced by the respondent. The petitioner has not brought on record of this petition even the evidence produced before the Arbitration Council by the respondent. In the circumstances, it cannot be said that any material piece of evidence has been misread or excluded from consideration."*

If the quantum of maintenance of the minor is considered in the light of the afore-quoted judgment, the documents produced by learned counsel for the respondents during the course of arguments are suggestive of the fact that respondent No.1 is incurring huge amount on maintenance of the minor especially towards her educational expenses. Likewise, since respondent No.1 did not bother to challenge the findings of learned trial Court on the point of maintenance for the minor, she cannot claim increase in the maintenance more than that decreed by the learned trial Court. Moreover, the question as to whether anything is outstanding against the petitioner on account of maintenance of the minor, the same would be decided by the learned executing court, thus, any observation made in that

regard may prejudice the case of either party before the executing forum.

15. For what has been discussed above, while **dismissing this petition** connected petition is **partially accepted** and findings of the learned appellate Court on the point of maintenance of the minor are **set-aside.** As a result, findings of learned trial Court on the said point shall hold the field. Rest of the findings of the learned appellate Court shall remain intact. No order as to costs.

16. Before parting with this order, it is observed that if in future respondent No.1 considers the quantum of maintenance insufficient to cater for the needs of the minor, she would be at liberty to institute fresh suit or to file miscellaneous application for increase in the awarded maintenance.

Judge

Approved for Reporting.

Judge

Jamil*