

*Form No: HCJD/C-121.*  
JUDGEMENT SHEET  
IN THE ISLAMABAD HIGH COURT, ISLAMABAD  
JUDICIAL DEPARTMENT

**WRIT PETITION NO. 2784 OF 2021**

Mst. Sidra Asif

Vs

Baqir Ali and others.

PETITIONER BY: Mr. Abdul Hafeez, Advocate.

RESPONDENTS BY: Syed Ali Abdullah Rizvi and Syed Moazzam Ali Rizvi, Advocates.

DATE OF DECISION: 21.02.2022.

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**BABAR SATTAR, J.-** The petitioner is aggrieved by judgment and decree of the learned Additional District Judge dated 23.06.2021 pursuant to which the appeal filed by respondent No.1 was accepted and the judgment and decree passed by the learned Judge Family Court dated 27.01.2021 was set aside.

2. The learned counsel for the petitioner submitted that the petitioner and respondent No.1 were married pursuant to marriage deed dated 07.01.2017. That rukhsati did not take place and respondent No.1 divorced the petitioner pursuant to divorce deed dated 25.01.2018. That according to the marriage

deed the petitioner was entitled to Haq Mehr in the amount of Rs.5,000/- in cash and 15 tolas of gold. That Rs.5,000/- cash amount was paid at the time of execution of the marriage deed. But 15 tolas of gold was remained unpaid, for which purpose the petitioner filed the suit that was decreed by the learned Judge Family Court on 27.01.2021 ordering respondent No.1 to pay 7.5 tolas of gold to the petitioner. That the learned Additional District Judge set-aside the judgment and decree of the learned Family Court through the impugned judgment and decree on the basis that the Special Attorney appearing on behalf of respondent No.1 had stated during cross-examination that the amount of Rs.5,000/- and 15 tolas of gold were paid to the petitioner at the time of execution of the marriage deed. And as the petitioner had not controverted the contention by any suggestion in rebuttal, such contention would be deemed to be accepted and consequently respondent No.1 was not liable to pay anything having taken the position that the entire amount of Haq Mehr had already been paid. He submitted that pursuant to the marriage deed, the 15 tolas of gold was deferred dower and as rukhsati never took place and the marriage was not consummated there was no occasion for respondent No.1 to pay the dower to the petitioner. He contended that other than a bald statement made during cross-examination there was no evidence that 15 tolas of gold specified as deferred dower in the marriage deed was ever paid to the petitioner.

3. Learned counsel for respondent No.1 submitted that Barim Maqsood Raja (DW-1) appearing as special attorney for

respondent No.1 stated during cross-examination that notwithstanding the fact that 15 tolas of gold was deferred dower it was paid at the time of execution of the marriage deed and consequently no payment of dower was outstanding. He submitted that where a fact as asserted by a witness was not cross-examined such fact was deemed to be admitted. He relied on **Usman Khan Vs. Mst. Shehla Gul (2020 CLC 910)** and **Muhammad Aslam Vs. Absar Fatima (2011 CLC 1521)** in support of his contentions.

4. The petitioner and respondent No.1 entered into a marriage contract on 07.01.2017 which stated in clause 13 of the marriage deed that the dower amount was Rs.5,000/-in cash and 15 tolas of gold. Clause 14 of the marriage deed stated that 15 tolas of gold would be deferred dower. Respondent No.1 executed a divorce deed on 25.01.2018 in London and sent it to the petitioner. After failure of reconciliation proceedings, a divorce certificate was issued on 10.09.2018. The petitioner filed a suit for recovery of dower wherein she claimed that the 15 tolas of gold which constituted deferred dower was outstanding and that respondent No.1 was liable to pay the same. Para 1 of the suit states the following:

*That the nikah of the plaintiff was solemnized with defendant on 07.01.2017 at Union Council Sahang, Village Pind Bala, Tehsil Gujar Khan, District Rawalpindi in accordance with Islamic Law against the dower consideration of Rs.5000/- prompt and deferred dower weighing 15 tolas of gold ornaments out of which prompt dower is paid and deferred dower is outstanding.*

5. In his written statement respondent No.1 stated the following in relation to para 1.

*1. That Para No. 1 is admitted to the extent of solemnizing Nikkah with the defendant and payment of dower rest of the Para is incorrect and vehemently denied the detail answer to this Para is already given in preliminary objection above.*

6. A perusal of the above establishes that respondent No.1 admitted the fact asserted by the petitioner in relation to payment of dower i.e. that Rs.5,000/-, which constituted prompt dower, was paid at the time of execution of the marriage deed and 15 tolas of gold specified as deferred dower remained unpaid. In his preliminary objections within the written statement respondent No.1 in para 3 stated that as the marriage between the parties had not been consummated no question of payment of deferred dower arose and took a clear position in such preliminary objections that deferred dower was a guarantee for a woman against ill-treatment, non-maintenance and desertion and where the parties had agreed to divorce the question of payment of deferred dower did not arise. A perusal of the written statement clearly establishes that the respondent accepted the factual assertion by the petitioner that deferred dower was not paid. Respondent No.1 also filed an affidavit before the learned Family Court through his Special Attorney (DW-1), which stated in para 2 that *"the marriage of the deponent was not consummated and the prompt dower was paid at the time of nikah in the presence of witnesses and nothing is outstanding on account of anything"*. Thus, even the testimony in the form of affidavit sworn by respondent No.1 only confirmed

that respondent No.1 had paid prompt dower to the petitioner, and implied that because the marriage was not consummated, he was not liable to pay deferred dower to the petitioner and thus nothing was outstanding. Barim Maqsood Raja (DW-1), however, during cross-examination took a position contrary to that in written statement as well as affidavit sworn by respondent No.1 that not only was the prompt dower in the amount of Rs.5,000/- paid at the time of execution of marriage deed but 15 tolas of gold which constituted deferred dower was also paid at such time in presence of witnesses.

7. The learned Judge Family Court in its judgment noted that respondent No.1 failed to produce any witness to verify the payment of 15 tolas of gold ornaments as dower. The only evidence available is a statement made by Special Attorney (DW-1) about such payment, which the learned Family Court found insufficient in proof of the fact that such dower was paid. The learned Family Court took into account the fact that deferred dower became payable in two situations i.e. in the case of divorce and in the event of death of the husband. And as the petitioner had been divorced by respondent No.1 it found that half of the deferred dower amounting to 7.5 tolas of gold was payable by respondent No.1 to the petitioner in view of the fact that their marriage had not been consummated.

8. The learned Additional District Judge relied on para 2 of the affidavit (Ex-D3) sworn by respondent No.1 wherein respondent No.1 had stated that prompt dower was paid at the time of nikah and that nothing was outstanding on account of

anything. The learned Additional District Judge read this part of the affidavit together with the assertion made by Barim Maqsood Raja (DW-1) during cross-examination, that the deferred dower was also paid by respondent No.1 to the petitioner at the time of execution of the marriage deed, and held that as the assertion made in the cross-examination was not rebutted with any further, it would be deemed to have been admitted by the petitioner.

9. The learned Additional District Judge appears to have not appreciated the fact that respondent No.1 in his written statement in relation to Para-1 of the suit admitted the factual assertion made in the suit that the prompt dower in the amount of Rs.5,000/- was paid and the deferred dower specified as 15 tolas of gold remained unpaid at the time of execution of the marriage deed. The affidavit (Ex-D3) of respondent No.1 further confirms the same contention. Collective reading of the written statement filed by respondent No.1 together with his affidavit (Ex-D3) establishes the contention of respondent No.1 that he had paid the petitioner the prompt dower as specified in the marriage deed at the time of execution of such deed and was not liable to pay the deferred dower as the marriage had never been consummated.

10. The question before the learned Judge Family Court as well as the learned Additional District Judge therefore was whether as a matter of law respondent No.1 was liable to pay deferred dower in the event that the marriage was not consummated. Instead of appreciating the written statement

and the affidavit (Ex-D3) sworn by respondent No.1 the learned Additional District Judge erred in setting aside the judgment and decree of the learned Family Court merely on the basis of one statement made by Special Attorney of respondent No.1 (DW-1) during cross-examination, that the deferred dower (i.e. 15 tolas of gold) was also paid to the petitioner at the time of execution of the marriage deed in presence of witnesses. A reading of cross-examination clearly reflects that it was suggested to DW-1 that such contention was incorrect as he was asked whether he had noticed that 15 tolas of gold was mentioned as deferred dower (غيرمؤجل) to which he responded that he had read the same. He had further been asked whether he had produced any other witnesses to the marriage deed (who would then also have witnessed the payment of the deferred dower), to which he responded that such witnesses had not been produced and that DW-1 was also not a witness to the marriage deed himself.

11. It is obvious from a comparison of the position taken by respondent No.1 in the written statement and the affidavit (Ex-D3) that such position is in contradiction with the assertion made by DW-1 during cross-examination. The learned Additional District Judge also did not appreciate that respondent No.1 whether himself or through a special attorney could not take a position during cross-examination which was contrary to the content of written statement as well as the content of the affidavit sworn as testimony of respondent No.1. The learned Additional District Judge also did not appreciate that suggestions were made to DW-1 after his assertion in cross-examination that

15 tolas of gold was paid at the time of execution of the marriage contract that such amount was deferred dower and further that none of the witnesses of the marriage deed who purportedly witnessed the payment of such deferred dower by respondent No.1 to the petitioner were produced before the Court.

12. It is settled law that a party cannot take a position while providing oral testimony which is contrary to the position taken in the written statement and pleadings of such party. The learned Family Court correctly appreciated the evidence and lack of production of any witnesses testifying that deferred dower had been paid by respondent No.1 to the petitioner at the time of execution of marriage deed. The learned Additional District Judge failed to appreciate that while there is nothing prohibiting the payment of deferred dower at the time of execution of the marriage deed, whole idea of specifying certain portion of the dower as deferred is that the husband is not liable or willing to pay the same at the time of execution of the marriage deed or on demand of the wife thereafter, till the time of divorce or death of the husband. It would thus be extraordinary that while specifying a certain part of the dower as deferred dower in a marriage contract the husband were to treat the same as prompt dower at the time of execution of such marriage contract. In order to establish that such assertion was true it was for the husband to discharge the onus and establish through production of witnesses to the marriage deed that they did witness payment of deferred dower at the time of execution of the marriage deed.



As no witnesses to the marriage deed were produced by respondent No.1 the learned Family Court rightly concluded that there was no evidence produced by respondent No.1 that the deferred dower as specified in the marriage deed had been paid at the time of execution of such deed.

13. In view of the above, the learned Additional District Judge erred in setting aside the reasoned judgment of the learned Family Court and the decree passed on such basis. The instant petition is **allowed** and consequently the impugned judgment and decree of the learned appellate Court dated 23.06.2021 is **set-aside**, and the judgment and decree passed by the learned Judge Family Court dated 27.10.2021 is upheld.

(BABAR SATTAR)  
JUDGE

Saeed.