Judgment Sheet

IN THE PESHAWAR HIGH COURT, PESHAWAR

(Judicial Department)

Writ Petition No.627-P of 2017 with CMsNo.119, 1208& 1209-P/2017 and CMs No.259& 260-P/2018,

Islam Gul Vs. Mst. Neelam etc

Date of hearing: 02.09.2019

For Petitioner: Mr. Muhammad Siddique Haider Qureshi, Advocate.

For Respondent: Shahab Ullah Khan, Advocate.

JUDGMENT

Ahmad Ali, J.- Aggrieved of the judgment/decree 08.11.2016 of the Additional District Judge, Takht Bhai, whereby the appeal filed by petitioner against judgment/decree dated 27.10.2015 of the learned Judge Family Court and application for production additional evidence were dismissed with cost of Rs.10,000/-.

2. Brief and essential facts leading to present petition are that the respondent No.1, Mst. Neelam, filed a suit on 28.11.2014 seeking decree for dissolution of marriage, return of 5 tolas gold ornaments, dowry articles and recovery of maintenance. In alternate, she sought decree for grant of Khula. The petitioner (defendant) contested the suit by filing written statement on 10.06.2014 with a counterclaim of recovery of gold ornaments and decree for restitution of conjugal rights. After framing issues, evidence of parties was recorded and

closed, and thereafter, having heard the arguments of parties the learned Judge Family Court/Civil Judge-III, Takht Bhai, decreed the suit vide judgment/decree dated 27.10.2015 to the extent of dower, maintenance till *Iddat* period @ Rs.5,000/- per month, dowry articles per list annexed with plaint except items No.27 and the divorce already recorded by the petitioner was held sufficient. Discontented with the decree of learned judge family Court, the petitioner preferred a family court appeal. At appellate state the petitioner also filed an application for additional evidence to produce witnesses in support of the divorce deed dated 17.05.2014. However, the learned Additional District Judge-I, Takht Bhai, dismissed the appeal with cost of Rs.10,000/- vide judgment dated 08.11.2016 and the application for production of additional evidence too was rejected. Now instant petition has been filed by petitioner (defendant) with the prayer to set aside the impugned order, judgments& decrees and suit of respondent No.1 may be dismissed in view of divorce deed dated 17.05.2014, or in alternate, remand the case back to the learned appellate court to decide a-fresh the application dated 18.11.2015 for additional evidence.

3. Learned counsel for the petitioner argued that the impugned judgments/orders of both the courts below are illegal and without jurisdiction Both the courts below have not appreciated the correct legal position in view of the

divorce deed dated 17.05.2014. He kept on to say that the said divorce deed dated 17.05.2014 was executed between parties which was taken to Karachi by the petitioner and it was misplaced there. Now petitioner has found the said document therefore, production of additional document to prove its execution is sine qua none for the just decision of family suit.

4. Learned counsel for the respondent/plaintiff on his turn defended the impugned judgments/decrees of the learned courts below and argued that the petitioner/defendant while filing his written statement and recording evidence did not make reference to the divorce deed dated 17.05.2014 or its witnesses rather the same was executed antedated to sabotage the rights of a pathetic lady.

5. Arguments heard and record perused with utmost care and valuable assistance of learned counsel for parties.

6. During course of arguments, the whole thrust of the attack of learned counsel for petitioner was the divorce deed dated 17.05.2014 and the petitioner also prayed for setting aside the decrees of courts below in view of the ibid deed. According to him, the said divorce deed was executed during pendency of the family suit between parties with their consensus whereby the respondent/wife after receiving back her dowry waived off the terms & conditions of her *Nikah*, whereas, petitioner/husband had announced three divorces orally as well

in writing in the presence of witnesses. Thus, this divorce deed is in-fact a deed of Khula.

7. Record manifests that plaint was filed on 28.04.2014 and the petitioner/defendant submitted written statement on 10.06.2014 i.e. after execution of divorce deed dated 17.05.2014. However, written statement does not contain even a single word about the said divorce deed or that the divorce deed was misplaced in Karachi rather petitioner/defendant has loudly prayed for the decree of restitution of conjugal rights in his written statement. Relevant excerpts from written statements are:

i. Preliminary Objection No.7 (last sentence):

"---لہٰذا مدعا علیہ ڈگری زن آشوئی کا حقدار ہے۔"

ii. Para No.3 of written statement (last sentence):

"---اور کافی انتظار اور جرگوں کے بعد مدعیہ جب واپس نہ ہوئی تو مدعا علیہ نے دوسری شادی کی لہٰذامدعاعلیہ حقوق زن آشوئی کا حقدار ہے۔"

iii. Para No.5, sub Paras No. *Alif and Seen*:

"5۔ (الف)۔ فقرہ نمبر 5 جز الف سراسر غلط ہے، لہٰذا انکار ہے کیونکہ مدعا علیہ نے مدعیہ کا خاص خیال رکھا ہے اور اب بھی اسکو آباد کرنے کیلیے تیار ہوں---"

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(س)فقرہ نمبر 5 جز س عرضی دعویٰ غلط ہے۔ مدعا علیہ ہر گز سینہ زور و سرکش نہیں بلکی مدعیہ سرکش ہے اور اپنے خاوند کا گھر بغیر کسی معقول وجہ کے چھوڑی ہے حالانکہ مدعیہ کو کئی بار کہا گیا کہاپنے خاوند کے گھر واپس آ کر عزت کی زندگی گزارے۔"

iv. Prayer of written statement:

"استدعا ہے کہ دعویٰ ہٰذا بمعہ خرچہ عدالت خارج فرمائی جائے اور ڈگری دلاپانے واپسی طلائی زیورات اور حقوق زن آشوئی بحق مدعا علیہ بمعہ خرچہ عدالت صادر فرمائی جائے۔"

8. If, petitioner/defendant had divorced the respondent No.1 on 17.05.2014, then why he is stressing so hard for restitution of conjugal rights in his written statement filed on 10.06.2014 i.e. much after the said divorce deed. Why the witnesses of said divorce deed were not cited in the schedule of witnesses or mentioned in the written statement. Besides, respondent/plaintiff too seems ignorant of the said divorce deed as she in her cross examination as PW-1, recorded on 14.02.2015, very frankly stated that she is ready to go with her husband if he pays her dower and performs other matrimonial obligations. Had she been divorced, she would not have expressed her willingness to join her husband.

9. Moreover, in his examination in chief as DW-1, the petitioner/defendant has not uttered even a single word about any divorce rather he prayed for restitution of conjugal rights. Nevertheless, during cross examination he admitted the sending of written divorce to respondent/plaintiff. Even then there is nothing to suggest that the said written divorce refers to divorce deed dated 17.05.2014 or it was some other document.

9. Apart from above, the divorce deed dated 17.05.2014 by itself creates doubts as to its veracity besides its legal infirmities. Parties are admittedly residents of Mardan and, per ibid deed, it was scribed at Darri (Mardan)but stamp papers were purchased from Karachi and no reason for

purchasing the same from Karachi instead of Mardan has been advanced. Said stamp papers were not issued to either of the parties. The said deed is shown to be signed by the respondent/ plaintiff only and there no signature of her brother, father or any other male member of her family related to her within the prohibited degree as a token of her identification, free will, and independent advice. Even otherwise, it is now settled that a wife, at her own, cannot announce or award *Khula*, rather such prerogative rests with the Family Courts to dissolve marriage on the basis of *Khula* on the request of wife. Even otherwise, it was held by this Hon'ble Court in case "***Sajid Ullah Vs Mst. Shakeela Naz*** reported in ***PLD 2016 Peshawar 1"***:

> "***Pronouncement of divorce on basis of Khula….Procedure…Jirga/Arbitration proceedings, validity of….Islamic provisions relating to marriage, maintenance and Talaaq were governed and regulated through Muslim Family Laws Ordinance, 1961… Exercise of right of Khula by wife was subject to satisfaction of judicial conscious of court…Unlawful decisions through Jirga system were practised in Pakistan but when some provision of law were violated by Jirga members or arbitrators that could not be protected …Talaaq through Khula could only be pronounced with intervention of Court.*** "

10. Learned counsel for petitioner argued that under Section 7(2) of the West Pakistan Family Courts Act, 1964, parties may with the permission of court can call any witness at later stage. Section 7 of the ibid Act, 1964 is reproduced as below:

> ***7. Institution of the Suit:*** *(1) - - -*

> *(2) The plaint shall contain all material 1[facts relating to the dispute and shall contain a Schedule giving the number of witnesses indeed to be produced in support of the plaint, the names and addresses of the witnesses and a brief summary of the facts to which they would depose:*
>
> *Provided that the parties may, with the permission of the Court, call any witness and at any later stage, if the Court considers such evidence in the interest of justice.*

11. The bare reading of this section shows that the learned Judge Family Court is restrained by law not to allow additional evidence or add names of witnesses in the schedule. The provisions are mandatory. The schedule cannot be amended and the names of witnesses cannot be added under section 7(2) of the Family Courts Act. The provisions of this section empowers the learned judge family Court that parties with the permission of the Court call any witness at any later stage if court considers such evidence expedient in the inters of justice. This does not mean that the family court will re-open the schedule and allow the parties to produce additional witnesses as there is no provision to allow a family court or appellate court to re-open schedule submitted by the parties. Reliance is placed on **2003 CLC 1787** titled Muhammad Akram Vs. Mst. Shakeela Bibi & others, wherein it was held:

(c) West Pakistan Family Courts Act (XXXV of 1964)---

--S. 7(2)—Additional evidence, production of – Restraints on such procedure---Principles--- Family Court is restrained by law under the provisions of S. 7(2) of West Pakistan Family Courts Act, 1964, not to allow additional evidence or add names of witnesses in schedule---Schedule cannot be amended and the names of witnesses cannot be added under S. 7(2) of West Pakistan Family Courts Act, 1964.

(d) West Pakistan Family Courts Act (XXXV of 1964)---

--S. 7(2)--- proviso --- Calling witness at any later stage --- Jurisdiction of Family Court --- Scope --- Provisions of proviso to S. 7(2) of West Pakistan Family courts Act, 1964, do not mean that Family Court can reopen the schedule to allow the parties to produce additional evidence.

12. Similar view has been adopted by the Abbottabad Bench of this Court in the case titled Muhammad Azeem Vs. Nasreen Bibi reported as **2018 YLR 761 [Peshawar (Abbottabad Bench)]** wherein it has been held that;

"***Suit for maintenance allowance of minors by mother---Application for production of additional evidence by father-----Bib-mentioning of said witnesses in the list filed with written statement---Effect---Father contended that he could be allowed to produce additional evidence of the witnesses which could not be included in the list earlier---Validity---Record revealed that father had submitted list of twelve witnesses alongwith his written statement, however, he produced only three witnesses and later he submitted an application for recording the statement of two persons and requested that court to allow him to produce and record their statements in support of his case---Said application was filed by the father after lapse of more than two years, he had not shown any plausible reason or ground for not mentioning the names of said persons in the list of witnesses submitted by him---High Court observed that father's evidence had been closed and the case was pending for final arguments of the parties, therefore, at such belated stage the application for production of additional evidence would not serve any useful purpose rather said application was an attempt to further delay***

> ***the decision of the case which was not desirable under the law---Constitutional petition being bereft of merit was dismissed accordingly***"

Another view in this regard has been reported as **NLR 2004 Civil 23** titled Muhammad Akram VS. Mst. Shakeela Bibi etc, wherein it has been held that;

> "***The bare reading of this section shows that the learned Judge, Family Court is retrained by law not to allow additional evidence or add names of witnesses in the schedule. The provisions are mandatory. The schedule cannot be amended and the names of the witnesses cannot be added under section 7(2) of the Family Courts Act. Te provision of this section empowers the learned Judge, Family Court that the parties with the permission of the Court call any witness at any later stage if Court considers such evidence expedient in the interest of justice does not mean that the Family court will re-open the schedule and allow the parties to produce additional witnesses, therefore, the learned Judge Family Court rightly rejected the application as there was no provision to allow a Family Court to re-open the schedule submitted by the parties. Hence, keeping in view all the circumstances as observed by this Court, there is no substance in this writ petition which is dismissed.***"

13. Usually, in family cases, the husband for the satisfaction of his ego try to linger-on the family case in order to drag the wife in a protracted litigation so that she cannot live peacefully in this male dominant society. Petitioner remained silent during the trial of case despite ample opportunity to produce everything and every witness in his defence, and at appellate stage he filed application for additional evidence. Though the Family Courts Act, 1964, does not allow such addition of witnesses, even otherwise, the civil law too discourage such a practise and the august

Supreme Court in the case of Sher Baz Khan & others reported as **PLD 2003 Supreme Court 849** held:

> *---O.XIII, R.1 --- Additional evidence, production of --- Party requesting for production of additional evidence had not satisfactory answer as to why the documents to be produced as additional evidence were not relied under O. VIII read with O. VII, R. 14, C.P.C. as every party in a suit was required to mention the documentary evidence which it would like to produce in evidence in support of its case so that the adverse party had sufficient notice --- Effect --- Unsuccessful part in a suit was not to be granted opportunity to fill up weaker parts of its case by producing additional evidence to the prejudice of the other party.*

14. Same view has been adopted in **PLD 2009 Lahore 41** titled Faiz Muhammad through legal representatives and others Versus Mst. Khurshid Bibi, wherein party seeking production of documents through additional evidence at revisional stage was not permitted as such documents were available with it and same were not produced during recording of evidence. It was held that permission of such documents at the time when adverse order had been passed against petitioners could not be allowed at belated stage.

15. Now coming to the merits of case, the respondent/ plaintiff has though expressed her willingness to join petitioner/defendant but subject to condition that if he pays her dower and performs matrimonial obligations. This, clearly means that the petitioner is neglecting his wife and

this further props-up from the fact that petitioner, without the express or implied permission of the respondent No.1, has solemnized 2nd marriage. The petitioner, while recoding his statement as DW-1, has raised finger on the character of respondent No.1. Thus, it can safely be held that relation between parties were strained and this was only because petitioner/defendant was interested in another lady, his 2nd wife and finally he divorced the petitioner who was keen to join her husband even in the presence of his 2nd wife.

16. The status of father of respondent No.1/plaintiff as a livestock businessman and having certain landed property, as stated by her during her cross examination as PW-1, has not been denied by petitioner; and as such, giving the dowry articles per list annexed could not be denied. Defendant in his written statement has admitted the dowry articles but alleged that the same were taken back by plaintiff herself; but there is no evidence to support the version of petitioner as to taking back the dowry articles. There is a concurrent finding of fact qua dowry articles and value of same mentioned in the list Ex.P.W.1/1 of the two courts and hence, it could not be interfered with. Reliance is placed on **2005 SCMR 1740**, titled Mirza Arshad Baig Vs. Additional District Judge, Multan and others.

17. The learned judge family court has rightly passed the decree for dower, maintenance and dowry articles in favour of the respondent/plaintiff. The learned appellate court below has correctly maintained the same by imposing cast. Both the learned Courts below correctly appreciated the evidence brought on record and have arrived at proper conclusions while passing decree in favour of respondent No.1. The learned counsel for the petitioner was unable to point out any jurisdictional error in the impugned judgments calling for interference by this Court in exercise of its extraordinary constitutional jurisdiction.

18. For the reasons mentioned above, the instant petition being bereft of any merit and substance is hereby dismissed. The CMsNo.119, 1208-P/2017 andNo.259& 260-P/2018 have thus become infructuous and dismissed accordingly; whereas, CM No.1209-P/2017 being bereft of any merit is also dismissed.

Announced.
02.09.2019.

JUDGE