

Stereo.HCJDA 38.
Judgment Sheet
**IN THE LAHORE HIGH COURT,
MULTAN BENCH, MULTAN
JUDICIAL DEPARTMENT**

....

Writ Petition No.5288 of 2019.

Mst. Saima Sarwar.

Versus

District Judge Rajanpur, etc.

J U D G M E N T.

Date of hearing: **19.11.2025.**

Petitioner by: Mian Mubashir-ul-Hassan, Advocate.

Respondent No.3 by: Mahar Ghulam Shabbir Aaheer,
Advocate.

AHMAD NADEEM ARSHAD, J. Through this Constitutional Petition filed under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, the petitioner has called into question validity and legality of judgments & decrees of the Courts below pursuant whereto her suit for recovery of dower and gold ornaments was partially decreed. Respondent No.3 through connected Writ Petition (*W.P. No.15233/18*) has also challenged these judgments, seeking dismissal of petitioner's suit in toto.

2. Tersely, necessary facts forming background of the proceedings in hand are that on 30.05.2017 the petitioner (Mst. Saima Sarwar) instituted a suit for recovery of dower, gold ornaments and maintenance allowance against the respondent No.3 wherein she maintained that marriage between the parties was solemnized on 27.12.2015 and at the time of Nikah a house

measuring 05 Marlas valuing Rs.15,00,000/-, gold ornaments weighing 03 Tolas and Rs.2,000/- was fixed as her dower but the respondent No.3 failed to pay the same. She pleaded that the respondent is impotent and unable to perform matrimonial obligations but for the sake of honor of her parents she remained silent, however, the respondent No.3 ousted her from his house 06 months prior to the institution of the suit. She claimed past and future maintenance allowance at the rate of Rs.3,000/-.

3. On the other hand, respondent No.3 contested the suit by filing a written statement in which he denied the claims of the petitioner. He asserted that she left his house of her own accord and, while leaving, took with her the jewelry, prize bonds, and clothing. He specifically rejected her allegation of impotency, stating that it was a false accusation. He claimed that he is fully capable of performing his marital obligations and that petitioner had even become pregnant but later she aborted three-month-old fetus. Learned Trial Court framed necessary issues and invited the parties to lead their respective evidence.

4. It is pertinent to mention here that on 16.10.2017 marriage between the parties was dissolved on the basis of Khula under Section 10(5) of the West Pakistan Family Courts Act, 1964, subject to surrender of 50% of deferred dower. Said order was not challenged by either party, hence, the same attained finality.

5. After recording evidence of the parties pro & contra, oral as well as documentary, learned Trial Court vide judgment & decree dated 09.05.2018 partially decreed the suit of petitioner in the following terms:-

"In view of my findings on above issues, the suit of plaintiff in respect of dower is decreed to the extent of half of the five Marla constructed house or its price i.e. Rs.7,50,000/- Whereas the suit to the extent of remaining claim of plaintiff i.e. recovery of gold ornaments and maintenance allowance is dismissed"

6. Feeling aggrieved, respondent No.3 preferred an appeal which was allowed by the learned Appellate Court vide judgment & decree dated 22.09.2018 and findings of learned Trial Court on issue No.2 were modified in the following manner:

".....the appeal in hand is allowed and findings of the learned trial Court on issue No.2 are modified to the effect that the respondent/plaintiff will get 1/4th of 5 Marlas constructed house or its price worth Rs.3,75,000/-."

7. Being dissatisfied, the petitioner has filed above captioned Writ Petition with the prayer that by modifying judgments & decrees of Courts below her suit be decreed in toto, whereas, respondent No.3 has filed connected Writ Petition by praying that petitioner's suit be dismissed.

8. I have heard learned counsel for the parties at length and gone through the record with their able assistance.

9. After hearing learned counsel for the parties and going through the record, it has been observed that marriage between the parties was dissolved on the basis of Khula by the learned Trial Court vide order dated 16.10.2017 under Section 10(5) of the West Pakistan Family Courts Act, 1964, subject to surrender of 50% of deferred dower. Neither of the parties challenged said order, hence, the same attained finality.

10. Learned Trial Court vide judgment & decree dated 09.05.2018 decreed the suit of petitioner only to the extent of

dower i.e. half of five Marla constructed house or its price Rs.7,50,000/-. However, learned Appellate Court, while accepting the appeal of the respondent No.3 modified the finding of learned Trial Court by observing that marriage between the parties was not consummated.

11. It is an admitted position that at the time of marriage a house measuring 05 Marlas valuing Rs.15,00,000/- was fixed as dower. The petitioner proved her version during evidence by producing cogent and trustworthy evidence, hence, she is entitled to receive half of the dower as the marriage was dissolved on the basis of Khula subject to surrender of 50% of deferred dower vide order dated 16.10.2017.

12. However, both the Courts below observed that marriage was not consummated and in the light of this learned Appellate Court further reduced the dower. Only point for determination before this Court is that whether the Courts below were justified in holding that marriage between the parties was not consummated.

13. Perusal of the plaint reflects that although petitioner pleaded that the respondent No.3 is impotent and unable to perform matrimonial obligations but she neither specifically pleaded that the marriage was not consummated nor any specific issue was framed in this regard. Moreover, the marriage was dissolved on the ground of Khula rather than non-performance of marital obligations by the respondent No.3. In these circumstances, the findings of both courts on the question of non-consummation are

legally untenable, as such a conclusion could not have been drawn in the absence of proper pleadings or a framed issue.

14. In Islamic law, consummation of marriage does not require proof of actual sexual intercourse; rather, it is legally presumed upon the occurrence of al-Khalwah al-Ṣaḥīḥah (valid seclusion). This concept, firmly established in Islamic jurisprudence, particularly under the Hanafi school, refers to a situation where the husband and wife spend time together in complete privacy, in a place where no third person can enter or observe them without their knowledge and where no physical, social, or Shar‘ai barrier exists that would prevent marital relations. When such seclusion occurs, Islamic law treats it as the equivalent of consummation (*dukhūl*) even if there is no direct evidence that intercourse took place.

15. Under Muhammadan Law, the dower becomes confirmed by:

- (a) *consummation of marriage;*
- (b) *valid retirement (khalwah al-ṣaḥīḥah); or*
- (c) *the death of either spouse.*

16. Thus, valid retirement carries the same legal effect as actual consummation. The essentials of a valid retirement are clearly defined which are that: a) the spouses must be alone in a secure and private place, b) free from any obstruction or disability (whether physical, mental, or religious) that would make intercourse impossible. Abdul Rahman, an authoritative scholar on Muslim personal law, explains:

“The valid retirement which constitutes a legal presumption of the consummation of marriage, and

perfects the wife's right over the whole dower, is that in which the husband and wife are alone together in a secluded place in which nobody can overlook them without their knowledge, and where the husband is free to have connection with his wife without let or hindrance.”

17. Classical juristic works such as *Kitab-ul-Fiqah* and *Radd-ul-Muhtar* reinforce this principle, recognizing that once the spouses assemble in such seclusion and no *Shar'ai* impediment exists—such as illness, minority, or ritual impurity—the law presumes consummation. The presumption is strong and does not require affirmative proof of physical union.

18. The legal consequences of a valid retirement, as outlined in *Radd-ul-Muhtar*, are significant. Once *khalwah al-ṣaḥīḥah* is established:

- *the marriage is deemed consummated for all legal purposes;*
- *the wife becomes entitled to the full dower (mahr), even if the husband is impotent;*
- *the legitimacy of any child conceived thereafter is unquestioned;*
- *the husband becomes obligated to maintain, clothe, and house the wife; and*
- *upon dissolution of marriage, the wife must observe iddah, and the husband is temporarily barred from marrying her sister or certain other women.*

19. Once valid retirement is admitted or proven, allegations of non-consummation cannot be sustained without compelling and credible evidence to the contrary.

20. This is the agreed position of *Jamhur* (majority of jurists), including the *Hanafi*, *Maliki* and *Hanbali* schools that intercourse is not necessary for consummation of marriage and consummation occurs when the couple spends some time after the marriage in seclusion or privacy. This was also the opinion of the four Caliphs after the Prophet Muhammad (ﷺ). The Prophet Muhammad (ﷺ) stated:-

"The husband who lifts the veil of his wife (following Nikah), looks at her (privately), the mahr (bridal gift) becomes mandatory, whether he had intercourse with her or not."
(*Al-Dar Al-Qutniy*)

Ibn-e-Omar (may God be pleased with Him), said:

"When the doors are closed, the curtains are drawn, and privacy is established, the full mahr becomes due, inheritance applies, and 'iddah must be completed."
(*Tafsir Al-Hawi*).

21. In the present case, it is an admitted position that the spouses remained together in matrimony for a continuous period of nearly eight to nine months. Once such prolonged cohabitation and shared marital life stand established, no question of non-consummation can legally arise, particularly in view of the well-settled principles of Islamic jurisprudence relating to *al-khalwah al-ṣaḥīḥah*, which create a strong presumption of consummation upon valid seclusion. The learned Courts below, while passing the impugned judgments and decrees, failed to appreciate this fundamental legal position and proceeded on an erroneous assumption that the marriage had not been consummated. Their findings are the result of patent misreading and non-reading of

evidence, and the judgments appear to have been rendered in a slipshod and mechanical manner, without proper consideration of the pleadings, admitted facts, or established jurisprudential principles. Such flawed conclusions, being contrary to law and unsupported by material on record, are not sustainable in the eye of law and warrant interference.

22. As an inescapable consequence of the above discussion, this petition is allowed. Consequently, while setting aside the impugned judgments & decrees to the extent of non-consummation of marriage, suit of the petitioner is partially decreed and she is held entitled to recover dower i.e. half of 05 Marla constructed house or Rs.750,000/- as its alternate value as the marriage stood dissolved on the basis of Khula subject to surrendering 50% of deferred dower. Connected Writ Petition filed by respondent No.3 (W.P. No.15233 of 2018) is dismissed.

(AHMAD NADEEM ARSHAD)
JUDGE.

APPROVED FOR REPORTING.

JUDGE.

*M. Arsalan**