

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Writ Petition No. 1490 of 2011

Raja Muhammad Khalil Akhtar

Versus

Mst. Nadia Mir, Etc.

Date of Hearing : **16th March, 2012.**
For petitioner : Mr. Sana Ullah Zahid, ASC.
For Respondents 1 : Raja Muhammad Khan, Advocate.

MUHAMMAD ANWAR KHAN KASL J:-

The petitioner has challenged the judgment and decree dated 14.10.2010, passed by learned Addl. District Judge Islamabad, whereby original judgments decree dated 11.11.2009 passed by learned Judge Family Court, Islamabad was modified and enhanced dower amount of Rs.5,00,000/- in addition to Rs.50,000/-was decreed.

2. Brief facts for the disposal of this petition are that the respondent No.1 / plaintiff filed a suit for the recovery of dower amount of Rs.5,50,000/-and maintenance allowance equal to the amount of price of two tolas of gold.

3. The suit was contested by the petitioner / defendant through written statement and the learned trial court framed the following issues;

- i. Whether the plaintiff is entitled to decree for recovery of maintenance allowance, if so at what rate and since when? OPP

- ii. Whether the plaintiff is entitled to decree for recovery of dower as prayed for? OPP
- iii. Whether the plaintiff has no cause of action to file this suit? OPD
- iv. Whether the suit is not maintainable in its present form? OPD
- v. Whether the instant court lack territorial jurisdiction to entertain the matter? OPD
- vi. Whether the plaintiff has concealed the material fact from the court? OPD
- vii. Whether the plaintiff is disobedient wife so she is not entitled to any maintenance allowance? OPD
- viii. Whether the plaintiff has filed the instant suit with malafide intention, ulterior motive, just to blackmail, harass and pressurize the defendant? OPD
- ix. Whether the suit is false, vexatious and frivolous? OPD
- x. Relief.

4. The parties produced their respective oral as well as documentary evidence and after hearing the parties, learned Trial Court decreed the suit for recovery of dower amount of Rs. 50,000/-and maintenance allowance one tola gold per month or its price for the period from February 2008 to the date of divorce and Iddat period i.e up to October, 2008.

5. The respondent No.1 / plaintiff being dissatisfied filed an appeal before the learned Addl. District Judge, Islamabad, who after hearing the parties, partly allowed the appeal and decreed the suit to the extent of enhanced dower amount of Rs.5,00,000/-, but rejected the claim of maintenance allowance @ two tolas of gold.

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6. The petitioner / husband has now approached this Court on the ground that the registered Nikah Nama dated 06.05.2005 (Exh.P3) was executed between the parties and in column 3, dower amount has been mentioned as Rs.50,000/- while affidavit dated 17.06.2006 has got no evidentiary value because it was neither executed by the present petitioner nor it was proved through evidence before the trial court. It is further submitted that the affidavit does not contain his signatures in original, there are no marginal witness and it has not been sworn before Oath Commissioner and even otherwise the affidavit cannot be considered as undertaking or agreement.

7. The learned counsel for the respondent No.1 / plaintiff opposed the petition on the ground that the petitioner had himself executed the affidavit and never rebutted its contents before the learned trial court.

8. On the other hand, the findings given by the learned Judge Family Court on the suit of conjugal rights have attained finality regarding enhanced dower amount of Rs.5,00,000/-. It is further submitted that the present writ petition is not maintainable as it involves disputed questions of facts and evidence cannot be discussed at this stage.

9. Both the parties relied upon case law reported as Ameer Ali Khan Vs. Kishwar Bashir (PLD 2004 S.C 746), wherein it was held that the enhanced dower amount on the basis of an agreement after the Nikah can be claimed through family suit and not through civil suit.

10. The respondent also relied upon a reported judgment of Hon'ble Lahore High Court titled as Major (Retd) Ishtiaq Mehmood Vs. Mst. Zareen Gul (2002 CLC 1838), wherein it was held that the wife can refuse to live with husband, if her husband, on demand, does not pay the dower amount and that the distinction between Khula and Mubaraat is that in the former the wife desires a separation by giving some consideration for her release, while in Mubaraat both the parties agree and wife is entitled for half of the benefits.

11. Heard and record perused.

12. Admitted position is that Nikah was performed on 06.05.2005 and according to column 13 of registered Nikha Nama (Exh.P3), dower was fixed as Rs.50,000/-while affidavit (Exh.P4) is said to be executed on 17.06.2006.

13. A bare perusal of affidavit shows that it was neither sworn on oath nor it was solemnly affirmed before any Oath Commissioner. An affidavit cannot be equated with an agreement or undertaking, because affidavits are not registered documents and since there are no marginal witnesses, it cannot be proved. After its denial by the petitioner / defendant, onus had shifted on plaintiff to prove it, but she never produced any witness on this point nor requested for its reference to a hand writing expert. There is no dispute on the point that there is neither any agreement nor undertaking on record and, therefore, the learned Addl. District Judge erred in holding that on the basis of affidavit

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(Exh.P4) Dated 17.06.2006 the respondent is entitled to recover the enhanced dower amount of Rs.5,00,000/-.

14. As far as the claim of maintenance allowance is concerned, it has been accepted by both the parties at the rate of one tola per month or its price for the period of eight month i.e February to October 2008, therefore, no findings on this point are required.

15. For the foregoing reasons, the petition is accepted, judgment dated 14.10.2010 passed by learned Addl. District Judge Islamabad is set-aside to the extent of recovery of enhanced dower amount of Rs.5,00,000/-. Parties are left to bear their own costs.

(MUHAMMAD ANWAR KHAN KASI)
JUDGE

Announced in Open Court, on this 2nd day of April, 2012.

JUDGE

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