JUDGMENT SHEET

PESHAWAR HIGH COURT PESHAWAR
JUDICIAL DEPARTMENT

BA No.285-P of 2015.

Shamsur-Rehman……..Vs……..……The State.

J U D G M E N T.

Date of hearing _____20.04.2015_____

Appellant/Petitioner(s) by Abdul Samad Khan, advocate.

Respondent (s) by Malik Misraf Khan, adv: for complainant & Ms. Raazia Gul, advocate for State,

WAQAR AHMAD SETH,J:- *Accused-petitioner Shams-ur-Rehman seeks post arrest bail in case FIR No.538 dated 20/07/1999 under sections 302/324/34 PPC registered at Police Station, Badaber District Peshawar which was refused to him by the Courts below*

2- Briefly stated the facts of the case are that on 20/07/1999 at 06.40 hours Jamil Khan brought his nephew Samiullah aged about 10/11 years in an injured condition to the casualty of LRH, Peshawar where he lodged the report to the effect that on the same day at 06.00 hours he alongwith his nephew Samiullah were present in the house, when in the meanwhile accused Zareef Khan alongwith his brothers Shamsur Rehman and Lais Khan duly armed with deadly weapons came there and started firing at them as a result of which his nephew Samilullah sustained injuries while he

escaped unhurt. Motive is stated to be the land dispute. Besides the complainant the occurrence is stated to have witnessed by Sher Rehman and Tilawat Khan. Subsequently on the following day the injured succumbed to his injuries in the Hospital.

3- I have heard the learned counsel for the parties and have also gone through the record with their able assistance.

4- Before releasing the accused on bail, the Court is required to apply its mind keeping in view the provisions contained in subsections (1) and (2) of section 497 Cr.P.C. in its totality and the sine qua non for releasing an accused on bail is that the Court should come to the conclusion that there are no reasonable grounds to believe that he has committed a non-bailable offence as provided in subsection (1) of section 497 Cr.P.C. or to prevent the abuse of the process of Court or to do justice, keeping in view the particular facts of each case. The bail in the case of commission of a non-bailable offence and particularly falling in the prohibitory clause in subsection (1) of section 497 Cr.P.C. is not to be granted as a matter of course, with the simple sentence that it is a case of further inquiry and without keeping in view the entire provisions of section 497 Cr.P.C.

5- It is settled principle of law that at bail granting stage the material available on record is to be sifted through in order to establish whether prima face the petitioner before

the Court can be connected with the crime in question and hence, no detailed inquiry is to be made by the Court.

6- It is, undoubtedly, within the discretion of the competent criminal Courts to grant bail to the accused, even in appropriate murder cases. They are, however, under heavy duty to exercise their discretion fairly, justly and properly which, in any case, should be based on good grounds to meet the ends of justice. The appreciation of evidence and the drawing of conclusions therefrom in relation to all the circumstances is the function exclusively of the trial Court. It cannot be anticipated by a superior Court dealing with an ancillary matter i.e. the grant of bail pending trial.

7- Perusal of the record reveals that the accused-petitioner has been directly charged in the promptly lodged FIR for the murder of deceased Samiullah. The version of the complainant has been fully supported by the medical evidence, recovery of blood stained earth and recovery of, 20 empties of 7.62 bore from the spot. Moreover, the occurrence has taken place on 20/07/1999 and the accused-petitioner went into hiding and was arrested in the case on 29/10/2014 after more than fifteen years for which no plausible explanation has been given by him. Warrant under section 204 and proclamation under section 87 Cr.P.C. were issued against him and ultimately he was proceeded against

under section 512 Cr.P.C. by the learned Additional Sessions Judge-I/JSC, Peshawar vide his order dated 12/06/2001. No justifiable reason for his non-appearance in the trial of his co-accused has been furnished by the petitioner. The petitioner surrendered himself only after recording acquittal of his co-accused. The order of acquittal of co-accused was concluded with the following finding qua the petitioner:-

> ***"As a prima facie case exists against absconding co-accused namely Shamsur Rehman, so he is hereby declared as Proclaimed Offender. Perpetual warrant of his arrest be issued against him and the quarter concerned be directed to enter his name in the list/registers of P.Os. Case property be kept intact till the arrest/trial of the aforesaid absconding accused".***

8- The evidence recorded in absence of an accused could not be used against him and fate of such an accused is to be decided on the evidence recorded in his presence. When the evidence recorded in absence of an accused cannot be used for his conviction the same can also not be used for the benefit of that accused. In this regard the case of ***"Sardar….Vs….The State" (P L D 1979 Peshawar 16)*** *can advantageously be reproduced as below:-*

"Accused petitioner remaining outlaw after occurrence for about eight years and his trial to be held independently of previous trial resulting in acquittal of his co-accused----Contention that other accused in case having been acquitted and evidence being same in both cases, petitioner exonerated from charge of murder---Held: Not correct----Acceptance of contention amounts to examining of witnesses in petitioner's case as a matter of mere formality or there being no need to examine such witnesses for reasons of such evidence having already been taken into consideration in previous case and such course not permissible in law---Bail application rejected."

9- The abscondance may be either deliberate or due to lack of knowledge about the registration of the case or may be due to the fear of Investigating Agency or for any other just cause. The superior judiciary has time and again considered the factum of abscondance in a number of cases. There are cases wherein concession of bail is refused to an absconder when the Court arrived at a conclusion on tentative assessment from the available record that abscondance was wilful and noticeable, however, there are cases wherein the accused are allowed bail on making

tentative assessment of the prosecution evidence and ignoring the factum of abscondance for reasons. This practice that an accused went into deliberate abscondance to wait for the result of co-accused trial and surrender only when under-trial co-accused earned acquittal is highly deplorable and cannot be allowed, the concession of bail which shall amount granting permission on the mockery of law. Allowing concession of bail to a wilful absconder would create a sense of insecurity among people and disturbance in the society and offenders shall prefer abscondance after the commission of offence and shall surrender only when acquittal of an under arrest accused is recorded. No outlaw deserves the concessionary relief which could be extended to those who surrender before law. In the instant case the accused-petitioner deliberately avoided his arrest, although he was well-aware of the charge against him as his real brother Zareef Khan co-accused was arrested and put on trial. The petitioner was waiting for the result of the trial of his co-accused and when he earned acquittal he surrendered himself. The conduct of the petitioner speaks of his guilty mindedness and he cannot be given benefit of his abscondance on the sole ground of acquittal of the co-accused and this type of conduct of the petitioner would be sufficient to disentitle him for the concession of bail.

10- Resultantly, this bail petition is dismissed. However, the trial Court is directed to conclude the trial expeditiously but not later than two months. Office is directed to send the record to the quarter concerned immediately.

Needless to observe that the above observations are tentative in nature and the trial Court shall not be influenced, in any manner, while deciding the case.

ANNOUNCED.
Dated: 20/04/2015..

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8- In writ petition No.2114-P/2013 respondent-husband has challenged the judgment and order of both the courts below in respect of dower of half share of the house mentioned in the heading of the plaint. While in writ petition No.2266 filed by petitioner-wife, she has challenged the judgment of the appellate court whereby the decree passed by trial court in respect of house No.121 Street No.12 Sector F-8 Phase-VI, Hayatabad Peshawar was modified to the extent that instead of half share in the house as dower, the market price thereof is decreed in her favour. While in writ petition No.2265 she seeks the constitutional jurisdiction of this court and questioned the judgment of both the courts below with regard to non-payment of ten tolas golden ornaments as dower.

9- It is contended by the plaintiff-wife that her nikah was performed with defendant-husband in consideration of tolas gold ornaments, half share of her house and Rs.2000/- as maintenance allowance. In support of her claim she produced three witnesses. She appear as P.W.1 and given the detail of execution of nikahnama Ex.PW-1/1 and affidavit Ex.PW-1/2. Rehmatullah and Wazirzada were examined as PW-2 and PW-3 respectively. Both the witnesses have supported the contents of nikahnama and categorically stated that it was executed in her favour. Defendant-husband was examined as DW-1. He stated that nikah between the spouses was performed orally and an affidavit was executed before nikah between the parties. He stated that half share of the house was given to the plaintiff in lieu of dower which is situated in his village District Karak. He further stated that ten tolas of gold ornaments were fixed as dower out of which five tolas was prompt and remaining five tolas as deferred. He admitted his signature on the affidavit Ex.PW-1/2. In cross examination he showed his ignorance about the fact that whether the nikan was oral or in writing. He also could not disclose the name of the witnesses in whose

presence nikah was performed. Though he denied the execution of nikahnama and contended that she annexed bogus and tempered documents with her plaint and made tempering in nikahnama. But from the record, it reveals that the defendant miserably failed to prove that she had made any tempering in the nikahnama or prepared bogus documents. Though, in his statement he admitted the dower and share in the house which was given to her in lieu of her dower which is situated in his native village but such stance is not mentioned in the written statement. It is settled law that parties can not go beyond the pleadings. Thus, his evidence is not admissible. The defendant-husband himself admitted his signature on affidavit Ex.PW-1/2. He has not been able to prove any tempering in the nikahnama. While plaintiff-wife has proved the nikahnama through oral and documentary evidence. In the nikahnama Ex.PW-1/1 the name of Rehmat Ullah and Amir Daraz Khan are mentioned in its column No.8. Plaintiff produced both these witnesses as PW-2 and PW-3. Defendant also admitted the presence of these PWs at the time of nikah. In column No.13 to 17 of nikahnama the detail of dower is mentioned which included half share in the house

situated in Hayatabad, ten tolas gold ornaments and Rs.2000/- per month as maintenance allowance.

10- In writ petition No.2114-P of 2013 respondent/defendant contended that it is clear from the pleading of the parties and supporting documents annexed thereto that dower claimed by plaintiff-wife is of deferred category and could be claimed only in case of dissolution of marriage by death or divorce, but this material fact has been overlooked by both the courts below, which amounts to departure from evidence and not permissible under the law and rules governing the subject. These arguments were rebutted by learned counsel for the plaintiff-wife and contended that the dower has great significance in the contract of marriage in the Islamic society. It was obligatory upon the husband to pay dower to the wife happily. According to learned counsel, the question of paying of dower happily in the eventuality of dissolution of marriage by divorce did not arise, in as much as the parties were afflicted with bad feelings against each other, therefore, no husband would pay it happily at the time of divorce. Hence according to the learned counsel, the whole dower has to be paid on demand. He also contended

that dower is a gift given by the bride grown to the bride. That Holy Quran is silent on two type of dower i.e. prompt and deferred dower. He relied on sura Al-Nisa V 4.4 of Holy Quran and sated that according to the command of Allah “SWT given in the Holy Quran (Sura Al-Nisa, V.R.4) read as under:-

“At the time of marriage, give the women their dowers willingly as an obligation; but if they, by their own free will, give up to you a portion of it then you may enjoy it with pleasure “. Record shows that during the course of trial respondent-defendant submitted an application for deletion of part B from the suit pertaining to deferred dower being pre-mature in view of section 290 of Muhammadan Law. This application was contended by plaintiff and the learned trial court vide order dated 12.7.2010 while relying in 2006 YLR-33 dismissed the application by holding that dower whether prompt or deferred was inalienable right of wife and after consummation same would become vested right for a wife at that time. This order has not been challenged by the respondent-husband. At appellate stage he had challenged the order/judgment dated 15.3.2012 on the sole score that the same is liable to be set aside, as the

right of further cross examination and production of additional evidence was illegally struck off by the trial court. In appeal, he has not challenged the order dated 12.7.2010. Now, through this constitutional petition, he challenged it. First, we want to see whether the dower fixed in favour of wife was prompt or deferred. As discussed above, the plaintiff-wife has been able to prove the contents of nikahnama Ex.PW-1/1 which has got much authenticity then any other documents. The detail of dower is given in para No.13 and 17 of the Nikah Nama. Here we deem it proper to reproduce the relevant para of the Nikahnama (Para No.13, 14, 15, 16 and 17) as under:--

With regard to the dowered house, it is not mentioned that it is deferred. In para No.16 it is clearly mentioned that share of 7 marlas house situated at phase No.VI F-8, Hayatabad, Peshawar has been given. Only in respect of ten tolas gold ornaments, five tolas has been declared as prompt and five tolas as deferred and it is cleared from record that no decree in respect of golden ornaments has been given. The respondent-husband has not been able to prove his contention. So far the contention of plaintiff-wife in Writ Petition No.2266 of 2013 with regard to the decree of market value (price) of the half share in house no.121 Street No.12 Sector F-8, Phase-VI, Hayatabad, Peshawar is concerned, learned counsel for the petitioner at the very outset stated at the bar that he does not want to press the writ petition because plaintiff is ready to receive the market price of the house noted above instead of its half share.

11- Petitioner-wife filed writ petitionNo.2265 to the effect that both the courts below have erred in not passing the decree of gold ornaments weighing 10 tolas claimed by her in the suit. From the perusal of plaint, it reveals that no such relief of ten tolas gold has been

claimed by the plaintiff in the heading of the plaint and in the last para the plaintiff seeks only the grant of relief which has been claimed in the heading of the plaint. Both the courts below have rightly confined themselves to the decree/relief as claimed for and refused to grant decree for gold ornaments which has not been alleged by the petitioner/plaintiff.

12- In view of the above discussion, we hold that the petitioners have not been able to substantiate their claim in their respective writ petitions. The findings of both the courts below on the basis of evidence are not amenable in the writ jurisdiction. The High Court in exercise of its extra ordinary jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 can neither substitute findings of facts recorded by courts below nor give its opinion regarding adequate evidence. Such matter should be decided by courts below vested with jurisdiction to decide them. Assessment of evidence is the function of Family Court which is vested with exclusive jurisdiction to decide matter. No misreading or non-reading of evidence by courts below was pointed out by the counsel for the petitioners. The concurrent findings of courts below

cannot be successfully assailed in writ petition. Thus, all the three writ petitions being without force are hereby dismissed.

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Dated: 04/12/2014.

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