

## JUDGMENT

**MOHSIN AKHTAR KAYANI, J.**---Through this writ petition, the petitioner has assailed the concurrent findings of learned Additional District Judge (West), Islamabad and learned Family Judge (West), Islamabad, passed vide orders dated 08.06.2018 and 20.01.2016, respectively, whereby appeal and suit filed by petitioner have been dismissed.

2. Brief facts referred in the instant matter are that petitioner filed suit for recovery of dower and maintenance at the rate of Rs.500,000/- per month from December, 2012 with the contentions that she tied the knot with Respondent No. 1 in July, 2012, whereby Respondent No. 1 promised to give the petitioner Rs.500,000/- as maintenance per month, half of his propertied, outcome of his businesses, other properties and shares from all the companies, whereafter they lived together till November, 2012, however differences cropped up between the parties when Respondent No. 1 refused to give the petitioner a copy of Nikahnama and maintenance as agreed. The suit was contested by Respondent No. 1, whereafter the learned Family Judge vide order dated 20.01.2016 dismissed the suit of petitioner, which compelled the petitioner to file appeal before the learned Additional District Judge, which was dismissed vide impugned judgment dated 8.6.2018. Hence, the instant writ petition.

3. Learned counsel for petitioner, inter alia, contends that both the Courts below have failed to appreciate the fact that Respondent No. 1 admitted before the Jirga that petitioner is his wife and passed the impugned orders; that the documentary communication produced by the petitioner in shape of WhatsApp and e-mails has been admitted by Respondent No. 1 in his cross-examination; that non-production of Nikahnama is not an acknowledgeable ground for dismissal of suit; that Qanun-e-Shahadat Order, 1984 was promulgated for the purpose of using modern techniques and devices to prove the events and circumstances of the case, especially under Article 73 of the Qanun-e-Shahadat Order, 1984 and Electronic Transaction Ordinance clearly stated the electronic evidence is primary evidence, rather than secondary one; that the impugned orders dated 08.06.2018 and 20.01.2016 are without merit and have been passed without due process of law, therefore, the same may kindly be set aside and suit of petitioner may kindly be decreed in her favour.

4. Conversely, learned counsel for Despondent No. 1 contends that the allegations levelled by petitioner are baseless and denied the existence of marriage; that the impugned orders passed by both the Courts below are well within the four corners of law and have rightly been passed, therefore, the instant writ petition may kindly be dismissed.

5. Arguments heard, record perused.

6. From the perusal of record, it has been observed that the petitioner has filed a suit for recovery of dower and maintenance amount of Rs. 500,000/- per month on the ground that Respondent No. 1 entered into marriage with her in July, 2012 in accordance with Islamic rites and ceremony and Respondent No. 1 agreed to pay maintenance Rs.500,000/- per month against dower amount half of his properties including a house in Sector F-6, Islamabad, a house in Sector F-10, Islamabad and House No. 28, Begum Sarfraz Iqbal Road, Sector G-6/4, Islamabad, and shares from all his companies and half of shares of his properties in UAE.

7. As per stance of petitioner, she resided with Respondent No. 1 in his apartment i.e. Flat No. 508, Al-Safah Towers, F-11 Markaz, Islamabad till the end of November, 2012 and during this period, on the request of petitioner to provide her copy of Nikahnama, Respondent No.1 had not provided the same on one pretext or other, whereafter Respondent No. 1 shifted the petitioner from the said flat with a request that he is going to sell the flat and he will get her a new house. Respondent No. 1 while contesting the suit, filed his written statement and by straightway denying the factum of Nikahnama took the specific stance that petitioner is not his lawfully wedded wife and this led to the question mark that as to whether the parties entered into a valid Nikah or otherwise?

8. To reach at just conclusion, I have gone through the evidence of petitioner filed through affidavit of evidence in which she has reiterated her stance and mainly relied upon: the Communication made through SMSs to prove her alleged relationship of being wife of

Respondent No.1. For ready reference, the same is reproduced as under:

"I cancelled my visit to restaurant and was coming to u, but it stop me, your friends will not like an old husband! Ok, b happy with friends!"

"Ooho! Hum Shaher se jaan ban gae hain! Bai wah"

9. During the course of cross-examination, petitioner acknowledged that she neither produced any witness from Ufone Cellular Company nor any certificate to justify the contents of SMS received from a particular number.

10. The petitioner has also produced Haji Syed Akhtar Hussain Shah as PW-2, who submitted his affidavit as Exh.P7 and contended that he is witness of Jirga convened for reconciliation of petitioner with Respondent No. 1. However, during the course of cross-examination, PW-2 Haji Syed Akhtar Hussain Shah acknowledged the following facts:

11. The petitioner has also produced one Qazi Muhammad Irshad, another member of Jirga, who submitted his evidence as Exh.P3 and reiterated the stance of Jirga meeting with the acknowledgment that he has not seen the Nikahnama of marriage of petitioner with Respondent No. 1.

12. Similarly, I have also gone through evidence of Respondent No.1, wherein no acknowledgment has been made by Respondent No.1 in his cross-examination about the alleged relationship.

12. In general, the entire evidence is silent about the following facts:-

- i. The petitioner has not produced any witness of Nikah.
- ii. The petitioner has failed to produce any Nikah Khwan or Nikahnama in this case.
- iii. The petitioner has not produced any witness or close relative who can say in unequivocal terms that the parties lived together as husband and wife for a particular of time.
- iv. The petitioner has not produced any documentary proof in shape of photographs captured or videos recorded on the day of Nikah or any other function in which petitioner and Respondent No. 1 could be seen as husband as wife.
- v. The petitioner has not produced any documentary evidence to prove the quantum of dower and maintenance.

14. Besides the above referred deficiencies, I have also gone through the judgment of learned Trial Court dated 20.01.2016, wherein detailed reasoning on Issue No. 1 has been given in the following manner:

"Perusal of available material and evidence of parties reveals following points to determine fact of marriage:

- i. Admittedly no witness of marriage has been produced by plaintiff both counsel have relied upon same judgment. Plaintiff relied upon PLD 1990 SC 28 this judgment has upheld decision made in PLD 1989 Lahore 200 which has been relied by defendant. It was held in referred judgment that non-registration of marriage, does not in itself, invalidate marriage, if it is otherwise proved to have taken place, in accordance with requirements of Islamic law non-registration may, however cause some doubts on

existence and solemnization of marriage if factum of marriage is in serious dispute between parties to marriage.

- ii. According to Islamic law, both men and woman have rights over each other when they enter into a marriage contract. A marriage contract gave rise to different financial, social, religious and moral rights and obligations. In absence of a written Nikahnama, cautious approach is to be adopted to hold existence of a marital relationship and said decision should only be based upon strong evidence.
- iii. Learned counsel for plaintiff submits that according to Islamic law; in absence of a written Nikahnama/document, marriage between parties can be proved by establishing offer, acceptance and/or long standing cohabitation.
- iv. Plaintiff has relied upon message dated 11.07.2010, wherein, defendant allegedly said "Salam, good morning, how are you, dear, please do not go, I cannot live without you, I want to marry you, please", learned counsel for plaintiff referred said message as an offer, but Plaintiff has neither produced her reply to said message, nor produced messages exchanged during communication before or after said messages. Moreover, said message is contrary to plaintiff stance as according to Paragraph No. 04 of plaintiff parties entered into marriage in the month of July 2012, and this message has reported to be sent much earlier i.e. on 11.07.2010. In these circumstances, element of offer/acceptance is missing from available record.
- v. Learned counsel of plaintiff stressed upon message dated 19.12.2012, wherein defendant allegedly said "Ooho! Hum Shohar se Joan ban gae hain! Bai wah", learned counsel for Plaintiff referred said message as admission of marriage, however, here again plaintiff has not produced her messages to draw inference under what circumstances said message has been made.
- vi. To prove factum of cohabitation, plaintiff stated in Paragraph No. 6 that she resided with defendant at his apartment from (sic.) till end of November 2012; however she has failed to convincingly prove factum of her residence at referred flat. Learned counsel for plaintiff relied upon 1991 CLC 1290 and submits that continuous cohabitation, gave a presumption of marriage. However, facts and circumstances of referred case are distinguished from matter under adjudication in as much as in reported case, there was continuous cohabitation of more than twenty years, moreover in said case husband has died and legal heirs have challenged factum of marriage, whereas in the instant matter, defendant himself is denying any cohabitation with plaintiff.
- vii. Plaintiff has referred in Paragraph No. 10 of plaintiff that plaintiff tried to contact with defendant through family members, but not a single family member has come forward to depose in favour of plaintiff. PW-3 who deposed in favour of plaintiff admitted that he is not relative of plaintiff and only met her on 04.08.2013 when jirga was held.
- viii. Evidence is to be led according to pleadings, and any improvement is liable to be rejected straight-away. In the instant case plaintiff has made numerous improvement in her evidence, some of them are referred as follows:
  - a. Plaintiff has not mentioned time, place, date of marriage in plaintiff, however, she has referred exact date in paragraph No. 04 of her affidavit in evidence Ex P1;
  - b. Plaintiff has not mentioned any of number of defendant in her plaintiff, but subsequently she has mentioned exact numbers of defendant in her affidavit in evidence;
  - c. Plaintiff has not referred any specific message in plaintiff, but referred specific messages in paragraph No. 03 and No. 09 of her affidavit in evidence;
  - d. Plaintiff has also deposed in Paragraph No. 10 of affidavit that defendant admitted her as wife in front of his son, but no such fact has been mentioned in plaintiff;
  - e. Specific detail events of reconciliation as mentioned in paragraph No. 13-16 as referred in affidavit are also beyond pleadings.

- ix. Learned counsel for plaintiff referred that during cross-examination defendant has volunteered that plaintiff got information from his employee "Nayab" and name of "Nayab" has also been referred during communication. Be that as it may, it would only establish that parties were in contact, however, question here is whether this communication or contact was converted into marital relations or not?
- x. List of witnesses produced by plaintiff has referred name of "Sania" as witness of Nikah, but said witness has not been produced by plaintiff nor any reason has been put forward for her non-appearance, therefore, borrowing analogy from illustration (g) of Article 129, Qanun-e-Shahadat Order, 1984, it is presumed that if said "Sania" would be produced, she would depose against plaintiff;
- xi. Main evidence of Plaintiff is list of messages, which, as per her stance have been made during communication with defendant, plaintiff has produced as many as twenty two (22) pages comprising of messages, but she has only produced four messages, sent by her to defendant. Due to reasons, best known to plaintiff, she has concealed her communication with defendant, in this way she has not approached this Court with clean hands;
- xii. Plaintiff has relied upon messages allegedly made during her conversation with son of defendant, however, during all communications; she has been demanding financial help from said Jahanzeb and said messages, in no way established marital relationship of plaintiff and defendant.

Keeping in view, material available on record, and points mentioned hereinabove, this Court holds that sufficient material is not available on the record to establish relationship of wife and husband between the parties.

15. While considering the above referred findings of the learned Trial Court, I have also gone through the judgment of the first Appellate Court, wherein the judgment of the learned Trial Court has been appreciated in clear terms and concluded that the petitioner has failed to prove the factum of marriage. As per Article 268 of Muhammadan Law, marriage can be presumed in absence of any direct proof in prolonged and continual cohabitation as husband and wife, however in this case the petitioner neither brought any evidence to that effect nor any witness has been produced, even there was not a single stance brought on record through which it could be presumed that petitioner and Respondent No. 1 ever lived together as husband and wife, whereas Respondent No. 1 denied the factum of marriage in categorical terms, hence the requirements of Muslim, marriage under Islamic law have to be given wide importance in such type of cases which are:

- a. Nikah should be performed publically in presence and hearing of two (02) males or one (01) male and two (02) females witnesses, who must be sane and adult Muslims.
- b. The proposal and acceptance must be expressed by both the parties in one meeting.
- c. The (  ) offer and acceptance, has to be ascertained and determined by Nikah Khwan and other witnesses.
- d. The girl/bride, whose hand is to be given in marriage, should be major and ordinarily her marriage is to be conducted by her guardian or Wali.

16. In addition to the above referred requirements of Muhammadan Law, I have also gone through the requirements of Muslim Family Law Ordinance, 1961, which provides the requirements of registration of marriage in terms of sections 7, 8, 9, 10 and 11 and a complete mechanism has been provided in order to avoid any complication.

17. It is trite law that the onus, in such type of cases, is upon a person who intends to prove the relationship and all such relationships could be proved by way of documentary evidence or through witnesses, which lacks in this case. At this stage; I am not inclined to accept the arguments of the petitioner side, who has heavily relied upon the text messages, as the same has different reference and connotation and even could not be replaced with legal requirements, although the modern devices/technologies like mobile phones, WhatsApp,

Facebook, e-mail, etc., can be used as part of evidence. However, the message referred by petitioner in Para-9 of her affidavit of evidence, in which the sender acknowledged himself as an old husband, if presumed to be true on behalf of Respondent No. 1, even then this admission could not be considered as a whole truth as it lacks a specific subject matter with respect to relationship of petitioner and Respondent No. 1 as of being husband and wife, even otherwise, Respondent No. 1 has denied all such messages in totality. Similarly, another message sent on 19.12.2012, which reads that, "Shohar se jaan ban gae hain", does not reflect any acknowledgment.

18. In the same way, the controversy involved in the case in hand discloses the miseries of the society, in which people by adopting rebellious attitude towards the social norms are entering into obscured relationships/marriages for their own motivated reasons, but in my humble view, such kind of bond could not be called as marriage for the reason that it lacks public acknowledgment, which is the key factor of an Islamic society for the sacred relationship of marriage, and as such the key factor of any society is family unit, which starts from the factum of Nikah/marriage and in case when people concealed such important element, they could not be given benefit subsequently for their claims arising out of such relationship, unless the same was acknowledged publically, voluntarily or by some written document.

19. Keeping in view the above facts of the case and law on the subject, I am of the opinion that petitioner has failed to discharge the onus to prove the factum of Nikah and the concurrent findings of the both the Courts below are correct to that extent, therefore, the instant writ petition is misconceived and the same is hereby DISMISSED.

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