

**[Peshawar]**

**Before Dost Muhammad Khan and Yahya Afridi, JJ**

**Hafiz AMJED ALI---Petitioner**

**Versus**

**Mst. NASREEN and 4 others----Respondents**

Writ Petition No.323 of 2011, decided on 10th February, 2011.

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

---S. 5, Sched. & S.14---Constitution of Pakistan, Art.199---Constitutional petition---Suit for recovery of dower amount and maintenance allowance---Obligations of husband to render dower to his wife---Scope---When wife would demand her dower from the husband, the refusal or delay in payment thereof, would entitle the wife to seek maintenance from the husband till payment thereof---Rights of wife to demand and be paid maintenance was well established in Islam---Principles---In the present case dower deed was produced by the plaintiff/wife without any objection or protest by the defendant/ husband---Even the stamp vendor and one marginal witness to the said dower deed, were also produced, who stood by the assertions of the plaintiff--Plaintiff, no doubt, had admitted that she had received five Tolas of gold ornaments at the time of her `Rukhsati', but she had further stated that same were taken back by the defendant and never returned---Later part of her statement, went totally unrebutted by the defendant which would be accepted as admitted, in circumstances---Courts below had exercised their discretion properly, keeping within the bounds of safe administration of justice; and judiciously considering the claim of parties and the supporting evidence produced in support thereof---Award of maintenance and quantum so fixed by the Family Court and confirmed by Appellate Court, was in accord with Islamic Injunctions---In absence of any jurisdictional error or misreading or non-reading of evidence in the decisions of the courts below which were well reasoned, same could not be interfered with by High Court in constitutional petition.

**(b) Islamic law---**

---Maintenance to wife---Obligations of husband to render dower to his wife and to maintain his wife according to Quran and Sunnah, explained.

The Holy Qur'an Verse No.3 of Surah An-Nisa; Verse 232 of Surah Al-Baqrah; Muhammadon Law Chapter XV titled "Rights and Duties of the Married Parties; Farah Naz v. Judge Family Court PLD 2006 SC 457; Muhammad Asad v. Humera Naz 2000 CLC 725; Muhammadon Law by Mulla, Section 284; Rahilan v. Sanaullah PLD 1959 Lah. 470; Nooruddin Ahmad v. Masooda Khanam PLD 1957 Dhaka 242; Mst. Muhannadi v. Jamaluddin PLD 1960 (W.P.) Kar. 663 and Ishtiaq Mehmood v. Zarin Gul 2002 CLC 1838 ref.

Haji Sardar Ali for Petitioner.

Nemo for Respondents.

Date of hearing: 10th February, 2011.

## JUDGMENT

**YAHYA AFRIDI, J.**--- Hafiz Amjad Ali seeks the constitutional jurisdiction of this Court praying that:--

"It is, therefore, humbly prayed that on acceptance of this writ petition the judgment/decree passed by the lower courts (respondents Nos.4-5) may please be declared as null and void and the suit of petitioner for conjugal rights may please be decreed in his favour with cost throughout.

2. The brief and essential facts which lead to the present petition are that the present petitioner married Mst. Nasreen ("Respondent No.1") and from their wedlock, Mst. Warisha ("Respondent No.2") and Master Wajid Ali ("Respondent No.3") were born and are presently under the care and custody of their mother, Mst. Nasreen. The marriage between the spouses witnessed difficulties, which forced Mst. Nasreen to move along with her children to her parent's house. Having refused her dower, she instituted a suit, wherein she along with her two minor children (Respondents Nos.2 and 3) sought relief against the present petitioner claiming recovery of dower for Rs.50,000, five Tolas gold ornaments and one five Marla plot situated at Surkh Dheri, near Sheikh Maltoon Town, Mardan, recovery of maintenance for Mst. Nasreen and for the minor children (Respondents Nos.2 and 3).

On the other hand, the present petitioner along with his father instituted a suit against respondent No.1 and her parents for restitution of conjugal rights, recovery of 17 Tolas of gold ornaments, Rs.2000 cash as well as recovery of Rs.400,000 from respondent No.1's parents based on the terms of the 'Kabeen Nama' dated 29-7-2006 ( 'Kabeen Nama' ).

3. Both the suits were consolidated. The Judge Family Court framed eleven consolidated issues and after considering the evidence produced by the parties, passed a decree in favour of present respondents Nos.1 to 3 for recovery of dower, maintenance allowance at the rate of Rs.1000 per

month from the date of institution of the suit till the date of payment of dower prayed for and respondents Nos.2 and 3 were allowed maintenance at the rate of Rs.1000 per month till her marriage and his majority, respectively. And the counter claim of the present petitioner for restitution of conjugal rights and the recovery claimed in his suit was dismissed vide the consolidated judgment and decree dated 19-6-2009.

The petitioner being aggrieved of the decision of the Judge Family Court impugned' the same in appeal, which was dismissed by the learned Additional District Judge-II, Mardan vide judgment and decree dated 11-1-2010.

Feeling aggrieved thereof and having no other alternative remedy, the present petitioner has invoked the constitutional jurisdiction of this court challenging the decisions of the two courts below.

3. The learned counsel for the petitioner vehemently argued that the courts below had totally ignored the clear evidence of the present respondent No.1's admission that she had received dower in the form of gold ornaments weighing five Tolas at the time of her 'Rukhsati' from the present petitioner; that respondent No.1 had left his house without his consent and hence she was not entitled to the maintenance decreed; that the courts below ought to have granted the decree for conjugal rights in favour of the petitioner; and that the dower deed was not admissible in evidence.

4. The valuable arguments of the learned counsel for the petitioner have been duly noted and the available record thoroughly considered.

5. The obligation of a husband to render dower to his wife has been ordained in The Holy Qur'an. Verse No.3 of Surah An-Nisa commands that: -

"Give women their dower in good cheer. Then, if they forego some of it, of their own will, you may have it as pleasant and joyful."

Whereas, the obligation of the husband to maintain his wife has been clearly directed in Verse 232 of Surah Al-Baqrah as:-

"It is the obligation of the one to whom the child belongs that he provides food and clothing for them (the mothers) with fairness. Nobody is obligated beyond his capacity."

History bears witness to the fact that Islam elevated the status of a wife and bestowed upon her valuable rights of claiming dower and maintenance from her husband. These rights were then "alien" to the society prior to the advent of Islam.

The husband's obligation to maintain his wife in Islam is based on the social contract of

marriage. Dower being the "consideration" for the wife to enter this social contract, which the husband has to pay her, either promptly or deferred, as mutually agreed between them during their "Nikkah". The provision of maintenance to the wife is an obligation, which is a very crucial and essential ingredient of marriage and has to be paid by the husband to his wife during the term of their marriage and under certain circumstances even thereafter.

Syed Ameer Ali in "Muhammadon Law" in Chapter XV titled "Rights and Duties of the Married Parties" describes the duties of the husband to maintain his wife in the following manner:--

"The husband is legally bound to maintain his wife and her domestic servants whether she and her servants belong to the Muslim Faith or not. 'It is incumbent on the man to maintain his wife' says the Fatawai Qazi Khan, 'whether she be Moslemah or non-Moslemah' (Lit. Zimmai), poor or rich, whether there has been Copula or not; whether grown up adult or young, so that intercourse with her is possible...."

He further adds that under the Hanfi law,

"The husband is bound to maintain his wife even if she be residing in her father's house, provided he has not required her to come to his own house or came cohabit with her there. If he has called upon her and lived with him and she has refused without any valid justifiable reason, such as non-payment of prompt dower or illness, she is not entitled to maintenance while, residing in her father's house."

The august Supreme Court in Farah Naz v. Judge Family Court PLD 2006 SC 457 clearly reiterated the significance of maintenance to be provided by husband to his wife in the following terms:--

"On the merits of the case, we find that the appellant having been lawfully wedded to the respondent in the absence of any proof of dissolution of marital tie, it was his legal, moral as well as social duty under the Islamic Principles to provide adequate maintenance for her respectable living as in law he could not neglect to maintain her during the subsistence of the marriage tie."

We may also seek guidance from the judgment titled Muhammad Asad v. Humera Naz 2000 CLC 725, wherein the concept of maintenance was described in the following terms:--

"The definition of maintenance in Islam is Nifka. In the language of law it signifies all those things which are necessary to the support of life, such as food, clothes and lodging. The subsistence of the wife is incumbent upon her husband. When a woman surrenders herself into the custody of her husband, it is incumbent upon him thenceforth to supply her with food, clothing and lodging, whether she be a Mussalman or an infidel, because such is the precept in Holy Qur'an. Such an obligation arises from the moment the wife is subject to the moral control and in certain cases for a time even after it is dissolved. "A wife must be accommodated with a separate apartment. It is incumbent upon a husband to provide a separate apartment for his wife's habitation, to be solely and exclusively appropriate to her use, so that none of her husband's family, or others, may enter without

her permission and desire, because this is essentially necessary to her, and, is therefore, her due the same as maintenance for the word of God appoints her a dwelling house as well as a subsistence and as it is incumbent upon a husband to provide a habitation for his wife under the control of I her husband". Reproduced from Hedaya by Hamilton, Chapter XV, page 143, Imam Shafi says that the maintenance is in all circumstances to be considered a debt upon the husband in conformity with his tenet."

It has by now been settled that when a wife demands her dower from the husband, the refusal or delay in payment thereof entitles the wife to seek maintenance from the husband till the payment thereof. In this regard, we note that under Section 284 of the Muhammadon Law by Mulla clarifies the matter even further and states that:---

"The wife may refuse to live with her husband and admit him to sexual intercourse so long as the prompt dower is not paid [Baillie, 125]. If the husband sues her for restitution of conjugal rights before sexual intercourse takes place, non-payment of the dower is a complete defence to the suit, and the suit will be dismissed. If the suit is brought after sexual intercourse has taken place with her free consent the proper decree to pass is not a decree of dismissal, but a decree for restitution conditional on payment of prompt dower." (emphasis provided).

Thus the rights of a wife to demand and be paid maintenance in case the husband refuses to pay her the prompt dower is well-established in Islam. The maintenance is neither a "gift" nor a "grace" given by the husband to the wife but in fact it, is inalienable legal obligation of the husband to maintain his wife in accordance with the dictates of Islam. The superior courts of our jurisdiction has recognized this right and reliance may be sought from the case decided titled *Rahilan v. Sanaullah* PLD 1959 Lah. 470, *Nooruddin Ahmad v. Masooda Khanam* PLD 1957 Dhaka 242, *Mst. Muhammadi v. Jamaluddin* PLD 60 (W.P.) Kar. 663 and *Ishtiaq Mehmood v. Zarin Gul* 2002 CLC 1838.

6. Now, moving on to the merits of the present case, we note that despite the clear and express exclusion of provisions of Qanun-e-Shahadat Order, 1984 as provided under section 17 of the Act, the courts below have extensively applied the provisions of proof provided therein to test the veracity and admissibility of the evidence produced by respondent No.1 in support of her claim. The Dower Deed was produced in evidence by the respondent No.1 without any objection or protest by the present petitioner. Even the stamp vendor and one the marginal witness to the Dower Deed were also produced, who stood by the assertions of the present respondent No.1. No doubt, respondent No.1 admitted that she had received the five Tolas of gold ornaments at the time of her Rukhsati, however, she further stated that the same were taken back by the present petitioner and' never returned. The later part of her statement went totally un-rebutted by the present petitioner, hence would be accepted as admitted.

7. On the whole, we note that the courts below have exercised their discretion properly, keeping within the bounds of safe administration of justice, and judiciously considering the claim of the parties and the supporting evidence produced in support thereof. As far as the award of maintenance and the quantum so fixed by the Judge Family Court and confirmed by the appellate court, this court finds that the same is in accord with the Islamic Injunctions and the principles laid down in the Act.

8. Before parting, this court would like to note that the present petitioner may, after payment of the decretal amount to the present respondents, seek his restitution of his conjugal rights

privately and in case of refusal by respondent No.1, may approach the Judge, Family Court, who shall proceed with the matter in accordance with the law.

9. This court finds that no jurisdictional error or misreading or non-reading of evidence has been pointed out by the petitioner in the impugned decisions of the courts below. In fact, the impugned decisions are well reasoned.

10. Accordingly, for the reasons stated hereinabove, this court finds that the present petition does not merit acceptance. Hence, the same is dismissed, in limine.

H.B.T./118/P

Petition dismissed.