

[Lahore]

Before Malik Shahzad Ahmad Khan, J

Mst. RAZIA BEGUM----Petitioner

Versus

JANG BAZ and 3 others----Respondents

Writ Petition No.315 of 2009, heard on 7th September, 2011.

(a) West Pakistan Family Courts Act (XXXV of 1964)---

---S. 5 & Sched.---Constitution of Pakistan, Art.199---Constitutional petition---Suit for possession of house given to wife in lieu of dower by her husband and father-in-law or in alternative for recovery of Rs.3,00,000/- as its present market value---Suit decreed by Family Court for possession of house or in alternative for recovery of Rs.10,000/- as its price mentioned in Nikahnama was modified by Appellate Court granting same only for recovery of Rs.10,000/---Husband's plea that such house was not owned by him, thus, no decree against his father could be passed---Validity---Nikahnama did not find mention any condition to the effect that in case of failure to give such house to wife, husband would pay her Rs.10,000/---Value of such house mentioned in Nikahnama was its market value at time of marriage---Wife was entitled to decree for possession of such house or in the alternative, for recovery of amount equivalent to its present market value---Duty of Family Court was to pass decree after determining prevalent market value of such house, but its omission to do so would not render its decree ineffective or illegal as such value would be determined by Executing Court during execution proceedings---Wife could validly file suit for recovery of dower against her father-in-law, if he either stood surety or guaranteed its payment, thus, he would be liable to pay dower as bridegroom himself---Father-in-law of petitioner was party to Nikahnama containing his thumb-impression as "Wakeel" of bridegroom, thus, Family Court had validly passed decree against him---High Court modified impugned judgments/decrees by declaring that wife was entitled to recovery of possession of such house or in the alternative to its price equivalent to its present market value to be determined by Executing Court during execution proceedings.

Amjad Hussain and another v. Mst. Shagufta and 2 others PLD 1996 Pesh. 64; Liaquat Ali v. Additional District Judge, Narowal and 2 others 1997 SCMR 1122 and Mst. Hussana and others v. Mst. Ghufrana and others 2003 YLR 250 **ref.**

Anjum Firdous v. Additional District Judge and others 2007 CLC 1433 and Mst. Shahenaz Akhtar v. Fida Hussain and 2 others 2007 CLC 1517 **rel.**

Export Promotion Bureau and others v. Qaiser Saifullah 1994 SCMR 859 and Javed Masih and others v. Additional District Judge, Lahore and others 2010 SCMR 795 **distinguished.**

(b) West Pakistan Family Courts Act (XXXV of 1964)---

---S. 5 & Sched. Items Nos.2 & 9---Suit for recovery of possession of immovable property given to wife in lieu of dower---Jurisdiction of Family Court to entertain such suit ---Scope---Such suit could be validly filed before Family Court as Items Nos.2 & 9 of Sched. of West Pakistan Family Courts Act, 1964 clearly brought such suit within ambit of its jurisdiction---Illustration.

Liaquat Ali v. Additional District Judge, Narowal and 2 others 1997 SCMR 1122 **rel.**

(c) West Pakistan Rules under the Muslim Family Laws Ordinance, 1961---

---Rr. 8, 9 & 10---Qanun-e-Shahadat (10 of 1984), Arts.85 & 87---Nikahnama, certified copy of---Admissibility in evidence---Scope---Duty of Nikah Registrar and system of remuneration payable to him would make him a 'public officer'---Nikahnama being a public document could safely be relied upon---Such certified copy could be produced in evidence and would hold field in absence of rebuttal thereof.

Mst. Zubaida Bibi and others v. Mst. Majidan and another 1994 SCMR 1978 and Amjad Hussain and another v. Mst. Shagufta and 2 others PLD 1996 Pesh. 64 **rel.**

(d) West Pakistan Family Courts Act (XXXV of 1964)---

---S. 5 & Sched.---Suit for possession of immovable property given to wife in lieu of dower by her father-in-law---Maintainability---Wife could validly file suit for recovery of dower against her father-in-law, if he either stood surety or guaranteed its payment, thus, he would be liable to pay dower as bridegroom himself---Illustration.

Mst. Shahanaz Akhtar v. Fida Hussain and 2 others 2007 CLC 1517 **rel.**

Malik Muhammad Saeed for Petitioner.

Agha Muhammad Ali Khan for Respondents Nos.1 and 2.

Date of hearing: 7th September, 2011.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.--- This petition has been filed against the impugned judgment and decree dated 27-11-2008, passed by the learned Additional District Judge, Attock, camp at Jand, as well as against the consolidated judgment and decree dated 22-7-2008, passed by the learned Judge Family Court, Jand with the prayer that the above mentioned judgments and decrees may kindly be declared as illegal, null, and void and the same

may be modified with the result that the suit of the petitioner for recovery of possession of house in lieu of petitioner for recovery of possession of house in dower may be decreed, as prayed for, in the original plaint.

2. Brief facts of the present case are that Mst. Razia Begum (the petitioner/plaintiff) contracted marriage with Jang Baz (respondent/ defendant No.1) on 9-12-1987. At the time of marriage, gold jewellery weighing two tolas and land measuring 5 marlas in Mohallah Gohri village Jand was given to the petitioner in lieu of dower and entries in this respect were also incorporated in the relevant columns of Nikahnama Exh.P.2. No issue was born, out of the said wedlock and ultimately on 28-11-2007 the petitioner was divorced by defendant/respondent No.1. The petitioner, thereafter, filed two separate suits bearing No.154/06.12.2007 and 269/06.12.2007 against the respondents for the recovery of maintenance allowance for the period of Iddat, recovery of gold ornaments Rs.30,000/- recovery of dowry articles Rs.1,58,100/-, recovery of Rs.20,000/- and for recovery of house or in the alternative recovery of Rs.3,00,000/- (present market value of the house) in lieu of dower. The said suits were filed in the court of learned Judge Family Court, Jand, District Attock.

3. The above mentioned suits were contested by the defendants/ respondents Nos.1 and 2 by filing their written statement. The defendant/respondent No.1 (Jang Baz) is ex-husband of the plaintiff/petitioner, whereas, the defendant/respondent No.2 (Ghulam Adalat) is her ex-father-in-law.

4. The learned trial court framed the following issues out of divergent pleadings of the parties:---

ISSUES.

- (1) Whether the plaintiff is entitled to recover maintenance allowance for iddat period from the defendant? If so, at what rate? OPP.
- (2) Whether the plaintiff is entitled to recover Rs.30,000/- as price of gold jewellery of dower? OPP.
- (3) Whether the plaintiff is entitled to recover Rs.1,58,100/- as price of dowry articles as per list annexed with the plaint? OPP.
- (4) Whether the plaintiff is entitled to recover Rs.20,000/- as per column No.18 of Nikahnama? OPP.
- (5) Whether the plaintiff is entitled to recover possession of suit house or in alternative its price of Rs.3,00,000/? OPP.
- (6) Whether the plaintiff has no cause of action? OPD.
- (7) Whether this Court has no jurisdiction to entertain and try the suit for possession of house? OPD.
- (8) Relief.

5. The parties were directed to produce their evidence. The petitioner Mst. Razia Begum appeared as PW.1. whereas, Dilawar Khan was examined as PW.2. The petitioner/plaintiff also produced the list of dowry articles Exh.P 1 and copy of Nikahnama Exh.P.2.

The defendants/respondents Nos.1 and 2 failed to produce any oral or documentary evidence in support of their defence.

6. After conclusion of the trial, the suit of the petitioner/plaintiff was decreed to the extent maintenance allowance for Iddat period at the rate of Rs.2000/- per month, whereas, suit to the extent of recovery of Rs.30,000/ price of jewellery and for

recovery of Rs.1,58,100/- price for dowry articles and Rs.20,000/- as per condition of column No.18 of Nikahnama was dismissed with costs. The suit of the plaintiff/petitioner for possession of the house was decreed and it was held that the plaintiff/petitioner was entitled to get possession of the house or in the alternative to receive its price Rs.10,000/- vide consolidated judgment and decree dated 22-7-2008, passed by the learned Judge Family Court Jand.

7. The petitioner being aggrieved of the above mentioned judgment and decree, filed two separate appeals before the learned Additional District Judge, Attock camp at Jand who accepted the appeal of the petitioner to the extent of recovery of dowry articles. He also modified the judgment and decree of the learned trial court and it was held that the decree for possession of the house could not be granted because the amount of dower was determined in cash in Nikahnama Exh.P.2, therefore, the plaintiff/petitioner was, entitled to recover Rs.10,000/- instead of possession of the land/house vide impugned judgment and decree dated 27-11-2008.

8. The petitioner/plaintiff being dissatisfied with the above mentioned impugned judgments and decrees has filed the present writ petition in this Court.

9. It is contended by the learned counsel for the petitioner that a plot measuring 5 marlas was given to petitioner in lieu of dower and entry to this effect was also incorporated in Column No.16 of Nikahnama Exh.P.2, therefore, the impugned judgments and decrees, whereby the petitioner was held entitled to recover Rs.10,000 as value of the said plot are not sustainable in the eyes of law; that the present market value of the said plot is more than Rs.10,00,000 (1 million), therefore, there was no justification with the courts below to award a meagre amount of Rs.10,000 to the petitioner; that the respondents/defendants could not produce any documentary evidence in rebuttal, therefore, the suit of the petitioner was liable to be decreed, as prayed for; that case of the petitioner was fully established through production of Nikahnama Exh.P.2, that Nikahnama Exh.P.2 is public document and in absence of rebuttal, the same can safely be relied upon; that if possession of the suit-land cannot be handed over to the petitioner, then, the present market value of the said land may be determined and the petitioner/plaintiff may be awarded the said value. In support of his contentions, the learned counsel for the petitioner has placed reliance on the case of Amjad Hussain and another v. Mst. Shagufta and 2 others (PLD 1996 Peshawar 64 (DB)), Liaquat Ali v. Additional District Judge, Narowal and 2 others (1997 SCMR 1122) and Mst. Hussana and others v. Mst. Ghufrana and others (2003 YLR 250).

10. On the other hand, the learned counsel appearing on behalf of respondents Nos.1 and 2 had vehemently opposed this petition on the grounds that the Family Court has no jurisdiction to grant the relief as prayed for by the petitioner/plaintiff; that the petitioner is seeking possession of an immovable property, therefore, the case of the petitioner does not fall within the jurisdiction of the Judge Family Court; that an imovable property of the value of more than Rs.100/- can only be transferred through a registered deed; that the findings of courts below cannot be disturbed in writ jurisdiction because reappraisal of evidence is not permissible while exercising constitutional jurisdiction. In support of his contentions, he has placed reliance on the case of Export Promotion Bureau and others v. Qaiser Saifullah (1994 SCMR 859), Javed Masih and others v. Additional District Judge, Lahore and others (2010 SCMR 795) and Gul Muhammad Tabassam v. Ghulam Ara and 2 others (2003 CLC 1062).

11. Arguments heard and record perused.

12. The petitioner Mst. Razia Begum was married with Jang Baz (respondent No.1) on 9-12-1987. Ghulam Adalat (respondent/defendant No.2) is real father of respondent/defendant No.1. The respondents Nos.1 and 2 undertook to pay dower to

the petitioner, detail of the same is mentioned in Columns Nos.13 to 17 of Nikahnama. The above mentioned columns of Nikahnama Exh.P.2 reads as under:---

13. No issue out of the above mentioned wedlock was born and due to this reason on 28-11-2007 the petitioner was divorced by respondent No.1. The petitioner, thereafter, filed the above mentioned two separate suits. The suit of the plaintiff/petitioner for possession of 5 marlas of land was decreed and it was held by the learned trial court that the petitioner was entitled to the possession of 5 marlas of suit-land or in the alternative Rs.10,000/- as price of the said land, which was mentioned in Nikahnama Exh.P.2. The said judgment of the learned trial court was modified in appeal and suit for recovery of dower of the plaintiff/ petitioner was decreed, only to the extent of recovery of Rs.9000/- and decree to the extent of possession of 5 marlas land was refused vide the impugned judgment and decree dated 27-11-2008, passed by the learned Additional District Judge, Attock.

14. I have gone through the Nikahnama Exh.P.2. Column No.16 makes it clear that respondent No.1 would give 5 marlas of land situated in Mohallah Gohri Village Jand, District Attock to the petitioner. There is no condition that in case of failure to give the above mentioned 5 marlas of land to the petitioner, the respondent No.1 would pay Rs.10,000/- to the petitioner. I find that both the courts below have grossly misapplied the law on the subject by granting decree worth Rs.10,000/- instead of granting decree for possession of the suit-land or in the alternative granting decree for the amount equivalent to the present market value of the suit-land. As the petitioner/plaintiff was given 5 marlas of land at the time of wedding and the amount of Rs.10,000/- was written in the Nikahnama, just to mention the market value of the said land at that time, therefore, the petitioner is entitled to the decree for possession of the suit-land or in the alternative for recovery of the amount equivalent to the present market value of the said land. I am also fortified in my above mentioned views by the case-law reported as Muhammad Sana Ullah v. Mst, Shamim Naz Kausar and 2 others (1995 SCMR 1208). Similar question was raised before the Hon'ble Supreme Court of Pakistan. The facts of the said case are almost identical with the facts of the present case. Para No.1 of the said judgment is reproduced as under:---

"Petitioner, Muhammad Sana Ullah, married with respondent Mst. Shamim Naz Kausar on 6-10-1977. The petitioner undertook to pay dower to the respondent, which is mentioned in paragraph No.13 of the Nikahnama as under:---

The Hon'ble Supreme Court of Pakistan had held in the above mentioned judgment as under:---

"Dower, payment of---Husband agreed to give 1/2 portion of house and six Kanals of land to his wife as dower and such fact was entered in Nikahnama--- Trial Court decreed wife's suit but granted her specified amount instead of portion of house and land as specified in Nikahnama---Trial Court's decision, was although maintained by Appellate Court, yet High Court modified decree and instead of specified amount decreed plaintiff's suit in respect of 1/2 portion of house and land in question---Validity---Specified para of Nikahnama had made it clear that husband had agreed to pay dower to his wife in terms of 1/2 portion of house and specified land---No condition was specified that husband would pay specified amount instead of said portion of house and the land---High Court was thus, justified in awarding decree for 1/2 portion of house and land in question, as mentioned in Nikahnama---Leave to appeal was refused in circumstances"

15. The learned counsel for the respondents Nos.1 and 2 has argued that the petitioner has filed a suit for possession of immovable property and the learned Judge Family Court, Jand has no jurisdiction to entertain the said suit.

The said argument of the learned counsel for the respondents Nos.1 and 2 is not convincing. Plea of want of jurisdiction of Family Court to entertain suit for possession of land given to wife in lieu of dower was not warranted because Family Court was empowered in terms of section 5, West Pakistan Family Courts Act, 1964, to entertain and decide such suits. Section 5 of the Act *ibid* is reproduced as under:---

"5 Jurisdiction.---. (1) Subject to the provisions of the Muslim Family Laws Ordinance, 1961, and the Conciliation Courts Ordinance, entertain, hear and adjudicate upon matters specified in [Part I of the Schedule]:

(2)

(3)

SCHEDULE

- (1) Dissolution of marriage [including Khula].
- (2) Dower
- (3) Maintenance.
- (4) Restitution of conjugal rights.
- (5) Custody of children [and the visitation rights of parents to meet them]
- (6) Guardianship.
- (7) [Jactitation of marriage]
- (8) Dowry.
- (9) Personal property and belongings of a wife.

It is evident from the perusal of above mentioned provisions of law that suit for possession of immovable property given to wife in lieu of dower can validly be filed before the Judge of Family Court. Items Nos.2 and 9 the above mentioned schedule clearly brings the above mentioned case within the jurisdiction of Family Court. Family Court was not restrained to entertain suit for recovery of immovable property given as dower to wife. Reference in this respect may be made to the case of Liaquat Ali v. Additional District Judge, Narowal and 2 others (1997 SCMR 1122). The Hon'ble Supreme Court of Pakistan has held in the said judgment as below:---

"West Pakistan Family Courts Act (XXXV of 1964)---

----S. 5---Constitution of Pakistan (1973), Art.185(3)---Wife's suit for possession of land (given to her as dower vide "Kabinnama" and "Nikahnama" at the time of marriage) was decreed against her husband---Decree in wife's favour was maintained up to the High Court---Validity---Plea of want of jurisdiction of Family Court to decree suit for possession of land given to wife in dower was not warranted for Family Court was empowered in terms of S.5, West Pakistan Family Courts Act, 1964, to entertain and decide such suit---Family Court was not restrained to entertain suit for recovery of immovable property given as dower to wife---Three Courts below had believed oral evidence as well as Kabinnama and Nikahnama---Petitioner had failed to point out any misreading or non-reading of evidence by three Courts below---Leave to appeal was refused in circumstances."

16. The learned counsel for the respondents Nos.1 and 2 has further argued that the suit of the petitioner could not be decreed because immovable property of the value more than Rs.100 cannot be transferred on the basis of Nikahnama and the same could only be transferred through a registered deed. The said objection of the learned counsel for the respondents Nos.1 and 2 is not valid. It is, by now, well-settled law that Nikah Registrar's duty and system of remuneration make him a "public officer" and "Nikahnama" is a public document. Certified copy of "Nikahnama" can be produced in evidence and in absence of rebuttal would hold the ground. In the instant case, no oral or documentary evidence was produced by the respondents Nos.1 and 2, whereas, the petitioner/plaintiff has produced oral evidence in the shape of P.W.1 and P.W.2 and documentary evidence in the shape of list of dowry articles Exh.P.1 and Nikahnama Exh.P.2. As no evidence was produced by the respondents Nos.1 and 2 in rebuttal of the above mentioned evidence of the plaintiff/petitioner, therefore, Nikahnama Exh.P.2, which is a public document can safely be relied upon. Reference in this respect may be made to the case-law reported as Mst. Zubaida Bibi and others v. Mst. Majidan and another (1994 SCMR 1978) and Amjad Hussain and another v. Mst. Shagufta and 2 others (PLD 1996 Peshawar 64 (DB)).

17. So far as the alternative prayer of the petitioner/plaintiff and the question of determination of present market value of the suit property is concerned, it is noted that it was duty of the learned trial court to determine the said value and decree the suit of the petitioner/plaintiff in light of the prevailing market value of the said property. Omission on part of the learned trial court/Appellate Court by not determining the price of the suit-land equivalent to its present market value, could not render the impugned judgments redundant or ineffective. Illegality/ irregularity so committed by the courts below is cured/rectified by holding that the said value will be determined by the executing court during execution proceedings. Reference in this respect may be made to the case of Anjum Firdous v. Additional District Judge and others (2007 CLC 1433). In a similar case, it was held in the said judgment as under:---

---S. 5 Sched. & S.14-Constitution of Pakistan (1973), Art.199--- Constitutional petition---Suit for recovery of dower---Suit was dismissed, but Appellate Court partly allowed appeal against judgment of the Family Court holding that though the respondent was not owner of the house which was given in dower to the petitioner at the time of marriage, which earlier stood transferred in favour of mother of respondent, but respondent was bound to pay its price and that contention of respondent that he had already paid cash amount to petitioner in lieu of price of said house as owner, was not established---Respondent having not challenged findings of Appellate Court qua the house in dispute, said finding which had attained finality was binding on respondent---Omission on part of Appellate Court by not determining the price of house equivalent to its value could be termed as an accidental slip and same did not render judgment of Appellate Court, either redundant or ineffective---Illegality/irregularity so committed by Appellate Court was cured/rectified by the High Court in constitutional jurisdiction, holding that, in view of admission by respondent regarding transfer of house in dispute to the petitioner in lieu of dower at the time of marriage, respondent could not be relieved of his liability to pay the price of disputed house, equivalent to its value---Constitutional petition was allowed and by modifying the impugned judgment of Appellate Court, it was declared that petitioner would be entitled to recover the price of house in dispute equivalent to its value from respondent to be determined by Executing Court during executing proceedings."

18. The learned counsel for the respondents Nos.1 and 2 has argued that as the husband of the petitioner was not owner of the land in question against therefore, the

suit filed by father-in-law (defendant/ respondent No.2) could not be decreed to that extent. In this respect it is held that the suit for recovery of dower can validly be filed against father-in-law, if the father-in-law had stood surety or had guaranteed the payment of dowers. He could lawfully be impleaded in the suit and was, as such, liable to pay the dower as the bridegroom himself. The father of the respondent No.1 namely Ghulam Adalat (respondent No.2) has been arrayed as defendant No.2 by the petitioner in her above mentioned suit. Ghulam Adalat (respondent/defendant No.2) was party to Nikahnama Exh.P.2. His name is clearly mentioned in Column No.11 of Nikahnama. He was appointed as 'Wakeel' of the bridegroom. The Nikahnama also contains thumb-impression of Ghulam Adalat (defendant/respondent No.2), therefore, the judgment and decree can validly be passed under the Family Laws against the defendant/respondent No 2. Reference may be made to the case of Mst. Shahenaz Akhtar v. Fida Hussain and 2 others (2007 CLC 1517). This court, in the said case, decided the above issue in the following terms:---

---S. 5 & Sched.---Constitution of Pakistan (1973), Art.199--- Constitutional petition---Suit by wife for recovery of dower, dowry articles and for grant of maintenance allowance against husband and her father---Jurisdiction of Family Court---Scope and extent---Necessary parties to suit---Dower amount fixed was prompt and settled as Rs.60,000 out of which plaintiff was permitted to obtain the plot of five Marlas with one constructed room, transferred in her favour from father of husband on basis of an agreement, in lieu of dower amount of Rs.40,000, which for the remaining amount of Rs.20,000 four Tolas gold ornaments were to be delivered, which were handed over to her---Question arose as to whether plaintiff could file suit against father of bridegroom for completion of contract executed by him for the payment of dower---Held, there was no bar or prohibition in the way of plaintiff in that regard, so as to impede the way of plaintiff from claiming the implementation and completion of the agreement---Family Court under S.5, West Pakistan Family Courts Act, 1964 had exclusive jurisdiction to entertain, hear and adjudicate upon matters specified in Part I of the Schedule to the said Act and there was no barring provision that while claiming dower from the husband only bridegroom/husband could be impleaded in the suit for recovery of dower and none else---If another person had stood surety or had guaranteed the payment of dower, he/she could lawfully be impleaded in the suit---Surety and guarantor to the dower were as much party and liable to pay dower as the bridegroom himself---Principles.

The judgments referred by the learned counsel for respondents Nos.1 and 2 are distinguishable from the facts of the present case and the same are not relevant for decision of issues involved in case.

19. The pith of all the discussion made above is that this petition is allowed by modifying the impugned judgment and decree of the learned Judge Family Court, Jand dated 22-7-2008 and by also modifying the impugned judgment and decree dated 27-11-2008 of the learned Additional District Judge, Attock Camp at Jand and it is declared that the petitioner would be entitled to the recovery of possession of 5 marlas of land, fully described in Column No.16 of the Nikahnama Exh.P.2 or in the alternative, the petitioner is entitled to recover price of the said land equivalent to its present market value from respondent No.1 to be determined by the executing court during execution proceedings. No order as to costs.

S.A.K./R-51/L

Petition accepted.