Judgment sheet

IN THE PESHAWAR HIGH COURT, PESHAWAR JUDICIAL DEPARTMENT

Writ Petition No. 3634-P/2012.

Date of hearing… 18.11.2014.

Mst. Shumaila Bibi..Vs..Zahir Khan & Nawab Khan.

Petitioner (s) by ……

Respondent (s) by ……

HAIDER ALI KHAN, J:- Petitioner, seeks the constitutional jurisdiction, praying that;

> **" It is therefore, humbly prayed that on acceptance of this writ petition the impugned judgment / decree of the learned Additional District Judge-V Kohat dated 31.10.2012 may kindly be set-aside and the decree /judgment of the learned Family Judge, Kohat vide order dated 3.3.2012 may please be restored/intact."**

2. Through the instant constitutional petition filed under Article-199 of the Islamic Republic of Pakistan, 1973, petitioner Mst. Shumaila Bibi has called in question the judgment and decree of the learned Additional District Judge-V Kohat, dated 31.10.2012, whereby the judgment and decree dated 3.3.2012 passed by the learned Judge Family Court, Kohat was partially set aside/modified.

3. Brief facts as per contents of the plaint are that, the marriage between the petitioner and respondent No.1 herein, was solemnized on 25.4.2008 and Rs. 100,000/- 08 tolas of gold ornaments, Rs. 3000/- per month as maintenance allowance as well as the share of respondent No.1 in his father's (respondent No.2) house situated in Street No. 10, College Town Kohat was fixed as dower and in this regard a valid deed (Nikah Nama) was executed between the parties.

4. That the relations between the spouses became strained after some time of the marriage, hence petitioner was expelled from the house of respondent No.1 without payment of single penny, therefore, she filed the instant suit.

5. The suit was contested by the respondents by filing their written statement. The learned Judge Family Court framed the issues out of the divergent pleadings of the parties and allowed the parties to adduce their respective evidence.

6. At the conclusion, the learned trial Court passed a decree vide the impugned judgment dated 3.3.2012 in the following terms:

i. Recovery of dower Rs. 100,000/- cash, 8 tolas gold ornaments and share of respondent No.1 in the house.

ii. Maintenance allowance i.e. Rs. 1500/- per moth for the past 1-1/2 years and onward till rehabilitation of parties.

iii. Dowry articles as per list attached or its market value.

iv. Restitution of congeal rights in favour of respondent No.1 subject to payment of whole dower.

7. Feeling aggrieved from the said judgment and decree, the respondent No.1 / husband went in appeal before the learned Additional District Judge-V, Kohat who after hearing both the learned counsel for parties, partially allowed the appeal vide impugned judgment dated 31.10.2012 whereby the decree to the extent of share of the respondent No.1/husband in house of respondent No.2 (his father) was set aside.

8. Having felt aggrieved from the said judgment, the petitioner /wife has invoked the constitutional jurisdiction of this Court through the instant writ petition.

9. Learned counsel for the petitioner argued that the impugned judgment and decree passed by the learned

Additional District Judge, Kohat is against law, facts on record and is the result of mis reading and non reading of evidence on record; that the learned appellate Court wrongly excluded the share in house of respondent No.1 as it was duly mentioned in the nikah nama so executed in presence of witnesses as well as respondent No.2, who has also admitted his presence at the time of the ceremony of Nikah.

10. On the other hand, learned counsel for respondents supported the impugned judgment passed by the learned Additional District Judge and stated that it has been passed after proper appreciation of evidence and record available.

11. We have heard both that learned counsel for the parties and gone through the record carefully with their valuable assistance.

12. Perusal of the record reveals that the foremost question for determination before this Court is, whether the father could give dower to his daughter in law on the eve of his son’s marriage.?

13. Admittedly, the marriage between the petitioner and respondent No.1 was solemnized on 25.4.2008, according to Sharia Muhammadi and in this regard a valid Nikah Nama Ex.Pw-2/1 was scribed regarding the nature and quantum of the dower so agreed upon by both the parties. It is also in the custom of our society that terms and conditions for such Nikah/ marriage are settled by elders of the bride and bridegroom. In the agreement / Nikah nama, which is duly registered, it has clearly been mentioned in column No.16 that the share of respondent No.1 in the house of his father (respondent No.2) situated at Street No. 10 College Colony Kohat, being given to the petitioner/wife which bears the signature of respondent No.2. and which was further supported by examination of the attesting witnesses.

14. It is established rule that the husband could not give any property in dower to his wife that did not belong to him but belong to some one else, but if the father of bridegroom consented and agreed to do so. Admittedly there is no rule that the father has the liability to give the debts of

his son, but in such like situation when a father consented to give his daughter in law the specific property or portion of the property as her share in lieu of dower, hence the father assumed the direct liability and stood surety, when his presence at the time of scribing of nikah nama during nikah ceremony, is not denied and proved during course of trial as in the instant case. This view was further fortified in the case of **Maj. Rifat Nawaz and 5 others..VS.. Mst.Tahira and 2 other (2008 CLC 803)** by holding that;

> **" That father in law could give a dower of movable as well as movable property on the eve of his son's marriage particularly when Nikah nama contained the stipulation regarding the dower with full particular in shape of boundaries of the said house.—Said Nikah nama had also been thumb impressed by the father of the defendant---Document in question had been fully proved in the record of the case."**

15. In the instant case, the Nikah deed Ex.PW-2/1 has been signed by the respondent No.2 and it is also admitted that he was present at the time of nikah which fact has further been supported from his own statement (respondent No.2) who had deposed before the trial Court in his cross examination as DW-2 that he was present at the

time of nikah between the petitioner and respondent No.1. Admitted that the respondent No.2 was present at the time of nikah ceremony and it is also proved that he was in full knowledge of the terms and conditions of the Nikah Nama being written in his presence and with his consent being elder (father of the respondent No.1).

16. As per our customs, thus, an inference can be drawn that the respondent No. 2 was in full agreement to give his house (to the extent of share of respondent No.1) to his daughter-in-law. In this regard the case of Mst. Shehnaz Akhtar ..Vs Fida Hussain and 2 others (2007 CLC 1517) is worth reliance wherein it was held as;

> **" Question arose as to whether plaintiff could file suit against father of bridegroom for completion of contract executed by him for the payment of dower---Held, there was not bar or prohibition in the way of plaintiff in that regard, so as to impede the way of plaintiff from claiming the implementation and completion of the agreement---Family Court, under S. 5, West Pakistan Family Courts Act, 1964 had exclusive jurisdiction to entertain, hear and adjudicate upon matters specified in Par-1 of the Schedule to the said Act and there was no barring provision that while claiming dower from the husband only bridegroom/husband could be impleaded in the suit for recovery of**

dower and none else—If another person had stood surety or had guaranteed the payment of dower, he/she could lawfully be impleaded in the suit—Surety and guarantor to the dower were as much party and liable to pay dower as the bridegroom himself."

17. It was further held in the case of **Muhammad Anwar Khan…Vs Sabia Khanam (PLJ 2010 Lahore 122) that; " the house mentioned in the Nikahnama as dower for daughter in law, even though, it did not belong to the husband of respondent is liable to be transferred to the daughter in law as the father in law had given his consent for the same."**

18. Needless to remark that inspite of having the knowledge that his house was being given to the petitioner as dower but he did not object / take any legal action to exclude the same from the Nikah Nama till the filing of the present by the petitioner.

19. For what has been discussed above, we are of the considered view that the house in question (to the extent of share of respondent No.1) as mentioned in the Nikah Nama as dower, albeit, which did not belong to the respondent No.1/husband, is liable to be transferred to the petitioner.

20. In view of above, this petition is allowed whereby the impugned judgment and decree passed by the learned Additional District Judge-V Kohat dated 31.10.2012, is modified and it is held that the petitioner /wife would be entitled to the ownership of the house in question (to the extent of share of respondent No.1 / husband) as mentioned in the Nikah Nama Ex.PW-2/1 or in the alternative to its present market value from the respondents duly determined by the learned Executing Court during the execution proceedings.

Announced
18th of November, 2014

Zarshad

J U D G E

J U D G E