

[Peshawar]

Before Dost Muhammad Khan and Yahya Afridi, JJ

Mst. GULZARA---Petitioner

Versus

AZAM KHAN---Respondent

Writ Petition No.1387 of 2009, decided on 20th April, 2011.

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

----S. 5, Sched. [as amended vide Family Courts (Amendment) Ordinance (LV of 2002)] and S.14---Constitution of Pakistan, Art. 199--- Constitutional petition---Suit for recovery of dower, maintenance allowance and recovery of dower articles---Family Court decided case in favour of plaintiff and granted to her, dower of five Tolas golden ornaments or its market value; separate house of five marlas; maintenance for five months at the rate of Rs.2000 per month future maintenance at the rate of Rs.3000 per month; subject to condition that the plaintiff would resume her marital obligations with defendant---Dowry articles, however, were declined to the plaintiff---Appellate Court accepted appeal of defendant to the extent that dower comprising of gold ornaments and the house was set aside, while the maintenance of past and future allowances were maintained---Plaintiff had contended that the dower had been fixed on 3-9-2006 through an agreement, while the marriage between the parties was solemnized in the year 2002---Appellate Court, had totally misconstrued the legal jurisdiction of Judge Family Court as envisaged under S.5 read with Part-1 of Schedule of West Pakistan Family Courts Act, 1964---Section S. of West Pakistan Family Courts Act, 1964 provided that matters enunciated in Part-1 of Schedule, would be within the jurisdiction of Family Court to adjudicate upon---Item No.9 of Part-1 of Schedule had expanded the scope and jurisdiction of Judge Family Court to adjudicate all the matters stated therein including matters relating to the claim of a wife over her present property, which was other than her dower---Finding of Appellate Court that Judge Family Court was barred to adjudicate upon the agreement deed, was totally incorrect and contrary to the clear provisions of the Schedule of West Pakistan Family Courts Act, 1964---Judgment and decree passed by the Appellate Court below was declared to be illegal and without lawful authority and was set aside, in circumstances.

Iftikhar Ali Qadari for Petitioner.

M. Amin Khatak Lachi for Respondent.

Date of hearing: 20th April, 2011.

JUDGMENT

YAHYA AFRIDI, J.---Mst. Gulzara has, through the instant constitutional petition, challenged the judgments and decrees passed by the Judge, Family Court, Takht Bhai and the Additional District Judge-I, Takht Bhai dated 19-11-2008 and 20-3-2009,

respectively.

2. The brief and essential facts leading to the present petition are that the petitioner instituted a suit against respondent No.1 seeking:

- (i) Recovery of dower comprising of five tolas of gold and house constructed over ten marlas of land.
- (ii) Allowance at the rate of 2,000 per month for the last eight months with future maintenance with enhanced rates.
- (iii) Recovery of dowry articles specifically stated therein.

The assertions made by the present petitioner were vehemently denied by the respondent No.1 in his written statement.

3. The contesting pleadings of the parties led the trial Court to frame fourteen issues. Thereafter, the evidence of the parties was recorded. Finally, the Judge, Family Court vide judgment and decree dated 19-11-2008 decided the case in favour of the petitioner and granted to her; dower of five tolas gold ornaments or its market value; separate house of five marlas; maintenance for five months at the rate of Rs.2,000 per month future maintenance at the rate of Rs.3,000 per month, subject to the condition that the petitioner shall resume her marital obligations with respondent No.1. However, the dowry articles were declined to the present petitioner.

4. Aggrieved thereof, the present respondent No.1, impugned the same in appeal. The appellate Court vide impugned order dated 20-3-2009 accepted the appeal of respondent No.1 to the extent that the dower comprising of gold ornaments and the house were set aside, while the maintenance of past and future allowances were maintained. Even the conditionality of the future maintenance with the restitution of conjugal right was also upheld by the appellate Court. Hence, the present constitutional petition by the present petitioner, impugning the judgment of the appellate Court.

5. The learned counsel for the petitioner vehemently contended that the dower had been fixed through agreement dated 3-9-2006 (Exh.P.W.1/1) and the same did not require registration and thus was wrongly declined by the appellate Court.

6. The learned counsel for the respondent No.1 rigorously opposed the contention of the learned counsel for the petitioner and argued that the petitioner had earlier instituted a suit in the year 2006 against the present respondent No.1, which culminated in a compromise deed dated 3-9-2006 (Exh.P.W.1/1), which was made the basis of dower claimed by the present petitioner; that the appellate Court was correct in deciding that the transaction inked vide agreement (Exh.P.W.1/1) could not be treated as a dower deed within the purview of the provisions of Family Court Act, 1964 ("Act") and thus the petitioner had to seek specific performance of the said agreement being a contract between two parties, outside the pale of the jurisdiction of the Judge," Family Court under the Act; and that the said compromise also incorporated and included the present petitioner to the restitution of conjugal rights of respondent No.1, which were not performed by the present petitioner, and thus the agreement was not enforceable by the petitioner against respondent No.1.

7. The Valuable arguments of they' learned counsel for, the parties heard and the available record of the case thoroughly considered.

8. The record reveals that the marriage between the petitioner and respondent No.1 was solemnized in the year 2002; while the agreement dated 9-6-2006 (Exh.P.W.1/1) was inked four years later, being a settlement, on the intervention of the locals of the area. The appellate Court, it seems, has totally misconstrued the legal jurisdiction of Judge, Family Court as envisaged under section 5 read with Part-I of Schedule of the Act.

9. Section 5 of the Act provides for the jurisdiction of the Judge, Family Court, wherein it is clearly provided that matters enumerated in Part-I of the Schedule, would be within the jurisdiction of the Judge, Family Court to adjudicate upon. In this regard, Part-I of the Schedule of the Act provides the following;

(1) Dissolution of marriage including `Khula'.

(2) Dower.

(3) Maintenance.

(4) Restitution of conjugal rights

(5) Personal property and belongings of a wife."

Item No.9 of Part-I of the Schedule of the Act has been inserted vide Ordinance No. LV of 2002 dated 1st October, 2002. This insertion in the Schedule has expanded the scope and jurisdictions of a Judge/ Family Court to adjudicate all the matters stated therein, including matters relating to the claim of a wife over her personal property, which is other than her dower.

10. Thus the finding of the appellate Court, that the Judge, Family Court was barred to adjudicate upon the deed (Exh.P.W.1/1) was totally incorrect and contrary to the clear provisions of the Schedule of the Act. This finding of the appellate Court goes to the very root of the impugned decision and thus exposes it to be contrary to law and thus warranting interference by this Court, in its constitutional jurisdiction.

11. Accordingly, for the reasons stated hereinabove, this Court accepts the present petition. The judgment and decree passed by the Additional District Judge-I, Takht Bhai dated 20-3-2009 is declared illegal and without lawful authority and is thus set aside.

H.B.T./177/P

Petition accepted.