**SUPREME COURT OF PAKISTAN**
(Appellate Jurisdiction)

**PRESENT:**
Justice Munib Akhtar
Justice Shahid Waheed
Justice Musarrat Hilali

**CIVIL APPEAL NO.1227 OF 2016**

[On appeal against the judgment dated 22.12.2015 passed by the Peshawar High Court, Abbottabad Bench, in W.P.No.573-A of 2015]

***Mst. Haseena Bibi*** ...*Appellant(s)*

**VERSUS**

***Abdul Haleem, etc*** ...*Respondent(s)*

| | | |
|---|---|---|
| For the Appellant(s) | : | Malik Tahir Mehmood, ASC<br>Syed Rafaqat Hussain Shah, AOR |
| For the Respondent(s) | : | Mr. Zulfiqar Ahmed Bhutta, ASC |
| Date of Hearing | : | 15.11.2023 |

**JUDGMENT**

***Musarrat Hilali, J.***— This appeal is directed against the judgment dated 22.12.2015 passed by the Peshawar High Court, Abbottabad Bench, whereby the Writ Petition filed by the respondent was allowed. Leave to appeal was granted by this Court on 21.04.2010 to consider the contention "that the concurrent findings of the Family Court and the Appellate Court, which were based on proper appreciation of evidence adduced by the parties, have been set aside by the Peshawar High Court through the impugned judgment as a result of misreading and non-reading of evidence".

2. In essence, the crux of the matter pertains to the suit filed by the appellant/plaintiff which was decreed in her favour by

the learned Family Court and upheld by the learned District Judge as follows:

> *"i) Recovery of dower i.e. five tola gold ornaments or its market price i.e. Rs.2,25,000/-;*
> *ii) Recovery of maintenance of the plaintiff @ Rs.2,000/- per month from 01.01.2013 to 01.11.2013;*
> *iii) Recovery of maintenance of the minor @ Rs.2,000/- per month from 01.09.2013 till his majority".*

The High Court, while disposing of the Writ Petition filed by the respondent/defendant against the concurrent judgments and decrees of the Courts below, passed the following order:

> *"In view of the foregoing discussion, the writ petition to the extent of maintenance allowance of Mst. Haseena Bibi and minor child is dismissed as not pressed. However, the writ petition to the extent of recovery of five tola gold ornaments or Rs.2,25,000/- as price thereof is accepted and judgments and decrees of both the trial as well as appellate Courts to that extent are set-aside".*

In opposition to the decision of the High Court, the appellant/ plaintiff filed instant appeal before this Court.

3. Heard. Record perused.

4. After having heard the arguments advanced by both parties and going through the record, the issue between parties is the determination of dower pertaining to five tolas gold ornaments or price thereof at prevailing rate amounting to Rs.2,25,000/-. For this purpose, we have carefully examined the record and found two Iqrarnamas from the side of the appellant. First Iqrarnama dated 21.11.2012 (Ex.PA) was written during the pendency of the family suit filed by the appellant which, *inter alia*, provided at Clause-II that

Abdul Haleem will provide gold ornaments weighing 5 tolas to Mst. Haseena Bibi as her dower. In pursuance of Iqrarnama (Ex.PA) a reconciliation took place between parties and the suit was disposed of. A second Iqrarnama was executed on 09.04.2013 (Ex.DW-1/1) and it read that the appellant has given up her dower in lieu of divorce and custody of the minor Ameer Muavia. It further provides that all previous Court proceedings and Iqrarnamas between parties will be treated as cancelled.

5. The contention of the appellant/plaintiff is that the Iqrarnama dated 21.11.2012 (Ex.PA) still holds the field and could not be treated as cancelled on account of Iqrarnama dated 09.05.2013 (Ex.DW-1/1). She further contends that she was not even a party to the Iqrarnama (Ex.DW-1/1) and the said contention is evident from the absence of her signature or thumb impression on the same. Conversely, the plea taken by the respondent/defendant was that the Iqrarnama dated 09.04.2013 (Ex.DW-1/1), had an overriding effect upon the Iqrarnama dated 21.11.2012 (Ex.PA) whereby five tola gold ornaments had been fixed as a dower of the appellant.

6. Evaluation of the Iqrarnama dated 09.04.2013 (Ex.DW-1/1) reflects the prevailing societal practice where familial agreements and compromises are entered into without their active participation, particularly, in matters deeply entwined with their rights and well-being. The delivery of Mahr is one such right, the duty of which is bestowed upon the husband for the financial support and stability of his wife. Such entitlement to dower has the origin in the Holy Quran, and the inspiration of the same entitlement has been made part of the statutory law. The Holy

Quran presses upon the presentation of dower to wife by commanding: "present them 'their Mahr'" (the Quran IV:4). The inspiration of the guiding principles of the Holy Quran is made part of Section 5 of the Dissolution of Muslim Marriages Act, 1939 (the **"Act"**), which reads as under:

> ***"5. Right to dower not be affected.*** *Nothing contained in this Act shall affect any right which a married woman may have under Muslim law to her dower or any part thereof on the dissolution of her marriage".*

Dower, therefore, is a right rendered by Islam and has a footing in statutes. It is a well-known fact that no estoppal lies against a statute and it has been held by this Court in the case of **Bahadur Khan and others v. Federation of Pakistan** [2017 SCMR 2066], that there could be no estoppel against the statute or the rules having statutory force. Since right to dower has its footing in Section 5 of the Act, therefore, a wife cannot be estopped from such right and any agreement where she waives the same is void. Reference can also be made to the case of **Zulfiqar Ali v. Musarrat Bibi and others** [2006 SCMR 1136], where this Court emphasized on the exercise of the free will and consent of the respondent-lady while executing agreement on her behalf concerning her dowery etc. In the cited case, the brothers could not show the authority, exercised by them on behalf of their sister, while entering into such agreement, with her husband. The petition was dismissed and the agreement was held as having no value in the eyes of law.

7. So far as the custody of minor is concerned, Para 352 (5) of the Muhammadan Law provides that the mother is entitled to the custody (Hizanat) of her male child until he has completed the age of seven years and of her female child until she has attained

puberty. These rights cannot be denied to her as any such action would be contrary to law. Any agreement related to the custody of minor child would be violative of law and cannot be enforced by a Court of law. This Court in a reported case titled **Mst. Beena v. Raja Muhammad and others** [PLD 2020 SC 508], at paragraph 8, held that the agreement where mother surrendered the custody of her child or the agreement which stopped the mother to claim his custody is not lawful; it is contrary to the Islamic principles governing Hizanat and the law determining the custody of minors and thus forbidden. An agreement the object or consideration of which is against public policy is void, as stipulated in section 23 of the Contract Act. Furthermore, in the case of **Mst. Razia Rehman v. Station House Officer and others** [PLD 2006 SC 533], this Court held that agreements deciding the custody of minor child lacks legal validity and enforceability. It explicitly held that:

> *"It is also an undeniable fact that according to the law of the land, any agreement reached between the two parents, inter alia, regarding custody of the minor children is neither valid in law nor even enforceable. Therefore, even if it be presumed that the petitioner-lady had, through some alleged compromise(s) which she is, however, denying, waived her right of Hizanat, the said compromise or agreement had no binding force in the eyes of law."*

8. In view of the facts and circumstances of the case and the law laid-down by this Court supra, we hold that it is imperative that the wife must be made a party to the agreements concerning her rights. A wife enjoys exclusive and absolute right over her dower and the same could not be waived via Iqrarnama/ Agreement/Compromise and any such document, registered or

unregistered, attempting to compromise the wife's right to dower, especially in the context of familial dissolution, lacks legal validity. Further, any Iqrarnama/Agreement/Compromise made by the mother waiving her statutory right of Hizanat of a minor child would be violative of law and cannot be enforced by a Court of law.

9. For what has been discussed above, we are of the view that the High Court has not appreciated the evidence available on record judiciously while setting aside the concurrent findings of the Courts below. Therefore, this appeal is allowed and the impugned judgment dated 09.04.2015 passed by the Peshawar High Court, Abbottabad Bench, is set-aside to the extent of recovery of dower i.e. five tola gold ornaments or price thereof and is maintained to the extent of the maintenance allowance of Mst. Haseena Bibi and the minor child. No order as to costs.

ISLAMABAD
15.11.2023
APPROVED FOR REPORTING
Hashmi