JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD

WRIT PETITION NO. 4292 OF 2019.

MUHAMMD SAEED BUTT.
Vs.
THE ADDITIONAL DISTRICT JUDGE (WEST), ISLAMABAD, ETC.

Petitioners by	**:**	**M/s M. Wajid Hussain Mughal and Qasim Sarfraz, Advocates for Petitioner.**
Respondents by	**:**	**Mr. Sadiq Khan, Advocate.**
Date of Hearing	**:**	**20.04.2022.**

SAMAN RAFAT IMTIAZ, J.:- Through the instant writ petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (**"Constitution"**), the Petitioner has assailed the Judgment and Decree dated 11.03.2019 passed by the learned Judge Family Court (West) Islamabad **("Trial Court")** and the Judgment and Decree dated 07.11.2019 passed by the learned Additional District Judge (West) Islamabad **("Appellate Court")** to the extent of recovery of maintenance allowance and the dower amount of the Respondent No.3 and the maintenance allowance of the Respondents No.4 & 5.

2. The pertinent facts as per the Memo of the petition are that the Petitioner and Respondent No.3 were married to each other and the Respondents No.4 & 5 are their sons. The Respondents No.3 to 5 filed a Suit for Recovery of Dower, Dowry Articles and Maintenance and prayed for recovery of maintenance allowance for the Respondent No.3 at the rate of Rs.20,000/- per month from October, 2013 till expiry of period of Iddat; past and future maintenance at the rate of Rs.60,000/- per month for each child since October, 2013; return of dowry articles or in alternative payment of Rs.800,000/-; and payment of dower amount as mentioned in the Nikahnama. The Petitioner contested the said suit by filing written statement. After framing of issues and recording evidence the Trial Court decreed the suit as follows:-

> *"1. Plaintiff No.1 is held entitled to recover maintenance allowance at the rate of Rs.10,000/- per month from October 2013 till expiry of Iddat period 27.12.2016.*

ii. *Plaintiff No.1 is held entitled to recover the value of dowry articles i.e. Rs.100,000/-.*

iii. *Plaintiff No.1 is entitled to recover dower in shape of 4 Tolas gold ornaments.*

iv. *Plaintiff No.2 is entitled to recover maintenance from defendant since October 2013 till attaining the age of majority at the rate of Rs.20,000/- per month with 10% annual increase.*

v. *Plaintiff No.3 is entitled to recover maintenance from defendant since October 2013 till attaining the age of majority at the rate of Rs.20,000/- per month with 10% annual increase.*

vi. *Maintenance allowance already paid to the plaintiffs during the pendency of the lis will be adjusted during execution proceedings."*

3. Aggrieved of the Impugned Judgment and Decree dated 11.03.2019 **("Impugned Judgment I")**, the Petitioner preferred an appeal before the Appellate Court, which was dismissed vide Impugned Judgment and Decree dated 07.11.2019 **("Impugned Judgment II")**.

4. The learned counsel for the Petitioner contended that the Impugned Judgments and Decrees are perverse and against the law and facts and the result of misreading and non-reading of evidence, which are therefore not sustainable in the eyes of the law. The learned counsel pointed out that the Petitioner pronounced divorce upon the Respondent No.3 on 28.09.2016, whereas the suit for recovery was filed thereafter, which according to him proves that the Petitioner was maintaining the Respondents till the date of divorce and as such the grant of maintenance from October, 2013 is unjustified. He contended that the Respondent No.3 did not enter the witness box despite being present before the Court and that in any event her special attorney, who appeared as P.W.1 admitted that the Petitioner and the Respondents No.3 were married in the year 1998 and lived together for a period of 16 to 17 years, which proves that the alleged date of desertion in 2013 is fake. He submitted that maintenance should be granted to the Respondents only from the date of divorce as the Respondents were unable to prove desertion. With regard to recovery of value of dowry articles he contended that both the Courts below failed to appreciate that as per the list of dowry articles provided by the Respondent No.3, such articles were ordinary household items, which are subject to wear and tear and therefore were consumed during the subsistence of the marriage that lasted 16 to 17 years and therefore the Petitioner was not liable to return the value thereof.

Lastly he argued that dower as per Nikahnama was Rs.20,000/- in the shape of gold ornaments weighing 4 Tolas however gold ornaments are no longer available for the price of Rs.20,000/- therefore the Petitioner should only be liable for Rs.20,000/- as dower. With regard to maintenance of the Respondents No.4 & 5, the learned counsel highlighted that the Respondent No.4 reached the age of majority two months after institution of the suit, whereas the Respondent No.5 will reach the age of majority in August, 2022 and as such the Impugned Judgments and Decrees granting maintenance to the Respondents No.4 & 5 are erroneous.

5. On the other hand, learned counsel for the Respondents No.3 to 5 drew the Court's attention to the admission made by the special attorney of the Petitioner during the course of cross-examination, whereby he admitted that the Petitioner evicted the Respondent No.3 from his house. While controverting the suggestion made by the learned counsel for the Petitioner regarding length of marriage, the learned counsel for the Respondents No.3 to 5 pointed that special attorney of the Respondent No.3 categorically stated in his cross-examination that the parties were married till 2013. The learned counsel further submitted that the list of dowry articles was produced by the Respondent No.3 as Ex: P-7, therefore, the Impugned Judgements and Decrees are based on evidence. Lastly he fully supported the reasoning given by learned Trial Court for the grant of dower in the form of 4 tolas as correct, which was accordingly upheld by learned Appellate Court. He further argued that the Impugned Judgements and Decrees are based on correct appreciation of the facts and the applicable law and as such do not warrant interference by this Court, therefore, he prayed for dismissal of the instant writ petition.

6. I have heard the learned counsel for the parties and have gone through the record.

7. First and foremost, it is to be borne in mind that a High Court in exercise of Constitutional jurisdiction does not act like a Court of appeal. It neither reappraises evidence nor does it substitute the concurrent findings of fact recorded by the Family Court and upheld by the Appellate Court with its own findings solely on the ground that another view is possible on the same evidence. A party approaching the High Court under Article 199 of the

Constitution has to demonstrate that there is a gross misreading or non-reading of evidence or jurisdictional error or such legal infirmity that has caused miscarriage of justice.

8. Here I would like to recall the scope of jurisdiction of this Court under Article 199 of the Constitution as explained in the case of *Pakistan Sugar Mills Association (PSMA), Islamabad Versus Federation of Pakistan through Secretary, Cabinet Division, Islamabad*, PLD 2021 Islamabad 55:

> *"66. This Court will not issue a writ if equitable considerations do not permit it. The jurisdiction of this Court under Article 199 of the Constitution is extraordinary, discretionary and equitable in nature and is to be exercised in the larger interest of justice. While exercising this jurisdiction, the facts and circumstances of the case should be seen in their entirety to find out if there is miscarriage of justice. It can be exercised ex debito justitiae, i.e. to meet the ends of justice. While exercising writ jurisdiction, the High Court not only acts as a Court of law but also as a Court of equity. It is, therefore, the duty of this Court to ensure that it exercises jurisdiction to advance the ends of justice and uproot injustice.* ***In exercise of this jurisdiction, this Court will intervene where justice, equity and good conscience require such intervention.*** *"* [Emphasis added].

9. With such scope in mind, I shall consider the arguments raised in the instant matter.

Maintenance for Respondent No. 3 from the date of the alleged desertion

10. The Petitioner's legal counsel argued that maintenance for Respondent No.3 should have been granted from the date of divorce i.e. 28.09.2016 as opposed to the alleged date of desertion because (a) desertion was not proved; and (b) even otherwise the date of the alleged desertion in the month of October, 2013 is fake.

11. Suffice it to say that DW-1 who was the Petitioner's Special Attorney categorically admitted that the Respondent No.3 had been thrown out of house by the Petitioner six months prior to divorce. Although the date of ouster/desertion as contended by the Special Attorney of the Petitioner is different from the date of desertion/ouster contended by the Respondent No.3, the said statement of DW-1 confirms that Respondent No.3 was admittedly deserted /ousted by the Petitioner.

12. It was argued by the learned counsel for the Petitioner that the Special Attorney of the Respondent No. 3 who appeared as PW-1 admitted that the parties were married in 1998 and remained married for a period of

approximately 16-17 years which according to him shows that the date of desertion alleged by the Respondent No. 3 i.e. 2013 is fake. Such argument is not convincing given that PW-1 categorically stated that the Respondent No. 3 left the house of the Petitioner at his behest in October, 2013. In view of such statement the approximate period of subsistence of marriage stated by PW-1 on cross examination can be attributed to miscalculation.

13. In any event, as far as the date of desertion is concerned the two lower courts have given concurrent findings in favour of Respondent No.3. In such circumstances when no misreading or non-reading of evidence has been pointed out by the petitioner this Court cannot substitute the concurrent findings of the lower court below with its own in the exercise of Constitutional jurisdiction.

Maintenance for Respondents No. 4 and 5 from the date of the alleged desertion

14. It has been contended in the memo of petition by the Petitioner that the suit for maintenance was filed after pronouncement of divorce by the Petitioner on 28th September 2016 which according to the Petitioner proves that the Respondents No. 3 to 5 were being maintained till then. Such line of argument is devoid of force as it is trite law that a negative fact cannot be proved through evidence. Therefore, the onus lay upon the Petitioner to prove through evidence that he was in fact providing maintenance for Respondents No. 3 to 5 for the period he has challenged. However, no such evidence was identified by the learned counsel for the Petitioner that was produced but not read or misread by the lower courts.

15. I also do not find any infirmity in the Impugned Judgments and Decrees in respect of the period for which maintenance has been granted to the Respondents No. 4 and 5 as the learned Trial Court has specifically allowed them maintenance till the age of majority. As such, if the Respondent No. 4 attained the age of majority within two months after institution of the suit as contended by the learned counsel for the Petitioner, the Petitioner will only be liable for maintenance for the Respondent No. 4 from the date of desertion till two months after institution of the suit. Similarly, if the Respondent No. 5 is turning 18 in August, 2022 as contended, the Petitioner will not be liable for maintenance for him after

such date. No modification is required in the Impugned Judgments and Decrees in this regard.

Dowry Articles

16. With regard to the Respondent no.3's claim of dowry articles the only argument raised by the learned counsel for the petitioner before this Court was that the learned Trial Court as well as learned Appellate Court failed to take into consideration that dowry articles were used for 16 to 17 years during the subsistence of the marriage between the Petitioner and Respondent No.3 and as such were consumed during such time being every day household items subject to wear and tear.

17. On the contrary, however, bare perusal of the Impugned Judgment and Decree passed by the learned Trial Court shows that the effect of depreciation has been taken into consideration by the learned Trial Court and the value of the dowry articles to be paid by the Petitioner has been reduced to Rs. 100,000/, which has been upheld by the learned Appellate Court as well. No illegality requiring modification in the Impugned Judgments and Decrees has therefore been pointed out in this regard.

Dower

18. The Petitioner claims that the lower courts have erroneously granted dower in the shape of gold ornaments weighing 4 tola due to misinterpretation of the relevant clause of the Nikah Nama. Therefore, it is pertinent to reproduce the said clause for consideration:-

"13-مہر کی رقم- 00-20،000 روپیہ (بصورت طلائی زیور چار عدد چوڑیاں
وزن 4 تولے مالیتی -/ 000، 20 روپیہ)"

19. The said clause roughly translates as follows:-

> *"Rupees 20,000/- (in the form of gold ornaments 4 bangles weighing 4 tola valued at Rs. 20,000/-)."*

20. The learned Trial Court observed that the marriage was solemnized in the year 1998 and was dissolved in the year 2016 and as such concluded that with the passage of time the value of currency has decreased, hence the Respondent No. 3 was found entitled to recover dower in the shape of gold ornaments weighing 4 tolas. However, decrease in the value of the currency cannot be the reason to grant gold ornaments weighing 4 tolas as dower

unless the intention of the parties was to fix dower as gold ornaments weighing 4 tolas. The learned Appellate Court, on the other hand, simply regurgitated the language used in the Nikhanama to describe the dower and then without any analysis concluded that it cannot be held that the Respondent No. 3 is not entitled to recover dower in the shape of 4 tola gold ornaments comprising 4 bangles. No effort was made by either Court to ascertain the real intention of the parties.

21. In my view the argument raised by the Petitioner in this regard is not without force. A nikahnama is essentially a civil contract between two parties. It is trite law that while construing a contract, the Courts are obliged to find the intention of the contracting parties. The plain language used in clause No. 13 of the Nikahnama executed between the Petitioner and the Respondent No. 3 specifying the dower amount is that dower is Rs. 20,000/- which is followed with a description within brackets of the form in which such amount was to be paid. Therefore, essentially, the parties' intention was to fix the amount of dower at Rs. 20,000/-. The form in which it was to be paid was gold ornaments comprising four gold bangles weighing 4 tolas. The conclusion reached by the lower Courts implies the opposite. I am not convinced that the interpretation made by the learned Trial Court and upheld by the learned Appellant Court is correct. Such conclusion is not supported by the entry in the Nikahnama for reasons aforesaid. Therefore, the said misinterpretation is a legal infirmity which has indeed resulted in the miscarriage of justice which warrants interference by this Court.

22. The appreciation in the monetary value of gold has rendered payment of the dower amount in the form agreed upon by the parties virtually impossible. Such situation is covered by clause 56 of the Contract Act, 1872, which is reproduced herein below:

> *"56. Agreement to do impossible act. An agreement to do an act impossible in itself is void.*
>
> ***Contract to do act afterwards becoming impossible or unlawful. A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful becomes void when the act become impossible or unlawful.***
> *Compensation for loss through non-performance of an act known to be impossible or unlawful. Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not known to be impossible or unlawful such promisor must make compensation to such promisee for any loss which*

such promisee sustains through the non-performance of the promise." [Emphasis added].

23. In my opinion, since the form in which the dower was agreed to be paid, is no longer possible such contract has become void in light of clause 56 of the Contract Act, 1872. However, the amount of dower as agreed is nevertheless payable. Having said that I cannot lose sight of the fact that the dower amount at issue is deferred dower, which is payable at a specified period of time and where no time period is fixed, on dissolution of marriage by death or divorce. In the instant case, the Petitioner divorced the Respondent No. 3 on 28.09. 2016, however he has not paid the dower till date. Therefore, I find that the Petitioner is liable to the Respondent No. 3 in the amount of Rs. 20,000/- plus interest at the prevailing rate.

24. In view of the above, the instant petition is partially allowed, the Impugned Judgments and Decrees I & II are modified to the extent of payment of dower and the Petitioner is directed to pay an amount of Rs. 20,000/- as dower to the Respondent No.3 plus interest at the prevailing rate from the date of divorce till realization instead of dower in the shape of 4 tolas gold ornaments as held by both the learned Courts below. Whereas, the Impugned Judgments and Decrees I & II are upheld to the extent of maintenance allowance of Respondents No. 3 to 5 and recovery of amount equivalent to the value of dowry articles.

(SAMAN RAFAT IMTIAZ)
JUDGE

Announced in the open Court on 13th of June, 2022.

JUDGE

R.Anjam.