

Before Rooh-ul-Amin Khan and Malik Manzoor Hussain, JJ

Mst. SAEEDA JAVED---Petitioner

Versus

JAVED IQBAL and 2 others---Respondents

Writ Petition No.1962 of 2010, decided on 27th March, 2013.

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

---S. 5, Sched.---Dissolution of Muslim Marriages Act (VIII of 1939), S.2---Suit for dissolution of marriage by wife on ground of infertility of husband---Maintainability---Neither Islam nor Dissolution of Muslim Marriages Act, 1939 recognized such ground for dissolution of marriage as fertility or infertility or other incapacitation for being beyond control of human being and an act of nature---Marriage in case of infertility of husband could be dissolved either by him by giving Talaq to wife or by her through "Khula"---Principles.

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

---S. 5, Sched. & S.10(4)---Dissolution of Muslim Marriages Act (VIII of 1939), S.2---Constitution of Pakistan, Art.199---Constitutional petition---Suit for dissolution of marriage on ground of infertility of husband---Suit dismissed by Family Court decreed by Appellate Court on ground of "Khula"---Husband's plea was that Appellate Court had no jurisdiction to dissolve marriage on an unclaimed ground of "Khula"---Validity---Wife, if either failed to prove claimed ground also recognized by Dissolution of Muslim Marriages Act, 1939 OR she was not desirous to live with husband for any reasons not recognized by the Act, would still be entitled to dissolution of marriage on ground of "Khula"---Wife in case of dissolution of marriage on ground of "Khula" would have to either remit dower amount, if not received by her or pay back same to husband, if so received by her---Record showed that wife in the present case, was not ready to live with husband despite having failed to prove any cruelty on his part---Muslim spouses could not be forced to live a life devoid of harmony and happiness---Court in such case had no alternative but to dissolve marriage on ground of "Khula" even being an unclaimed ground---Principles---High Court dismissed constitutional petition in circumstances.

Holly Quran Sura Baqara Verse 229 ref.

Arshad Jamal Qureshi for Petitioner.

Niaz Wali Khan for Respondents.

Date of hearing: 27th March, 2013.

JUDGMENT

ROOH-UL-AMIN KHAN, J---Through this single judgment we propose to dispose of the instant writ petition and connected Review Petition No.18 of 2011 with C.M. No.12 of 2011 in Writ Petition No.2201 of 2010. Petitioner has assailed judgment and decree dated 20-3-2010 passed by learned Additional District Judge-VII, Peshawar, whereby appeal of the respondent was accepted while the appeal filed by petitioner-plaintiff was also allowed but to the extent of dowry articles as prayed for as per list, however, the dissolution of marriage on the ground of cruelty was converted into khula and the claim of house and gold ornaments stands abandoned/infructuous and modified the judgment and decree passed by the Judge Family Court accordingly. Petitioner also seeks review of judgment and order dated 15-2-2010 passed by this Court in Writ Petition No. 2201 of 2010.

2. Brief facts of the case are that the petitioner herein filed a suit for recovery of maintenance allowance @ Rs.2000 per month from May 2007 and for future, cash amount of Rs.20,000 as dower, 15 tolas gold ornaments or its market value, house bearing No-3036 measuring four marla, boundaries mentioned in plaint, and dowry articles as per list annexed with the plaint. According to the plaint the marriage of the parties was solemnized on 14-2-1998, in lieu of the dower and maintenance etc. mentioned above. Just after the marriage the attitude of the defendant became inhuman and cruel, who oftenly used to beat her, but she endured this cruelty for the sake of better future and matrimonial ties. She also claimed that the defendant is barren, infertile and not capable to born children. The defendant has ousted her in her three wears and since then she is residing with her parents. The defendant has not paid her dower and maintenance allowance and he has also not tried to take her back or to meet out the demand of the plaintiff. On summon the defendant contested the suit through filing written statement and strongly rebutted the allegation of cruelty and non-payment of dower. From divergent pleadings of the parties the learned Judge Family Court reduced the controversy into fifteen issues including relief and one Additional Issue. Pro and contra evidence were recorded and after hearing the parties the learned trial court decreed the suit in favour of the petitioner/plaintiff to the extent of dissolution of marriage, recovery of half dower, cash amount of Rs.20,000 and gold weighing 7 tolas. Some of the dowry articles and maintenance allowance, as prayed for, was also decreed in favour of the plaintiff-petitioner.

3. Both the parties, feeling aggrieved of the said judgment and decree filed separate appeals before the District Judge, which were marked to Additional District Judge-VII, Peshawar, who vide judgment and decree dated 20-3-2010 accepted the appeal filed by respondent, set aside the judgment and decree dated 14-12-2009 passed by the Judge Family Court. The marriage was dissolved on the basis of Khula instead of cruelty and the claim of house and gold ornaments stands abandoned/ infructuous while the appeal filed by petitioner-plaintiff was also allowed to the extent of dowry articles as prayed for as per list.

4. Dissatisfied with the judgment of Appellate Court, the petitioner approached this Court

through the instant Constitutional Petition, as well as Writ Petition No.2201 of 2010, which were decided by this Court vide judgment dated 15-12-2010.

5. The petitioner, aggrieved from the judgment dated 15-12-2010, passed by this Court in Writ Petition No.2201 of 2010, filed Review Petition No.18 of 2011, while the respondent, dissatisfied from the aforesaid judgment of this court passed in instant writ petition, approached the august Supreme Court of Pakistan through Constitutional Petition No.110-P of 2011. The august Supreme Court after granting leave accepted the Appeal No.30-P of 2011, set aside the judgment of this court dated 15-12-2010 and remitted the case back to this court for decision afresh on merit in accordance with law.

6. Arguments of learned counsel for the parties heard and record of the case gone through.

7. Record divulged that plaintiff-petitioner filed suit for dissolution of her marriage on the ground of cruelty and infertility of respondent-defendant. To this effect a specific issue reproduced below was framed by the trial court:--

"Additional Issue:

1-A. Whether the plaintiff is entitled for dissolution of marriage on the basis of infertility and cruelty, if so its effect?"

8. After adducing pro and contra evidence by the parties, the learned trial court arrived at a conclusion that the plaintiff has failed to prove any physical torture or cruelty yet the marriage was dissolved and the wife was held entitled for recovery of dower, and maintenance for the reason that the defendant had concealed his infertility from the plaintiff, which amount to cruelty. The Additional District Judge set at naught the finding of the trial court and held that the conclusion of the trial court is based on misreading of evidence of the parties and misappreciation of law on the subject, thus the marriage between the parties was dissolved on the basis of Khula'.

9. From perusal of record it transpired that the plaintiff herself has admitted before the court, while recording her statement, that at the time of her marriage she was in knowledge of the fact about incapability of defendant to create children. She has also admitted that except the medical receipt and prescription of 1999 she has not brought on record any medical evidence to prove that the defendant is still suffering from the said disease.

10. Infertility is not a recognized ground for dissolution of marriage under the Dissolution of Muslim Marriages, Act 1939, thus, it could not be based for dissolution of marriage. The fertility or infertility or any other incapacitation is beyond the control of human being and an act of nature. In this regard we would sought guidance from the Holy Qur'an, which is a complete code of life. There are two stories of infertility in Holy Qur'an out of which the first is that of Hazrat Ibraheem Aleh Salam and his wife Sara. The two main account of this story is as follows:--

"And his wife was standing (there) and she laughed: But we gave her glad tidings of Isaac and after him, of Jacob. She said "Alas for me; Shall I bear a child, seeing I am an old woman, and my husband here, is an old man? That indeed would be a wonderful thing" They said; "Dost thou wonder at Allah's decree? The grace of Allah and His blessing on you. O ye people of the house! For He is indeed worthy of all praise full of Glory!" 11:71:73.

And they (angels) gave him (Ibrahim) glad tidings of a son endowed with knowledge. But his wife came forward clamoring she smote her forehead and said: "A barren old woman!" They said "Even so has thy Lord spoken and He is full of wisdom and knowledge" 51-28-30".

The detail concerning the life of Sara and Ibrahim Aleh Salam received from Ahadith reveals that the Sara was old about ninety years and Ibrahim Aleh Salam was 100 years old, and God blessed them with a child. Here one can take a lesson that the life of spouses do not end, because they have no children. One must also accept, what Allah has planned for mankind. It is also important to take notice of the example set by Hazrat Ibrahim Aleh Salam and his barren wife Sara. Both were never harsh to each other in words or deeds, nor they abandoned each other. The bond of marriage, love, faith and tenderness kept the couple together even during infertility. Second story relates to Hazrat Zakariya Aleh Salam and his wife Ishba. Allah says in Quran Majeed:--

"And (remember) Zakariya, when he cried to his Lord: "O my Lord! Leave me not without offspring, though thou art the best of inheritors." So We listened to him: and We granted him Yahya: We cared his wife's (Barrenness) for him. These (three) were ever quick in emulation in good works; they used to call on Us with love and reverence, and humble themselves before Us.21:89:90.

From the above quoted two cases, it is clear than crystal that Ibrahim Aleh Salam did not shunned, shammed, divorced or look down his wife for the reason of infertility. It is a lesson that all of the Ummah must learn, as Allah says "He leaves barren whom He wills 42:50:"

It is a decree from Allah and it is, therefore, the legislature while drafting and promulgating the Dissolution of Muslim Marriages Act, 1939, very wisely not recognized the infertility as a valid ground for dissolution of marriage. If it would have been introduced in the statute then majority of the couples, having no children and issueless would have been living separately. Even the religion of "Islam" has never approved the dissolution of marriage on such a ground. However, even then if the wife or the husband desirous of children and any one of them is infertile and incapable to born, they can dissolve the marriage amicably i.e. from the husband side through divorce (Talaq Salasa) or from the wife side through "Khula".

11. Learned counsel for the petitioner also argued that the plaintiff has never claimed dissolution of her marriage on the basis of "Khula", therefore, the Appellate Court was not vested with power to dissolve the marriage on the unclaimed ground i.e. "Khula". He went on to say that the judgment of the Appellate Court against law and liable to be set aside.

12. We are not agreed with the above arguments of learned counsel for petitioner as the same are flimsy and not convincing. The Muslim Family Court Act, 1964 provide a mechanism for trial of the matrimonial and family disputes between the spouses. Section 10(4) of the Act, ibid, provides that in pre-trial proceedings if no compromise or reconciliation is possible between the

parties, the court shall proceed and shall decide the matter after recording pro and contra evidence. It further provides that notwithstanding any decision or judgment of any court or Tribunal, the Family Court in a suit for dissolution of marriage, if reconciliation fails, shall pass decree for dissolution of marriage forthwith and also restore to husband the "Haq Meher" received by the wife in consideration of marriage. By inserting the above quoted provisions in the Act, *ibid*, the legislature has recognized the dissolution of marriage through "Khula". The legislature while introducing the amendment in the Act *ibid*, have derived wisdom from the verse No.229 "Sura Baqara of HOLLY QURAN and instances of "Khula:, whereby marriage of Sabit-Ibne-Qais was dissolved by the Holly Prophet Hazrat Muhammad (S.A.W.) on a complaint made by Jamila (wife of Sabit-Ibne-Qais) for relieving her from the Nikah of Sabit-Ibne-Qais.

13. It is by now well-settled law that if the dissolution of marriage is claimed by the wife on any ground recognized under the Muslim Marriages Act, 1939, then it is her duty to prove the allegation. If she succeeded to prove the allegation then the court shall grant her decree for dissolution of marriage along with other benefit. But if she fails to prove then the mere fact that the wife could not establish her allegation qua grounds taken for dissolution of marriage would not disentitle her for termination of marriage contract on the ground of "Khula". In such eventuality the court is under legal obligation to grant decree for dissolution of marriage, but on the basis of Khula and for the same she shall remit the dower amount if not received or pay it back to the husband, if so received. "Islam" does not force on the spouses a life devoid of harmony and happiness and if the wife is not desirous to live with her husband for any reason, even not recognized by the Statute, it permit separation, on the basis of "Khula".

14. In the instant case both the courts below have arrived at a unanimous conclusion that the plaintiff has failed to prove any cruelty on the part of the defendant-husband and despite the fact the wife is not ready to live with the husband. In these circumstances there was no alternate with the court but to dissolve the marriage on the basis of Khula' notwithstanding the fact that she has not claimed her dissolution on the ground of "Khula".

15. In view of the above discussion, we hold that the judgment of the learned appellate court is based on proper appreciation of evidence and does not suffer from any illegality or irregularity. The instant writ petition and review Petition No.18 of 2011 in Writ Petition No.2201 of 2010 are hereby dismissed.