

SUPREME COURT OF AZAD JAMMU AND KASHMIR
[SHARIAT APPELLATE JURISDICTION]

PRESENT:

Kh. Muhammad Nasim, J.

Raza Ali Khan, J.

1. Civil Appeal No. 433 of 2020
(PLA Filed on 02.01.2020)

Asma Bashir Abbasi, wife of Shehzad Ahmed Abbasi, resident of Ward No. 2, Garhi Dopatta, Tehsil & District Muzaffarabad, presently residing with her real father, Muhammad Bashir Abbasi, at Chehla Bandi Tehsil & District Muzaffarabad.

.....APPELLANT

VERSUS

Shahzad Ahmed Abbasi, son of Muhammad Nazeer Abbasi, resident of Ward No. 02, Garhi Dopatta, Tehsil & District Muzaffarabad.

.....RESPONDENT

[On appeal from the judgment and decree of the Shariat Appellate Bench of the High Court dated 08.11.2019 in family appeals Nos. 11 & 14 of 2019]

APPEARANCES:

FOR THE APPELLANT: Syed Atif Mushtaq Gillani,
Advocate.

FOR THE RESPONDENT: Mr. Akhlaq Hussain
Mughal, Advocate.

2. Civil Appeal No. 434 of 2020
(PLA Filed on 05.12.2019)

1. Shahzad Ahmed Abbasi s/o Muhammad Nazir Abbasi,
2. Muhammad Nazir Abbasi s/o Sardar Safdar Khan Abbasi r/o Garhi Dupatta, Tehsil & District Muzaffarabad, Azad Jammu & Kashmir.

.....APPELLANTS

VERSUS

Mst. Asima Bashir Abbasi d/o Muhammad Bashir Abbasi, w/o Shazad Ahmed Abbasi r/o Challa Bandi, Tehsil & District Muzaffarabad, Azad Jammu & Kashmir.

.....RESPONDENT

[On appeal from the judgment and decree of the
Shariat Appellate Bench of the High Court dated
08.11.2019 in family appeals Nos. 11 & 14 of 2019]

APPEARANCES:

FOR THE APPELLANT: Mr. Akhlaq Hussain
Mughal, Advocate.

FOR THE RESPONDENT: Syed Atif Mushtaq Gillani,
Advocate.

Date of hearing: 25.08.2021.

JUDGMENT:

Raza Ali Khan, J.— The captioned appeals by
leave of the Court, have been directed against the
consolidated judgment and decree, dated 08.11.2019,
passed by the Shariat Appellate Bench of High Court of
Azad Jammu & Kashmir (hereinafter to be referred as
High Court) in Family Appeals No. 11 & 14 of 2019.

2. The facts forming the background of the
captioned appeals are that Mst. Asima Bashir, filed
two suits before the Judge Family Court,

Muzaffarabad on 07.02.2017. One for recovery of dower Rs 500,000/-, in form of a house consisting of two rooms, a kitchen and a bathroom, at ward No. 02, Garhi-Dopatta, and the other one for grant of past and future maintenance allowance at the rate of Rs. 15000/- per month, from 11th February 2016. The defendants resisted the suits by filing written statements. The learned Family Judge in the light of the pleading of parties, framed issues and directed the parties to record evidence. At the conclusion of the proceedings and hearing the parties, the learned Family judge decreed the suit for recovery of dower Rs. 500,000/- in form of a house consisting of two rooms, a kitchen and a bathroom, situated at Ward No. 02, Garhi-Dopatta, in favour of the plaintiff. The other suit for recovery of maintenance allowance was also decreed at the rate of Rs. 5000/- per month, for

future maintenance allowance in case of re-settlement, whereas, the suit for maintenance allowance to the extent of past maintenance was dismissed, vide judgment and decrees dated 17.12.2018. Feeling dissatisfied from the said judgment and decree, both the parties preferred separate appeals before the Shariat Appellate Bench of the High Court. The learned High Court after necessary proceedings has dismissed the appeals through the impugned judgment and decrees dated 08.11.2019.

3. Mr. Syed Atif Mushtaq Gillani, the learned Advocate representing Asima Bashir Abbasi, while arguing the appeal of Asma Bashir, appellant in appeal No. 433 of 2020, submitted that version of the appellant regarding the cruel attitude is proved from cogent evidence, but the learned trial Court wrongly

decided the issue No. 2, against the appellant and dismissal of appeal by the learned High Court in this regard is not justified. He further argued that the learned Family Judge neither framed issue No. 04 properly nor decided the same in its true prospect. He added that the maintenance allowance prior to the date of expulsion was not the case of the appellant, rather the appellant has claimed the maintenance after the date of expulsion, which is admittedly not paid by the respondent, therefore, the findings recorded by the learned Family Judge on issue No. 4 are erroneous and illegal. He finally submitted that while accepting the appeal of Asma Bashir, the appeal filed by the respondents may be dismissed with cost. The learned counsel for the appellant while opposing the cross appeal filed by Shahzad Ahmed while defending the judgments and decrees of Courts below

argued that the learned Family Court has rightly passed the decree to the extent of dower and the learned High Court has committed no illegality while upholding the same in this regard, hence, the concurrent findings of facts recorded by the Courts below to the extent of dower cannot be disturbed by this Court. He further argued that the appellant was living in the same house which was specified in the Nikah-nama, however, after the judgment of this Court titled Shahzad Rauf vs. Shabana Yasmin, reported as 2017 SCR 1522, the respondents changed their stance that no house has been given to the appellant as her dower and in this regard, no documentary evidence has been produced. He further argued that it is clearly mentioned in the Nikahnama that the gold ornaments were given to the appellant as a gift, and the respondent has no concern whether

the appellant keeps the same in custody of her father or avails the facility of loan against them. He added that the learned Family Court while mentioning the details of the facility of loan availed by the appellant has misread and non-read the evidence produced by the parties and the same is based upon surmises and conjectures.

3. Mr. Akhlaq Hussain Mughal, the learned Advocate for Shezad Ahmed Abbasi & another while controverting the arguments of the learned counsel for Asma Bashir and in support of the appeal filed by Shahzad Ahmed, argued that both the judgments and decrees of the Family Court and the High Court to the extent of dower are against law and liable to be set-aside. He further argued that the appellant (Shahzad Ahmed) earned money and bought gold ornaments from Kuwait which were stolen by the respondent

(Asma Bashir) and the learned Family Judge failed to recover the same even after admission of the respondent in the evidence. He further argued that the learned Family Judge also failed to adjust the said amount of the stolen articles which has been admitted by the respondent in her evidence that 15/16 tola jewelry articles are in possession of her father. He further argued that the Courts below have not appreciated the evidence of the parties in its true perspective while passing the decree for recovery of dower as well as the decree of future maintenance because the dower was paid to the respondent and she was not ousted from the house, rather she herself left her husband's house, hence is not entitled to receive dower as well as future maintenance allowance. He finally submitted that this appeal may

be accepted and a cross appeal filed by the respondent may be dismissed.

4. We have heard the learned Advocates for the parties and gone through the available record of the case. The examination of the record reveals that Asima Bashir Abbasi, filed two suits before the Family Court, Muzaffarabad. One for the recovery of the dower amounting to Rs. 500,000/- in form of a house consisting of two rooms, a kitchen and a bathroom at ward No. 02, Garhi Dupatta. The second suit was filed for recovery of past and future maintenance allowance at the rate of 15000/- per month from 11.02.2016. The learned Family Judge after due process of law, decreed the suit of the recovery of dower at the rate of 500,000/- in form of property cited above, in favour of the plaintiff and observed that the defendant shall transfer the aforesaid

property and in case of default, defendant No. 2 who is mentioned as guarantor in the Nikahnama, is bound to transfer the property in favour of the plaintiff. The other suit for maintenance allowance was partly decreed to the extent of future maintenance allowance at the rate of Rs. 5000/- per month subject to her re-settlement with husband/defendant, however, to the extent of past maintenance, the suit was dismissed. Being dissatisfied from the judgment and decrees of the Family Judge, both the parties approached the learned High Court by filing separate appeals. The learned High Court after formal proceedings, has dismissed the appeals through the impugned judgment and decrees dated 08.11.2019.

5. In the context of matrimonial cases, “the concept, “proof beyond the shadow of doubt” does not apply as is applied in Criminal cases. So while

deciding the matrimonial matters one has to see what are the possibilities in a case, specially where no cogent and direct evidence of the parties is helpful to resolve the issues.

6. For better appreciation, the impugned judgments of the learned High Court and the Family Court as well as the record have deeply been scrutinized. Firstly, we would like to deal with the point of recovery of dower. The perusal of the Nikahnama dated 25.05.2013, divulges that the dower of the plaintiff was fixed as 500,000/- in form of a house consisting of two rooms, a kitchen and a bathroom at ward No. 02, Garhi Dupatta, Muzaffarabad, as the prompt dower. It is a settled principle of law that the contents of the Nikahnama in family matters are treated as sufficient proof, however, from the perusal of evidence, it emerges

that the said property was not transferred in her favour at the time of Nikah nor thereafter. Zia-ur-Rehman, the witness produced by Asima Bashir, deposed in his statement that:-

"حق مہر میں ایک کچن باتھ روم دو کمرے مکان دینا طے ہوا تھا
- مدعیہ کو حق مہر کی ادائیگی نہ ہوئی ہے"

The other witness Gohar Rehman, produced by Asima Bashir Abbasi, deposed in his statement:-

"حق مہر مبلغ 5 لاکھ روپے دو کمرے باتھ کی صورت میں مقرر
ہوا تھا۔ حق مہر مدعیہ کو نہ دیا گیا ہے۔ حق مہر میں دیئے
گئے مکان پر قبضہ مدعا علیہ کا ہے۔ یہ غلط ہے کہ بوقت نکاح جملہ
حق مہر ادا ہو چکا ہے۔"

Asima Bashir Abbasi, herself deposed in her statement that:-

"حق مہر مبلغ 5 لاکھ روپے دو کمرے مکان کچن باتھ وارڈ نمبر
2 گڑھی دوپٹہ میں دیا گیا جو نکاح نامہ میں ادا شدہ درج کیا گیا
ہے۔ حق مہر کا ضامن نذیر عباسی ہے بوقت نکاح مظہرہ کو زیور
بھی دیا گیا تھا۔ زیور میں ایک ہار سیٹ چھ چوڑیاں اور دو
انگوٹھیاں بھی دی گئیں تھیں۔"

While the witness namely Ayaz Nazir produced by Shehzad Ahmed Abbasi, deposed in his statement that:-

"نکاح نامہ مظہر کی موجودگی میں مولوی صاحب نے تحریر کیا تھا۔ مظہر نے نکاح نامہ دعویٰ و جواب دعویٰ دائر کرتے وقت نہ دیکھا۔ یہ درست ہے کہ نکاح نامہ Exh.PA فریقین کی شادی کا ہے۔ یہ درست ہے کہ حق مہر 5 لاکھ روپے کے عوض میں دو کمرے مکان باتھ واقع موضع وارڈ نمبر 2 گڑھی دوپٹہ مدعا علیہ کے قبضہ میں ہیں۔ مدعیہ کے قبضہ میں نہ ہیں"

The perusal of the above statements of witnesses clearly show that the property was given as dower but the same was not transferred in favour of the plaintiff. In this regard, the learned Family Judge has also framed issue No. 1, which has been properly resolved in the light of pleading and evidence of the parties and the learned High Court has rightly affirmed the same. The stance of Shehzad Ahmed that during re-settlement, the whole dower of Rs. 500,000/- has

been paid in cash, has no force, as he has failed to prove the same through cogent evidence.

7. The learned Advocate for Asima Bashir contended that her husband had a cruel behavior with the plaintiff and was ousted by him from his house, therefore, the learned Family Judge has committed grave illegality while refusing the grant of past maintenance allowance. Mst. Asima Bashir has claimed Rs. 15000/- as past maintenance and future maintenance, whereas, the decree has been passed only to the extent of future maintenance. The perusal of the evidence reveals that she has failed to prove the fact that she was ousted from the house of husband due to cruelty. In this regard, the statements of the witnesses are on record and witness namely Dawood Khan produced by Shehzad Ahmed Abbasi deposed in his statement that:-

"زیور متذکرہ مدعالیہ نے مظہر کے سامنے لایا تھا جو مظہر نے دیکھا ہوا تھا۔ زیور متذکرہ مظہر نے گڑھی دوپٹہ مدعالیہ کے گھر دیکھا تھا۔ زیور میں سونے کے بسکٹ تھے۔ یہ غلط ہے کہ زیور متذکرہ مدعیہ کے کنٹرول میں نہ تھا۔ یہ درست ہے کہ مدعیہ خود غیر آباد ہوئی ہے۔"

The other witness of Shehzad Ahmed namely Sheeraz Abbasi, deposed in his statement that:-

"مدعالیہ نے ساری بات سسرال والوں کو بتائی انہوں نے بتایا کہ عاصمہ اپنے والدین کے گھر آگئی ہے۔ بعد ازاں مدعالیہ نے سسرال والوں کو بتایا کہ بینک والے بار بار کال کر رہے ہیں اس معاملہ کو آپ حل کریں یا دیکھیں۔ سسرال والوں نے بینک والوں کو بتایا کہ ہم بینک والا معاملہ حل کرتے ہیں آپ پولیس میں کوئی رپورٹ درج نہ کروانا، معاملہ برادری میں بیٹھ کر حل ہو گا۔ یہ درست ہے کہ مدعیہ کی آبادی کی نسبت متعدد درجے ہوئے"

From the perusal of above statement, it is crystal clear that her husband has not deserted her from his house rather, she left her house with her own free will, and she by her own conduct brought the relationship to the point of irretrievable breakdown,

hence, we find force in the contention of learned counsel for Shehzad Ahmed Abbasi that Asma Bashir left her matrimonial house with her free will without any reasonable cause and excuse and to rebut this stand, no evidence was brought by Asima Bashir before the learned Family Court to prove her point. It is settled principle of law that husband is duty bound to pay maintenance allowance to the wife subject to consideration that she is faithful to husband and lives with him. The learned trial Court has rightly refused the decree of past maintenance allowance, however, the decree to the extent of future maintenance allowance at the rate of Rs. 5000/- in case of re-settlement with her husband, in our view seems to be in accordance with law.

8. Even otherwise, the concurrent findings of facts recorded by the trial Court and upheld by the

High Court are not open to challenge until and unless a case of gross misreading or non-reading of evidence or total absence of evidence is made out. In this regard, reliance can be placed on the judgment of this Court reported as *Muhammad Din vs. Muhammad Ashraf & others* [2005 SCR 225], wherein, it was held that:-

“... When a question of fact concurrently decided by the Courts below is upheld by the High Court then it is not proper for this Court to substitute its opinion against the opinion of the Courts below...”.

In another case titled *Kamal Hussain vs. M. Shabir & others* [2017 SCR 236], the same view has been observed by this Court:-

“The defendant -appellant could not succeed to point out any misreading or non-reading of evidence, therefore the findings of facts concurrently recorded by the Courts below cannot be disturbed or interfered with merely on the strength of the argument which

*does not find support from the law
or record.”*

In view of the above, both the appeals
having no merits, are hereby dismissed. No order as to
cost.

Muzaffarabad,

JUDGE
(J-II)

JUDGE
(J-I)