

Before Mazhar Alam Khan Miankhel and Fazal-i-Haq Abbasi, JJ

Mst. SARWAT BEGAM---Petitioner

Versus

FARMANULLAH and 2 others---Respondents

Writ Petitions Nos.525 and 557 of 2011, decided on 28th February, 2012.

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

---Ss. 10(4) proviso, 5 & Sched.---Constitution of Pakistan Art. 199---Constitutional petition---
Suit for dissolution of marriage and recovery of dower---Suit was decreed and marriage was
dissolved by the Trial Court on the ground of 'Khula' instead of on the ground taken by the wife
of cruelty by the husband and Trial Court gave no directions for return of benefits to the wife---
Appellate Court modified said judgment of Trial Court and found that the total dower fixed
between the parties was 25 tolas of gold out of which the wife received 8 tolas at the time of the
Rukhsati and out of the remainder 17 tolas of gold, 9 tolas were held to be "Badl-e-Khula" and
therefore, the wife would have to surrender her claim to that extent and would be entitled to
receive the remaining 8 tolas of gold only---Contention of the wife (petitioner) was that the total
dower was 50 tolas of gold since dower was enhanced later by the husband through an agreement
executed at the time of marriage in view of the findings of a "jirga"---Validity---Wife had failed
to prove the existence of such a decision by a "jirga"---Wife herself had not claimed dissolution
of marriage on the basis of "khula" but had claimed dissolution of marriage on the basis of non-
payment of dower and cruelty by the husband and had led evidence in such regard, but the same
was not held to be sufficient to be relied upon by the courts below---Trial Court by considering
that the spouses could not live within the limits ordained by Almighty Allah dissolved the
marriage not on basis of the grounds taken by the wife, but on the basis of khula, and in said
situation, it became the direction of the Trial Court to fix the amount of "Badl-e-Khula", keeping

in view the peculiar facts of the case---High Court modified the judgment of the Appellate Court and keeping in view the period of wedlock between the parties, reduced "Badl-e-Khula" from 9 tolas to 5 tolas and directed that the wife would be entitled to receive the remaining 12 tolas of gold---Constitutional petition was disposed of accordingly.

Muhammad Riaz v. Mst. Noorul Islam and 2 others 1998 CLC 1936 and Dr. Fakhruddin v. Mst. Kosar Takreem and another PLD 2009 Pesh. 92 ref.

Amir Gulab Khan for Petitioner.

Muhammad Saeed Khan Shagla for Respondents

Date of hearing: 28th February, 2012.

JUDGMENT

MAZHAR ALAM KHAN MIANKHEL, J.---Through this single judgment we intend to dispose of W.P.No.525 of 2011 with the title of Mst.Sarwat Begum v. Farmanullah and others and W.P. No.557/2011 with the title of Farmanullah v. Mst.Sarwat Begum as the both petitions are the outcome of the same judgment and decree of the appellate Court.

2. The petitioner of W.P. No.525/2011 is the plaintiff in a suit for dissolution of her marriage with respondent/husband and recovery of dower of 50 tolas of gold along with Rs.10,00,000/- as cash dower amount, dowry articles and her maintenance to the tune of Rs.5000/- per month. Her claim was decreed by the trial court vide its judgment and decree dated 3-7-2010 but had dissolved the marriage of the spouses on the ground of Khula' instead of cruelty etc. with no direction of return of benefits. The appellate court partially modified the judgment and decree of the trial court on the basis of khula' in lieu of 9 tolas of gold ornaments by fixing the total dower of 25 tolas of gold. The learned counsel for the petitioner mainly contended that though initially the dower fixed between the spouses was 25 tolas of gold but later on husband/respondent enhanced the same from 25 to 50 tolas of gold on the basis of an agreement on the intervention of elders of the locality. He next contended that petitioner proved the execution of said

agreement in accordance with law but the appellate court without any legal justification refused to place reliance on the said document and wrongly held it to be 25 tolas of gold and placed reliance on Muhammad Riaz v. Mst. Noorul Islam and 2 others (1998 CLC 1036) and Dr.Fakhruddin v. Mst.Kosar Takreem and another PLD 2009 Peshawar 92).

3. As against that the learned counsel for the respondents who has also questioned the judgment and decree of the appellate court through his independent connected Writ Petition No.557 of 2011, submitted that the findings of the two courts below are against the law of the land and Sharia as the marriage between the parties was dissolved not on the basis of cruelty but on the basis of 'Khula' and as per law, petitioner was liable to return all the benefits received in the shape of 8 tolas of gold ornaments at the time of 'Rukhsati' and should have surrendered her claim with regard to remaining gold ornaments as were fixed by the appellate Court.

4. The learned counsel for the parties were heard and record of the case was perused.

5. Perusal of the record would reveal that it has been admitted on the record that initially the dower between the parties was fixed to the tune of 25 tolas of gold ornaments but the petitioner in her suit has alleged it to be 50 tolas of gold ornaments as the dower was later on enhanced by the husband/respondent on the basis of agreement dated 3-7-2010. No doubt the trial court has granted a decree to the petitioner as prayed for but the appellate court has partially modified the said decree by holding that the actual dower fixed between the spouses was 25 tolas of gold out of which the petitioner had received 8 tolas of gold at the time of her 'Rukhsati' and out of remaining 17 tolas, 9 tolas of gold was held to be as 'Badl-e-Khula' and she has to surrender her claim to this extent and would also be entitled to receive remaining 8 tolas of gold as remaining dower.

The perusal of the record would reveal that the petitioner had asked for her dissolution of marriage on the basis of cruelty and non-payment of dower but the trial court of its own, dissolved the marital bond between them on the basis of 'Khula' and not on other grounds but the trial court failed to give any finding with regard to return of any dower though that is within the discretion of the court. The appellate court modified the decree by holding it to be a dissolution on the basis of 'Khula' in lieu of 9 tolas of gold as 'Badl-e-Khula' out of 25 tolas in total by placing reliance on Dr.Fakhruddin v. Mst.Kosar Takreem and another, supra.

The claim of petitioner regarding 50 tolas of gold as dower enhanced later on by the husband in view of the findings of 'Jirga' but the petitioner failed to prove any decision of 'Jirga'. Though she

has produced the marginal witnesses of the agreement but the husband had totally denied from the execution of the said deed and the appellate court instead of sending the signatures of the respondent for comparison with the admitted signatures of the handwriting expert but compared himself the disputed signatures with that of the admitted one and held that there is a clear cut difference between the two and thereby held that the petitioner failed to prove the fixation of 50 tolas of gold as dower and fixed the same as 25 tolas as were fixed initially between the spouses at the time of their marriage.

6. Now the question would whether plaintiff-petitioner could be held liable to pay/return all the benefits she received from husband as 'Badl-e-Khula'. Law on the subject is very much clear. She herself had not claimed dissolution of marriage on the basis of 'Khula' but had claimed her dissolution on the basis of non-payment of dower and cruelty of the husband. She also led her evidence in this regard but that was not sufficient to be relied upon by the Courts below. So the trial Court by considering that the spouses cannot live within the limits ordained by the Allah Almighty, so, instead of dissolving the marriage between the spouses on other grounds dissolved the same on the basis of 'Khula' so in such a situation it becomes the discretion of the court to fix the amount of 'Badl-e-Khula' keeping in view the peculiar facts and circumstances of the case. So the appellate Court held that she would be held liable to surrender 9 tolas of gold ornaments as 'Badl-e-Khula' out of 25 tolas of gold.

7. No illegality or irregularity in exercise of jurisdiction by the appellate court was pointed out by either of the parties, however, by keeping in mind the period of the wedlock between the spouses we partially allow the Writ Petition No.525/2011 of the wife and further reduce the 'Badl-e-Khula' from 9 tolas to 5 tolas and for rest of the remaining 12 tolas she would be entitled to receive the same. The Writ Petition No. 557 of 2011 of the husband Farmanullah is dismissed.

K.M.Z./145/P

Order accordingly.