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Judgment Sheet

IN THE LAHORE HIGH COURT
BAHAWALPUR BENCH, BAHAWALPUR
JUDICIAL DEPARTMENT

Writ Petition No.826 of 2022

Muhammad Shoaib

Versus

ADJ, Lodhran, etc.

JUDGMENT

Date of hearing	22.01.2024
Petitioner by:	Mr. Akbar Fayyaz Arain, Advocate.
Respondent by:	Mr. Amjad Parvez, Advocate.

SHAKIL AHMAD, J.: This petition has been filed under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 ("the Constitution") by Muhammad Shoaib *(petitioner herein)* to assail consolidated judgment & decree dated 28.10.2021 and judgment & decree dated 12.01.2022, respectively passed by learned Senior Civil Judge (Family Division), Lodhran and District Judge, Lodhran, whereby suit for recovery of dower, etc. filed by Sadia Bibi *(hereinafter referred to as the 'respondent')* was partially decreed, whereas appeal filed by petitioner against decree of trial court was dismissed.

2. Facts, in brief, giving rise to the filing of instant petition are that the respondent instituted a suit against the petitioner on 16.05.2020 seeking dissolution of marriage besides seeking recovery of dower consisting of 05-Marla plot, a constructed house valuing Rs.5,00,000/- and 02-Marla commercial plot falling in Khewat No.1717, Khatooni Nos.91 to 217/218 valuing Rs.15,00,000/- as detailed in column No.16 of the *Nikahnama*, precisely on the ground that her marriage was solemnized with petitioner on 05.09.2015, however, no *rukhsati* took place and that she had developed strong aversion against the petitioner as he was a person of bad character besides being a drunkard and she would rather prefer to die than joining the

petitioner. Matter was contested by petitioner by way of filing written statement raising therein some preliminary objections as well as allegation of forgery and interpolation in the entries of *Nikahnama* qua dower consisting of landed property. In the meanwhile, petitioner also preferred to file separate suit seeking cancellation of entries as stipulated in column Nos.15 & 16 of the *Nikahnama* on the ground that same were the result of forgery. Both the suits were consolidated and after framing consolidated issues by the learned Judge Family Court, both the parties produced their respective evidence. Learned Judge Family Court after hearing learned counsel for the parties proceeded to dismiss the suit filed by petitioner, whereas suit filed by respondent was partially decreed vide consolidated judgment & decree dated 28.10.2021, whereby respondent was held entitled to get half of the dower as mentioned in the *Nikahnama*. Petitioner's appeal filed before learned District Judge, Lodhran, however, was dismissed vide judgment & decree dated 12.01.2022, hence this petition.

3. Heard learned counsel for the parties. Record perused.

4. In view of pleadings of the parties and evidence adduced at trial facts that petitioner's *Nikah* was solemnized with respondent on 05.09.2015 and no *rukhsati* took place till the dissolution of marriage vide decree dated 29.10.2020 passed in terms of section 10(4)(5) of the Family Courts Act, 1964 ("Act 1964") have attained the status of admitted facts between the parties. In the face of these admitted facts, question that whether respondent is entitled to dower as decreed by learned Judge Family Court and maintained by learned Appellate Court or not needs to be answered in the instant petition. A factual controversy qua fixation of dower amount as hinted in the *Nikahnama*, however, needs to be taken up in the first place prior to dilating upon and answering above hinted query. The fact qua fixation of dower, as claimed by the respondent in her plaint is disputed by the petitioner in his written statement in addition to challenging the same through filing of separate suit. As per stance taken by the respondent, 05-Marla plot, a constructed house valuing Rs.5,00,000/- and 02-Marla commercial plot valuing Rs.15,00,000/- was fixed as dower and this fact was duly incorporated in Nikah Nama

whereas according to petitioner, at the time of Nikah, only Haq-ul-Maher to the extent of 02-Marlas land was settled and same was incorporated in *Nikahnama* but subsequently same was changed in the Nikah Nama as the digit '4' was superimposed on digit '2' in the first Nikah Pert and in second Nikah Pert entry qua 05-Marlas land was the result of forgery. Both the courts below while resolving this controversy preferred to accept the stance of respondent by rejecting the version of the petitioner by observing that petitioner failed to prove any forgery and tempering in *Nikahnama* through any positive and cogent evidence. The findings of facts recorded by both the courts below having jurisdiction to decide the matter can hardly be revisited while invoking the constitutional jurisdiction of this Court. In case *"Shajar Islam v. Muhammad Siddique"* **(PLD 2007 SC 45)**, the Supreme Court of Pakistan observed that this Court should not interfere with the finding on controversial questions of facts based on evidence even if those findings were erroneous. While explaining the scope of judicial review under Article 199 of the Constitution, it was further observed in the said esteemed judgment as under: -

> *"…that the scope of judicial review under Article 199 of the Constitution in such cases was limited to instances of misreading or non-reading of evidence or when the finding was based on no evidence, leading to miscarriage of justice and that the high court should not disturb findings of fact through a reappraisal of evidence in its constitutional jurisdiction or use this jurisdiction as a substitute for a revision or appeal and that an interference with the lower courts' findings of fact was beyond the scope of the high court's jurisdiction under Article 199 of the Constitution. …"*
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> (Underlining is to supply emphasis).

Subsequently, in case "*Mst. Tayyeba Ambareen and another v. Shafqat Ali Kiyani and another"* **(2023 SCMR 246),** it was further resolved by the Supreme Court of Pakistan that the objective of exercising jurisdiction under Article 199 of the Constitution is to foster justice, preserve rights and to correct the wrong. It was further observed that appraisal of evidence is primarily the function of the Trial Court. Learned counsel for petitioner remained unable to point out any instance of misreading or non-reading of evidence by the learned courts below, therefore, findings of facts qua mentioning of dower in *Nikahnama* as claimed by the respondent cannot be taken to any exception particularly when petitioner has not opted to

impugn judgments of both the learned courts below whereby his suit for cancellation of entries in *Nikahnama* was dismissed as in the instant petition he has prayed only for dismissal of the suit filed by the respondent. Even findings of both the learned courts below on this factual controversy have not been seriously objected to by learned counsel for the petitioner who by placing reliance on case *"Ajmal Khan and another v. Mst. Falak Negar Bibi and 2 others"* **(PLD 2019 Peshawar 218)** merely focused his arguments on the point that since no *Rukhsti* had taken place and marriage stood dissolved at the instance of the respondent, she would not be entitled to receive any dower.

5. Reverting to the moot point so formulated in the opening lines of preceding paragraph, it may be seen that according to learned counsel for the petitioner, respondent was not entitled to any amount of dower in view of admitted facts of this case. Learned counsel for the respondent controverted the said plea and argued that where marriage between the parties was dissolved prior to valid retirement *(khalwat-e-sahiha)*, respondent would become entitled to half of the dower and according to him both the courts below rightly proceeded to award half of the dower through the impugned judgments and decrees. It is by now settled proposition of Islamic law that if marriage between the parties has either been consummated or there was a valid retirement *(khalwat-e-sahiha)* before pronouncement of divorce by the husband, the whole of the unpaid dower whether prompt or deferred, becomes immediately payable by the husband to the wife and is enforceable/recoverable like any other debt, however, if there was no consummation of marriage or a valid retirement *(khalwat-e-sahiha)* before pronouncement of divorce by the husband, the wife would be entitled to get half of the dower so fixed in view of the command of Allah as ordained in Ayat No.237 of Surah Al-Baqarah, English translation[1] of which reads as follows: -

> *"If ye divorce them before ye have touched them, and have already settled a dower on them, ye shall pay them one-half of what ye have settled."* ***(Surah Al-Baqarah Ayat 237).***

[1] HEDAYA or guide: a commentary on the MUSSULMAN LAWS by Charles Hamilton, Second Edition Vol.I (page No.44)

Undeniably, in the instant case, petitioner did not pronounce divorce upon the respondent and respondent obtained the decree for the dissolution of marriage in terms of section 10(4)(5) of the Act, 1964 before consummation of marriage or valid retirement. In the instant case, it was the respondent who herself approached the court seeking dissolution of marriage on the basis of Khula by asserting that she would rather die than joining the petitioner as his wife. Since in the instant matter, petitioner did not dissolve the marriage by pronouncing divorce upon respondent prior to consummation of marriage or valid retirement, respondent would not become entitled to receive even half of her dower as decreed by the learned Judge Family Court and maintained by the learned Appellate Court. In view of para No.289-F of the Principles of Muhammadan Law by D.F. Mulla [2] , dower becomes confirmed by consummation of marriage; or by valid retirement *(khalwat-e-sahiha)*; or by death of either husband or wife and in case husband pronounces divorce upon his wife before consummation of marriage or valid retirement *(khalwat-e-sahiha)*, wife would become entitled to receive half of the dower. In this case, however, it is not the case that the marriage between the parties was dissolved by pronouncing divorce by the petitioner and it was respondent who obtained decree for the dissolution of marriage in terms of section 10(4)(5) of the Act, 1964. Where marriage was not dissolved by way of pronouncing *talaq* by the husband on a wife and marriage was not consummated or there was no valid retirement, wife would not be entitled to any amount of dower so fixed if dissolution of marriage had taken place at her wish or instance. Reference in this regard may be made to Para No. 78(4) of Anglo-Muhammadan Law[3] and same is reproduced hereunder for the facility of ready reference: -

> *"78. The consequences indicated in the first five sub-clauses of this section follow from the completion of a valid (*bain) divorce by any of the above-mentioned methods.
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> *(1) ...*
> *(2) ...*
> *(3) ...*
> *(4) If the marriage had been consummated before the divorce, the whole of the unpaid dower, whether prompt or deferred, becomes immediately payable by the*

[2] Pakistan Edition (Revised Edition 2015) published by PLD Publishers, Nabha Road, Lahore
[3] By SIR ROLAND KNYVET WILSON (Fifth Edition). Published in 1921 by CALCUTTA AND SIMLA, THACKER, SPINK & CO, LONDON: W.THACKER & CO., 2, CREED LANE, E.C.

> *husband to the wife, and is enforceable like any other debt.*
> *If the marriage had not been consummated, and the amount of dower was specified in the contract, he is liable for half that amount; if none was specified, he must give the divorced wife a present (mut'at), consisting of three articles of dress suitable to her rank, or their value. But the wife has no right to anything if the divorce before consummation took place by her wish, or in consequence of any disqualification on her side-e.g. her apostasy.*

(Underlining is to supply emphasis).

Same view has been taken by Dr. Tanzeel-ur-Rehman at para-72 of his celebrated work titled "مجموعہ قوانین اسلام"[4] in the following terms:-

> خلوت صحیحہ کے بغیر طلاق یا فسخ نکاح کی صورت میں مرد کے ذمہ نصف مہر واجب ہو گا۔
> توضیح:(الف)اگر کوئی مہر مقرر نہ ہوا ہو تو عورت کو صرف کپڑوں کا ایک جوڑا دیا جائے گا۔
> (ب)اگر فسخ نکاح کی ذمہ داری عورت پر ہو تو وہ کچھ مہر پانے کی مستحق نہ ہو گی۔

Learned author further elaborated above referred point in the note given by him at page No.290 of the said book that reads as under:-

> مہر مسمی کی صورت میں نکاح فسخ ہونے پر نصف مہر واجب ہو گا لیکن اگر خلوت صحیحہ سے قبل مابین زوجین تفریق واقع ہو جائے جس کی ذمہ داری عورت پر ہو تو عورت کچھ مہر پانے کی مستحق نہ ہو گی۔

(Underlining is to supply emphasis).

In the instant case, separation between the parties that undeniably happened prior to either consummation of marriage or any valid retirement, was not by way of pronouncing divorce by the petitioner rather the marriage was dissolved on the basis of *Khula* in terms of section 10(4)(5) of the Act, 1964 vide decree dated 29.10.2020 passed by learned Judge Family Court as respondent was not willing to join the petitioner in any manner and came up with the assertion that she would rather die than joining the petitioner as his wife. In such eventuality, respondent No.3 was not entitled to any amount of dower, however, both the courts below have passed the impugned judgments and decrees by remaining altogether oblivious to the above hinted legal aspect of the matter. In view of admitted facts and circumstances of the instant case, respondent was not at all entitled to receive any dower whatsoever. While

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[4] جلد اول، قانون ازدواج،ناشر "ادارہ تحقیقات اسلامی، الجامعہ الاسلامیہ العالمیہ"

passing impugned judgments & decrees, both the courts below have committed jurisdictional error and exceeded their jurisdiction. Instant case is a fit case for interfering in impugned judgments & decrees in view of the guidelines given in Mst. Tayyeba Ambareen's [5] case by invoking the provisions of Article 199 of the Constitution for the reason that objective of Article 199 of the Constitution is to foster justice, protect rights and to correct the wrong. In the instant case wrong committed by both the courts below needs to be corrected by invoking the jurisdiction under the provisions of Article 199 of the Constitution in order to foster justice and protect the rights of petitioner. Findings of both the courts below to the extent of holding respondent entitled to get half of the dower are not sustainable.

6. The upshot of above discussion is that petition in hand is allowed, impugned consolidated judgment & decree dated 28.10.2021 passed by learned Senior Civil Judge (Family Division), Lodhran and judgment & decree dated 12.01.2022 passed by learned Additional District Judge, Lodhran to the extent of holding respondent entitled to get half of the dower are set aside and in consequence whereof, suit for recovery of dower filed by respondent No.3 stands dismissed.

(SHAKIL AHMAD)
JUDGE

Mohsin Raza*

Approved for reporting.

JUDGE

[5] Mst. Tayyeba Ambareen and another v. Shafqat Ali Kiyani and another (2023 SCMR 246)