SUPREME COURT OF AZAD JAMMU AND KASHMIR
[Appellate Jurisdiction]

PRESENT:
Raja Saeed Akram Khan, J.
Ghulam Mustafa Mughal, J.

Civil Appeal No.234 of 2019
(PLA filed on 19.6.2019)

Kamran Anjum s/o Muhammad Ashraf Mughal r/o Mughal Pura, p/o Afzalpur, Tehsil and District Mirpur.

…. APPELLANT

VERSUS

Raheela Hafiz d/o Abdul Hafiz r/o Pindi Suberwal, Tehsil and District Mirpur.

….. RESPONDENT

(On appeal from the judgment of the Shariat Appellate Bench of the High Court dated 20.4.2019 in Family Appeal No. 244 of 2017)

FOR THE APPELLANT: Mr. Muhammad Sajjad, Advocates.

FOR THE RESPONDENT: Mr. Muhammad Waheed Nazir, Advocate.

Date of hearing: 20.01.2020

JUDGMENT:

Ghulam Mustafa Mughal, J.— The caption petition for leave to appeal has been directed against the judgment 20.04.2019, passed by the

Shariat Appellate Bench of the Azad Jammu & Kashmir High Court in family appeal No.244 of 2017.

2. The precise facts forming the background of the captioned petition for leave to appeal are that Raheela Hafiz, plaintiff/respondent, herein, filed three suits; first, for dissolution of marriage; second, for recovery of dowry articles; and third, for recovery of maintenance allowance in the Court of learned Family Judge Mirpur on 10.02.2015, 11.11.2015 and 10.02.2015, respectively. It was averred that the marriage between the plaintiff and the defendant was solemnized on 08.08.2008 at village Pindi Sabarwal and out of the wedlock a minor child namely Zain Kamran Anjum was born. It was claimed that after marriage the defendant was not properly maintaining the plaintiff and on demand of the maintenance allowance, he used to abuse and torture her physically and mentally. It was further claimed that the defendant finally ousted the

plaintiff from his home after beating her in 2009. It was alleged that the dowry articles given by the parents worth Rs.382,900/- are laying at the home of the defendant. It was prayed that decree for dissolution of marriage on the ground of cruelty/non-maintenance, recovery of maintenance allowance and dowry articles may be granted in favour of the plaintiff. Kamran Anjum, defendant/appellant, herein, besides contesting the suits by filing written statement, also filed a suit for restitution of conjugal rights before the same Court on 26.06.2015 and refuted the claim of the plaintiff. The learned Judge Family Court consolidated all the suits, framed issues in light of the pleadings of the parties and asked them to lead evidence in support of their respective claim. At the conclusion of the proceedings, the learned trial Court decreed the suit for dissolution of marriage in favour of plaintiff-respondent; partially decreed the suit for recovery of maintenance allowance to the extent of defendant

No.2, whereas, dismissed the suit for recovery of dowry articles for want of proof vide consolidated judgment and decree dated 26.09.2017. The suit filed by appellant, herein, for restitution of conjugal rights was also dismissed through the same judgment and decree. Feeling aggrieved from the aforesaid judgment and decree of the learned Family Judge, the appellant, herein, filed two appeals before the Shariat Appellate Bench of the Azad Jammu & Kashmir High Court. The learned Shariat Appellate Bench of the High Court after hearing the parties vide impugned judgment and decree dated 20.4.2019 has dismissed both the appeals.

3. Mr. Muhammad Sajjad, the learned Advocate appearing for the appellant argued that the respondent herself pleaded in her suit that she has left the home of her husband in January 2015 in absence of the defendant/appellant, herein, and remained as such till 2017, therefore, she is entitled to the decree for dissolution of marriage on the

ground of non-maintenance for a period of 2 years. The learned Advocate further argued that fact of the matter is that required period of non-maintenance should be before institution of the suit and time which consumed in proceedings cannot be counted towards the period of non-maintenance, hence, the decree for dissolution of marriage cannot be granted. dissolution is claimed. The learned Advocate further argued that the dissolution was claimed by the respondent, herein, on the ground of cruelty but it was not proved thus the learned Family Judge was not empowered to dissolve the marriage on the ground of non-maintenance/cruelty. The learned Advocate submitted that the suit filed by the appellant, herein, for restitution of conjugal rights was illegally dismissed by the learned trial Court. The learned Advocate further submitted that it was categorically pleaded by the respondent, herein, before the Court that she cannot live with her husband within the limits ordained by the Allah

Almight, thus, in presence of this plea the decree for dissolution of marriage on the ground of khula was proper but the learned Family Judge has misread the evidence as well as the record and came to an erroneous conclusion.

4. Conversely, Mr. Muhammad Waheed Nazir, the learned Advocate appearing for the respondent argued that the plaintiff/respondent, herein, was abandoned by the defendant since 2009, therefore, the learned Family Judge has rightly dissolved the marriage on the ground of non-payment of the maintenance allowance. The learned Advocate further argued that the learned Family Judge has taken into account the conduct, the second marriage as well as the cruel treatment of the appellant, herein, while granting the decree of dissolution of marriage on the ground of non-maintenance. The learned Advocate further submitted that the appellant, herein, failed to maintain the respondent, herein, even after the

compromise on the basis of which an earlier suit was withdrawn by the respondent, herein. The learned Advocate further submitted that the judgments passed by the Courts below do not suffer from any legal infirmity.

5. We have heard the learned counsel for the parties and have gone through the record of the case. A perusal of the record reveals that the respondent, herein, filed three suits in the Family Court Kotli. First, for dissolution of marriage; second, for recovery of dowry articles; and the third, for recovery of maintenance allowance. The controversy before this Court is only with regard to the suit for dissolution of marriage. The precise case of the appellant, herein, is that as per record, the respondent has left the home of the appellant in January, 2015 and she filed the suit for dissolution of marriage in February, 2015, thus, the period of non-maintenance was not spreading over 2 years. It may be stated here that for dissolution of marriage,

it is essential to prove that before institution of the suit, the wife has been deserted and has not been provided the maintenance allowance consecutively for a period of 2 years. In the case in hand, the respondent filed a suit for dissolution of marriage earlier somewhere in 2009, however, during pendency of that suit she compromised and thereafter populated with the appellant, herein, for some time. It is on the record that she was not given monthly maintenance allowance for that time, thus, dissolving the marriage on this ground, in our estimation, was not proper. Although, dissolution of marriage on the ground of cruelty was also claimed but the factum of cruelty has not been proved. The respondent, herein, has made a categoric stand regarding the conduct and attitude of the appellant, herein, that she cannot live with him within the limits ordained by the Allah Almighty. In these circumstances, when period of non-maintenance spreading over 2 years was not complete, the

dissolution of marriage on the ground of non-maintenance was not proper, thus, it is in the interest of justice to dissolve the marriage on the ground of *khula* in view of the pleadings of the parties, evidence and statement of the plaintiff. We, therefore, maintain the judgment of the learned Family Court Kotli as well as the impugned judgment of the learned Shariat Appellate Bench of the High Court, however, modify the same to the extent that the marriage of the parties is dissolved on the ground of *khula* instead of non-maintenance. The respondent is under obligation to return the dower and other benefits which she has taken from the appellant.

The appeal stands decided in the manner indicated above.

JUDGE JUDGE

Mirpur JII JI
20.01.2020