

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.4929/2018
Syed Zeeshan Muthar
Versus
Mst. Hafiza Farah and others

Date of Hearing: 03.12.2019
Petitioner by: Syed Rashid Ali Shah, Advocate
Respondents by: Rana Ali Akbar, Advocate, for respondents
No.1 to 3
Amicus Curiae: Hafiz Arfat Ahmed Chaudhry and Ms.
Kashifa Niaz Awan, Advocates

MIANGUL HASSAN AURANGZEB, J:- Through the instant writ petition, the petitioner, Syed Zeeshan Muthar, impugns the judgment and decree dated 11.10.2018 passed by the Court of the learned District and Sessions Judge (East), Islamabad, whereby his appeal against the judgment and decree dated 28.02.2018 passed by the Court of the learned Judge Family Court, Islamabad was dismissed with costs. Vide the said judgment and decree dated 28.02.2018, the learned Family Court partially decreed the suit for recovery of maintenance allowance, dowry articles and gold ornaments, instituted by respondents No.1 to 3.

2. The facts relevant for disposal of the petition are that the petitioner and respondent No.1 got married on 26.01.2012. According to columns No. 13 and 14 of the *Nikahnama*, dower of Rs.5,000/- was paid promptly at the time of *Nikah* whereas five *tolas* gold were fixed as deferred dower. It is apposite to mention that in the *Nikahnama*, no condition or time period was specified for the payment of deferred dower. The couple was blessed with two children namely Syed Muhammad Ali (respondent No. 2) and Syeda Amna, (respondent No.3) born on 07.01.2013 and 19.07.2014, respectively.

3. After the relations between the petitioner and respondent No.1 turned sour, the latter moved to her parents' house. On 27.05.2015, respondent No. 1 instituted a suit for recovery of past and future maintenance for her *iddat* period at the rate of Rs.10,000/- per month since March 2014 and for the minors at the rate of Rs.8,000/- per

month for each minor. In her suit, she further claimed recovery of dowry articles as per list attached with the plaint and recovery of deferred dower consisting of gold ornaments weighing five *tolas* as well as the cost of litigation. The petitioner contested the suit by filing written statement. Out of divergent pleadings, learned Family Court framed the following issues:-

- “1. *Whether the plaintiff is entitled for recovery of maintenance till completion of iddat period @ Rs.10,000/- per month since March 2014? OPP*
2. *Whether the plaintiff is entitled for recovery of past and future maintenance of the plaintiff No.2 & 3 @ Rs.8,000/- each since March 2014? OPP*
3. *Whether the plaintiff is entitled to recover the dowry articles or alternate value? OPP*
4. *Whether the plaintiff is entitled to recover the 5 tolas of gold ornaments? OPP*
5. *Whether the suit of plaintiff is not maintainable? OPD*
6. *Whether the plaintiff has concealed the material facts? OPD*
7. *Relief*”

4. During the plaintiff's evidence, respondent No.1 herself appeared as PW-1 and produced her affidavit as Exh.P/1. Respondent No.1 also produced her father Muhammad Afzal Aasi as PW-2. The said witnesses produced his affidavit as Exh.P/2. Both the witnesses were cross-examined by the defendant/petitioner. In documentary evidence, she produced copy of *Nikahnama* as Mark-A, list of dowry articles as Mark-B, receipts of jewelry items as Exh.P/3 and Exh.P/4, receipts of furniture as Exh.P/5 and Exh.P/6.

5. The case was at the stage of the petitioner/defendant's evidence when due to default in appearance he was proceeded against *ex parte* and ensuing proceedings lead to the *ex parte* judgment and decree dated 01.11.2016. However, on the petitioner's application the said *ex-parte* judgment and decree was set aside vide order dated 13.04.2017 passed by learned Family Court. Thereafter, the petitioner appeared as DW-1 and submitted his affidavit as Exh.D/1. The petitioner produced his sister Dr. Syeda Asma Bano as DW-2, she submitted her affidavit as Exh.D/2. Both the witnesses were cross-examined. The said witnesses produced purchased receipts of gold ornaments Exh.D/3 and Exh.D/4, copy of student card Exh.D/5 and HBL receipt as Mark-C.

6. The learned Family Court vide judgment and decree dated 28.02.2018 partially decreed the suit of respondents No.1 to 3 to the following extent:-

- "(i) **Maintenance:**
- (a) *Respondent No.1 (wife) was held entitled to recover maintenance @ 8000 per month for the period of iddat only;*
- (b) *Respondents No.2 and 3 (minors) were held entitled to the recover maintenance @ Rs. 5000/- each since March, 2014 till their legal entitlement;*
- (ii) **Dowry articles:**
- Respondent No.1 was held entitled to recover Items mentioned at serial No. 2-9 of list (Mark-B) and gold ornaments (weighing 33 grams and 150 milligrams as per Exh.P/4) or their market value in the alternate;*
- (iii) **Dower:**
- Respondent No.1 was held entitled to recover 5 tolas of gold ornaments or their market value in the alternate;"*

7. As mentioned above, the petitioner preferred appeal against the judgment and decree passed by learned Family Court, which was dismissed vide judgment and decree dated 11.10.2018 passed by learned District Judge (East), Islamabad. The said judgment and decree has been assailed in the present petition.

8. Learned counsel for the petitioner submitted that the impugned judgment is illegal being based on surmises and conjectures; that the petitioner had not divorced respondent No.1, as such she is still his legally wedded wife and no question of maintenance for *iddat* period arises; that since marriage between the parties is still intact respondent No.1 is not entitled for deferred dower; that the petitioner is an unemployed student but while awarding maintenance for minors his financial resources have not been shown into account; that the petitioner can afford to pay maintenance to the minors at the rate of Rs.2000/ each; that respondent No.1 is a disobedient wife and left the matrimonial abode on her own; and that at the time of desertion, respondent No.1 stole 3 gold sets of the petitioner's sister weighing approximately 08 *to/as*; and that the learned Courts below while awarding the maintenance did not pass any order regarding meeting of the petitioner with the minors. Learned counsel prayed for the petition to be allowed and for the impugned judgments and decrees to be modified as prayed for.

9. On the other hand, learned counsel for respondents No. 1 to 3 opposed the writ petition by stating that on 17.08.2014, the petitioner telephonically pronounced one divorce on respondent No.1 and thereafter did not contact her to reconcile with her or to revoke the divorce; that the petitioner did not pay any maintenance to respondents No. 1 to 3 and all their expenses are being borne by respondent No.1's parents; that the petitioner is a man of means having valuable rent bearing properties and business; that the petitioner raised false defenses to deprive of the respondents from maintenance and dowry; that the petitioner has remarried and has a son from the second marriage; and the petitioner can easily pay the maintenance awarded by the learned Courts below. Learned counsel for respondents No. 1 to 3 prayed for the petition to be dismissed.

10. This Court appointed Ms. Kashifa Niaz Awan Advocate as *amicus curiae*, who assisted the Court by placing following case law on record Allah Dad Vs. Mukhar etc (1992 SCMR 1273), Mst. Kaneez Fatima Vs. Wali Muhammad etc (PLD 1993 SC 901), Zahida Shaheen etc Vs. The State (1994 SCMR 2098), Muhammad Boota Vs. ADJ etc (2002 SCMR 1275), Mst. Farah Naz Vs. Judge Family Court Sahiwal (PLD 2006 Sc 457), Fawad Ahsan etc Vs. Chairman Arbitration Council Islamabad etc (PLD 2017 Islamabad 364), Mrs. Parveen Chaudhry Vs. VIth Senior Civil Judge etc (PLD 1976 Karachi 416), Lal Din Vs. Mst. Zeenat Bibi etc (1987 CLC 587), Mirza Qamar Raza Vs. Tahira Begum etc (PLD 1988 Karachi 169), Fida Hussain Vs. Mst. Najma etc (PLD 2000 Quetta 46), Sohail Majeed Kareem Vs. IInd Family Judge Karachi etc (PLD 2004 Karachi 498) and Roheela Yasmeen Vs. Neelopher Hassan etc (2014 YLR 2315).

11. I have heard the contentions of the learned counsel for the contesting parties as well as learned amicus curiae, and perused the record with their able assistance.

12. The claim of respondent No.1 about maintenance for the *iddat* period and deferred dower is pegged with the question as to whether or not the marriage between the couple has been dissolved? In this regard, respondent No.1's stance is that the petitioner pronounced single divorce on her during their telephonic conversation on 17.08.2014. She maintained this stance in the plaint

as well as in the affidavit submitted as Exh.P/1 before learned Family Court. During respondent No.1's cross-examination, she stated that the petitioner also called respondent No.1's mother and informed her about pronouncement of divorce on respondent No.1. It is pertinent to mention that respondent No.1's mother did not appear before the learned Family Court to record evidence in support of respondent No.1's version. On the other hand in the petitioner's written statement and evidence as DW-1, he denied pronouncement of divorce on respondent No.1 and claimed that she is still his legally wedded wife. However, during respondent No.1's cross-examination no suggestion was put to negate her claim regarding pronouncement of divorce.

13. Be that as it may, it appears that despite significant divergence in the pleadings of the parties, learned Courts below did not frame a specific issue regarding pronouncement of divorce between the petitioner and respondent No.1. This is despite the fact that in his written statement filed on 18.03.2016, at paragraph 11 the petitioner claimed that he filed a suit for restitution of conjugal rights against respondent No.1 which is *sub-judice* before the learned Family Court, Rawalpindi. Respondent No.1, in her cross-examination, admitted that the said suit for restitution of conjugal rights was decreed by the learned Family Court, Rawalpindi.

14. Now, the learned Family Court and learned Appellate Court at Islamabad while deciding respondent No.1 to 3's suit and the petitioner's appeal did not record any findings on this aspect of the case. So much so that in the impugned judgments and decrees there is no express finding or declaration on the collateral question about existence of matrimonial relationship between the parties.

15. In column 14 of the Nikahnama, five *tolas* gold is mentioned as deferred dower (*mehr ghair muajjal*) and it has not been mentioned to be payable on demand (*indal talab*) even no condition has been mentioned for the same becoming payable therefore it becomes recoverable on dissolution of marriage by divorce or death. The Hon'ble Supreme Court in the case of Saadia Usman Vs. Muhammad Usman Iqbal Jadoon (2009 SCMR 1458) held that "*Where no time was stipulated, deferred dower did not become "prompt" merely because wife*

had demanded the same... As no time was fixed for payment of deferred dower of Rs.5,00,000 it would be payable in eventuality of dissolution of marriage either by death or divorce or death”.

16. Now, since the termination of a marriage is a precondition for (i) the deferred dower to become due and payable and (ii) commencement of *iddat* period, the learned Courts below could not have granted deferred dower and maintenance for *iddat* period to respondent No.1, without first deciding as to whether divorce between the parties had taken place or not ? Mere reliance on failure of the petitioner/defendant to put a negative suggestion regarding this material aspect of the case would not be sufficient to decide the controversy. Admittedly, notice of divorce under Section 7 of the Muslim Family Laws Ordinance, 1961 was not given to the Arbitration Council and the factum about pronouncement of divorce was specifically denied by the petitioner/ defendant. Learned Courts did not take into account the law laid down by the Hon’ble Supreme Court in case of “Mst. Kaneez Fatima Vs Wali Muhammad (PLD 1998 SC 901) wherein it was held that *Muslim Family Laws Ordinance is an existing law which has not so far been declared by the Federal Shariat Court or by the Shariat Appellate Bench of the Supreme Court in conflict with the provisions of Islamic Injunctions*. Relying upon the earlier judgment in case of “Muhammad Salahuddin Vs. Muhammad Nazir Siddiqui” (1984 SCMR 583) it was further held that *“the statute takes over where the parties by settlement arrive at dissolution” Section 7 was held to be observed even in such circumstances.* “

17. The petitioner/husband denied issuance of divorce in no uncertain terms. A suit for restitution of conjugal rights before learned Family Court, Rawalpindi was said to be pending at the time of filing written statement (which according to the statement of respondent No.1 stood decreed). Notice of divorce under Section 7 of the Muslim Family Laws Ordinance, 1961 was never issued. In such circumstances, question as to whether marriage has been dissolved is of paramount importance, being precondition for the entitlement for deferred dower and maintenance for *iddat* period. Due to this significant omission an error of law has crept in the finding of learned Courts below as regards the question of

respondent No.1's entitlement for maintenance during the *iddat* period and deferred dower. As such to this extent the impugned judgments and decrees, being non sustainable, are set aside.

18. So far as the dowry articles are concerned, the petitioner only challenged the judgment and decree of learned Family Court to the extent of gold ornaments decreed according to Exh.P/4. During cross-examination, the petitioner (DW-1) had admitted that one chain with locket and two earrings of respondent No.1 are lying at his house, the said description is undisputedly according to Exh.P/4 therefore finding of the Courts below on this aspect do not warrant interference.

19. Furthermore, contentions of the petitioner that quantum of maintenance for minors at the rate of Rs.5,000/- each is excessive does not merit consideration because the same is even less than the expenditure ordinarily incurred on growing up children.

20. In view of above, present petition is partially accepted. The impugned judgment and decrees are set aside to the extent of maintenance for iddat period and deferred dower awarded to respondent No.1. To this extent, the matter is remanded to learned Family Court for decision afresh by framing an issue as to whether the petitioner had divorced respondent No.1 through a telephonic call on 17.08.2014? Thereafter, the learned Family Court should decide issues No. 1 and 4 afresh on the basis of decision given on the additional issue. To the remaining extent the present petition is dismissed. There shall be no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON ____/2019

*Qamar Khan**

(JUDGE)