

Mr. Abdur Rahim, Advocate for Respondent No, 1. Dates of hearing: 364-10-1983.

JUDGMENT

Abdul Karim Khan Kundi, J This writ petition arises in the circumstances that Muslim Sher petitioner (husband) instituted a suit against Mst. Qudrat Bibi respondent No.1(wife) for the restitution of conjugal rights. On the other hand, wife instituted a counter suit for maintenance and dower in cash, ornaments and 1/3rd share in a house. Both the suits were consolidated and were disposed of by a judgment and decree dated 29-4-1979. The trial Court found the wife and her minor child entitled to the maintenance at the rate of Rs. 60/- per month each from 1-7-1977 till 30-4-1979. The Court also granted a decree to the wife about the recovery of dower in cash for the sum of Rs. 1000/-. However, regarding issue of recovery of dower in the shape of ornaments and 1/3rd share in the house, the Court held that the wife had since been delivered the ornaments and also possession of the house and if the items were later on usurped, the same will not be recoverable as part of dower through the proceedings in a Family Court. The Court also held that the alleged cruelty had not been proved by the wife at the trial. The Court granted a decree for restitution of conjugal rights to the husband subject to condition of the payment of cash dower of Rs. 1000/- and the past maintenance of Rs. 2640/-.

2. The husband went in appeal against the said judgment and decree of the Family Court before the District Judge which was dismissed on 3-2-1980. He had, however, meanwhile remitted the cash dowry of Rs. 1000/- to the wife by money order on 23-11-1979, receipt of which was duly acknowledged by the wife. Soon after on 17-2-1980 the wife instituted a suit for the dissolution of marriage on grounds of cruelty, non-maintenance, non-performance of conjugal rights, protracted litigation and 'khuli'. The husband had by then deposited the decretal amount of maintenance allowance and applied for execution of decree for conjugal rights. In his reply to the dissolution suit the husband denied the allegations levelled by the wife. Besides, he raised the pleas of estoppel and res judicata. There has, however, not been framed an issue on the points of res judicata by the Family Court Judge.

3. In the dissolution suit the trial Court, in nutshell, held that the wife was entitled to the maintenance with effect from 1st of July, 1977 and

1. Since no-otln-i remeL, ;\ ,va> i>i appeal or revision was available to the husband as against the decree of Dissolution of marriage passed against him, the husband filed this writ petition on grounds that in view of the decree for restitution of conjugal rights passed against the wife and his hiivnp; paid the dower Oul pass maintenance, no decree of dissolution of fmarri;re could be passed agau.a! him He further alleged that the wife had n;j c,,use of action for instiutiv-; the suit for dissolution of marriage on the 'roun-J'J oi noii-mdin U'isa-^vs for two year; and non-performance o' ou-iugai rights lor thre-^ years as she nad uilegedly instituted her suit before the expiry of the statutory periods. He aliened that the wife was .ecraliV barred (rorr. ajjUnhnc. the pica of cruelty in her suit for dissolution ... marriage as no such ph-u was ev>>r advanced t>y her in his suit for rostit.,',n of conjugal ri;h>;. Tho i-;s,i>i>J also raised an objection to the c: = so^o-i-o-i: ' !!!!!rrar-e i,mim- «rouid o; * hula * 'vjthout, the determination ;: ;r'rorr. /' the coujufit j /-ecvjed of UK- ' wife. Last he raised the objection /'..- / resionde:!! No. 2, the Presidin-', Officer of the Family Court, was a is-~A-2 a.d could riot act as a Qazi ano as such the decree passed i,y her ;,& tui; a.v.l void. This objection was, however, not pressed at the bar .ner. confronted to wit*; the y"rdief o! the Federal Shariat Court* that i: tjOfir-ir the learned counsel for the parties at some length, ;,- proceed to set;us the points rvised in the writ petition in the light of he factuai back-ground as detailed ahovf: S. As the outset a refen-m- /- is r:njii- i-j 2? , i.e. 1'S, a Full Bench authority of the Allahabad H,which wife was held not entitled to a decree for the dissolute n :', i;ir-i-; ;, o.; the ground of non-maintenance in vicvj of a decree for the restit.,',o;- f.f.-onjuga! rights obtained by the husband while he was also willing to maintain the wife at h>s house. Further as 3 pica of cruelty raised by the \{?*' ii-: a suit for the restitution of conjugal rights was decided b} ucc tour: a'arist her, the Court accordingly held that ;,lea of cruelty as suel: co<io ,oi t>e agitated in a subsequent suit for the dissolution of mariafji:.

T, l'ere th« nusband contends thai i't« *ui<iu* of cruelty was not advanced oy t/- tvjff- in hss suit for rest;i:tion of c'>!:jujai rights y'hich, however, does not appear to be correct ;:- duritifi the course of judgment, the trial Court concluded from the eyKit">ee tnai the alleged cruelty has not been proved by the wife on the basis u,(which sho could claim separate livelihood and maintenance. The wife rou;ci not t.hos possibly agitate the plea of cruelty as a ground in f. r sun for th? dissolution of mamar'e in the absence of any subsequent instance of cruelty.

8. As far mainienoiu¹ - it stands concluded that the wife has been iivinij Hpart from the husband since 1-7-1377, duly entitled to the maintenance fin account of nori-
p-lynn-nl of prompt dower which has only been paid on or after 23-11-1979, after the expiry of a period of two years. Thus the husband's failure to maintain the wife
for two years before the institution of suit incurred a right to the wife to obtain a decree of dissolution of S;c;c PL! 198: FSf !. marriage on the ground 'f non-
maintenance under section 2(ii) of the Dis-solution of Marriages Act, 1939.

9. Husband was granted a decree for restitution of conjugal rights subject to condition of payment of prompt dower and past maintenance. The restitution decree was thus executable only on the fulfilment of the conditions and before that the wife was entitled to live apart from the husband and to refuse marital obligations to him. The past maintenance arrears were deposited in Court on 26-3-1980 subsequent to the institution of the dissolution of suit. However, a period of three years counted with effect from 1st of July, 1977 shall be completed on 30-6-1980 and as such the wife shall be deemed to have failed to pro-ve the issue of non-performance of marital obligations on the part of husband for the requisite period. The contrary finding of the Family Court on the issue appears to be based on misreading of evidence liable to be declared unlawful.

10. 'Khui'a' has been recognized as a valid ground for the dissolution of marriage under the Muslims Law. Judge may order the dissolution of marriage on the sole ground of 'khui'a' on partial or total restoration of benefits received by the wife as consideration of marriage. Instantly the Family Court did not advert to the determination and partial or total return of the benefits received by the wife while simultaneously granting a decree for the dissolution of marriage inter alia also on the

failed to determine the benefits received by the wife as consideration of marriage and to order partial or total restoration thereof in case of dissolution of marriage on the additional ground of 'khula'.
13. In view of the foregoing discussion, this writ petition is dismissed <vith no order as to costs.

(TQM)

Petition dismissed.