

2022 C L C 372

[Balochistan]

Before Naeem Akhtar Afghan and Rozi Khan Barrech, JJ

MUHAMMAD YASIR NAZEER----Petitioner

Versus

LUBNA KOSAR and 2 others----Respondents

C.P. No.353 of 2017, decided on 22nd July, 2020.

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

----Ss.5, Sched. & 14---Dissolution of Muslim Marriages Act (VIII of 1939), S.2---Suit for dissolution of marriage---Appeal---Scope---Suit for dissolution of marriage was decreed by the Trial Court---Appeal filed against the decree was dismissed---Validity---Appeal against the marriage dissolved by Family Court on any ground, except the one mentioned in S.2(viii)(d) of Dissolution of Muslim Marriages Act, 1939, was not competent in view of S.14 of Family Courts Act, 1964---Statements of witnesses of defendant proved that there was maltreatment both physically and mentally from the defendant's side that was why he gave surety that next time there would be no beatings---Defendant had failed to maintain the plaintiff for more than four years, who was residing with her parents---"Cruelty" was not limited to physical beating rather it could be either mental or even by conduct---Petition was partly accepted and the impugned order of appellate court to the extent of return of appeal in respect of dower amount, maintenance, gold ornaments and medical expenses was set aside.

(b) Dissolution of Muslim Marriages Act (VIII of 1939)---

----S.2---Grounds for decree for dissolution of marriage---Scope---Cruelty is not limited to physical beating rather that can be either mental or even by conduct.

(c) Interpretation of statutes---

----Proviso---Provision of proviso is to be strictly construed.

Muhammad Baqir Bakhtiar and Syed Abuzar Haider for Petitioner.

Muhammad Mushtaq Lodhi for Respondent No.1.

Date of hearing: 13th July, 2020.

JUDGMENT

ROZI KHAN BARRECH, J.----Facts necessary for adjudication of this case are that the respondent No.1 filed a suit for dissolution of marriage, recovery of dower amount, dowry articles and maintenance against the petitioner in the Court of Family Judge-II, Quetta, (hereinafter "the trial Court") with the following prayers:-

- "a. To dissolve the marriage tie between the parties on account of cruelty, misconduct and non-maintenance of plaintiff.
 - b. To direct the defendant to pay the amount of Haq Meher of Rs.50,000/- which is not paid to the plaintiff by the defendant.
 - c. To direct the defendant to return all the dowry articles along with gold ornaments according to list which is annexed with the suit of plaintiff which are in possession of the ' defendant.
 - d. It is also be directed to the defendant that according to the clause 17 of Nikah Nama, the plaintiff is also entitled to receive the gold ornaments and clothes, photo albums, marriage video etc may also be returned to plaintiff which are also in possession of defendant.
 - e. It is also be directed to defendant that the past maintenance of 15 months and future maintenance be paid to the plaintiff and the amount which has been spent by the parents of the plaintiff on the treatment of Rs.30,000/- and the amount which was taken by the defendant from the plaintiff for the purchase of vehicle Rs.80,000/- may be returned to the plaintiff.
 - f. It is also be directed to defendant to pay the past maintenance and future maintenance to the plaintiff as required by law.
 - g. Any other relief which is proper and deems fit to the circumstances of the case may also be awarded to the plaintiff with the cost of the plaint, in the interest of justice".
2. The suit was resisted by the petitioner on legal as well as factual grounds. On divergent stance of parties the trial Court framed the following issues:-
- "1. Whether the plaintiff is entitled to dissolution of marriage on the round of cruelty, misconduct and non-maintenance?
 2. Whether the dower amount of Rs.50,000/- has not been paid to the plaintiff? Whether the plaintiff is entitled to the payment of dower amount of Rs.50,000/- from the defendant?
 3. Whether the plaintiff was given dowry articles along with gold ornaments at the time of marriage as per list annexed with the plaint? If yes whether the dowry artkles and gold ornaments are in the possession of the defendant? Whether the plaintiff is entitled to the return of the dowry articles and gold ornaments as claimed for?
 4. Whether the plaintiff is entitled to receive gold ornaments, clothes, photo albums, marriage video from the defendant according to clause 17 of the Nikah Nama?
 5. Whether the plaintiff is entitled to receive maintenance from the defendant? If yes

since when and what should be the quantum of maintenance fixed at?

6. Whether medical expenses of Rs.30,000/- were incurred on the plaintiff by her parents, whether the plaintiff is entitled to recover these medical expenses from the defendant?
7. Whether the plaintiff is entitled to the relief claimed for?
8. Relief?

3. In support of their claim, the parties produced their respective evidence.

4. After hearing arguments from both side, the learned trial Court decree the suit of respondent No.1 /plaintiff on 31.08.2015 (hereinafter "the impugned Judgment") in the following manner:-

- i. The marriage tie between spouses namely Lubna Kosar d/o Ahmed Bakhsh Tareen (plaintiff) and Muhammad Yasir Nazeer son of Nazeer Ahmed (defendant) is dissolved on the ground of cruelty.
- ii The defendant is directed to pay dower amount of plaintiff Rs.50,000/-.
- iii. The defendant is directed to pay maintenance towards the plaintiff w.e.f. 04.04.2014 till dissolution of marriage i.e. 31.08.2015 and for lddat period at the rate of Rs.3000/- per month.
- iv. The defendant is directed to return gold ornaments as mentioned in Column No.17 of Nikah Nama as per list of dowry articles mentioned from Serial No.1 to Serial No.7, photo, albums, marriage video.
- v. The defendant is directed to pay medical expenses of Rs.30,000/- incurred on the plaintiff.
- vi Suit of plaintiff is till the extent of dowry articles is dismissed".

5. Being aggrieved from the impugned judgment and decree dated 31.08.2015 passed by learned trial Court, the petitioner preferred an appeal under section 14 of the Family Courts Act, 1964 (hereinafter "the Act") before the learned District Judge, Quetta, which was transferred to the Court of learned Additional District Judge-I, Quetta (hereinafter "the appellate Court").

6. After hearing arguments of both the learned counsel for the parties, the learned appellate Court returned the appeal to the petitioner vide impugned order dated 13.03.2017 on the ground that the appellate Court has no jurisdiction.

7. We have heard the learned counsel for the parties and have gone through the available record with their assistance.

8. The question of law raised for determination are as under:-

"(i) Whether in case of dissolution of marriage on the basis of 'cruelty, an appeal is entertainable by husband in spite of bar contained under section 14 of Family Courts Act, 1964?

It will be useful to reproduce section 14 of the Act *ibid* which reads:--

"14. Appeal.---(1) Notwithstanding anything provided in any other law for the time being in force, a decision given or a decree passed by a Family Court shall be appealable;

(a) to the High Court, where the Family Court is presided over by District Judge, an Additional District Judge or a person notified by Government to be of the rank and status of a District Judge or an Additional District Judge; and

(b) to the District Court, in any other case.

(2) No appeal shall lie from a decree passed by a Family Court--

(a) for dissolution of marriage, except in the case of dissolution for reasons specified in clause (d) of item (viii) of section 2 of the Dissolution of Muslim Marriages Act, 1939;

(b) for dower or dowry not exceeding rupees thirty thousand;

(c) for maintenance of rupees one thousand or less per month.

(3) No appeal or revision shall lie against an interim order passed by a Family Court.

(4) The appellate Court referred to in subsection (1) shall dispose of the appeal within a period of four months."

Clause 'd' of Section 2 of the Dissolution of Muslim Marriages Act, 1939 is reproduced hereunder:

"disposes of her property or prevents her from exercising her legal rights over it; or"

A bare reading of section 14(1) reveals that decision given or decree passed by a Family Court shall be appealable. So far subsection (2), which put embargo coming in the way of appeal in circumstances (a) to (c) that is in the nature of proviso to subsection (1). It is settled law that the provision of proviso is to be restrictively construed. The logic behind non-provision of appeal in the dissolution case is to protect under privileged and generally oppressed section of our society i.e. wife from costly and prolonged litigation. Rather in clear words, the law makers put a clog on the right of husband to file appeal in case of dissolution of marriage, keeping in view the peculiar circumstances prevailing in our society.

9. Section 14 of the Family Courts Act, 1964 contemplates appeal from the decision of the Judge, Family Court to be competent before the District Judge but with a bar that no appeal shall lie from decree passed by a family court dissolving marriage on any other

grounds or grounds specified therein except on the ground mentioned in section 2(viii)(d) of Dissolution of Muslim Marriages Act, 1939, which relates to the disposal of property of wife preventing her from exercising her legal right over it. From the above, it is manifest that except on the ground mentioned above, if marriage is dissolved by the family court on any other ground, the appeal would not be competent.

10. In the case in hand, the learned appellate Court who was not vested jurisdiction to entertain the appeal with respect to dissolution of the marriage on the basis of cruelty by husband has rightly been determined. However, the remaining portion pertaining to the impugned judgment i.e. maintenance etc the appellate Court is vested with the jurisdiction.

11. Now dilating upon the merit of the case to the extent of dissolution of marriage between the parties on the basis of cruelty. Although, the re-appreciation of evidence is not the function of this Court under its constitutional jurisdiction, however, for our own satisfaction, we have perused the record minutely. The arguments agitated by the counsel for the petitioner that factor of cruelty is not proved by the respondent No.1/plaintiff as she herself abandoned her conjugal domicile and deserted the house of petitioner is unpersuasive and run contrary to the record. The respondent/plaintiff has urged that attitude of the petitioner has remained toward her and she has always been kept in stress and she was forcibly shunted out from his house and she took shelter to her parent house and did not maintain her.

12. She has also urged that for the last four years she has been shunted out by the petitioner from her house in her one way she is residing with her parents. During this period the petitioner has never better to abide about her and also did not given her maintenance. She also urged that she was turned out from the house of the petitioner. In such circumstances, she was compelled to take shelter at her parent house from 09.11.2012 till 09.02.2014 upon intervention of some elder on 09.02.2014 the dispute was set up while the petitioner made assurance for keeping the good behaviour with plaintiff in future and also undertook to abide by all mental obligations, but the defendant/petitioner did not mend his way and again started and continued torture and inhuman behaviour towards the plaintiff without any justification and reason. The plaintiff further urged that the petitioner did not stop her, she has been shunted out by the petitioner from her house in her only three wearing clothes and since then she is residing with her parent.

During this period, the petitioner has never bothered to enquire about her and also did not give maintenance to her. In support of her claim she produced PW-4 who fully supported the statement of the respondent/defendant. In addition, she stated that the petitioner tortured the plaintiff and taken money from her. PW-5 representative of the Children Hospital who produced discharge receipt, prescription slips (Ex.P/2 to Ex.P/13). PW-6 produced receipt on the name of Lubna Kosar (Ex.P/14 to Ex.P/16).

13. On the other hand, DW-1 produced by the petitioner/defendant admitted in his cross-examination that the plaintiff/respondent is residing at her parent house and they have not paid her any maintenance, voluntarily stated that they were not bond to pay maintenance. DW-2 admitted during cross-examination that the defendant himself, his parents and relative

went to bring the plaintiff, after dispute settled, the defendant made assurance and undertook that there will be no beating again, then plaintiff was sent back, but showed unawareness that she was taken back on 09.02.2014. He further showed awareness during cross-examination that the defendant had not paid any maintenance to the plaintiff. The defendant even in his statement admitted that when the plaintiff went to her parent house, his notables reconcile the matter and brought back the plaintiff, voluntarily stated that only once she was brought. DW-1 who is father of the defendant/petitioner during cross-examination stated that since the plaintiff is at her parent house they have not maintained her.

14. From the above reply of witnesses of the defendant/petitioner it can be easily said that there was maltreatment both physically and mentally, from the side of the defendant/petitioner that is why the petitioner gave surety that next time there will be no beatings. On the other hand, the defendant/petitioner failed to give substantiating evidence to prove that the plaintiff willingly left him and refused to rejoin him. Especially where the DWs, have admitted during there cross-examination that when the dispute was reconcile the plaintiff again join the defendant. It has also come on record that from the evidence of both the parties since the plaintiff is residing at her parent house, the petitioner has not sent any maintenance for her.

15. From the above, it is manifest that the petitioner has failed to maintain the plaintiff/respondent for more than four years who is residing with her parents. Dissolution of Muslim Marriages Act, 1939 provide recognized grounds for dissolution of marriage, according to which neglecting or non-maintaining the wife for a period of two years will entitle the wife for seeking dissolution of marriage on ground of cruelty.

16. As discussed above, in the instant case, it is proved on record that the respondent/plaintiff has taken abode and inhabited in her parents house for more than four years and the petitioner has neglected her. The cruelty is not limited to physical bearing rather that can be either mental or even by conduct. In the case in hand, the petitioner has taken shelter in her parent house for the last four years and in such situation the plaintiff/respondent has sustained acute mental anguish and suffering by the reckless and careless attitude and conduct of the petitioner which compelled her to approach the trial Court for dissolution of her marriage.

17. The learned trial Court after appreciation of the evidence rightly dissolved the marriage between the parties on the basis of cruelty.

18. Whereas the matter related to the dower amount, maintenance, gold ornaments and medical expenses are concerned, the appellate Court has the jurisdiction to decide the above matters. The appellate Court has not decided the matter about maintenance, dower amount, medical expenses and dowry despite having jurisdiction.

For the above reasons, the petition is partly accepted. The impugned order of the appellate Court dated 13.03.2017 to the extent of return of appeal in respect of dower amount, maintenance, gold ornaments and medical expenses is set aside. The matter is remanded to the appellate Court. The appeal filed by the petitioner is deemed pending before

the appellate Court. The appellate Court is directed to decide the appeal of the petitioner on merits to the extent of the claim of respondent No.1 for dower amount, maintenance, gold ornaments and medical expenses.

The judgment passed by the Family Judge-II, Quetta, dated 31.08.2015 to the extent of dissolution of marriage on the basis of cruelty is upheld and the constitution petition to that extent is dismissed.

SA/225/Bal.

Order accordingly.