2018 Y L R 1251

[Lahore]

Before Jawad Hassan, J

MUHAMMAD KAMRAN---Petitioner

Versus

Mst. SAMERA MAJEED and others---Respondents

W.P. No.3955 of 2015, heard on 13th February, 2018.

(a) Family Courts Act (XXXV of 1964)---

----S. 5, Sched.---Dissolution of marriage on basis of 'khula'---Dower (haq-mehr), return of---Scope---Where wife obtained decree for dissolution of marriage on basis of khula, it was subject to return of dower amount and she subsequently could not claim it as of right---In case of khula, wife would have to either remit the dower amount, if she had not received it or pay back the same to the husband if she had received it.

Mst. Saeeda Javed v. Javed Iqbal and 2 others PLD 2013 Pesh. 88 ref.

(b) Family Courts Act (XXXV of 1964)---

---S. 10(4)---Dissolution of Muslim Marriages Act (VIII of 1939), Ss. 2(ii) & 2(iv)---Dissolution of marriage on basis of 'khula'---Section 10(4) of the Family Courts Act, 1964 was applicable to the dissolution of marriage on basis of "khula" and not to dissolution of marriage on the grounds available to a wife under Ss. 2(ii) & 2(iv) of the Dissolution of Muslim Marriages Act, 1939.

Khalid Mahmood's case PLD 2007 Lah. 626 and Mst. Saima Irum and 3 others' case 2006 MLD 83 ref.

Ch. Muhammad Ayub for Petitioner.

Muhammad Asif Mughal for Respondents.

Date of hearing: 13th February, 2018.

JUDGMENT

JAWAD HASSAN, J.---Through this Constitutional Petition, the Petitioner has called in question judgment and decree dated 29.11.2014 (the "impugned judgment and decree"), passed by learned Additional District Judge, Jhang, whereby judgment and decree of Judge Family Court, Jhang was upheld to the extent of maintenance allowance and dowry articles and modified

to the extent of dower amount whereby the Respondent No.1 was held entitled to recover dower amounting to Rs.50,000/- from the Petitioner.

2. Facts briefly for the disposal of this constitutional petition are that as a consequence of suit for recovery of maintenance allowance, return of dowry articles and recovery of dower amount judgment and decree dated 21.07.2014 was passed by Judge Family Court, Jhang, whereby the Respondent No.1 was held entitled to get maintenance allowance for the period of iddat at the rate of Rs.5000/-and dowry articles as per statement recorded on oath of Holy Quran on 10.05.2014 or in alternate their depreciated value Rs.3,50,000/-. The claim of the Respondent No.1 qua recovery of dower was dismissed. Feeling aggrieved thereof both the parties filed their respective appeals before the learned Additional District Judge, Jhang, which were consolidated and vide impugned judgment and decree dated 29.11.2014, the appeal filed by the Respondent No.1 was partially accepted and impugned judgment and decree of Judge Family Court, Jhang was upheld to the extent of maintenance allowance and dowry articles and modified to the extent of dower amount whereby the Respondent No.1 was held entitled to recover dower amounting to Rs.50,000/- from the Petitioner, whereas appeal filed by the Petitioner was dismissed. Hence this petition.

3. Learned counsel for the Petitioner has argued that while passing the impugned judgment and decree the learned Additional District Judge, Jhang has not applied his judicious mind and in a slipshod manner has passed the impugned judgment and decree which is not warranted by law; that while passing the impugned judgment and decree, the learned courts below have misread the evidence on record and arrived at a conclusion which is contrary to law as the marriage was dissolved on the basis of "Khula" by the learned Judge Family Court subject to return of dower amount, therefore, the learned Additional District Judge, Jhang was not justified to pass decree of dower amounting to Rs.50000/-, therefore, the said findings are erroneous and are liable to be set aside. Lastly, he prayed for setting aside of the impugned judgment and decree.

4. On the other hand counsel for the Respondent No.1 has supported the impugned judgment and decree and contended that the learned Additional District Judge, Jhang has passed the impugned judgment and decree, in accordance with law therefore, no exception can be taken to it. Lastly, he prayed for dismissal of the writ petition.

5. Arguments heard and record perused.

6. From the perusal of record it reveals that the learned Judge Family Court, Jhang considered the evidence of the Respondent No.1 (PW-1) and her witness (PW-2), who corroborated the stance of the PW-1. In rebuttal, the Petitioner, appeared as the DW-1 and tendered his affidavit. Consequently the learned Judge Family Court, after recording issue-wise findings decreed the suit of the Respondent No.1 vide judgment and decree dated 21.07.2014 in the terms mentioned supra. The said judgment and decree was assailed by the Respondent No.1 before the learned Additional District Judge, Jhang in an appeal, which was partially allowed vide judgment and decree dated 29.11.2014, with modification whereby the Respondent No.1 was held entitled to get dower amount of Rs.50,000/-. The pivotal question to be determined by this Court is whether the learned Appellate Court had rightly considered the case regarding dower amount.

7. From the perusal of record it reveals that in the Nikahnama Rs.50,000/- was fixed as deferred dower and the marriage of the Respondent No.1 was dissolved on the basis of Khula. The learned Judge Family Court has rightly held that deferred dower is only payable when marriage is dissolved by pronouncing Talaq by bridegroom of his death. However, in the case in hand, the Respondent No.1 herself has obtained decree for dissolution of marriage on 24.09.2013 on the basis of khula subject to return of dower amount. Further, the learned Additional District Judge, has misread the evidence of DW-1/Petitioner, wherein he in cross-examination has categorically stated that he paid Rs.50,000/- as dower amount at the time of solemnization of Nikah in the presence of witnesses namely Muhammad Liaqat son of Muhammad Ibrahim and Muhammad Asif son of Muhammad Younas, although they were not produced in the witness box. The perusal of statement of DW-1 reveals that the amount of dower was given to the Petitioner by his father. So far as payment of receipt is concerned, it is common practice in our society that parents of bridegroom never demand the receipt of payment from the parents of bride at the time of solemnization of nikah. Further the Respondent No.1 herself has obtained decree for dissolution of marriage which was subject to return of dower amount, therefore, subsequently she cannot lay claim for dower amount. It has been held in so many judgments that when wife herself obtains decree for dissolution of marriage on the basis of Khula that is subject to return of dower amount and she subsequently cannot claim it as of right.

8. It is also worth-mentioning here that Section 10(4) of the West Pakistan Family Courts Act, 1964 is applicable to the dissolution of marriage on the basis of "Khula" and not to the dissolution of marriage on the grounds available to a wife under Section 2(ii) & (iv) of the Dissolution of Muslim Marriages Act, 1939. If any precedent in this regard is required, reliance may be placed on the case of Khalid Mahmood (PLD 2007 Lahore 626). The relevant portion of the same reads as under:-

> "11. The condition on the wife to restore to husband the dower, received by her at the time of marriage, while seeking dissolution of marriage on the basis of Khula, according to provisos to sub-section (4) of section 10 of Family Courts Act, is explicitly indicative of fact that this provision of law (brought through amendment vide Ordinance, 2002) is only meant to apply in suits in which dissolution of marriage is prayed for only on the basis of Khula. Further in such like situation the decree is passed straightway on failure of reconciliation. This proviso is not applicable, where the decree is not passed forthwith, on failure of reconciliation proceedings and where the dispute cannot be resolved without recording of evidence. Proviso was introduced to absolve the Court from following normal procedure of trial and to empower it pass a decree, on failure of reconciliation, without framing of issues and recording of evidence. Word "and" used between the sentences, "If reconciliation fails, shall pass a decree for dissolution of marriage forthwith" and "shall also restore to husband the Haq Mehr" has been employed insightfully. This envisages that order for dissolution of marriage and restoration of Haq Mehr, was to be passed simultaneously; When question of dissolution of marriage is determined after proper trial then proviso, (ibid) is not applicable and Court can dissolve the marriage according to the circumstances of each case. The power of the Family Court to fix any consideration for dissolution of marriage, cannot be curtailed. The Court can dissolve the marriage on the basis of Khula, even without any compensation, when it finds that Khula, is being claimed due to the fault, on the part of husband."

A Full Bench of Peshawar High Court in the case of Mst. Saima Irum and three others (2006 MLD 83) has also expressed similar view. Relevant portion of the same is reproduced as under:-

> "6. Therefore, in our view, the word `Khula' should be construed as subject to the presumption that the legislature does not intent, by its general language, to subvert the established principles of Shariah on the subject and has left it for the Family Courts to decide whether to dissolve the marriage between the spouses on the ground of Khula or not. If from the plaint submitted by the wife, the only prayer of the wife is to dissolve her marriage on the ground of Khula, then the Family Court under added provisos to sections 9 and 10 of the Family Courts Act, 1964 could dissolve the marriage between them on the ground of Khula and could also order for restoration of the Haq Mahr received by the wife in consideration of marriage, but if the claim of the wife is based on other grounds also, such as cruelty etc., then the Family Courts shall proceed with the case in accordance with law to determine by recording of evidence that the fault lies in which of the parties and which of the parties are entitled to it."

9. In this case, the learned Judge Family Court vide order dated 24.09.2013 has dissolved the marriage between the parties by specifying that the marriage is being dissolved on the ground of Khula subject to return of dower, therefore, the learned Judge Family Court has proceeded with the case in accordance with law, therefore, no exception can be taken to it. In case titled "Mst. Saeeda Javed v. Javed Iobal and 2 others" (PLD 2013 Peshawar 88) it has been held that "wife in case of dissolution of marriage on the ground of "Khula" would have to either remit the dower amount, if not received by her or pay back same to husband if so received by her".

In the findings recorded by learned Additional District Judge, Jhang qua dower amount, he has merely appreciated the evidence of the Respondent No.1 and her witnesses but he has failed to take into consideration this aspect of the case that the Respondent No.1 has obtained decree for dissolution of marriage merely on the basis of "Khula" subject to return of dower amount. It is settled preposition of law that wife in case of dissolution of marriage on the ground of "Khula" would have to either remit the dower amount, if not received by her or pay back same to husband if so received by her.

Since the Respondent No.1 herself had obtained dissolution of marriage on the basis of "Khula", therefore, she is not entitled for dower in the subsequent proceedings. In view of the above, this petition is allowed the impugned judgment and decree of learned Appellate Court is set aside and that of learned Judge Family Court, Jhang is. upheld.

MWA/M-50/L Petition allowed.