

PLJ 2018 Quetta 43 (DB)

Present: MRS. SYEDA TAHIRA SAFDAR AND ZAHEER-UD-DIN KAKAR, JJ.

KHUDAI NOOR--Petitioner

versus

DISTRICT JUDGE PISHIN and 2 others--Respondents

C.P. No. 85 of 2017, decided on 11.5.2017.

Pleadings--

---Constitution of Pakistan, 1973, Art. 199--West Pakistan Family Court Rules, 1965, R. 4--Civil Procedure Code, (V of 1908), O. VI Rr. 14 & 15--Particulars of plaint--Production of documents--Non signing and verification--Suit for dissolution of marriage and maintenance allowance--Decreed--Appeal--Dismissed--Challenge to--Any omission in the signing and verification of the pleadings and presentation of the plaint is rectifiable at a subsequent stage--A plaint cannot be rejected or a suit cannot be dismissed for any of the irregularities in performing above said act. [P. 46] A

2006 MLD 1752, PLD SC 491, *ref.*

Cruelty--

---Define--Cruelty is not limited to physical beating rather can be either mental or even by conduct. [P. 48] B

Maintenance--

---Muhammadian Law--Para 320--Muslim Family Act, 1964--S. 7 & 9--Divorce By Kula or Mubaraat-Iddat--Maintenance allowance--Liability of husband--Validity--A divorce effected by Khula or Mubara'at operates as a release by the wife of a dower but it does not effect the liability of the husband to maintain the wife during her iddat. [P. 48] C

1999 CLC 160, 1988 CLC 2355, 1988 MLD 427, *ref.*

Mr. Amanullah Tareen, Advocate for Petitioner.

Mr. Sarwar Khan Kakar, Advocate for Respondents.

Date of hearing: 20.4.2017.

JUDGMENT

Zaheer-ud-Din Kakar, J.--Through this constitutional petition, the petitioner has called in question the judgments and decrees dated 27.7.2016 and 8.12.2016, passed by the Family Court, Pishin "the trial Court" and District Judge, Pishin "the appellate Court", respectively, whereby the former decreed the suit of Respondent No. 3/plaintiff while the latter upheld the judgment and decree of the trial Court.

2. Precisely stated facts of the case are that the plaintiff (Respondent No. 3) instituted a suit against defendant (petitioner) for dissolution of marriage, maintenance allowance, recovery of dowry articles, haq mehar and custody of minor. As per averments in the plaint that the marriage of the spouses was contracted before eleven years of filing of the suit in lieu of Rs.480,000/- as dower, which is still outstanding. That initially, the relationship between the couple was cordial but later in time the defendant used to abuse and beat her (plaintiff). That the defendant ousted her from his house in the month of June 2013 and since then he (defendant) did not pay any maintenance to her, nor returned the dowry, details given in para-2 of the plaint.

3. The defendant contested the suit by filing the written statement and denied the claim of the plaintiff. Out of divergent pleadings of the parties, following issues were framed on 19.4.2016.

ISSUES

1. Whether plaintiff and defendant appointed Salisan?
 2. Whether the parents of plaintiff were given dowry articles as per her detail? If yes whether the same are laying in possession of defendant? If so she is entitled for the recovery thereof?
 3. Whether the plaintiff is entitled to receive the maintenance allowance from June, 2013 till completion of Iddat period? If yes at what rate?
 4. Whether the welfare of minor of Bibi Iqra lies with plaintiff?
 5. Whether the plaintiff is entitled to receive the maintenance allowance of minor daughter? If yes at what rate?
 6. Whether the plaintiff is entitled for the relief claimed for?
 7. Relief?
4. The parties were directed to adduce evidence in support of their respective claims, whereupon, the plaintiff produced two witness namely Syed Asif as PW-1, Abdul Latif as PW-2 and lastly also recorded her statement through Affidavit. In rebuttal, the defendant produced only one witness namely Syed Muhammad Saleem as DW-1 and got recorded his own statement.
5. After hearing the learned counsel for the parties, the trial Court decreed the suit of the plaintiff *vide* its judgment and decree dated 27.7.2016.
6. The appeal filed by the defendant against the said judgment and decree was dismissed by the appellate Court *vide* its judgment and decree dated 08.12.2016.
7. Being dissatisfied by the concurrent findings of the Courts below, the defendant has challenged the same through this Constitutional Petition.
8. Learned counsel for the petitioner contended that the Courts, trial and appellate, while passing the impugned judgments/decrees have failed to consider the facts, circumstances and material on the record; that the suit was liable to be dismissed as it was neither instituted by Respondent No. 3 (plaintiff) herself nor she affixed her thumb impression on the plaint and affidavit; that prior to institution of the suit, the parties appointed arbitrators who had already given their decision, thereby decided that the dowry articles in possession of either of the parties shall deemed to be property of the respective party; that Respondent No. 3 (plaintiff) has failed to prove the dower amount. Lastly, he prayed for setting aside of the impugned judgments and decrees passed by the Courts below to the extent of maintenance allowance, dower amount and dowry articles.
9. On the other hand learned counsel for Respondent No. 3 vehemently opposed the petition and defended the impugned judgments and decrees.
10. We have heard learned counsel for the parties and have gone through the available record. The plaintiff (Respondent No. 3) applied for dissolution of marriage on the basis of cruelty, while during pendency of the suit, the petitioner/defendant filed a copy of Talaqnama dated 01.01.2016, with assertion that the marriage had been dissolved, which was not denied by the Respondent No. 3 (plaintiff). Thus, on the basis of said Talaqnama, the Family Court dissolved the marriage tie between the spouses. The petitioner is mainly aggrieved from the judgments and decrees of the trial Court as well as the appellate Court to the extent of dower amount, dowry articles and maintenance allowance. The point for determination before this Court is as to whether the Respondent No. 3 (plaintiff) is entitled for dower amount of Rs.480,000/-, as to whether the Respondent No. 3/plaintiff is entitled to receive the dowry articles and as to whether she is entitled to receive the maintenance allowance from June, 2013 till the date of dissolution of marriage w.e.f 01.01.2016 and Iddat period.
11. As far as objection of the learned counsel for the petitioner regarding maintainability of the suit with regard to non-affixation of thumb impression of the plaintiff on the plaint and affidavit is concerned, though in cross-examination, in reply to the Question No. 22 she admitted that:

"۲۲۔ یہ درست ہے کہ دعویٰ اور حالفیہ بیان پر نشان انگشت میں نے نہیں لگایا۔"

But in this regard the language of Rule 4 of the West Pakistan Family Courts Rules, 1965, requiring the signing, verification and presentation of the plaint is identical to the provisions of Rules 14 and 15 of Order VI of CPCA. Any omission or irregularity in the signing and verification of the pleadings, and presentation of the plaint is rectifiable at a subsequent stage. A plaint cannot be rejected and a suit cannot be dismissed for any of the irregularities in performing the above said acts. Further, it is a settled law that omission to mistake to sign the pleadings (plaint or written statement) is merely an irregularity and can be cured/rectified subsequently at any stage. Reliance is placed on 2006 MLD 1752 titled *Shahida Parveen and another v. Sher Afzal and two others and Muhammad Anwar Khan and others v. Choudhry Riaz Ahmed and others* reported in (PLD 2002 SC 491). Thus, the objection is overruled.

12. As far as the question of dower amount is concerned, there is no dispute between the parties in respect of fixation of dower of Rs.480,000/- at the time of marriage, because in his statement before the trial Court, the petitioner (defendant) and the DW-1 Syed Muhammad Saleem have specifically stated that the Haq Mehr was fixed Rs.480,000/- and during cross-examination, in reply to the Question No. 6 the petitioner admitted that:

"6۔ یہ درست ہے کہ مدعیہ کا حق مہر 4 لاکھ 80 ہزار مقرر ہوا۔"

Whereas, the DW-1 in reply to the Question No. 4 also admitted that^ث

4۔ مدعیہ کا حق مہر 4 لاکھ 80 ہزار مقرر ہوا۔

So the findings of Courts below regarding dower amount are in accordance with law which warrants no interference.

13. With regard to dowry articles, though the Respondent No. 3 (plaintiff) has failed to place on record any list or receipt of articles, which according to her claim, were given to her at the time of marriage in the shape of dowry, but the defendant during cross-examination, in reply to questions No. 7 and 8 admitted that:

"7۔ مدعیہ میرے گھر شادی کے وقت جو سامان لانی تھی اس میں الماری، پلنگ، برتن، سلانی مشین، بستر، کمبل، قالین میرے گھر میں پڑے ہیں۔"

8۔ یہ درست ہے کہ مدعیہ شادی کے وقت جہیز میں واشنگ مشین لے کر آئی تھی۔

The findings of the Courts below regarding dowry articles are in accordance with law which warrants no interference.

14. So far as issue of maintenance allowance from June, 2013 till the date of dissolution of marriage i.e. 01.01.2016 and Iddat period, is concerned. The plaintiff has alleged that the attitude of defendant has remained harsh and cruel towards her and he (defendant) also used to beat her. She also urged that for the last three years, she was shunted out by the defendant from his house, in her one wear and since then, she is residing with her parents. PWs-1 and 2 fully supported the statement of plaintiff. The plaintiff established the cruelty on the part of her husband (petitioner). The cruelty is not limited to physical beating rather that can be either mental or even by conduct. So, when wife is abused, misbehaved and disrespected it is also a cruelty and on the basis thereof she may refuse to live with her husband and so she is entitled to the maintenance allowance. So far as the plea of defendant that she left the house with her own will is not understandable as how a wife having one kid could adopt such an irresponsible behavior. Admittedly, a Muslim wife is entitled to get maintenance as of right from her husband. The plaintiff attained the status of wife of the petitioner about eleven years ago before filing of the suit, when she entered into a Nikah with him and after such date, it was his liability to provide maintenance to the Respondent No. 3/plaintiff, who was his wife. This right which has also been recognized in view of paragraph 320 of Muhammadan Law by D.F. Mulla with regard to a Muslim wife seeking divorce/Khula. A divorce effected by Khula or Mubara'at operates as a release by the wife of a dower but it does not affect the liability of the husband to maintain the wife during her Iddat. The learned Lahore High Court Lahore in case of "*Shafiqan Bibi v. Senior Civil Judge/Judge Family Court, Okara and another*" {1999 CLC 160} has held that the maintenance has always been considered as not a "benefit" but a "right" of wife and it was held that the judgment and decree of the Judge Family Court to the extent of withdrawing the benefit of dower in lieu of Khula was correct in making decree conditional on returning of the same but the claim of maintenance was held as not a "benefit" received by the wife from husband. Further, it was a duty of husband to maintain his wife so long as she remained in wedlock. Earlier in case of "*Iflikhar Ahmed v. Hussan Pari and others*" {1988 CLC 2355}, it was held that wife was entitled in law to maintenance and would not forfeit such right merely because she had sought divorce on the basis of Khula. Such principle of law, as noted above, also found support from another reported case of "*M Saqlain Zaheer v. Mst. Zaib-un-Nisa Zaheer alias Zaibi and another*" {1988 MLD 427}.

15. The learned Lahore High Court Lahore in case of “*Mst. Shamim Akhtar v. Additional District Judge, Sialkot and another*” {1991 CLC 1142} has dealt with similar situation where “Rukhsati” did not take place and the husband refused on that score alone the provision of maintenance to the wife and it was held that irrespective of the fact that whether “Rukhsati” takes place or not, it is the entitlement of the wife to have maintenance from her husband during subsistence of marriage and the wife was held entitled to the maintenance for a period the marriage between the parties had subsisted. Even after divorce, till completion of Iddat the wife is still entitled to claim maintenance and the fact that whether suit for recovery of maintenance was filed during subsistence, of marriage or afterwards was of no significance, if during period for which maintenance was claimed, marriage in between the parties remained intact.

16. The learned counsel for the petitioner failed to point out any illegality or irregularity in the exercise of jurisdiction by the Courts below, as such, the instant petition is without merit, thus, dismissed.

(W.I.B.) Petition dismissed