

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.

No. IHC/Judl.Deptt.

(REVISED FORM OF BLUE SLIP)

Case No. WP- 4382-14

Titled. Mst Rukhsana Kanwal Vs Abdul Jabbar and two 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.

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.4382 of 2014

Mst. Rukhsana Kanwal

Versus

Abdul Jabbar & two others

Date of Hearing:-	04.08.2015
Petitioner By: -	Mr. Abid Farooq Awan, Advocate,
Respondent No.1 By:-	Ch. Manzoor Ahmad Kamboh & Hafiz Liaqat Manzoor Kamboh, Advocates

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

This petition is directed against the judgments & decrees dated 28.01.2014 & 16.06.2014, passed by learned Judge Family Court & learned ADJ-V Islamabad [West], whereby suit of petitioner and her minor son [Muhammad Hamid] for recovery of maintenance allowance, dower and gold ornaments was partially decreed and appeal thereagainst was dismissed. Suit was filed on 02.4.2009 with the following prayer:-

- a. "Maintenance allowance of plaintiff No.1 @ Rs.5,000/- per month with effect from July 2005 to March 2008, which comes to Rs.225,000/- with future maintenance at the same rate with enhancement with the passage of time matching to the rates of inflation.
- b. Maintenance allowance of plaintiff No.2 @ Rs.2,000/- per month with effect from July 2005 to March 2008 which comes to Rs.90,000/- with future maintenance at the same rate with enhancement with the passage of time matching to the rates of inflation till attaining the age of majority.
- c. Dower amount Rs.10,000/- plus a residential house consisting of two rooms in the native town of defendant.
- d. Gold ornaments as per bill attached at Annexure-C or price thereto according to the present market value."

2. The respondent No.1/defendant was proceeded ex-parte on 20.6.2009 and in ex-parte evidence, petitioner herself appeared as PW.1 and tendered documentary evidence comprising copy of nikkahnama Exh.P1, receipt of gold ornaments Mark-A, copy of revenue record Mark-B, certificate of Nazim Union Council Exh.P.2 and photocopy of affidavit Mark-C.

3. The learned Judge Family Court after hearing arguments accepted her claim to the extent of maintenance allowance for herself and for the minor, whereas her claim of dower and gold ornaments was declined for the reasons that dower in the shape of two rooms has already been given to her, while she remained unable to substantiate

that ornaments were snatched by the respondent No.1. It is important to mention that petitioner instead of questioning the judgment & decree ibid filed an execution petition, wherein respondent No.1 filed an application for setting aside ex-parte judgment & decree, which was duly contested by the petitioner through reply and learned Judge Family Court accepted the same, vide Order dated 13.6.2013.

4. At this stage the respondent No.1 filed written statement, wherein he controverted the claim of the petitioner with regard to dower, gold ornaments and maintenance as well.

5. Petitioner in her plaint asserted that she was married with the respondent No.1 on 07.5.1999 at Jatoi District Muzaffargarh and at the time of 'rukhsati' she was given gold ornaments. The couple was blessed with two children, but only minor Hamid survived, thereafter, differences arose and subsequently compromise was effected but again she was expelled out of the house with the minor, whose custody was subsequently obtained through proceedings under Section 491 Cr.P.C on 14.7.2005 and since then they are living separately. She claimed that dower money of Rs.10,000/- cash and a residential house of two rooms mentioned in columns 16 & 17 of nikkahnama, respectively, were not provided to her. She also claimed maintenance @ Rs.5,000/- per month as stipulated in nikkahnama in case of any matrimonial dispute.

6. The respondent No.1 in written statement denied the contents of plaint. It was his stance that he was married with petitioner on 07.5.1999 and due to differences, on insistence of wife he divorced the petitioner on 22.8.2007, but she concealed this fact in her plaint. It was further averred that at the time of divorce an affidavit was also executed, whereby she received dower and dowry articles and nothing is outstanding. According to said deed, it was also agreed that she will not file any suit before any court of law and that minor will live with her. It was also maintained that for the same relief petitioner filed two suits simultaneously at two different places i.e. at Jatoi Muzaffargarh and at Islamabad despite the fact that she is residing in Village Jatoi.

7. As regards her claim of ornaments, it was replied that no such ornaments were given to her by her parents and the receipts tendered are forged & fake.

8. Evidence in this case comprised statement of petitioner pw.1, Muhammad Javed Akhtar [PW.2], respondent No.1 [DW.1] and his witness Ghulam Shabbir [DW.2] Documentary evidence consists of affidavits of witnesses [Exh.P1, Exh.P2, D1 & D2], copy of nikkahnama [Exh.P.3], School Fee Cards [Exh.P5], Gold Receipt [Exh.P7], copy of certificate regarding divorce [Mark-C] and divorce deed [Mark-D].

Q.

9. The learned trial court decreed the suit vide judgment & decree dated 28.1.2014 partially in terms that petitioner was held entitled to recover maintenance allowance @ Rs.1500 per month since July 2005 till 23.11.2007 and for iddat period @ Rs.5,000/- per month while minor was held entitled to recover maintenance allowance @Rs.1500/ per month since July 2005 till date and for future maintenance @ Rs.25,00/- per month with 10% annual increase till his majority while rest of the claim in suit was dismissed.

10. As mentioned above, appeal against that judgment & decree was dismissed by the learned Addl. District Judge-V, vide judgment dated 16.6.2014.

11. Arguments advanced by learned counsel mainly focused on the points that the maintenance allowance awarded to the petitioner is not consistent with the amount stipulated in nikkahnama in case of any dispute, which is Rs.5,000/- per month. His next contention was that the divergent stance of the respondent No.1 with regard to claim of ornaments is sufficient to prove that petitioner was given ornaments at the time of marriage and respondent No.1 attempted to defeat her justified claim.

12. According to learned counsel, respondent in written statement denied provision of any ornaments to the petitioner by her parents, whereas in his evidence Exh.D.1 he maintained that the petitioner took along with her the ornaments, which proved the fact that she was given the ornament at the time of marriage.

13. It is also averred that the documentary evidence Mark-D, Iqarnama Exh.D.2 are forged documents, but neither any issue in this regard was framed nor any of its scribe or witness was produced in evidence. In support of his submissions, learned counsel relied upon cases laws titled Mst. Zaibun V. Mehrban [PLJ 2004 SC AJ&K 90], Liaqat Ali V. The Addl. District Judge & others [2000 YLR 2084, Lahore], Mst. Bushra Qasim V. Dr. Abdul Rasheed & others [1993 CLC 2063, Lahore], Mazhar Iqbal V. Falak Naz & others [PLD 2001 Lahore 495] and Abdul Razzak V. Shabnam Noonari & others [2012 SCMR 976].

14. Learned counsel for the respondent No.1 repelled the above submissions by stating that both the courts on the basis of evidence rightly turned down the claim with regard to dower and gold ornaments which cannot be interfered with under constitutional jurisdiction. According to the learned counsel, concurrent findings of facts are based on correct appraisal of evidence, which had been recognized by the petitioner herself as she did not prefer any appeal against ex-parte judgment & decree dated 9.2.2010, whereby her claim with regard to dower and gold ornaments was earlier discarded.

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15. It is further averred that claim of the petitioner is hit by Article 103 of the Limitation Act, which provides period of three years for claim of dower. According to learned counsel, matter of limitation could not be left to the pleadings of the parties, but a duty was imposed on the court itself in this regard. In support of his submissions, learned counsel placed reliance on case laws titled as Muhammad Buta & another V. Habib Ahmad & others [PLD 1985 SC 153] & Commissioner of Income Tax Companies Zone-IV, Karachi V. Hakim Ali Zardari [2006 SCMR 170].

16. Heard & record perused.

17. Petitioner has urged his dissatisfaction with regard to following points;-

- (i) She seeks enhancement of the quantum of maintenance from Rs.1500/- per month to Rs.5000/- per month pursuant to condition contained in nikahnama Ex.P3,
- (ii) Period of maintenance as she claims that she had no knowledge of divorce purportedly became effective on 23.11.2007,
- (iii) Petitioner also claims dower and gold ornaments as per nikahnama which gives rise to a collateral question with regard to effect of unchallenged ex-parte dismissal of same claim vide ex-parte Judgment & decree dated 9.2.2010,
- (iv) Impact of limitation upon the suit of petitioner.

18. Attending to the first prayer, it is evident from column No.20 of nikahnama that with mutual consent of the parties an amount of Rs. 5000/- per month was fixed as maintenance in case of desertion (Ghair abadi) which should have been given due consideration, but the learned Appellate Court fell in error by observing that party at fault cannot be ascertained although during cross examination of petitioner, the respondent-defendant's side put a suggestion that due to joblessness and torture of defendant-husband, differences arose between the parties. The relevant portion is reproduced hereunder:-

” یہ درست ہے کہ درعالمہ کے کام کاج نہ کرنے اور شہر کی وجہ سے
ہمارے اختلافات ہوئے تھے “

19. Similarly, respondent-defendant during cross-examination in affirmation of a suggestion disclosed that nuptial disputes were consequence of his unemployment, relevant portion whereof reads as under:-

” نہ ناپاجاتی کی وجہ سے روزگاری بھی “

20. The above account of defendant-respondent sufficiently depicts the state of affairs between the spouses and the core reason behind desertion from abode of her ex-husband, therefore, there is no justification available in reducing the quantum of maintenance from Rs.5000/- to Rs.1500/-.

21. Regarding the period of maintenance, it has been established through the evidence on record that she was ousted in July, 2005 consequently commencement period for past maintenance cannot be questioned. However, there is a dispute with regard to termination point of maintenance as on the basis of settlement deed Ex.D2 respondent /defendant claimed to have divorced the petitioner, but on the contrary, petitioner by alleging Ex.D2 to be a forged document, claims that she had no knowledge about such divorce, therefore, she is entitled for maintenance as prayed for in the plaint. It is pertinent to mention that she had filed an application under Section 476 Cr.PC before learned trial court which is still pending. Record reveals that apart from Ex-D2 a divorce certificate was produced by respondent No.1-Defendant which was issued by Union Council, Latifabad, District Hyderabad Sindh on 12.4.2012 wherein date of failure of conciliation and effectiveness of divorce has been mentioned as 23.11.2007. Said certificate being a public document carries presumption of correctness but neither its falsehood has been proved nor any endeavor for its cancellation was made on the part of petitioner, therefore, such cut off date cannot be disputed and petitioner has been rightly held entitled for maintenance beginning from July, 2005 till 23.11.2007 & for iddat period.

22. The other component of petitioner's claim relates to grant of dower and ornaments as per nikahnama. In this respect, learned Appellate Court has rightly observed that at earlier stage of case vide ex-parte Judgment & decree dated 9.2.2010, this portion of claim was declined and thereafter petitioner acquiesced the decision by not assailing the same through appeal, although such recourse was available under section 14 of Family Court Act, 1964. She instead, preferred application for execution of ex-parte decree. Such conduct of petitioner amounts to relinquishment of said part of claim and she is debarred from subsequently agitating the same. Petitioner had an option to file appeal, but failed to avail the same, hence a counter right in favour of the adverse party accrued which cannot be discarded merely because ex-parte judgment was subsequently set aside upon application of defendant because the ex-parte judgment was rolled back to the extent of respondent/defendant's grievance. In case of "District Co-ordination

Officer PakPattan Vs Safdar Ali etc” [2006 MLD 1 Lahore] it was held as follows;

“If a person was a party then the judgment of the competent Court as a plea was a bar or as an evidence conclusive between the same parties upon the same matter directly in question in another Court or in another action between the same parties in the same Court under the principle of estoppel by judgment or res-judicata---Non-appealing party to the litigation was bound by the determination made by the Court. Judgment of the Single Judge in the present case was not assailed by the applicant, the same attained finality and so the applicant was barred to challenge the same.”

23. Pursuant to Section 17 of Family Court Act, principle of res-judicata embodied under section 11 of CPC has been made applicable, therefore, there was no occasion for the petitioner/plaintiff to have re-agitated the claim which had already been decided finally.

24. So far as objection with regard to limitation is concerned, from admitted position, cause of action had accrued in July, 2005 at the time of desertion of petitioner-wife while the suit was filed on 2.4.2009 after more than three & a half years. In the said suit, plaintiff's claim had three heads namely recovery of maintenance, dower & gold ornaments. Limitation period of three years has been provided under Article 103 of Schedule to Limitation Act for recovery of dower while Article 49 of Act *ibid* deals with the recovery of other specific property such as ornaments in the present case and period of three years has been provided thereunder while petitioner moved the Court after more than eight months of the lapse of limitation period and for such delay no plausible explanation has been offered. However the said two heads have been declined vide ex-parte judgment & decree, therefore, aspect of limitation does not merit consideration to that extent. The remaining claim with regard to recovery of maintenance is dealt with under Article 120 of Schedule to Limitation Act, 1908 where period of Six years from accrual of right to sue has been provided and from that angle this claim is within limitation, therefore, element of limitation as highlighted by respondent No.1 does not ameliorate the consequence arrived at by the learned Trial Court as well as the learned Appellate Court. In this Connection

reference can be made to case of “Mst. Zaibun Vs Meharban” [PLJ 2004 SC (AJ&K) 90 wherein it was held as follows:

“The past maintenance can be granted by the family Court but in view of the fact that there is no specific article providing limitation for filing suit for maintenance, therefore, the residuary Article, 120 of Limitation Act, which prescribed six years as limitation , therefore, it is held that the past maintenance of six years can be granted and beyond that the claim would be barred by limitation.

25. The sequel of above discussion is that findings of the two learned Courts with regard to quantum of maintenance being in contravention of stipulation contained in nikahnama are required to be rectified. Resultantly, petitioner is held entitled to maintenance @ Rs.5000/- per month from July, 2005 to 23.11.2007 while for the remaining claims, the petition being without merit is dismissed. No order as to costs.

(CHIEF JUSTICE)

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

Approved for reporting.

(CHIEF JUSTICE)

S.Akhtar

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