

ORDER SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.2316/2020
Asif Pervez and another
Versus
Mst. Kanwal Asif etc.

S. No. of order / proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	08.10.2020	Ch. Waseem Bahadur, Advocate for the petitioners

Through the instant writ petition, the petitioners impugn the judgment and decree dated 27.11.2019 passed by the Court of the learned Additional District Judge-I (East), Islamabad, whereby petitioner No.1's appeal against the consolidated judgment and decree dated 07.10.2019 passed by the learned Judge Family Court was dismissed. Vide the said consolidated judgment and decree dated 07.10.2019, the learned Family Court decreed respondent No.1's suit for recovery of maintenance, dower and dowry articles while the suit filed by petitioner No.1 for restitution of conjugal rights was conditionally decreed.

2. The record shows that on 05.12.2016, respondent No.1 instituted the suit for recovery of maintenance, dower and dowry articles against the petitioners. Due to the petitioners' absence, initially they were proceeded against *ex-parte* vide order dated 31.01.2017. Later on vide consent order dated 08.03.2017, the *ex-parte* proceedings were set-aside. Thereafter, the petitioners filed a joint written statement while petitioner No.1 instituted a counter suit for restitution of conjugal rights against respondent No.1. On 26.04.2017 and 29.05.2017, the learned Family Court framed following consolidated issues:-

"1. *Whether the plaintiff is entitled for recovery of maintenance if yes at what rate for which period?*
OPP

- 1-A *Whether the plaintiff went abroad/Dubai without permission or consent of the defendant and lived abroad at her own will and wish? OPD*
2. *Whether the plaintiff is entitled to recover the dower in the shape of 15 tolas gold ornament, half ½ portion of house as per nikahnama? OPP*
3. *Whether the plaintiff is entitled to receive the dowry articles and gold ornaments as per list attached? OPP*
4. *Whether the defendant is entitled for decree of restitution of conjugal rights as prayed for? OPD*
5. *Whether the suit of the plaintiff is not maintainable and liable to be dismissed? OPD*
6. *Relief ?”*

3. Respondent No.1 appeared as PW-1 in support of her claim and also produced her father Aurangzeb Khan as PW-2. The said witnesses were not cross-examined as the learned Family Court vide order dated 09.01.2018 closed the petitioners' right of cross-examination. Petitioner No.1 assailed the said order in writ petition No.302/2018 which was dismissed vide order dated 01.07.2019 passed by this Court. Respondent No.1 also produced documentary evidence comprising of *nikahnama* dated 25.04.2009 (Exh.P/3) and even dated list of dowry articles (Exh.P/4).

4. Petitioner No.1 appeared as DW-1 and produced Amir Shabbir as DW-2. On 14.11.2018 petitioners moved an application for submission of additional evidence *inter alia* consisting of rent documents and salary slip. The said application was contested by respondent No.1. Vide order dated 11.02.2019, the learned Family Court dismissed the petitioners' said application.

5. The trial culminated in the consolidated judgment and decree dated 07.10.2019 whereby the learned Family Court decreed respondent No. 1's suit for recovery of maintenance, dower and dowry articles to the extent that respondent No.1 was held entitled to (i) maintenance at the rate of Rs.10,000/- per month from the date of the institution of the suit till

subsistence of the marriage; (ii) 15 *tolas* gold ornaments and half portion of the house mentioned in *nikahnama* as dower, and; (iii) dowry articles according to respondent No.1's list (Exh.P/4). Through the same consolidated judgment and decree dated 07.10.2019, the learned Family Court also decreed the suit filed by petitioner No.1 for restitution of conjugal rights subject to the condition that he pays dower to respondent No.1 as per *nikahnama* and maintains her.

6. Petitioner No.1 preferred an appeal against the said consolidated judgment and decree to the extent of decreeing the suit filed by respondent No.1. During pendency of the said appeal, petitioner No.2, on 23.11.2019, filed an application under Order I, Rule 10 C.P.C. for becoming a party to the said appeal. Vide order dated 27.11.2019, the said application was dismissed for having been filed after the expiry of the limitation period for filing an appeal. The learned Appellate Court dismissed petitioner No.1's appeal vide impugned judgment and decree dated 27.11.2019. Hence this petition.

7. Learned counsel for the petitioners submitted that the concurrent judgments and decrees passed by the learned Courts below are against the documentary and oral evidence produced by the petitioners; that the learned trial Court dismissed the petitioners' application for additional documents on hyper-technical grounds causing miscarriage of justice; that the learned trial Court unlawfully closed the petitioners' right to cross-examine respondent No.1's witnesses vide order dated 09.01.2018; that while deciding writ petition No.302/2018 filed by petitioner No.1 against the said order dated 09.01.2018, this Court had held that the petitioners can challenge the said order at the time of filing an appeal against the final order; that the learned appellate Court, in its

impugned judgment dated 27.11.2019, did not return any finding on this important aspect of the case; that by not allowing the petitioners to cross-examine the witnesses of respondent No.1, they were deprived of a proper opportunity of defence; that the impugned judgments and decrees are based on respondent No.1's evidence which was not allowed to be subjected to cross-examination; that due weightage was not given to the evidence of the petitioners; that the impugned judgments and decrees suffer from misreading and non-reading of the evidence; that the half portion of house was decreed in favour of respondent No.1 without considering that the same is not owned by petitioner No.1 and is a mortgaged property against a loan given by House Building Finance Corporation to petitioner No.2; that respondent No.1's suit pertaining to matrimonial obligations against petitioner No.1 could not have included petitioner No.2 as a party; that the learned Courts below passed the judgments and decrees against petitioner No.2 without having jurisdiction; that the gold ornaments had been decreed in respondent No.1's favour despite the fact that the same were in possession of the said respondent; that the impugned judgments and decrees are against the law and facts; and that the same have been passed arbitrarily without proper application of judicial mind. Learned counsel for the petitioners prayed for the writ petition to be allowed in terms of the relief sought therein.

8. I have heard the contentions of the learned counsel for the petitioners and have perused the record with his able assistance. The facts leading to the filing of the instant petition have been set out in sufficient detail in paragraphs 2 to 6 above and need not be recapitulated.

9. The petitioners' grievance with regard to the order dated 09.01.2018, whereby their right of cross-examination was closed is that the said order was not passed in accordance with law. Now, the record shows that on 15.06.2017 after submission of affidavits-in-evidence by respondent No.1, the learned Family Court adjourned the case to 11.07.2017 *inter alia* for cross-examination on respondent No.1's witnesses. Thereafter, the proceedings were adjourned on four occasions (i.e. on 11.07.2017, 23.09.2017, 04.11.2017 and 18.12.2017) either because the petitioners' counsel was absent or he was not prepared to conduct cross-examination. The order sheet shows that the learned Family Court on three occasions gave last and final opportunities to the petitioners to conduct the cross-examination. Even on 09.01.2018, before closing the petitioners' right of cross-examination, the learned Family Court took up the case thrice after the first call. Therefore, I am of the view that sufficient opportunities had been given to the petitioners to conduct cross-examination. Due to the petitioners' persistent default, the learned Family Court was correct to have invoked the penal provisions of the special law. The petitioners are to blame for the consequences of their default in ignoring the repeated directions of the learned Family Court.

10. The petitioners' contention that respondent No.1's suit for recovery of maintenance, dower and dowry articles was not maintainable against petitioner No.2 (*i.e.* father of her husband/petitioner No.1) does not inspire confidence. Under Section 2(d) of the Family Court Act, 1964 ("the 1964 Act"), a suit can be filed against 'any person' whose presence is considered necessary for proper decision of dispute. Now, since *nikahnama* (Exh.P/3) is an admitted document and half share in the house owned by

petitioner No.2 was alienated against dower of respondent No.1 in columns No. 14, 15 and 16 of the said document and since petitioner No.2 had signed the said Exh.P/3, his presence was definitely necessary for proper decision of the dispute *qua* recovery of dower.

11. Furthermore, *nikahnama* (Exh.P/3) is a registered document and it was also signed by petitioner No.2. Petitioner No.2 was thus not only aware but conscious of the transfer of half share in the house mentioned in Exh.P/3. As such it was rightly decreed by the learned Courts below in favour of respondent No.1. In the case of Mst. Shumaila Bibi Vs. Zahir Khan (PLD 2015 Peshawar 182), the petitioner before the Hon'ble Peshawar High Court challenged the appellate judgment and decree whereby dower in the shape of husband's share in the house of his father was excluded from the decree. The learned High Court returned its findings on this crucial question in the following terms:-

"14. It is established rule that the husband could not give any property in dower to his wife that did not belong to him but belong to some one else, but if the father of bridegroom consented and agreed to do so. Admittedly there is no rule that the father has the liability to give the debts of his son, but in such like situation when a father consented to give his daughter in law the specific property or portion of the property as her share in lieu of dower, hence the father assumed the direct liability and stood surety, when his presence at the time of scribing of Nikah Nama during Nikah ceremony, is not denied and proved during course of trial as in the instant case. This view was further fortified in the case of Maj. Rifat Nawaz and 5 others v. Mst. Tahira and 2 others (2008 CLC 803) by holding that;

"That father in law could give a dower of movable as well as immovable property on the eve of his son's marriage particularly when Nikah Nama contained the stipulation regarding the dower with full particular in shape of boundaries of the said house.- Said Nikah Nama had also been thumb impressed by the father of the defendant---Document in question had been fully proved in the record of the case."

15. *In the instant case, the Nikah deed Exh.PW-2/I has been signed by the respondent No.2 and it is also admitted that he was present at the time of Nikah which fact has further been supported from his own statement (respondent No.2) who had deposed before the trial Court in, his cross-examinations DW-2 that he was present at the time of Nikah between the petitioner and respondent No.1. Admitted that the respondent No.2 was present at the time of Nikah ceremony and it is also proved that he was in full knowledge of the terms and conditions of the Nikah Nama being written in his presence and with his consent being elder (father of the respondent No.1).*

16. *As per our customs, thus, an inference can be drawn that the respondent No. 2 was in full agreement to give his house (to the extent of share of respondent No.1) to his daughter-in-law. In this regard the case of Mst. Shehnaz Akhtar v. Fida Hussain and 2 others (2007 CLC 1517) is worth reliance wherein it was held as;*

"Question arose as to whether plaintiff could file suit against father of bridegroom for completion of contract executed by him for the payment of dower--Held, there was no bar or prohibition in the way of plaintiff in that regard, so as to impede the way of plaintiff from claiming the implementation and completion of the agreement---Family Court, under S.5, West Pakistan Family Courts Act, 1964 had exclusive jurisdiction to entertain, hear and adjudicate upon matters specified in Par-1 of the Schedule to the said Act and there was no barring provision that while claiming dower from the husband only bridegroom/husband could be impleaded in the suit for recovery of dower and none else-If another person had stood surety or had guaranteed the payment of dower, he/she could lawfully be impleaded in the suit-Surety and guarantor to the dower were as much party and liable to pay dower as the bridegroom himself."

17. *It was further held in the case of Muhammad Anwar Khan v. Sabia Khanam PLD 2010 Lah. 119 that; " the house mentioned in the Nikah Nama as dower for daughter in law, even though, it did not belong to the husband of respondent is liable to be transferred to the daughter in law as the father in law had given his consent for the same."*

18. *Needless to remark that in spite of having the knowledge that his house was being given to the petitioner as dower but he did not object/take any legal action to exclude the same from the Nikah Nama till the filing of the present by the petitioner."*

12. It is pertinent to mention that petitioner No.2 did not file an appeal against the judgment and decree

dated 07.10.2019 passed by the learned Family Court. After the expiry of the limitation period for filing an appeal provided in the West Pakistan Family Courts Rules, 1965 petitioner No.2, on 23.11.2019, moved an application for becoming party in the appeal filed by petitioner No.1. Petitioner No.2 was not allowed to become a party to the said appeal and his application to the said effect was dismissed vide order dated 27.11.2019 passed by the learned appellate Court. Consequently, this writ petition to the extent of petitioner No.2 is not maintainable since he failed to avail remedy of appeal under Section 14 of the 1964 Act.

13. The petitioners are also aggrieved by the order passed by the learned Family Court dismissing their application for additional evidence. Section 9 of the 1964 Act provides that “*where a defendant relies upon a document in his possession or power, he shall produce it or copy thereof in the Court alongwith the written statement.*” The petitioners filed the application for additional evidence at a belated stage (i.e. on 14.11.2018) when their witnesses had already been cross-examined and the plaintiff/respondent No.1 had already exposed lacunae in the defence evidence on crucial points, including petitioner No.1’s income and the title of the house (which was the subject matter of dower). These were areas where absence of defence evidence had been exposed during the cross-examination of defence witnesses. Allowing the application to produce petitioner No.1’s salary slip or rent documents would have amounted to letting the petitioners set up a fresh case. The record further shows that no reason or justification whatsoever was given in the petitioners’ application for not filing the said documents along with their written statement. For these reasons, I hold that the learned Family Court’s

order dated 11.02.2019 dismissing the petitioners' application for additional evidence was strictly in accordance with law.

14. Besides the fact that the witnesses of respondent No.1 were not cross-examined and their statement remained unchallenged, the learned appellate Court in the impugned judgment dated 27.11.2019, apart from relying on the statement of respondent No.1's witnesses has comprehensively appraised the evidence and referred to the admissions of petitioner No.1/DW-1 on important questions with regard to the entitlement of respondent No.1 for maintenance, dower and dowry articles. The petitioners were not able to show that the impugned judgments and decrees passed by the learned Courts below suffered from any misreading or non-reading of any material piece of evidence.

15. In view of the above, I find no merit in this petition, which is dismissed *in limine*.

**(MIANGUL HASSAN AURANGZEB)
JUDGE**

Qamar Khan

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