

**JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT, PESHAWAR**

(Judicial Department)

W.P.No.927-P/2015

Akhtar Kamal

Versus

Mst. Samreen Akhtar etc

JUDGMENT

Date of hearing: 02.02.2018.

Appellant-petitioner by Mr. Ghulam Mohyuddin Malik
Advocate

Respondent by Syed Kausar Ali Shah Advocate

IJAZ ANWAR, J.- ' Through the instant petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner has called in question the judgment and decree dated 17.12.2014 rendered by learned Additional District Judge, Takht Bhai, whereby the appeals filed by both the parties against the judgment and decree dated 27.4.2013 of learned Civil Judge-IV/Judge Family Court, Takht Bhai were disposed of.

2. The brief facts giving rise to the instant petition are that petitioner filed a suit against the respondent for restitution of conjugal rights and recovery. The respondent contested the suit by submitting her written statement. The pleadings of the parties gave rise to as many as eight issues

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including the relief. The parties produced their respective evidence as they wished to adduce. After hearing arguments, the learned Civil Judge-IV, Takht Bhai, Mardan, vide judgment and decree dated 27.4.2013, dismissed the suit of petitioner whereas granted decree to respondent No.1 to the following extent:-

“(i) Decree for recovery of dower consisting upon one dwelling house, situated at Mangal Bagh, Charsada road Mardan, landed property 40-k situated at Moza Shah Baig, Tehsil Takht Bhai, District Mardan and 10 tola golden ornaments.

(ii) Decree for recovery of maintenance allowance at the rate of Rs.5000/- per month for the period from 01.6.2010 till amicable settlement between spouses.

(iii) Decree for custody of children is passed in favour of defendant/wife and against the plaintiff/husband.”

3. Aggrieved from the judgment and decree dated 27.4.2013, both the parties filed appeals which were disposed of by the learned Additional District Judge-II, Takht Bhai vide judgment and decree dated 17.12.2014 in the following manner:-

“(a) Plaintiff Akhtar Kamal is held entitled to decree for restitution of conjugal rights, subject to payment of outstanding dower to the defendant. His suit for restitution of conjugal rights is decreed accordingly.



(b) Suit of the plaintiff for recovery of 130 tolas gold ornaments, Rs.1200000/- and American Repeater Gun and 9 MM pistol is returned for want of jurisdiction. He may have recourse to appropriate forum, if so desired.

(c) The defendant is held entitled for recovery of dower i.e. 40 kanals landed property, situated at Shah Baig, one residential house and one shop situated at Mangal Bagh, Mardan. However, she is not held entitled to recovery of dower amount to 10 tolas gold ornaments. Appeal No.3/FCA is allowed to the extent of shop as well while judgment and decree of the trial Court is upheld and maintained regarding immovable property already decreed. Appeal No.2/FCA is allowed to the extent of receipt of dower 10 tolas gold ornaments by the defendant and judgment and decree is reversed to this extent.

(d) The defendant is entitled to recovery of maintenance at the rate of Rs.5000/- with 10% annual increase on the principal amount from 01.4.2010 till payment of dower to her by the plaintiff. Judgment and decree of the trial Court is modified accordingly.

(e) Custody of minor son of Abdul Qadir is decreed in favour of his father, plaintiff, however, his mother, is entitled to visitation of her son on weekly basis. Judgment and decree of the learned trial court is reversed and appeal No.2/FCA is allowed to this extent. Custody of minor daughters namely *Khush Bakht and Summaiya* is given to their mother/the defendant. Judgment and decree of the learned trial Court is upheld in this regard. The

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plaintiff will, however, have the right to visitation his daughters on weekly basis. Moreover, the plaintiff shall be responsible for maintenance and education of the minor children irrespective of their custody. To be more specific, he will be responsible for education of the minor daughters in the institutions where they are studying and for their all other expenses, while they are in custody of their mother.

(f) The defendant/appellant is not held entitled to recovery of dowry articles including ornaments weighing 30 tolas as she has not proved the same. The judgment and decree of the learned trial court is upheld and appeal No.3/FCA is dismissed to this extent.”

4. The learned counsel for the petitioner argued that it was the suit of the petitioner for restitution of conjugal rights etc and a claim has been set forth in the written statement by the respondent No.1 pertaining to maintenance, dower etc which was beyond the scope of Section 9 of the Family Court Act, 1964. He made specific reference to section 9(1a) and Section 9(1b) to contend that such claim of the respondent No.1 is against law and that she was required to have filed a separate suit for the claimed relief. Learned counsel placed reliance on **PLD 2015 SC 166, PLD 2014 Sindh 133, 2016 SLR Lahore 453.** Learned counsel further argued that the respondent No. 1 has never appeared in support of her case and defendant No. 6 appeared as her attorney. He argued that dower has never been proved on the

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available record. He further argued that as referred to above the claim of the respondent No. 1 for maintenance is also hit by the provision of the Section 9 of the Muslim Family Laws Ordinance, 1961 as she was required to have filed petition before the Arbitration Council. He lastly requested for setting aside the impugned judgment being without lawful authority.

5. The learned counsel representing the respondent No.1 argued that the interpretation to section 9 (1a) and 9 (1b) given by the learned counsel for the petitioner if accepted it will certainly defeat the intention behind addition of (1a) and (1b) to this section. Learned counsel referred to Section 6 of the Muslim Family Laws Ordinance, 1961 and argued that the dower becomes due on the second marriage. He argued when the respondent No. 1 had filed a separate suit for the recovery of dower, it was on the application of the present petitioner that the Civil Court dismissed the suit and directed the respondent No. 1 to claim all such reliefs in her written statement before the Family Court. He argued that it shows the conduct of the present petitioner and deserve no relief in the equitable jurisdiction of this Court. He placed reliance on "2010 YLR 3264, 2016 MLD 200, PLD 2012 Lahore 418, 2011 YLR 2231 and 2015 PLD Lahore 88".

6. Arguments heard and record perused.

7. Perusal of the record reveals that it was in reply to the suit of the present petitioner for restitution of conjugal



rights that the respondent had placed a claim in her written statement for her dower, maintenance and for the maintenance of children and their custody. The main arguments of the learned counsel for the petitioner were regarding the non-maintainability of the claim of respondent No. 1, as according to him, the respondent No.1 was required to file a separate suit instead of setting her claim in the written statement.

8. In order to comprehend the intention of the legislature in adding (1a) and (1b) to Section 9 of the Family Court Act, 1964 through amended Ordinance LV-2002 dated 01.10.2002, reference to the preamble of the Family Court Act, 1964 is very relevant. It is reproduced as under:-

Whereas it is expedient to make provision for the establishment of Family Courts for the expeditious settlement and disposal of disputes relating to marriage and family affairs and for matters connected therewith.

9. The apparent intention in promulgating the West Pakistan Family Court Act, 1964 appears to be that it is a beneficial legislation enacted for the facilitation of the parties and expeditious justice as could be practicable. The insertion of sub-section (1a) and (1b) and Section 9 of the West Pakistan Family Court Act, 1964 are one of the steps in this direction of speedy justice. It is reproduced for convenience as under:-




S. 9. (1) Written Statement. — On the date fixed under clause (a) of subsection (1) of section 8, the plaintiff and the defendant shall appear before the Family Court and the defendant shall file his written statement, and attach therewith list of his witnesses alongwith a precise of the evidence that each witness is expected to give.

[(1a). A defendant husband may, where no earlier suit for restitution of conjugal rights is pending, claim for a decree of restitution of conjugal rights in his written statement to a suit for dissolution of marriage or maintenance, which shall be deemed as a plaint and no separate suit shall lie for it.

(1b). A defendant wife may, in the written statement to a suit for restitution of conjugal rights, make a claim for dissolution of marriage including *khula* which shall be deemed as a plaint and no separate suit shall lie for it:

Provided that the proviso to sub section (4) of section 10 shall apply where the decree for dissolution of marriage is to be passed on the ground of khula]



(2)

(3)

(4)

(5)

(a)

(b)

(6)

(7)

(8)

(underlines supplied)

By the insertion of the above sub-section either party may submit their claim in the written statement. Though in sub-section (1b) of the West Pakistan Family Court Act, 1964, the relief of only dissolution of marriage and Khula is mentioned as a claim to be set up by the wife, however, in the sub-section the word "*including khula*" is used which has enlarged its scope.

10. In the case of *Emperor V. Jiand and another* A.I.R 1928 Sind 149, while interpreting the word "*includes*" the Full Bench held that.-

"It is well-known rule of interpretation that the word "*includes*" is used as a word of enlargement and ordinarily implies that something else has been given beyond the general language which precedes it to add to the general clause a species which does not naturally belong to it."



Similarly, in A.I.R 1932 Madras 474 titled *Madras Central Urban Bank, Ltd. V. Corporation of Madras*, the Division Bench held that.-

“when it is mentioned that a particular definition ‘includes’ certain things, it should be taken that the legislature either intended to settle a difference of opinion on the point or wanted to bring in order matters that would not properly come within the ordinary connotation of the word or expression or phrase in question”.

11. In the case of *Malik Muhammad Inam and others V. Federation of Pakistan and others* 2006 SCMR 1670, the august Supreme Court of Pakistan while interpreting the word ‘include’ or ‘included’ in a statute held as under:-


Where in defining any, the Legislature uses the word “included” or “includes”, the rule of interpretation is that it is used as a word of enlargement and it ordinarily implies that something else has been included, which falls outside the general meaning of the word. It may also be used to give a comprehensive description that includes what is not



obvious, what is uncertain and what, in the ordinary sense, is not impossible.”

In the case of *Mushtaq Ahmad Vs The State*, 1991 SCMR 543, the august Supreme Court of Pakistan also commented upon the expression “includes” as under:-

The word “includes” is very generally used in interpretation clauses in order to enlarge the meanings of the words or phrases occurring in the body of the Statute; and when it is so used these words or phrase must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause that they shall include. But the word “include” is susceptible of another construction which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to ‘mean and include’ and in that case it may afford an exhaustive explanation of the meaning which for the purpose of Act, must invariably be attached to these words or expressions.



12. Thus merely specifying the word Khula and dissolution would not mean that the wife can claim only these two reliefs in her written statement but the word “including” used in Section 9 (1b) would enlarge its scope and the wife is not supposed to file separate suit for maintenance and custody of minor etc instead all these claims can be joined in the written statement. The word used in the concluding para (1b) are also very relevant which support the case of the respondent No. 1, i.e “*shall be deemed as a plaint and no separate suit shall lie for it*” and it further strengthen the case of the respondent No.1, and whatever she claimed in her written statement would be considered as if she has filed a separate suit to this effect.

13. This view also finds support from the case titled ***Rana Ahsan Mahmood Ahid V. Judge Family Court, Faisalabad and 2 others*** 2010 YLR 3264 and from the judgment of the Division Bench of this Court rendered in the case of “***Sheheryar Gul V. Mst. Sadaf Bibi***” 2016 MLD 200. The arguments on this point to the contrary advanced by the learned counsel for the petitioner are thus repelled.

14. It is strange to note that previously respondent No. 1 has filed a civil suit titled *Mst. Samreen Akhtar V. Akhtar Kamal and others* in the civil court claiming the relief regarding property given to her in dower decreed now by the Family Court, the suit was, however, dismissed by Civil Judge vide



order 24.02.2011 on the application of present petitioner that the relief of dower etc can be claimed in the family suit.

15. It was also argued on behalf of petitioner that recourse should have been made to Section 9 of the Family Court Ordinance, 1961 by adopting the mode and manner for approaching the Chairman Arbitration Council for the recovery of maintenance, however, it is noted that resort to Arbitration Council is one of the choice of the wife, the wording of section 9 are very clear and wife cannot be restricted to file the complaint/petition before the Arbitration Council only, as the wife can also seek any other legal remedy in addition to her approaching the Arbitration Council. Thus, bare reading of the section 9 of Muslim Family Laws Ordinance, 1961 transpires that two remedies are available to a wife for claiming the maintenance either by filing a suit for maintenance against her husband before the Family Court or by claiming maintenance in the manner and mode as provided in Section 9 of the Muslim Family Laws Ordinance, 1961.

16. Under the law father is morally and legally bound to maintain the children and he cannot escape from the liability on any pretext even if the custody of the minor is with the mother. The claim of dower of the respondent No. 1 is based upon a dower deed dated 01.10.1996 duly proved in the evidence and never rebutted in clear terms. Under the Islamic Law, payment of dower is obligatory upon the husband which is the entitlement of wife as consideration of the marriage. In the

case of *Dr. Sabira Sultana V. Maqsood Sulari, Additional District and Sessions Judge, Rawalpindi and 2 others (2000 CLC 1384)* and in the case of *Muhammad Azam V. Additional District Judge and others (2006 YLR 33)*, the Hon'ble High Court held as under:-

“The dower whether prompt or deferred is an inalienable right of a wife and after consummation of marriage same would become vested right of a wife at any time.”

Similarly reference to Section 6 (6) of the Muslim Family Laws Ordinance, 1961 will not be out of place, it is reproduced for convenience:-

S.6. Polygamy

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(5) Any man who contract another marriage without the permission of the Arbitration Council shall:

(a) Pay immediately the entire amount of dower, whether prompt or deferred, due to the existing wives, which amount, if no so paid shall be recoverable as arrears of land revenue; and

(b)



17. Likewise, in numerous judgments, it has been held that the husband on contracting second marriage without permission of first wife or Arbitration Council, becomes liable to pay to first wife entire dower amount either prompt or deferred. Reference can be made to the case of *Munazza Noor and 2 others V. Additional District Judge and others (2009 CLC 374)* and case titled *Mst. Shaheen Begum V. Zakaullah Khan Ghouri and others (2009 MLD 1124)*

18. For the reasons stated above, I find that the learned appellate Court has properly appraised the relevant record and rendered a balanced judgment which needs no interference of this Court in the exercise of constitutional jurisdiction, the writ petition having no merits is dismissed.

Announced
Dt:02.02.2018
Hasnain/*


JUDGE

(S.B)

Hon'ble Justice Ijaz Anwar