JUDGMENT SHEET

ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT

W.P.No.4055/2021
Mst. Ezza Masroor
vs.
Muhammad Fahad Tanveer & 02 others

Petitioner by:	Hafiz Asif Ali Tamboli, Advocate along with petitioner and her father
Respondent No.1 by:	Mr. Manzoor Hussain, Advocate along with respondent No.1 and his father
Date of Hearing:	13.01.2022.

MOHSIN AKHTAR KAYANI, J: Through the instant writ petition, the petitioner has called in question the judgment and decree of the learned Additional District Judge (West), Islamabad, dated 21.10.2021, whereby the petitioner's appeal preferred against the judgment and decree of the learned Judge Family Court (West), Islamabad, dated 27.07.2021, has been dismissed.

2. Brief facts referred in the instant writ petition are that Muhammad Fahad Tanveer (Respondent No.1) and Mst. Ezza Masroor (petitioner) got married on 22.03.2018, from whom a daughter was born on 27.07.2019, as such, they had been sharing cordial relation until the petitioner's parents forcibly detained her in their home restraining her to join back the abode of respondent No.1, as a result whereof respondent No.1 filed a suit for restitution of conjugal rights, which was decreed vide judgment and decree, dated 27.07.2021. Feeling aggrieved thereof, the petitioner preferred an appeal praying that a sum of Rs.25,000/- may be ordered to be paid by respondent No.1 as maintenance in favour of petitioner and the minor, each, alongwith maternity expenditures of Rs.100,000/-, as such, the appeal was dismissed vide impugned judgment and decree, dated 21.10.2021. Hence, instant writ petition.

3. Learned counsel for petitioner contends that the law provides no provision for restitution of conjugal rights, when the husband is not maintaining his wife according to the Holy Quran and Sunnah or is not ready to pay the maintenance of wife and minor, as such, both the Courts below have failed to appreciate this aspect of the case and decreed the suit of respondent No.1 in a haste; that respondent No.1 showed negligent behavior towards the petitioner and the minor with respect to their livelihood expenditures, per se, such conduct on the part of respondent No.1 created hate in the mind of petitioner, due to which she could not live with respondent No.1, therefore, impugned judgment and decree may be set-aside.

4. Conversely, learned counsel for respondent No.1 maintained that during the pre-trial reconciliation proceedings between the parties the petitioner expressed her willingness to join respondent No.1 as wife only if he takes care of her needs and keep her with dignity, as such, respondent No.1 has been treating the petitioner with dignity and fulfilling the needs as agreed, per se, the parents of petitioner are pressurizing her not to join the abode of respondent No.1 back; that both the Courts below have rightly appreciated each and every aspect of the case and concurrently decreed the suit of respondent No.1 in accordance with law.

5. Arguments heard, record perused.

6. Perusal of record reveals that petitioner Mst. Ezza Masroor was entered into *Nikah* with respondent No.1 on 22.03.2018 against *Haq Mehr* of 7 ½ gold (equal value of Rs. 440,000/-), which was paid at the time of *Nikah* and same is mentioned in column No. 14 and 15 of the *Nikahnama*. Both the parties were blessed with minor daughter namely Aimal Zehra, born on 27.07.2019, who is presently in custody of petitioner. The dispute started between the parties on primary issue of non-maintenance as per the stance of

the petitioner, who refused to live with the respondent husband, as a result respondent No.1 has filed suit for conjugal rights on 22.08.2020 and referred the initial cause of action as 22.03.2018 when marriage was solemnized from the date of filing of suit i.e. 22.08.2022.

7. On the other hand, petitioner contested the suit by filing written statement and claims that the plaintiff/respondent has neither brought the minor as well as petitioner to his house, nor he has paid maternity expenditures of Rs. 100,000/- and maintenance allowance of Rs. 25,000/- since 27.07.2019 and same has been fixed as condition for restitution of conjugal rights. The initial pre-trial reconciliation failed and Family Court has framed issues, whereby both the parties have recorded their evidences in categorical terms.

8. The petitioner being wife claims that the reconciliation has been failed between the parties, even she has recorded her stance in the Trial Court, but both the Courts have not appreciated the failure of reconciliation proceedings and passed the decree without adhering to the spirit of law.

9. While going through the record, especially the evidence of petitioner Exh.D1, whereby she reiterated her stance in her cross-examination, she stated in categorical terms:-

> میں مدعی کے ساتھ آباد نہیں ہونا چاہتی۔ یہ بھی درست ہے کہ میں نے کوئی دعویٰ تنسیخ نکاح دائر نہ کیا۔ از خود کہا کہ میں مدعی کے رویے کی وجہ سے مدعی کے ساتھ آباد نہ ہونا چاہتی ہوں۔

10. This aspect clearly establishes that the petitioner has developed hatred against the respondent No.1 and she is not able to live within the prescribed limit of *Quran* and Sunnah with her husband respondent No.1, but despite that Judge Family Court has passed the decree, which has been maintained by the learned First Appellate Court.

11. While considering the judgment of the appellate Court, whereby it is specifically written in para-12 of the said judgment and observed by the Court in the following manner:-

> *It is pertinent to mention here that this court has also made an effort to reconciliate the matter between parties in order to save the family institution and future of the minor but remained unsuccessful as the defendant has brought up a new condition during the reconciliation proceedings that her dower weighting 7 ½ tolas was snatched by the plaintiff and if her returned the same and pay the outstanding maintenance allowance to her and the minor since August, 2019 she is willing to reside with him. This condition of the defendant regarding the return of dower was not agitated before the Family Court in pleadings as well as in evidence, therefore, it appears that the defendant is not willing to continue with her matrimonial relationship with the plaintiff. Therefore, no misreading and non-reading of evidence is observed hence issue No.1 need no return.*

12. The above referred last lines of the impugned judgment spells out that the appellate Court has also considered of the fact that the petitioner is "*not "willing to continue with her matrimonial relationship with the plaintiff*", but despite that decree of conjugal rights has been maintained.

13. In such scenario, both the Courts below have not attended the spirit of Islamic law as well as *West Pakistan Family Court Act, 1964,* in which it has been settled that if reconciliation proceedings have been failed, no other decree could be passed, except decree of *Khulla*, although there is a technical handicap in this case as the petitioner has not filed a suit for dissolution of marriage till date and this aspect was specifically acknowledged in cross-examination referred above. However, this hyper technical reason does not absolve this Court as per recording of stance of petitioner in unequivocal terms.

14. This Court has given ample opportunities time and again to the petitioner as well as to respondent No.1/husband to sit together and resolve their issues in amicable manner as both are well educated and professionals as doctor and engineer, having one daughter, who is presently in the custody of her mother, despite giving sufficient time, both petitioner and respondent

No.1 are not in agreement to resolve their issues amicably, even fathers of both the parties are present in the Court, but petitioner in categorical terms stated that she is not willing to continue with this matrimonial bond, rather developed hatred with the respondent No.1, who is not paying single penny as maintenance, even the *Haq Mehr*, which was referred in the *Nikahnama* is still in the custody of husband/respondent. She has been time and again confronted with her stance, but she stated in a clear term in open Court that she is now intended to dissolve this marriage by all means and it is not possible for her to agree with the restitution of conjugal rights under the prescribed limit of *Quran* and *Sunnah*.

15. In such scenario, it has clearly been established that in the Courts below, both respondent and petitioner have failed to reconcile the matter with each other, but despite that learned Judge Family Court and the learned First Appellate Court have ignored the failure of reconciliation, rather put the petitioner/wife in a difficult position, who is not willing to live with her husband, and in this regard law envisaged in ***1948 SCMR 523 (Muhammad Siddique Vs. Mst. Kalsoom Bibi and others)***, ***1997 CLC 1317 Lahore (Mst. Surria Bibi Vs. Additional District Judge Khanpur and 2 others)***, very much favours the petitioner. This Court is convinced that present marriage is unhappy relation between the parties, with no hope for living together within the limits prescribed by Almighty Allah. Both are still involved in litigation and in this regard wife could legitimately ask for *Khula*, therefore, while considering this unacceptable reunion, which has been escaped notice by the Courts below, it is abundantly clear that decree for restitution of conjugal rights could not be passed, though the same was conditional based on the initial stance of the petitioner, who is claiming maternity expenses alongwith the maintenance of minor, as such respondent has not paid that maternity expenses, contends that petitioner is Doctor by profession, her

delivery charges were exempted by her senior doctors, though evidence to that extent is not available on record, but this aspect has concurrently been settled by the Courts below against the petitioner, even no evidence qua the expenditures of maternity was on record, such aspect further establishes a disputed situation as well as disparity among the parties.

16. While going through the above discussion and evidence as well as failure of reconciliation between the parties before this Court in terms of Section 10 (4) of the *West Pakistan Family Court Act, 1964*, this Court is not in a position to pass a decree for dissolution of marriage, though said fact has been recorded by this Court in this judgment.

17. This Court has also attended the claim of petitioner regarding enhancement of maintenance @ Rs. 25,000/- per month, which seems to be on higher side, especially when the minor is of two years and five months and not going to school at this point of time, therefore, the maintenance awarded by the Courts below has been maintained.

18. In these peculiar circumstances, instant writ petition is ***PARTIALLY ALLOWED***, as a result, judgment and decree to the extent of restitution of conjugal rights in favour of respondent No.1, passed by the Judge Family Court as well as by the learned First Appellate Court are hereby ***SET-ASIDE***. The matter is remanded to the Judge Family Court, who shall consider the request of petitioner for seeking dissolution of marriage on the basis of *Khula* or otherwise and shall decide the matter accordingly under the law within one month. Whereas the judgment and decree to the extent of maintenance of minor as well as the maternity expenses are hereby ***MAINTAINED***, as a result writ petition to that extent is ***DISMISSED***.

19. Before parting with the judgment, petitioner may raise her claim qua dower referred in the *Nikahnama* is so advised. However, the maintenance decree passed by the Courts below to the extent of minor has not been

implemented in strict legal sense, therefore, respondent/Father is directed to comply with the terms of the said portion of maintenance decree accordingly by depositing the amount in the petitioner's account.

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on 20.01.2022.

JUDGE

RAMZAN