

2012 M L D 1576

[Peshawar]

Before Mazhar Alam Khan Miankhel and Fazal-i-Haq Abbasi, JJ

NASIR---Petitioner

Versus

Mst. RUBINA and 2 others---Respondents

Writ Petition No.1971 of 2010, decided on 17th May, 2012.

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

----S.5 & Sched.---Constitution of Pakistan, Art. 199---Constitutional petition---Suit for recovery of dower and maintenance allowance was decreed in wife's favour and marriage was also dissolved by the Family Court on basis of Khula---Contention of the husband (petitioner) was that if the wife opted to dissolve the marriage on basis of khula, she was bound to return all the benefits received by her at the time of marriage and therefore, decree of recovery of dower in her favour was against Shariah and the law---Validity---Wife had asked for dissolution of her marriage on the grounds other than "khula" along with claim of recovery of maintenance and dowry articles---Perusal of judgment of Family Court revealed that it was mindful of the fact of period of wedlock of the spouses, the birth of the children out of the wedlock, second marriage of the husband and hatred the wife had towards living with the husband ; and said reasons might have been before the Family Court which precluded it to order the return of benefits---Family Court had to see and determine as to whether the wife would be liable to return any benefit she received at the time of marriage and had also the authority to determine the quantum of such return---Constitutional petition, being meritless, was dismissed.

Quranic verse No.229 of Surah Al-Baqarah quoted.

Dr. Fakhr-ud-Din v. Mst. Kausar Takreem and another PLD 2009 Pesh. 92 and Muhammad Tariq v. Mst. Shaheen and 2 others PLD 2006 Pesh. 189 rel.

Mahboob v. Mst. Siraj Bibi Writ Petition No.1381 of 2007 and Shaista v. Haseeb Ahmad Writ Petition No.1220 of 2010 distinguished.

(b) Muslim Family Laws Ordinance (VIII of 1961)---

---S.6---Marriage---Polygamy---Muslim under Shariah could marry four wives, but there were certain restraints in the shape of equal treatment between all the wives and doing justice among them---Law of the land also prohibited second marriage unless permission was given by the first wife.

Javid A. Khan for Petitioner.

Muhammad Rahim Shah for Respondents.

Date of hearing: 17th May, 2012.

JUDGMENT

MAZHAR ALAM KHAN MIANKHEL, J.---The defendant/ petitioner through instant writ petition has questioned the findings of the fora below i.e.. respondents Nos.2 and 3, to be illegal, unlawful and without lawful authority, whereby Civil Judge-III/Illaqa Qazi at Gul Kada, Swat,

respondent No.2, (wrongly written as Judge Family Court in writ petition) vide his judgment and decree dated 22-12-2009, decreed the suit for recovery of twenty tolas of gold etc. in favour of plaintiff/respondent, whereas appeal of the present petitioner against the same was dismissed by Additional District Judge/Izafi Zilla Qazi-VI, Swat, respondent No.3, vide his judgment and decree dated 13-2-2010, hence the present writ petition.

2. The brief but the material facts of the case are that the parties to the suit were married to each other but unfortunately their relation could not remain cordial and plaintiff/wife was compelled to file a suit for dissolution of her marriage along with her claim for recovery of dower, maintenance etc., which was decreed in her favour by the Judge, Family Court but during the pendency of the appeal of the present petitioner, the dispute between the parties was resolved through a compromise, copy of which was also produced in this case as Exh.P.W.1/2 and the parties once again attempted to live a happy and cordial life but their subsequent attempt, to their misfortune, also failed and the lady once again filed a suit for dissolution of her marriage along with claim of dowry articles etc. whereas the petitioner also filed a suit for restitution of conjugal rights as both the suits were filed in the year 2001, prior to Family Courts (Amendment) Ordinance of 2002. The learned Judge, Family Court dissolved the marriage of the spouses on the basis of Khula. Also granted her a decree for dowry articles to the tune of Rs.60,000 whereas maintenance allowance along with expenses incurred on medical treatment etc. were refused to her while the suit of the petitioner for restitution of conjugal rights was dismissed on 23-5-2002 through a single consolidated judgment. The appeal against the same by the present petitioner was dismissed and the said findings of dissolution of marriage on the basis of Khula attained finality between the parties.

3. It will not be out of place to mention here that the Judge, Family Court did not give any finding regarding the return of marriage benefits/ dower in lieu of Khula.

Besides the above suit of the wife, the wife had also filed a civil suit in February, 2001, (the controversy in hand) with regard to recovery of twenty tolas of her dower and some other personal property on the plea that the dower, after its payment to wife was forcibly snatched from her by the defendant/petitioner. The present petitioner also filed a civil suit for recovery of twenty tolas of gold as dower in lieu of dissolution of his marriage with the plaintiff/respondent. Both the suits were consolidated and the suit of the plaintiff/wife was decreed in her favour along with some of her personal property, vide a consolidated judgment dated 22-12-2009 by Civil Judge-III/Illaqi Qazi, Gulkada whereas the suit of the petitioner was dismissed. The petitioner then filed two separate appeals against the consolidated judgment but his both the appeals were dismissed by the Additional District Judge-IV/Izafi Zila Qazi, Swat, vide his judgment and decree dated 13-2-2010. The impugned judgment and decrees, being passed in general jurisdiction of a civil Court, were revisable but the defendant/petitioner filed instant writ petition by presuming it to be a judgment of a Family Court.

4. The learned counsel for the petitioner questioned the judgments of the two Courts below only on the question of return of benefits of marriage/dower in lieu of decree for dissolution of marriage on the basis of Khula by elucidating his stance that whenever the wife opts for dissolution of her marriage on the basis of Khula, then she is bound to return all the benefits of marriage/dower she received at the time of marriage from the husband and submitted that the decree for recovery of dower of twenty tolas of gold in favour of plaintiff/wife is against the Shariah and the law of the land and requested for setting aside of the same.

5. As against that the learned counsel for the plaintiff/wife vehemently controverted the arguments of learned counsel for the petitioner by submitting that the decree for dissolution of marriage on the basis of Khula is silent altogether with regard to return of any benefit of marriage and the same has also attained finality between the spouses; that the decree for dissolution of marriage was passed by the Judge, Family Court which has not been impugned before this Court at the moment and the same cannot be interfered with in the manner prayed for. He next contended that the dower was once paid to the wife but, later on, the same was snatched from her by the husband and in view of the prevailing law at that time, she filed a civil suit for recovery of the same and also placed reliance on the judgment of the Division Bench of this Court rendered in the case *Mst. Farhad v. Additional District Judge-II, Mardan* reported in case PLJ(sic) Peshawar 30 (D.B.).

6. Learned counsel for the parties were heard and record of the case was perused.

7. Perusal of the record would reveal that the marital bond between the spouses was broken by the decree of the Judge, Family Court on the basis of "Khula" on 23-5-2002. The decree of dissolution is entirely silent with regard to return of any benefit in lieu of "Khula". The appeal of the present petitioner, against the same, also did not bear any fruit. The said findings of the Family Court attained finality between the parties. Since the wife alleged that dower was once paid by the husband but later on it was forcibly snatched from her by husband so, she in the light of precedent law at the relevant time i.e. the case of *Mst. Farhad v. ADJ-II, supra*, filed a separate civil suit for the recovery of dower.

8. Arguments of learned counsel for the petitioner, in the peculiar circumstances of the case, would have no force at all. The wife had asked for dissolution of her marriage on the grounds other than the "Khula" along with claim for recovery of maintenance and dowry articles. The perusal of judgment of family Court would reveal that the Family Court was mindful of the fact of the period of wedlock of the spouses, the birth of the two children out of the wedlock and the

second marriage of the husband and hatred of the wife to live with husband. These might have been the reasons before the family Court which precluded the family Court to order for return of benefit. Because under the law when a lady herself opts for dissolution of her marriage on the basis of "Khula" then she is bound to return whatever benefit/dower she received from her husband and this is the settled principle of the injunctions of Islam and law of the land. The Holy Qur'an has allowed the wife this privilege of seeking divorce. The basis and the origin of legality of Khula is the Qur'anic verse No.229 of Surah Al-Baqarah. Translation of which is as under:--

"A divorce is only permissible twice; after that, the parties should either hold together on equitable terms or separate with kindness. It is of the lawful for you (men) to take back any of your gifts (from your wives) except when both parties fear that they would be unable to keep the limits ordained by Allah. If ye Judges) do indeed fear that they would be unable to keep the limits ordained by Allah, there is no blame on either of them if she gives something for her freedom. These are, the limits ordained by Allah, so do not transgress them."

The Full Court judgment of this Court in case of Dr. Fakhr-ud-Din v. Mst. Kausar Takreem and another reported in PLD 2009 Peshawar page 92 has elaborately discussed this aspect of the issue and the same can be referred in this regard.

9. While reverting back to the facts and circumstances of the case in hand, the lady asked for dissolution of her marriage on the grounds other than Khula but the judgment of the family court would reveal that it was the Judge Family Court, who himself dissolved the marriage on the basis of Khula instead of other grounds by keeping in mind the peculiar facts and circumstances of the case. So, in such like situation, it is up to the Qazi/Judge, Family Court to see and determine as to whether the wife would be liable to return any of the benefit she received from her husband at the time of marriage and has also the authority to determine the quantum of such return. The Qazi/Judge has also the authority to refuse return of benefits and this aspect of the case has fully been explained in detail in the judgment of Dr. Fakhr-ud-Din, supra. No order regarding the return of any benefit in the circumstances of the case as discussed above appears to be a mindful and intentional decision, as the wife had spent a considerable period of her youth with the petitioner as a wife and she gave birth to two children. The husband had also contracted a second marriage. Though, a Muslim under Shariah can marry four wives but there are certain restraints in the shape of equal treatment between all the wives and doing justice amongst them. The law of the land also prohibits the second marriage unless permission is given by the first wife.

10. The submissions of the learned counsel for the petitioner also cannot be considered on the ground that the matter of dissolution of marriage between the spouses attained finality and the

same cannot be reopened in the manner as the petitioner has asked for through his civil suit for recovery of dower. Yet the other aspect of the same is that the same is not before the Court and a decree which attained finality cannot be interfered with in the given circumstances specially when the same is not before the Court.

11. As for as filing of separate civil suit for recovery of dower in the light of judgment in the case of Mst. Farhad, supra, is concerned, the view of this Court has changed especially after the Family Courts (Amendment) Ordinance (LV of 2002). In this regard the case of Muhammad Tariq v. Mst. Shaheen and 2 others (PLD 2006 Peshawar 189) can be referred wherein it was held "that dower paid and snatched by husband---Dower would remain as dower, neither it would undergo any change nor it would be transformed into a civil liability in case it was snatched or taken back-forcibly from wife by husband---Neither Muslim Family Laws Ordinance, 1961 nor provisions of West Pakistan Family Courts Act, 1964 had provided either impliedly or expressly that when dower paid was snatched by husband then for its retrieval, wife would have to make recourse to the civil court---Dower paid to wife and snatched by husband would automatically restore his liability to repay same and it would remain as a dower due to wife, triable by Family Court alone---Once dower was paid, then it would become the property of wife as her complete domain was established over it---Act of its snatching would amount to the disposal of her property and Family Court alone would have jurisdiction to take cognizance for the recovery of the same---Appellate Court had committed legal error by refusing to exercise jurisdiction vested in it with regard to dower---Impugned judgment and decree reversing judgment and decree of Family Court with regard to recovery of dower and directing plaintiff to have recourse to Civil Court for its recovery was held to be without lawful authority---Impugned judgment and decree of appellate Court, was set aside and it was directed to decide entire case/appeal on merits."

This case was filed in the year 2001 when a separate suit for dissolution of marriage by wife was also pending trial before Family Court and no such like objection was raised by the petitioner. Besides the objection, he himself filed his own suit for recovery of twenty tolas of gold in lieu of dissolution of marriage on the basis of Khula. So, we in the circumstances would not like to enter into this controversy.

When the attention of learned counsel for the petitioner was drawn to the fact that impugned herein are the findings of a civil Court in a civil suit for recovery, how the same were impugned by way of instant writ petition, he frankly conceded to the fact and submitted that the same can be converted into a revision petition and such conversion, he submitted, is supported by many of the precedents of this Court but in view of the peculiar circumstances of the case, as discussed above, this conversion would also not bear any fruit for petitioner. So, it is held that the petitioner has wrongly filed this writ petition instead of civil revision.

The learned counsel for the petitioner placed reliance on the unreported cases of this court in Writ Petition No.1381 of 2007 dated 7-5-2010 Mahboob v. Mst. Siraj Bibi and Writ Petition No.1220 of 2010 dated 17-5-2010 Shaista v. Haseeb Ahmad. But both the cases have no bearing on the merits of this case and are distinguishable. Hence, cannot be relied upon.

In this view of the matter, this writ petition being meritless is hereby dismissed as no illegality or jurisdictional defect in the peculiar circumstances of the case was established.

KMZ/199/P

Petition dismissed.