

Form No.HCJD/C-121  
ORDER SHEET  
IN THE LAHORE HIGH COURT, LAHORE  
JUDICIAL DEPARTMENT

WP No. 8244 of 2019

Syed Sajjad Hussain  
vs  
Judge Family Court, etc.

S.No. of Order/ Proceeding	Date of order/ proceeding	Order with signature of Judge and that of parties or counsel where necessary
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13.02.2019 Mr. Ijaz Ahmad Janjua, Advocate for petitioner.  
Ms. Zarish Fatima, Assistant Attorney General and Mr.  
Muhammad Javaid Iqbal Sabri, AAG. On Court's call.  
M/s. Nasrullah Khan Babar, Ch. Muhammad Naseer and  
Ms. Uzma Razzaq Khan, Advocates/Amicus curiae.

Through this constitutional petition, the petitioner has called in question the judgment and decree dated 26.10.2018 passed by learned Judge Family Court, Ferozewala whereby the suit for recovery of dower filed by respondent No.2/wife ("respondent") was decreed in her favour whereas the suit for restitution of conjugal rights filed by the petitioner was dismissed.

2. Brief facts of the case are that marriage between the parties was solemnized on 10.07.2011 in lieu of deferred dower amounting to Rs.1,00,000/- Subsequently respondent No.2, claiming to have been divorced by the petitioner in June-2014, filed a suit for recovery of aforesaid deferred dower. The petitioner

denied the said facts through contesting written statement also filed a suit for restitution of conjugal rights. Both the afore referred suits were consolidated and the learned trial court vide its judgment and decree dated 26.10.2018 decreed the suit filed by the respondent for recovery of Rs.1,00,000/- as deferred dower whereas the petitioner's suit was dismissed. Feeling aggrieved of the said judgment and decree, the petitioner filed appeal before the appellate court, which vide order dated 07.12.2018 declared the appeal to the extent of recovery of dowry articles as not maintainable in view of bar provided under section 14 of the Family Courts Act, 1964 ('Act'), however has entertained the appeal against the dismissal of petitioner's suit for dissolution of marriage. The petitioner has filed this constitutional petition to challenge the decree for recovery of dower passed by the trial court.

3. Learned counsel for the petitioner has argued that the petitioner has not divorced the respondent, therefore, she could not claim deferred dower during the subsistence of marriage; that the petitioner has already paid deferred dower to the respondent, hence, the learned trial court has erred in law while decreeing the suit filed

by the respondent by assuming that marriage had been dissolved.

4. Learned Law Officers as well as amicus curiae appointed by this Court have argued that without commenting upon the fact that whether the marriage had actually been dissolved or not, as the petitioner claims to have paid dower to the respondent during the subsistence of marriage, therefore, the contention of the petitioner that deferred dower could not be claimed by the respondent before dissolution of marriage would be without justification in the given circumstances of the case.

5. Heard. Record perused.

6. The main question to be determined by this Court is whether in the given circumstances of the case in view of the petitioner's claim that dissolution of marriage has not been established on the record through any cogent evidence, the court had rightly decreed the respondent's claim for payment of deferred dower.

7. It is an admitted fact that respondent was married to the petitioner on 10.07.2011 in lieu of deferred dower amounting to Rs.1,00,000/- and from the said wed lock two minor children were born. The respondent claims

that the petitioner had divorced him in June, 2014 therefore he is liable to pay deferred dower. The petitioner denies the said facts and claims to have already paid dower to the respondent in two installments of Rs.50,000/- each in the month of February and May-2012 and nothing is due and outstanding against him. On the one hand, the petitioner claims that payment of deferred dower has not become due as marriage is still intact and on the other hand claims to have paid the same during the subsistence of marriage. Both the afore referred positions cannot co-exist and the pleas of the petitioner are contradictory and self-destructive. Deferred dower is usually not payable immediately at the time of performance of marriage ceremony/Nikah as required in case of prompt dower and is referred to as deferred because its payment is reserved to be made later on, however, the codified law does not prescribe when the deferred dower becomes payable and the law has left the same to be decided by the parties themselves. Deferred dower becomes payable to the wife on the fixed date, expiry of time period, on the occurrence of any event or fulfilment of pre-condition fixed for payment of the same in the Nikahnama or otherwise and if neither such date or

period is fixed nor any condition is imposed, the same becomes payable on the dissolution of marriage by death or divorce. Reliance in this behalf is placed on the judgment reported as Saadia Usman and another vs. Muhammad Usman Iqbal Jadoon and another (2009 SCMR 1458), wherein it is observed as under:

*"It is clear from the passages just quoted from the book titled "Kitab-al-Fiqh al-al-Madhahab-al-arba'a" that the Hanafi jurists allow both categories of Mahr. Mu'ajjal, (prompt, i.e. immediately payment) and Mu'wajjal (deferred, i.e. payment later, after a certain time). However, where a part of the dower is described as Mu'wajjal, i.e. deferred but no time limit is fixed for its payment, according to some jurists, the condition is valid and the time of the deferred payment is either death or divorce."*

8. In the present case although in the Nikahnama no such date, time period or condition for payment has been fixed, however, the petitioner claims to have paid the same in the year 2012. Non-fixation of any condition, date or time period for payment of deferred dower in Nikahnama does not preclude the parties for subsequently fixing the same through consent or conduct.

Even otherwise, in the absence of any agreed stipulation

relating to time of payment of deferred dower, the husband who has to make payment of the same, can bilaterally or unilaterally, expressly or impliedly through his conduct, waive the condition of waiting till the dissolution of marriage for making such payment by tendering dower or agreeing to tender the same immediately or on a future date, expiry of some time period or on the happening of some event or fulfilment of a fixed condition for which purpose subsistence or dissolution of marriage would be irrelevant. Therefore, without commenting upon the fact of subsistence or dissolution of marriage lest it may prejudice the appeal filed by the petitioner against the dismissal of his suit for restitution of conjugal rights, the court on the basis of petitioner's plea that dower had already been paid would be justified to presume that the parties through their conduct had modified the condition for payment of dower on the dates in February and May-2012 when the petitioner claims to have paid the same on the respondent's demand instead of waiting for the dissolution of marriage through divorce or death. Although all presumptions are rebuttable, unless treated as conclusive proof by law, the petitioner was required to

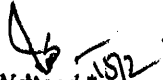
show through some cogent and confidence inspiring evidence that either he had not agreed to pay the deferred dower in the months of February and May-2012 or after having agreed to pay the same he had actually made the said payment. As the petitioner claims to have paid dower on the asking of the respondent and that too during the subsistence of marriage, therefore, at this stage he is estopped by his conduct to claim that deferred dower was not payable during the subsistence of marriage and in view of the aforesaid position taken by him, he had to establish the fact of such payment through cogent evidence which has not been done as the petitioner's own witness Syed Munawar Hussain Shah, who appeared in his support as DW-2, has although deposed that dower had been paid but his statement is sketchy and he did not state that he was a witness to the said payment, hence, the payment of dower by the petitioner has not been established on the record. The trial court in such circumstances was justified to decree the suit filed by the respondent for recovery of deferred dower and the said finding cannot be reversed regardless of the fact that the dissolution of marriage has been established or not.

WP No. 8244 of 2018  
Dated 13.02.2018.

9. For the reasons recorded above, this constitutional petition being devoid of any force is *dismissed*.

(MUZAMIL AKHTAR SHABIR)  
JUDGE

Approved for reporting.

  
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