

JUDGMENT SHEET

ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT

Writ Petition No.2885/2019

Adnan Zar

versus

Mst. Khadeeja Khanum & 2 others

Petitioner by: Raja Waqar Ahmad, Advocate.

Respondent No.1 by: Barrister Faisal Khan, Advocate.

Date of Decision: 17.01.2020.

MOHSIN AKHTAR KAYANI, J: Through the instant writ petition, the petitioner has called in question judgment of the learned Additional District Judge (West), Islamabad, dated 28.06.2019 as well as judgment and decree dated 07.03.2019 of the learned Family Judge (West), Islamabad with the prayer to dissolve the marriage on the basis of *Khullah*, rather on the basis of cruelty.

2. Brief facts referred in the instant writ petition are that Adnan Zar (*hereinafter referred to as "petitioner"*) and Mst. Khadeeja Khanum (*hereinafter referred to as "respondent"*) tied the knot on 13.10.2010 with dower consideration of Rs.500,000/-, while Rukhsati took place on 25.01.2014. Later on, the respondent filed a suit for dissolution of marriage on the basis of cruelty, recovery of dower, past and future maintenance together with dowry articles. The suit was contested by the petitioner being defendant on the ground that the allegations referred in the plaint are not correct and respondent become *Nasheeza* as the respondent left her abode and joined her parents, although he had also managed a Jirga in Islamabad, but of no avail, rather she refused to return to the abode of the petitioner. The learned Family Court after hearing the parties framed seven (07) issues vide order dated 15.12.2016, while the petitioner is presently arguing his case to the extent of Issue No.1, which is as under:

"Whether plaintiff is entitled for dissolution of marriage on the basis of cruelty? OPP

The learned Family Judge while recording the evidence of the parties decided Issue No.1 in favour of respondent (wife) and dissolved the marriage on the basis of cruelty vide judgment and decree dated 07.03.2019, which has been maintained by the learned Additional District Judge in appeal vide impugned judgment dated 28.06.2019.

3. Learned counsel for petitioner contends that the learned Trial Court as well as the learned first Appellate Court has not considered the evidence and passed the impugned judgment and decree on the basis of misreading and non-reading of evidence; that the respondent has miserably failed to produce any cogent and reliable evidence in respect of cruelty; that the learned Trial Court has also relied upon the medical treatment receipts (Exh.P/3 to Exh.P/5) which are inconsequential, especially when the doctor or any independent impartial evidence was not produced to prove the said receipts; that the respondent herself had left the abode of the petitioner, therefore, she is not entitled for any maintenance as she become *Nasheeza*.

4. Conversely, learned counsel for respondent (wife) contends that she had proved the cruelty faced by her at the hands of petitioner during subsistence of marriage and the factum of physical abuse was not rebutted during the test of cross examination; that the medical evidence is corroborated by the oral version of respondent that she was abused on different occasions by the petitioner, which is the very basis of cruelty; that the ground of cruelty has been proved in terms of Section 2 of the Dissolution of Muslim Marriages Act, 1939 and the respondent through her consistent statement justified that the marriage was rightly dissolved on the basis of cruelty by both the Courts below and as such, constitutional court could not enter into question of facts, which is appreciated by both the Courts below without any illegality, therefore, the instant writ petition is not maintainable and is liable to be dismissed.

5. Arguments heard, record perused.

6. Perusal of record reveals that the petitioner and respondent married on 13.10.2010 against dower consideration of Rs.500,000/-, while Rukhsati took place on 25.01.2014, however the respondent has filed a suit for dissolution of marriage, recovery of dower, dowry articles and maintenance on 26.03.2016 which specific ground raised in Issue No.1 that she is seeking dissolution of marriage on the basis of cruelty.

7. In order to prove the case, the respondent wife (plaintiff) has referred the instances of cruelty in Para-6 of the plaint, which are as under:

- a) *After the Nikah, but prior to her rukhsati, the plaintiff had to visit Canada and reside with her parents there for some time. During this period, the Defendant would show obsessive behavior and ask the Plaintiff to converse with him over the telephone and sit in front of the camera on Skype for many long hours, despite knowing the different time zones and deliberately trying to get the Plaintiff in trouble with her supervisors at her place of employment. When the Plaintiff tried to explain this to the Defendant, he used to get angry and seemed to take perverse pleasure in doing this to her.*
- b) *After the rukhsati, during the time when the Plaintiff and the Defendant were celebrating their honeymoon in Lahore, the Plaintiff was shocked to find out that the Defendant was calling his home every day to update his elder sister, Ms. Nargis, of all the intimate details of their trip, including a minute-by-minute account of what they had done during the day and the day-to-day expenses of their trip. The Plaintiff was perturbed by the fact that the Defendant did not respect their privacy and this became a big issue for the Defendant.*
- c) *The Defendant would often call the Plaintiff's family with filthy names and had a dedicated nickname for the Plaintiff's mother i.e. kanjoosni (miser). Furthermore, when the Plaintiff would object to such name callings, the Defendant would get violent and threaten her with physical harm, such that the Plaintiff would be too scared to say anything and start crying.*
- d) *There were a few occasions when the Defendant's temper flared up and he inflicted physical harm on the Plaintiff. In one incident, the Defendant held/twisted the right arm of the Plaintiff over a petty issue, despite knowing very well that the said arm of the Plaintiff was already injured and she was having physiotherapy for it. On another occasion, the Defendant dragged the Plaintiff to the staircase and said that he was going to take her down the stairs so that he could insult her in front of his whole family and then divorce her. The Plaintiff grasped the railing, but the Defendant lifted her and tried to dislodge her.*

Somehow the Plaintiff managed to free herself and ran back to her room. At this point, the Defendant were after her, dragged the Plaintiff by the shoulder, which had already been sprained previously and during this struggle, the Plaintiff's food hit the furniture, got injured and some skin came off. Similarly, on another occasion, while the Plaintiff was reading a book, for no rhyme or reason, the Defendant grabbed her left knee and dug his fingers into her flesh, to such an extent that the Plaintiff started crying. The Defendant seemed to enjoy hurting the Plaintiff and took sadistic pleasure in doing so.

- e) *The Defendant would not let go of a single opportunity to ridicule, embarrass and bully the Plaintiff in front of his friends and family. There have been numerous instances where the Defendant started shouting at the Plaintiff in front of relatives and friends over petty issues and threatened to divorce her on the spot. He would also make fun of her speaking accent in front of people, as the Plaintiff did not speak Pushto very fluently, and could not say some words of Pushto. This was done to intentionally ridicule and make fun of her in front of others.*

8. The abovementioned grounds were reiterated by PW-1 respondent in her statement of affidavit Exh.P1 in Para-7 (a, b, c, d & e), however PW-1 respondent (wife) was not cross examined qua the factum of cruelty in a specific manner, rather the facts specifically narrated in Para 7 of Exh.P1 were not refuted by the petitioner, except that a suggestion was given by the petitioner regarding reporting of complaint of physical torture to the police on which PW-1 respondent acknowledged that she has neither filed any application to police nor produced any medical certificate before the Court.

9. The respondent also produced PW-2 Dr. Tariq Khan i.e. her father, who has given entire details of relationship existed between the petitioner and respondent, however even PW-2 Dr. Tariq Khan was not cross examined on the issue of cruelty and same is the case with PW-3 Aneesa Begum and PW-4 Taimoor Khan as they have not been put to any question regarding issue of cruelty. It is trite law that if the witness has not been cross examined on material facts recorded on oath by way of affidavit or otherwise the same stand admitted in terms of Article 133 of the Qanun-e-Shahadat Order, 1984, although the

principles of Qanun-e-Shahadat Order, 1984 are not applicable in family court jurisdiction.

10. PW-1 Respondent has referred a specific stance in her evidence that:

There were a few occasions when the Defendant's temper flared up and he inflicted physical harm on the Plaintiff. In one incident, the Defendant held/twisted the right arm of the Plaintiff over a petty issue, despite knowing very well that the said arm of the Plaintiff was already injured and she was having physiotherapy for it. On another occasion, the Defendant dragged the Plaintiff to the staircase and said that he was going to take her down the stairs so that he could insult her in front of his whole family and then divorce her. The Plaintiff grasped the railing, but the Defendant lifted her and tried to dislodge her. Somehow the Plaintiff managed to free herself and ran back to her room. At this point, the Defendant were after her, dragged the Plaintiff by the shoulder, which had already been sprained previously and during this struggle, the Plaintiff's food hit the furniture, got injured and some skin came off. Similarly, on another occasion, while the Plaintiff was reading a book, for no rhyme or reason, the Defendant grabbed her left knee and dug his fingers into her flesh, to such an extent that the Plaintiff started crying. The Defendant seemed to enjoy hurting the Plaintiff and took sadistic pleasure in doing so.
(underlining is provided for emphasis)

11. The above referred specific issue of cruelty has been corroborated by the respondent by placing on record the document dated 16.06.2016 of the Shifa International Hospital (Exh.P2), whereby the respondent was examined by Dr. Rizwan Taj as well as document of prescription Exh.P5, in which medicines have been suggested. The respondent was also seen by Dr. Asima M. Khan vide Exh.P4/1, who is specialized in Adult Cognitive Behavior Treatment as referred in Exh.P4, who suggested relaxation techniques as referred in Exh.P4/2, dated 17.06.2016.

12. The above referred views, if seen in juxtaposition with the aforesaid documentary evidence, it is necessary to go through the stance of petitioner, who appeared as DW-1 through his evidence of affidavit Exh.D1, in which he has not denied any allegation in specific manner, rather refers that:

7۔ یہ کہ دوران شادی مدعیہ، مدعا علیہ اور اس کے گھر والوں کو تنگ کرتی رہی ہے اور ان کے ساتھ بسنے کی کوشش نہ کی ہے اور مدعا علیہ پر من گھڑت الزامات لگاتی رہی ہے۔ جن کا کوئی وجود نہ ہے۔

During the course of cross-examination, the DW-1 petitioner admitted the following facts.

- میں اب مدعیہ کو الگ رہائش، نان و نفقہ اور حق مہر نہیں دے سکتا۔
- لفظ ناشیزہ کا مطلب نافرمان ہوتا ہے۔ مدعیہ رخصتی کے بعد ناشیزہ ہونا شروع ہوئی۔ میں ایک ناشیزہ عورت کے ساتھ شادی میں رہنا چاہتا تھا۔ میں نے ابھی تک مدعیہ کو طلاق دینے کا نہ سوچا۔ میں نے کبھی مدعیہ کے خلاف باذو دعویٰ دائر کرنے کا نہ سوچا۔ مدعیہ مجھ پر وہی الزامات لگاتی تھی جو اس نے اپنے دعویٰ میں لکھے ہیں ازخود کہا کہ میرے پاس سے جانے کے بعد اس نے الزامات مجھ پر لگائے تھے۔
- یہ درست ہے کہ دسمبر 2015 کے بعد سے میں نے مدعیہ کو maintain نہ کیا ہے۔

13. The above referred position available in the evidence has been concurrently appreciated by both the Courts below in findings of Issue No. 1, therefore, while going through these factual aspects, I have attended to the grounds referred in Section 2 of the Dissolution of Muslim Marriages Act, 1939, whereby the non-provision of maintenance and treatment of wife with cruelty includes habitual assault as referred in Section 2(viii)(a), which refers as under:

(viii) *That the husband treats her with cruelty, that is to say:-*

(a) *habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment;*

14. The word “*cruelty*” has not specifically been explained in the Dissolution of Muslim Marriages Act, 1939, but perusal of the aforesaid Section 2(viii)(a) clearly establishes that cruelty is not limited to physical injury. Nevertheless, the meaning of word “*cruelty*” has been observed from different connotations i.e. *brutality, savageness, inhumanity, barbarism, murderous, callous, ruthless, heartlessness, evil, heinous, unkindness, abuse, harshness, painful, trauma, etc.* (as referred in the Oxford Thesaurus of English).

15. The entire testimony brought on record by the parties proves that there was no possibility of reunion to live together as husband and wife within the limits prescribed by Allah Almighty in *Surah Al-Baqarah, Verse No.231*.

16. The aversion and hatred are required to be proved and its onus is upon respondent in this case, whereas the evidence recorded on oath was sufficient to display a version of hate against husband, which is primary consideration for

dissolution of marriage on the basis of cruelty and the instances reported in the evidence were not rebutted, whereas the main test laid down by the Holy Quran is that when a Qazi apprehends that limits of Allah “*will not be observed*”. However, it is relevant to talk about the two instances relating to the wives of *Sabt Ibn-i-Qais* as reported in the history of Islam, whereby his first wife namely *Jamila* and second wife *Habiba* had sought dissolution of marriage from him and Holy Prophet (PBUH) had enforced the right of Khulla on both occasions. In particulars, *Jamila* had disclosed her concern that she found no fault with *Sabt Ibn-i-Qais* and the sole reason why she wanted to be released was that he was ugly and she could not bear him for she being herself a beautiful woman, whereafter Holy Prophet (PBUH) made pronouncement that husband and wife could not amicably live together. On the other hand, *Habiba* had sought dissolution of marriage from *Sabt Ibn-i-Qais* on the basis of cruelty as she had been physically abused by the latter, whereupon the Holy Prophet (PBUH) had dissolved the marriage.

17. The entire philosophy of relationship of husband and wife in Islam is based on the teachings of Holy Quran as also explained in PLD 1967 SC 97 (Mst. Khurshid Bibi vs. Baboo Muhammad Amin) in the following manner:

37. When the Holy Qur'an conferred on women a status of equality with men in their rights by stating *ولهن مثل الذي عليهن* (women have rights against men similar to those that men have against them according to the well known rules of equity), it was natural and logical that she should have been conferred the right of khula, as compared to the right of talaq existing in men. Verse 2: 229 of the Holy Qur'an requires that the husband should either retain the wife in honour according to the well recognised custom *امساک بالمعروف* or release her with grace *تسريح باحسان* so that detaining them wrongfully is sinful. It further enjoins on the husband not to cling to the woman in order to cause her injury *ولا تمسكوهن ضرارا لتعتدوا*. Allah further commands in verse 19, Sura Al Nisa (iv):

“Nor should ye detain them that ye may take away a part of what ye have given them.”

Thus the Holy Qur'an prohibits the wrongful or unwilling retaining of women, and favours their release. According to a hadith “let no harm be

done, nor harm be suffered in Islam لا ضرر ولا ضرار في الاسلام. If the Qazi is satisfied that relations between the spouses are so embittered that a marriage relationship between the spouses consistent with the tenets of Islam is not possible, and a reconciliation is out of question, the husband's clinging to her would be injurious to her, and since she would be prejudiced by the continuance of the marriage, the express words of the Holy Prophet clothe the Qazi with ample authority to dissolve the marriage "If a woman be prejudiced by marriage, let it be broken off" (Sahi ul Bukhari), as quoted by Ameer Ali in Muhammadan Law, Volume II (1965 Edition) at page 478.

38. The nature and extent of the power and authority of the, Qazi to order dissolution of marriage is to be found in the following words of Mujalla tul Ahkam :

الحاكم هو الذات الذى يعين و ينصب من قبل اسلطان لا جل فصل و حسم
الدعاوى و المخاصمات الواقعة بين الناس توفيقا لا حكا الدعوى مها
المشروعة"

(Hakim (Judge) is that person who is appointed by the Sultan to finally adjudicate upon and determine disputes and claims between the contestants according to Shariat).

Mabsoot, Volume V, at page 97 states:

"للتقاضى ولا يته اذالته الظلم با لطلاق"

(The Qazi has the power to prevent zulm by effecting separation).

Hedaya makes this further clear by stating in Volume II at page 323 as follows: -

"As Allah has enjoined that the husband should either retain the wife according to the well recognised custom release her with grace if she is not kept accordingly, it is necessary for him to release her with grace, or the Qazi will release her on his behalf."

Raddul Muhtar, which is a ,commentary of Hedaya, states that if the husband refuses to divorce his wife, she will make an application to the Qazi, and if her husband's refusal to divorce her is zulm, the Qazi will act on his behalf for relieving her of zulm, and it is permissible for the Qazi to dissolve the marriage.

18. Keeping in view the above position, this Court truly believes that the petitioner had made the life of respondent miserable by giving her emotional and psychological trauma by way of verbal and physical abuse, which are the key factors and covered under Section 2(viii)(a) of the Dissolution of Muslim

Marriages Act, 1939. The minimum threshold of evidence regarding cruelty was brought on record by the respondent, but surprisingly the learned Family Court has ignored the most important factor of the Family Court Act, 1964, which provides exclusive jurisdiction to the Family Court in terms of Section 5, Part-II of the Schedule, however in order to understand the law it is important to reproduce the provision of Section 5 of the Family Court Act, 1964, which is as under:

5. Jurisdiction.– [1] *Subject to the provisions of the Muslim Family Laws Ordinance, 1961, and the Conciliation Courts Ordinance, 1961, the Family Courts shall have exclusive jurisdiction to entertain, hear and adjudicate upon matters specified in [Part I of the Schedule].*

(2) *Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (Act V of 1898), the Family Court shall have jurisdiction to try the offences specified in Part II of the Schedule, where one of the spouses is victim of an offence committed by the other.*

(3) *The Government may amend the Schedule through addition, deletion or substitution of any entry in the Schedule.*

19. Section 5 provides two parts in Schedule, while this Court keeping in view the case in hand feels it indispensable to illustrate Part-II of the Schedule, which is as under:

Part II

Offences and aid and abetment thereof under Sections:

- 337A(i) PPC (*Shuja-e-Khafifa*)
- 337F(i) PPC (*Damiyah*)
- 341 PPC (*Wrongly Restrain*)
- 342 PPC (*Wrongful confinement*)
- 343 PPC (*wrongful confinement for 3 or more days*)
- 344 PPC (*wrongful confinement for 10 or more days*)
- 345 PPC (*wrongful confinement of a person whose liberation writ has been issued*)
- 346 PPC (*wrongful confinement in secret*)
- 352 PPC (*assault or use of criminal force*)
- 509 PPC (*insulting modesty or causing sexual harassment of a woman*).

20. The wisdom laid down by the legislature in this enactment by incorporating Section 5(2) read with offences defined in Part-II of the Schedule left no other meaning except that women have to be given protection, although

the legislative intent in Section 5(2) refers as, *where one of the spouses is victim of offence committed by other*. Hence, it can easily be construed that it protects both husband and wife tied in a matrimonial bond if either of the party is abusing the other spouse and committed the offences of Sections 337A(i), 337F(i), 341, 342, 343, 344, 345, 346, 352 and 509 PPC. However, it has been observed that in numerous judgments passed by Family Courts, despite availability of overwhelming evidence on record, the Courts are not attending to the wisdom laid down in Section 5(2) read with Part-II of the Schedule of the Family Courts Act, 1964, in which the family courts have been given exclusive jurisdiction to proceed against a spouse, who is an aggressor and had committed any of the above mentioned offences notwithstanding anything contained in the Code of Criminal Procedure, 1898. This aspect gives a legal cover to the family courts to prosecute those spouses, who have inflicted injuries on other spouse by way of emotional, psychological as well as physical harm, especially when the victim wife has been detained against her wishes or confines secretly in some place for different intervals of time or abuses physically (whether medical is available or otherwise).

21. In this case, the physical abuse was explained by respondent together with the psychological harm, which has been corroborated through documentary evidence Exh.P2 and Exh.P5, as such, concurrent findings given by the Courts below prove that petitioner had abused the respondent wife with extreme cruelty, the marriage was rightly dissolved under the law as no illegality has been established by the petitioner. However, it is the duty of the family courts to consider the following guiding principles.

- a) After recording of evidence by the Family Court, if it appears that any spouse who has suffered the psychological and physical injuries at the hands of other spouse covering under the offences referred in Part-II i.e. Sections 337A(i), 337F(i), 341, 342, 343, 344,

345, 346, 352 and 509 PPC, the learned Family Judge has to proceed against the perpetrator and award sentence in accordance with the law.

- b) The Family Court while considering the offences referred in Part-II of the Schedule should give clear findings and verdict while dilating upon the evidence, even with or without framing of charge of that offence as the legislation has used the term “*notwithstanding anything contained in the Code of Criminal Procedure, 1898*”.
- c) The Family Court can summon the evidence of expert psychiatrist, doctor, CMO or the relevant doctor who had treated the victim in such type of cases.
- d) The Family Court, before pronouncement of the final judgment, if *prima facie*, seem the offences referred in Part-II of the Schedule, may issue a show cause to the perpetrator or the spouse accused of the offence(s) in order to justify the requirements of Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973 by giving full opportunity for his defence and may record his/her statement being an accused as required under Section 342 Cr.P.C. or 340(2) Cr.P.C., if so required.
- e) The Family Court may also call the summary inquiry through the relevant police authorities or seek a report and treat all those reports, record and documents as part of trial and may also provide the copies of those documents to the person accused of the charge before final pronouncement of the judgment.
- f) The Family Court, while deciding the issue of cruelty, may frame specific charge for the offence, consider the evidence on the touchstone and requirement of ingredients of offences referred in Part-II of the Schedule and pass a sentence simultaneously in the

same judgment or may proceed separately in accordance with procedure provided under the Cr.P.C.

- g) The Family Court who has not given any findings on Part-II of the Schedule (of the offences) in its judgment despite availability of evidence in the Family Court jurisdiction, shall be treated as misconduct on its part, which has to be dealt with separately by the High Court on its administrative side.
22. While considering the above background, this Court is confident to hold that the petitioner has failed to prove his case on any legal justification, whereas the Family Court has rightly dissolved the marriage on the basis of cruelty, therefore, the instant writ petition is misconceived and the same is hereby **DISMISSED**. However, this Court while sitting in constitutional jurisdiction could not award any punishment at this stage in this case.
23. The learned Registrar of this Court is directed to circulate copy of this judgment to District & Sessions Judges of both Division, Islamabad for their perusal and information.

(MOHSIN AKHTAR KAYANI)
JUDGE

APPROVED FOR REPORTING.

JUDGE

Khalid Z.