

JUDGMENT SHEET
PESHAWAR HIGH COURT,
PESHAWAR

(Judicial Department)

Write petition No. 4744-P/2019.

Date of hearing:..... 30.8.2019.

Petitioner (Pervez Ali) by M/S Qazi Zakauddin
and Hidadayat Ullah Khan, Advocates.

J U D G M E N T

MUHAMMAD NAEEM ANWAR, J.- Petitioner,
through this constitutional petition, has questioned
the judgment and decree dated 22.7.2019 of
District Judge, Charssada, whereby his appeal was
dismissed and, consequently, the judgment and
decree passed by learned Judge, Family Court,
Charssada, in Family Suit No. 67/FC dated
7.1.2019, was upheld.

2. To understand the dispute involved in the
present case, it would be appropriate to recount
the facts of the case. It transpired that marriage of
the petitioner-defendant with respondent-plaintiff
was solemnized in lieu of (i) Agricultural
property, measuring 2 kanlas, situated in the estate
of Mara Parang, (ii) Constructed house of one
kanal, situated in (Shaheed Abad) Mara Parang,
fully described in the head-note of the plaint, (iii)

30 tola gold ornaments, which remained unpaid, and to this effect a deed was scribed on 16.3.1985. After the birth of a baby-daughter, namely, Memoona Perviz and contract of second marriage by the petitioner-defendant, the relation between the spouses started to become strained and, ultimately, she was ousted alongwith her daughter from the house, whereafter, she started to remain with her brothers. She instituted a suit bearing No. 70/FC on 29.5.2014 for recovery of the recovery of dower and maintenance allowance.

3. The petitioner-defendant, when summoned, appeared and on 27.9.2014, an application was submitted by the respondent-wife to the effect that she had received an amount of rupees five lac through a cheque dated 27.9.2014 as her maintenance allowance and rest of the claim shall be settled by them privately. To this effect joint statement of both the parties recorded and suit was disposed of on 27.9.2014. Thereafter, on 15.5.2015, the respondent-plaintiff instituted a suit No. 67/FC for recovery of;

- (i) Possession of agricultural land, measuring two kanals, or its market price,

- (ii) Possession of a constructed house and
- (iii) 30 tolas gold ornaments.

It was contended by the respondent-plaintiff that since after the settlement on 27.9.2011, the petitioner-defendant has never turned up to her what to say about settlement of dower.

3. The suit was contested by the petitioner-defendant and the learned lower Court, after recording evidence, pro and contra, vide judgment dated 7.1.2019, partially decreed the suit in the following terms:-

“(1) recovery of dower in shape of defendant’s share in agricultural/landed property, measuring 2 kanal, situated in Mera Prang or its market value,

(2) recovery of dower in shape of a house measuring 01 kanal situated in Mera Prang or its market value.

Rest of claim of the plaintiff is dismissed, while defendant plea for restitution of conjugal right stands decreed in his favour subject to payment of above mentioned dower.”

4. Feeling aggrieved, two separate appeals were filed by both the parties against the judgment and decree dated 7.1.2019 passed by learned Judge, Family Court, Charrsada. The learned District Judge, through a consolidated

judgment dated 22.7.2019, dismissed both the appeal, hence, this petition.

5. Learned counsel for the petitioner contended that both the courts below, while passing the impugned judgment, have erred in law by not considering that once the dower is paid, as alleged in the deed dated 16.3.1985, claim for recovery thereof could not be entertained by the Family Court as it lacks jurisdiction. He next argued that the respondent has alienated her share in property to Sajid Ali (brother of the petitioner), who has not been arrayed as party to the suit. He further contended that suit of the respondent is hit by Order II rule 2 of the Code of Civil Procedure, 1908. He also stressed that claim of the respondent against the purchased property of the petitioner could not be entertained as he was not the owner of it at the time of *nikah*. He added that the respondent has not challenged the entry of the revenue record, wherein the property and share in house were shown to have been transferred to Sajid Ali and Yousaf Ali (now dead). He further contended that the matter falls within the jurisdiction of civil court and that the courts

below have failed to read the evidence as produced by the parties. Lastly, he contended that both the learned courts below have caused grave miscarriage of justice at the cost of misinterpretation of law.

6. Record perused and the submissions of learned counsel for the petitioner were considered.

7. Perusal of the record reveals that the respondent-wife has sought recovery of possession of agricultural property alongwith a constructed house, which, as per her contention, were given to her in lieu of her dower. The petitioner-defendant in his written statement, while replying the first Para of facts, had admitted that he had given his share from his ancestral property to the plaintiff-wife alongwith constructed house, however, the factum of deed dated 16.3.1985 was denied. He also asserted that the house was jointly owned by him with brothers and the amount to the extent of her share in the house was paid to her. The petitioner in his written statement, though, has admitted the fixation of dower, but has taken the stance that the respondent-wife to whom the property was

transferred, in lieu of dower, has alienated it to Sajid Ali Khan. The respondent while appearing as PW-4 has reiterated the factum of fixation of dower and non-payment thereof, which portion of the statement remained un-rebutted, which shall be considered to have been admitted. Similarly, the respondent-wife has received the amount of her share in the house. It is interesting to note that as no property was ever mutated in the name of the respondent-wife, as such, she could never transfer it to Sajid Ali Khan. It is also astonishing that the petitioner could not produce any evidence regarding payment of share in house to the respondent-wife. The petitioner has miserably failed to prove on record that any property either constructed or otherwise would have been given to the respondent-wife.

8. The contention of learned counsel for the petitioner that Family Court lacks jurisdiction to entertain and adjudicate upon the suit for recovery of possession and dower of immoveable property is also misconceived as by now it is settled law that once the immoveable property is claimed as dower, the Family Court has got exclusive

jurisdiction in such dispute. The wisdom is derived from the case law titled **Liaqat Ali vs. Additional District Judge, Narowal and two others (1997 SCMR 1122)**, wherein Hon'able the Supreme Court observed that:-

“A plain reading of section 5 of the Family Courts Act, 1964 (W.P. Act XXXV of 1964) will show that the Judge Family Court alone was competent to entertain a suit for the recovery of the property given as dower to the wife at the time of marriage. Learned counsel has failed to quote any provision of law restraining Judge Family Court to entertain suit for the recovery of immovable property given as dower to a wife. The three courts below have believed the oral evidence as well as Kabinnama Exh. P.1 and Nikahnama Exh.P.3. Learned counsel has failed to point out any misreading or non-reading of evidence by the Courts below. The Judge Family Court has not flouted any relevant provision of law either learned Additional District Judge and the High Court as well were fully justified in dismissing the appeal and the constitution petition respectively.

Leave to appeal is, therefore, refused and the petition is dismissed.”

9. The next contention of the learned counsel that suit of the respondent was hit by Order II Rule 2 of the Code of Civil Procedure, 1908 is also misconceived as earlier suit was withdrawn on the basis of compromise and it was agreed that the matter of dower shall be settled privately, but

the petitioner failed to do so, as such, the respondent-wife has left with no option but to file this suit before the proper forum.

10. The contention of worthy counsel for the petitioner that the respondent-wife could not prove the deed dated 16.3.1985 is also not helpful for him keeping in view the categorical admission of fixation of dower in written statement. Lastly, revenue papers transpire that the petitioner is owner in the property, situated in Estate of Mara Parang, as such, there remains no question of non-joinder of parties in the suit.

11. For what has been stated above, the petition being without any merit is dismissed in *limine*.

Announced:
30.8.2019.

M.Zafra PS

J U D G E

(SB Hon'able Mr. Justice Muhammad Naeem Anwar).