

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.

No.

IHC/Judl.Deptt.

(REVISED FORM OF BLUE SLIP)

Case No. WP- 4787-13

Titled. Irshad Khan Vs Nousheen Akhtar and other

a) Judgment approved for reporting

✓
Yes/~~No~~

b) Judgment any comment upon the conduct of the
Judicial officer for quality of the impugned judgment
Is desired to be made.

Yes/No

(In case the answer is affirmative separate
confidential note may be sent to the Registrar
drawing his attention to the particular aspect).

Initial  of the Judge.

NOTE.

1. If the slip is used, the Reader must attach on top of first Page of the judgment.
2. Reader may ask the Judge writing the judgment whether the judgment is to be approved for reporting of any comment is to be made about the judicial officer / quality of judgment.
3. This slip is only to be used when some action is to be taken.

ORDER SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Writ Petition No. 4787 of 2013

Irshad Khan
Versus
Nousheen Akhtar & 03 others

Date of Hearing: - 22nd October, 2015
Petitioner By: - Ms. Jameela JahanNoor Aslam, learned ASC,
Respondents 1&2 By: - Ms. Saira Khalid Rajpoot, Advocate.

J U D G M E N T
MUHAMMAD ANWAR KHAN KASI, CJ:

Brief facts of the case are that petitioner married respondent No. 1 on 24.06.2007 through Nikah agreement registered under Muslim Family Laws Ordinance, 1961 whereby Dower of Rs. 100,000/- was fixed in Column 13 while according to Column 15, 4 Tolas of Gold was handed over as part of Dower consideration. Out of their wedlock a female child (Respondent No.2) namely Mst. Laiba was born on 01.07.2008. In result of matrimonial rift respondent No.1 left/evicted from abode. The dispute prompted litigation initiated by Respondent No.1, who on 22.05.2008 instituted 'Suit for Maintenance and Recovery of Dowry Articles', she sought maintenance for herself @ 5000/- per month while after the birth of respondent No. 2 an amendment in Plaint whereby maintenance @ Rs.5000/- per month was sought for Minor, besides maintenance recovery of Rs.50000/- as delivery & treatment charges and Dowry Articles or their value Rs.125,000/- . In written statement to this Suit petitioner/defendant, *inter alia*, sought Restitution of Conjugal Rights.

2. Thereafter on 23.06.2010 petitioner filed a 'petition under Guardian and Wards Act for custody of Minor respondent No.2' and lastly on 11.12.2012 respondent No.1 filed 'Suit for Recovery of Dower Amount' seeking recovery of Dower to the tune of Rs.100,000/- alongwith 4Tolas of Gold or Market value. After obtaining written replies learned Family Court framed following consolidated issues;

1. Whether the Plaintiff is entitled to recover maintenance allowance, if so, at what rate and for which period ? OPP,

2. Whether the Plaintiff is entitled to recover treatment expenses of Rs.50,000/- ? OPP
3. Whether the Plaintiff is entitled to recover Dowry Articles as per list or its price of Rs.125,000/- in lieu thereof ? OPP
4. Whether Plaintiff has cause of action to file this Suit, if not, its effect? OPD
5. Whether the Suit is false and frivolous, vexatious and not maintainable, if so, its effect ? OPD,
6. Whether the welfare of the Minor lies in her Custody with petitioner ? OPD,
7. Whether the petitioner of connected petition has got no cause of action, locus standi to file the present petition ? OPP
8. Whether the connected petition is false, frivolous, baseless, hence liable to be rejected ? OPP,
9. Whether the petitioner of connected petition has not come to Court with clean hands ? OPP
10. Whether the defendant is entitled for Decree of restitution of Conjugal Rights ? OPD,
11. What is Dower fixed and whether the same has been paid ? OPP & OPD,
12. What is the nature of Dower ? OPP & OPD,
13. Relief.

3. Parties produced their oral and documentary evidence and on 21.06.2012 the respondent No.1/plaintiff herself appeared as PW-1. She tendered her affidavit (Exh. P-1) whereafter she was cross examined and then produced remaining documentary evidence in shape of the Copy of NikahNama (Mark-A), Admission Form (Mark-B), Medical Receipt dated 20.11.2007 (Exh. P-2), Medical Receipt dated 31.01.2008 (Exh. P-3), Medical Receipt dated 05.12.2007 (Exh.P-4: 1-4) , Medical Receipt dated 15.3.2008 (Mark C-2 to C-6: 1-6), Receipt dated 16.5.2008 (Mark D1 to D2), Medical Test Reports (Mark E-1 to E-3), List of Dowry Articles (Exh. P-5). Respondent No.1 PW-1 again appeared on 25.03.2013 & tendered Affidavit (Exh.P-6). She was cross examined and then produced documentary evidence, Original Medical Certificates (Exh. P-8 to P-23), Jewelry Receipt (Exh. P-9), Dowry Purchase Receipt (Exh. 10/1 to 10/5), Defendant's Income documents (Exh. P-11/1 to P-11/2) , Fee

Card of Minor (Exh. P-12/1 to P-12/3), Minor's Admission Fee (Exh. P-13), Mark Sheet of Minor (Exh. P-14/1 to P-14/3), Minor's test paper Copy (Mark F-1 to F-2), Copy of NikahNama (Mark G-1), Copy of Fatwa (Mark G-2).

4. On the other hand Petitioner/defendant appeared as DW-1, tendered his affidavit (Exh. D-1) and produced Ameer Afzal DW-2 he tendered affidavit (Exh. D-2) and both were cross examined.

5. Learned Trial Court after considering the evidence and arguments of either side passed Consolidated Judgment & Decree dated 17.06.2013 to the following effect;

i) Respondent No.1 was held entitled to separate abode in lieu was awarded maintenance @ Rs.5000/- with 10 % annual increase till her entitlement and Rs.50,000/- Medical/Delivery Expenses as well as remaining Dowry Articles admitted by petitioner/defendant during cross examination.

ii) Respondent No.2 Minor was held entitled to maintenance allowance @ Rs.5000/- per month with 10% annual increase till her legal entitlement.

iii) Prayer for Restitution of Conjugal Rights as well as Suit with regard to recovery of Dower was dismissed by holding that defendant/petitioner has paid One Lac dower.

iv) Petition for custody was dismissed however visitation rights were settled.

6. Both the parties preferred separate appeals whereby petitioner assailed quantum of maintenance and award of Medical/Delivery Expenses while respondent No.1 was aggrieved of the Dismissal of her claim for Dower. Learned Appellate Court vide impugned Judgment dated 28.10.2013 dismissed Appeal of petitioner while partially accepted the Appeal filed by respondent No.1 to the extent of recovery of Dower to the tune of Rupees One Lac with costs. Feeling aggrieved, petitioner moved this Constitutional petition. It is pertinent to mention that during pendency of present petition, petitioner severed matrimonial cord vide Divorce Deed dated 25.11.2014 and the concerned Union Council Issued Divorce Effectiveness Certificate dated 25.02.2015. These Documents were placed on record on this case through C.M No. 2992/2015 which was filed by respondent No.1.

7. Learned Counsel for petitioner submitted that both the learned Courts ignored material aspects of evidence and erred in law as well as facts. She emphasized that respondent No.1 during evidence admitted that she left house of petitioner on her own in his absence and did not want to live with

petitioner/ then husband which establishes her being a 'Nasheeza' (disobedient) wife hence was not entitled for maintenance.

8. It is next submitted that while awarding Delivery expenses, learned Courts did not took into account the prescriptions & reports issued by medical practitioners of Public Sector and charity hospitals which are run on welfare basis to provide health aid to down trodden segments of society, therefore, there was no point of decreeing the huge amount of Rs.50,000/- as delivery charges. She adds that only two medicine purchase receipts were produced by the respondent No.1 during evidence showing payment of around one thousand rupees on account of medicine purchases.

9. Learned Counsel also averred that there were glaring contradictions in version of respondent No.1 which are not only gleaned from her evidence but also from the pleadings as in the plaint for 'Suit for Maintenance and Recovery of Dowry Articles' she claimed that she was expelled from house by the petitioner in Septemeber, 2007 while subsequently after birth of Minor when she moved application for amendment of plaint, she changed her version by pleading that she was ousted in June 2008. This naysay was repeated in Exh P-1 and Exh P-6. She adds that, *infact*, petitioner was taking her to hospital/medical doctors when she was on motherly way and she admitted this during cross examination but learned Court did not consider this while passing impugned judgments.

10. Learned Counsel further argued that dower was partially paid to bride in the shape of Four Tolas Gold jewelry as mentioned in Column 15 of the NikahNama. Moreover petitioner produced DW-2 a Nikah witness who deposed that the Dower was paid at the time of Nikah while petitioner is ready to pay the remaining portion of Dower amount of Rs.38000/-. Learned Counsel states that pending portion of dower is to be treated as deferred and such dower becomes payable at the time of dissolution of Marriage. It is added that during cross examination respondent No.1/ PW-1 admitted that at the time of her desertion, petitioner was not present at house, therefore, no question with regard to snatching of ornaments arise as she was free to take anything as desired. In support, reliance has been placed upon case of "Shah Daraz Khan Vs Mst. Naila" [2015 MLD 73 Peshawar].

11. Learned Counsel submits that while fixing the quantum of maintenance for Minor respondent No.2 learned Trial not only ignored the evidence but also family conditions and income sources. Respondent No.1 contrary to her pleading admitted that petitioner has been visiting the minor and occasionally bringing her gifts but this aspect had been overlooked. Learned Counsel added that respondent No.1 moved application for appointment of local commission to determin income of petitioner but sensing adverse conclusion withdrew the same and tried to deface the fact

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that petitioner is meagerly earning tailor who has other two wives and children to support but learned Courts did not consider this while dittoing the version of respondent No.1.

12. On the other hand learned Counsel for respondent No.1 vehemently opposed the above contentions by submitting that learned Appellate Court has rightly decreed the dower as there is no proof with regard to payment of dower. She adds that under Section 10 of Muslim Family Laws Ordinance, 1961 where nature of dower as being deferred or prompt is not mentioned in the NikahNama, it has to be treated as Prompt.

13. It is next submitted that no Gold ornaments were given to respondent No.1 at the time of Nikah rather her own jewelry was retained by petitioner which was recovered through Court Bailiff.

14. It is further submitted that petitioner's family consisted of multiple wives due to which it was difficult for respondent No.1 to stay in hostile environment while she was justified in claiming separate abode. Moreover non payment of Dower has been admitted by the petitioner and where a husband fails to pay the Dower, the wife is justified to live separately and she cannot be termed Nasheeza or disobedient wife, therefore, she is entitled for maintenance during period of ghairabadi as well as for iddat period. Reliance was placed on case of "Maj. (rtd) Ishtiaq Mahmood Vs Mst. Zareen Gul etc" [2002 CLC 1838 Lahore].

14. Learned Counsel submits that petitioner owns six shops and earning colossal income due to which he is capable to pay the maintenance while he merely appealed to the extent of quantum of maintenance, therefore, at this stage he cannot be allowed to re-assert fact of the case which have been thoroughly examined by the learned Trial Court. In support learned Counsel placed reliance on case titled as "Daud Abdul Khaliq Mehr Vs Dr. Sabira Sultana etc" [2000 CLC 1823 Lahore].

15. Learned Counsel lastly submits that when petitioner expelled her from house, she was pregnant and has successfully proved that she managed the required post and pre delivery medical procedure. It is added that delivery expenses are part of the maintenance, therefore, learned courts rightly decreed the same. Learned Counsel placed reliance on case law titled as "Maqsood Ahmad Sohail Vs Mst. Abida Hanif etc" [1992 MLD 219 Lahore].

16. Heard and record perused.

17. At the very outset it is observed that in relation to quantum of maintenance awarded to respondent No.2, the mother has placed sufficient material during evidence including private school fee receipts which justifies the tune of maintenance awarded. So far as the aspect of petitioner's income sources is concerned, he is admittedly self employed and running a tailoring shop prior to marriage between the parties since 2007 while Exh P-11 1 & 2

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which have been produced without any objection show conjoined business and that petitioner is being well paid for his services at higher rates collaterally depicts his occupational success, therefore, no intervention is warranted towards the awarded maintenance for minor respondent No.2 vide concurrent Judgment & Decrees.

18. Second aspect with regard to payment of maintenance to respondent No.1 does not seem to have been decided on the basis of evidence as she unambiguously and unconditionally stated that she does not want to live with petitioner anymore without setting any demands to be fulfilled while there was contradiction in relation to date of ghairabadi. Moreover during cross examination on 25.03.2013 respondent No.1 categorically admitted prior knowledge of petitioner's earlier marriage which disentitles her from mandatorily demanding separate abode. Respondent No.1 although claimed her forcible eviction but did not produce evidence with regard to domestic torture and during cross examination admitted that at the time of her leaving the house petitioner was not present at the house, therefore, it is established that she left the house without any coercion. The nature of Dower was not clarified in NikahNama as prompt or deferred while Section 10 of the Muslim Family Laws Ordinance, 1961 makes such dower payable on demand but respondent No.1 did not mention in the pleadings or produced evidence to show that she made any demand for payment of Dower prior to her *Ghairabadi*, resultantly she cannot be said to have chosen to live separately due to non payment of Dower and as such being a wife refusing to join abode of her husband cannot be held entitled to grant of maintenance during period of *Ghairabadi*. She is however entitled to maintenance for Iddat period at statutory rate.

19. Nikahnama being a registered document carries presumption of truth with regard to transactions executed thereunder while respondent No.1 had admitted to have signed the NikahNama (Mark-A) after reading the same while at Column 15 of the same it has been mentioned that Four Tolas of Gold have been given to the bride as part of Dower consideration while no sufficient evidence to rebuff this presumption is available on record, similarly respondent No.1 had admitted to have left abode of her husband at her convenience, therefore, petitioner's version with regard to Dower stands established and he is liable only to pay remaining dower amount after deducting the value of ornaments at the relevant time.

20. Lastly the Medical/delivery expenses to the tune of Rs.50,000/- awarded to respondent No.1 although are founded on admitted position that minor was born during *Ghairabadi* but quantum of expense seems to have been ordered under the rule of thumb because apart from few receipts no payment details have been produced by the respondent No.1 while the child

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has been admittedly delivered at a public sector Hospital. In absence of accurate evidence showing payment of medical expenses the expenses awarded seem to be on higher side particularly where non major-surgical delivery was performed while she had later claimed to have left the house of petitioner in June 2008 a month prior to birth of respondent No.2, therefore, medical check up expenses prior to delivery are not justifiable. Consequently the medical/delivery expenses are reduced to Rs.30,000/-.

21. In view of above the petition is partially allowed and decree is modified in the following manner that (i) Respondent No.2 Minor is held entitled to maintenance allowance @ Rs.5000/- per month with 10% annual increase till her legal entitlement, (ii) Respondent No.1 is held entitled to maintenance @ Rs.3000/- per month during Iddat Period and (iii) Rs.30,000/- as Medical/Delivery expenses, (iv) she is also held entitled for Dower after deducting value of Four Tolas Gold at the time of marriage, (v) Remaining decree of learned Trial Court with regard to custody of Minor, restitution of conjugal rights and remaining dowry articles shall remain unchanged. No order as to Costs.

22. During perusal of record it has been observed that Copy of Divorce Deed annexed with C.M No. 2992/2015 has been signed by executants on 25.11.2014 while the same has been notarized at Islamabad prior to that on 22.11.2014. The reverse of Revenue Papers used for scribing Divorce deed were issued on 22.11.2014 that, *prima facie*, shows that blank paper was Notarized which, if true, is misconduct on the part of Notary Public who is responsible to register instruments concerning valuable rights of parties. It is, therefore, directed that copy of aforementioned document be transmitted to Chief Commissioner Islamabad who shall get the matter enquired and, if need be, proceed in accordance with Section 10 of Notaries Ordinance, 1961.

(CHIEF JUSTICE)

Announced in Open Court, on this 15th day of December, 2015.

(CHIEF JUSTICE)

Approved for reporting

Umar