JUDGMENT SHEET

IN THE PESHAWAR HIGH COURT, D.I.KHAN BENCH

(Judicial Department)

Writ Petition No.321-D/2020 with
C.M. No.301-D/2020

Tauheed Farooqi VS. Faiqa Anmol etc

For Petitioner: Mr. Zia-ur-Rehman Kazi Advocate.

For respondent: Muhammad Abdullah Baloch Advocate.

Date of hearing **20.04.2022**

JUDGMENT

MUHAMMAD FAHEEM WALI, J.- Petitioner, Tauheed Farooqi, has invoked the constitutional jurisdiction of this Court as envisaged under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, through this petition in the nature of certiorari, calling in question the vires of Judgment & Decree dated 30.09.2019 of the learned Additional District Judge-V D.I.Khan whereby his family appeal, filed against Judgment & Decree dated 14.03.2019 of the learned Judge Family Court-II D.I.Khan, stood dismissed.

2. Facts forming factual canvas of this petition are that the respondent No.1/wife, instituted a family suit against the petitioner/husband seeking therein decree for:

a) Dissolution of marriage;

b) Return of dowery articles per list annexed with the plaint or value thereof Rs.500,000/-;

c) return of 15 tolas gold ornament or value thereof;

d) Recovery of Rs.5,000/- partial dower;

e) Maintenance @ Rs.10,000/- per month;

f) Possession through partition of 1/3rd share of the house detailed in the plaint.

After processing the suit in accordance with the procedure, the learned trial Court vide Judgment/decree dated 14.03.2019 decreed the suit of respondent/wife in the following manner:

i. decree for gold ornaments to the extent of 10 tolas or its market value;

ii. decree for recovery of maintenance @ Rs.5,000/- per month w.e.f. 02.01.2015 to 02.06.2017;

iii. decree of 1/3rd share in the suit house.

3. Discontented with the findings of learned Judge Family Court, petitioner/husband preferred appeal before the learned Addl. District Judge-V, D.I.Khan which stood dismissed vide Judgment & Decree dated 30.09.2019. The petitioner feeling aggrieved from the concurrent findings of the two learned courts below has approached this Court through the instant writ petition.

4. Arguments of the learned counsel for parties heard and record gone through with their valuable assistance but for the sake of brevity, without reproducing the arguments of the counsels, same will be adequately dealt with at appropriate stages in this judgment.

5. Before dilating upon merits of the case, I deem it appropriate to mention here that during the course of trial of family suit before the learned Judge Family Court, the right of production of evidence of petitioner stood struck off, after recording evidence of his three official witnesses, vide order dated 05.01.2019 which was upheld by this Court vide Judgment dated 12.02.2019 in W.P. No.51-D/ 2019 and the said judgment has attained finality. Argument of learned counsel representing petitioner that right of production of evidence of the petitioner/defendant was struck off and not the right of recording his own statement in defence, therefore,

findings of both the learned courts below, without recording the statement of petitioner, are unwarranted and thus liable to be set aside. In this context, a bare reading of the order sheet No.101 dated 05.01.2019 of the learned Judge Family Court reveal that defendant's right of production of evidence was struck-off. The word 'evidence' has a vast meaning and it cannot be limited to mean witnesses of a party only rather it includes party's own statement too. Thus, striking off the right of production of evidence placed a bar at the petitioner from recording his own statement.

6. Even otherwise, the defendant on the day of striking-off his defence was present before the Court; but he did not opt to record his own statement before the Court nor filed any application thereafter, expressing his readiness to record his own statement despite the fact that he used to attend the learned trial Court on each and every date of hearing till the decision of suit. The order sheet No.101 ibid further clarifies that the counsel for petitioner was not present before the Court, but he did not bother to get his own statement recorded rather, he insisted upon adjournment without any sufficient cause. There is nothing to show that petitioner was present and sought his examination nor did he move an application to the court for examination as the case had not yet been decided. After the decision of suit, the petitioner was

required to mention this fact specifically in the memo of appeal, supported by an affidavit of the Counsel or party, about his presence and asking for the examination. From the record of the present case it did not transpire that the plaintiff was present on the day when his evidence was closed and he asked the court to be examined. It was not the case of petitioner throughout the proceedings of the present case at any stage, as there was no such ground set out in the first memo of appeal before Appellate-Court. While rendering this view, I am fortified by the dictum laid down by the august Supreme Court of Pakistan in the reported case of ***Rana Tanveer Khan vs. Naseer-ud-Din and others*** **(2015 SCMR 1401)**.

7. Under these circumstances, the first argument of the learned counsel for petitioner does not hold water.

8. Now coming to the decree for recovery of 10 tolas gold ornaments and 1/3rd share of the house; suffice it to say that the respondent/plaintiff urge her such claim on the basis of marriage deed dated 26.12.2012, whereas, petitioner claimed that according to arbitration decision dated 23.09.2014, the operation of said Kabeen Nama/marriage deed stood suspended. This stance of the petitioner amounts a clean-breast admission of the execution of Kabeen Nama dated 26.12.2012 and the factum of its purported suspension vide arbitration decision dated 23.09.2014 has not been proved

through evidence nor any witness or arbitrator was examined to this effect. Thus, the alleged arbitration decision remained scanty of proof, whereas, marriage deed has become an admitted document, on the basis whereof the petitioner promised to give 10 tolas gold ornaments and 1/3rd portion of his house to the respondent/plaintiff.

9. The learned counsel for petitioner laid emphasis that the gold ornaments, as mentioned in the Kabeen Nama, was an actionable claim for which the jurisdiction is vested in the Civil Court and as such decree of gold ornaments granted by the learned trial court is nullity in the eye of law and in this regard he relied on the case of *Syed Mukhtar Hussain Shah Vs. Mst. Saba Imtiaz and others* (PLD 2011 SC 260). However, I am not in agreement with the said contention of the learned counsel representing petitioner for the simple reason that the facts & circumstances of Syed Mukhtar Hussain Shah case are distinguishable from the facts and circumstances of the present case; as in the referred judgment, there was an agreement between the spouse that in case of divorce the husband will pay a sum of Rs.100,000/- to wife as damages; whereas, in the present case the Kabeen Nama is admittedly a matrimonial document between the parties according to which the husband has bound down himself to give 10 tolas gold to his wife at the time of Nikah which shall be the sole ownership of wife.

Jurisdiction of family Court has been envisaged in Section 5 of the Family Courts Act, 1964, which reads as under:

> ***5. Jurisdiction.*** *Subject to the provisions of the Muslim Family Laws Ordinance, 1961, and the Conciliation Courts Ordinance, 1961, the Family Court shall have exclusive jurisdiction to entertain and adjudicate upon matters specified in the Schedule.*

10. The marriage deed (کابین نامہ) between parties was not an independent contract which could be interpreted as an 'actionable claim' within the contemplation of the provisions of transfer of Property Act, 1882, as according to its Section 3, "Actionable claim" means a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property, or to any beneficial interest in movable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent. Hence, the claim of wife for 10 tolas gold ornaments per marriage deed does not fall outside the domain of Family Courts Act, 1964; as in-fact it was a consideration of marriage. On this ground the decrees of gold ornaments and

the portion of house, as granted by the courts below, are outcome of proper appreciation of the record, evidence and law and not open to any exception.

11. Another stance of the learned counsel for petitioner was that the respondent No.1/wife recorded her statement before the Court wherein she herself prayed for dissolution of marriage on the basis of Khulla and vide order sheet No.45 dated 02.03.2017 her marriage was dissolved on the basis of Khulla therefore, she is not entitled to claim any of the rights on the basis of Kabeen Nama. In this context the order sheet No.45 ibid and the statement of respondent No.1, makes it clear that she wanted to put the marriage tie to an end, particularly because of second marriage of the petitioner. In this situation the learned Judge family Court noted, *"As far as payment or otherwise of dower is concerned, both the parties are at dispute regarding the same. Hence, the same will be decided after completion of evidence."* Accordingly, after recording evidence, the suit of respondent/plaintiff stood decreed. It is pertinent to mention that the respondent/wife while appearing as PW-2 stated:

"اگر مدعا علیہ گفتہ بالا حالات کے باوجود کابین نامہ کی
شرائط قبول کرکے میرے ساتھ اچھا سلوک کرنے کی

ضمانت دے اور مجھے میرا گھر الگ کر کے دے دے تو میں
اُس کے ساتھ جانے کو تیار ہوں۔"

12. This portion of the statement of respondent/wife is sufficient to establish that she was ready to join her husband subject to the good behavior of the husband and fulfilment of her rights as per the marriage deed. Every wife wants to live a happy life in harmony and peace with her husband and same was the demand of respondent/wife. In this situation too, the petitioner instead of fulfilling the legal and valid demands of respondent/wife, contracted second marriage, which reflects his conduct towards respondent No.1. Under these circumstances, when the wife was ready to go with her husband and join him but husband was too averse to accept her as wife, then the wife cannot be forced to relinquish her rights. In the pre-Islamic times, constant efforts were made to deprive the women of their due rights especially, the dower. The Holy Quran did away with every custom which deprived women of their dower. One of such customs was that when a man lost interest in his wife, he used to harass her to an extent that she under compulsion would accept his illegal demands, so much so, would readily agree to forego the dower or to return to the husband what was paid to her at the time of her marriage. The matter did not end there rather the same pretext

would be used by the husband, on one hand to dissolve the marriage through Khulla and on the other to compel the wife to return what she was given at the time of her marriage, wholly or partly. The Holy *Quran* orders:

يٰٓاَيُّهَا الَّذِيْنَ اٰمَنُوْا لَا يَحِلُّ لَكُمْ اَنْ تَرِثُوا النِّسَآءَ كَرْهًا ؕ وَ لَا تَعْضُلُوْهُنَّ لِتَذْهَبُوْا بِبَعْضِ مَآ اٰتَيْتُمُوْهُنَّ اِلَّآ اَنْ يَّاْتِيْنَ بِفَاحِشَةٍ مُّبَيِّنَةٍ ۚ وَ عَاشِرُوْهُنَّ بِالْمَعْرُوْفِ ۚ فَاِنْ كَرِهْتُمُوْهُنَّ فَعَسٰٓى اَنْ تَكْرَهُوْا شَيْـًٔا وَّ يَجْعَلَ اللّٰهُ فِيْهِ خَيْرًا كَثِيْرًا (19)

اے ایمان والو تمہیں حلال نہیں کے عورتوں کے وارث بن جاؤ زبردستی۔ اور عورتوں کو روکو نہیں اس نیت سے کہ جو مہر ان کو دیا تھا اس میں سے کچھ لے لو، مگر اس صورت میں کہ صریح بے حیائی کا کام کریں۔ اور ان سے اچھا برتاؤ کرو، پھر اگر وہ تمہیں پسند نہ آئیں تو قریب ہے کہ کوئی چیز تمہیں ناپسند ہو اور اللہ اس میں بہت بھلائی رکھے۔

وَ اِنْ اَرَدْتُّمُ اسْتِبْدَالَ زَوْجٍ مَّكَانَ زَوْجٍ وَّ اٰتَيْتُمْ اِحْدٰىهُنَّ قِنْطَارًا فَلَا تَاْخُذُوْا مِنْهُ شَيْـًٔا ؕ اَتَاْخُذُوْنَهٗ بُهْتَانًا وَّ اِثْمًا مُّبِيْنًا (20)

اور اگر تم ایک بیوی کے بدلے دوسری بدلنا چاہو اور اُسے ڈھیروں مال دے چکے ہو تو اس میں سے کچھ واپس نہ لو۔ کیا اسے واپس لو گے جھوٹ باندھ کر اور کھلے گناہ سے۔

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13. Much attention was paid to the rights of women and even the Holy Quran constantly forbade the husband to treat his wife with cruelty and even strict censure has been issued in that respect with constant threats and great punishment in the life hereafter. The Holy Quran also Orders that if a man wants to marry another woman by leaving his first wife, in that eventuality he should not ask to get back what he had provided to his first wife.

14. Considering the facts and circumstances of the case and arguments advanced by the highly competent counsels on either side and on perusing the typed-set of papers and the views of this Court as expressed in the above paras, this Court does not find any merit in this petition, and accordingly, the same stands dismissed leaving the parties to bear their own cost.

Announced.
20.04.2022
(*M/Subhan)

Faheem.

JUDGE

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