

**2017 C L C 35**

**[Balochistan]**

**Before Muhammad Ejaz Swati and Mrs. Syeda Tahira Safdar, JJ**

**AMANULLAH-----Petitioner**

**Versus**

**SADIA SHAH and others----Respondents**

C.Ps. Nos.884 and 885 of 2012, decided on 31st May, 2016.

**Family Courts Act (XXXV of 1964)---**

---S. 5, Sched.---Suit for recovery of dower amount and maintenance of wife and daughter---Plea of the husband, was that he had paid amount of dower in the shape of property---Trial Court, found that wife was not entitled for dower amount as the husband had proved that he had paid said amount to her in the shape of property---Appellate Court below reversed the findings of the Trial Court---Validity---Wife had herself admitted that property in question had been transferred in her name which fact had been mentioned in the divorce deed---Findings of the Trial Court had been discarded by the Appellate Court below on the ground that no evidence was available on record to show that the amount of dower was paid to the plaintiff, as divorce deed was not produced or exhibited---Findings of the Appellate Court below were based on misconstruction of evidence---Factum of divorce through divorce deed, arrived at between the parties, was neither in dispute, nor contents thereof, were under cloud---Question of non-exhibiting of divorce deed in evidence, would not affect the right of the party, as it was an admitted document---Non-production of divorce deed through evidence, would not change the admitted facts between the parties and it could be concluded that property was transferred in lieu of dower amount---Findings of Appellate Court, were reversed and that of the Trial Court, were upheld, in circumstances---Maintenance of daughter, which had been fixed by the Trial Court having not been assailed were not disturbed---Findings of the Appellate Court below that daughter of the plaintiff, was entitled for maintenance till attaining the age of majority, was not proper as daughter was entitled for maintenance till her marriage---Issue of maintenance of daughter was modified accordingly.

Mohammadan Law by Mulla, para 370 fol.

Nemo for Petitioner (in Constitutional Petitions Nos.884 and 885 of 2012).

Mudasir Nadeem and Noor Jan Buledi for Respondents Nos.1 to 4 (in Constitutional Petitions Nos.884 and 885 of 2012).

Date of hearing: 12th April, 2016.

## JUDGMENT

**MUHAMMAD EJAZ SWATI, J.---** Through this common judgment, we propose to dispose of Constitutional Petitions Nos.884 and 885 of 2012, as both the matters arising out of the same facts.

2. The referred cases are with facts that the private respondent had filed a suit for recovery of dower amount, her maintenance and maintenance for respondents Nos.2 to 4 against the petitioner. The Additional Family Judge, Quetta (hereinafter the "trial Court") vide judgment and decree dated 22nd June 2011 (hereinafter the "impugned judgment and decree") held as under:

a. plaintiff No.1 (Sadiah Shah) is not entitled for maintenance allowance from 27/07/2007, she is entitled for maintenance allowance only for her Iddat Period of three months at the rate of Rs.4000 per month (total Rs.12000/).

b. Plaintiff (Sadiah Shah) is not entitled for dower amount Rs.5,00,000/-,

c. Defendant has proved that he has paid dower amount of plaintiff No.1 (Sadiah Shah) Rs.5,00,000/- in the shape of property.

d. Plaintiff No.1 is entitled for maintenance allowance of her minors (plaintiffs Nos.2 to 04) at the rate of Rs.3000/- per month each for the sons namely Ishratullah and Owais from 16/12/2009 till this judgment i.e. 22/06/2011, till their majority and for the daughter namely Aliza from 16/12/2011 and for future till her marriage."

3. The petitioner filed an appeal against the above judgment and decree of the trial Court to the extent of awarding maintenance to the respondents. The respondents also filed an appeal bearing No.07 of 2012 to the extent of deciding issue No.2 against her before the District Judge (Adhoc), Quetta.

4. The learned District Judge (Adhoc), Quetta (hereinafter the "appellate Court") vide judgment and decree dated 26th November, 2012 (hereinafter the "impugned judgment and decree") after hearing the parties passed following order:---

i. The appellant / plaintiff is entitled to maintenance allowance only for her iddat period at the date fixed by learned trial court.

ii. The respondent/defendant is directed to pay dower amount of Rs.5,00,000/- to appellant/plaintiff.

iii. The respondent/defendant is directed to pay maintenance to minor Aliza from January 2010 till to-date and for future at the rate of Rs.3000/- per month till attaining her majority."

5. The petitioner has challenged the aforesaid judgments and decrees of the Courts below by way of filing Constitutional Petitions Nos.884 and 885 of 2012.

6. The petitioner had challenged the findings of the appellate Court mainly on the question of deciding issue No.2, and he prayed for setting aside of that issue.

7. The learned counsel for the petitioner through written arguments dated 5th May, 2016 submitted that the judgment of the trial Court is based on reasoning, but the appellate Court while deciding issues Nos.2 and 3 has failed to consider the evidence on record, therefore, the same is liable to be set aside and the judgment passed by the trial Court be maintained. It is further submitted that the maintenance related to minor Aliza was not properly appreciated by the appellate Court and the findings thereof be modified keeping in view the financial position of the petitioner.

The learned counsel for the respondents Nos.1 to 4 contended that the appellate Court had rightly decided the issue No.2, as the petitioner had failed to prove the payment of dower amount to the respondent No.1; that the transfer of property on the name of the respondent No.1, has no nexus with the dower of the respondent No.1.

8. We have heard the learned counsel for the parties and perused the record. The petitioner is mainly aggrieved from the judgment of the appellate Court, whereby issue No.2 has been decided against him and directed him to pay dower of Rs.500,000/- to the respondent No.1. Whereas the issue of maintenance is concerned, to that extent the appellate Court has also modified the issue of maintenance and directed that the respondent No.1 is entitled to maintenance allowance only for the iddat period at the rate fixed by the trial Court and in respect of maintenance of Aliza. From January, 2010 till to-date for future at the rate of Rs.3000/- per month till attaining her majority. There is conflicting views of the Courts below, it require reappraisal of evidence. The point for determination before this Court is as to whether the respondent No.1 is entitled for dower amount of Rs.500,000/- as to whether the daughter Aliza is entitled for maintenance till attaining her majority age or till her marriage. Whereas the question of dower amount is concerned, there is no dispute between the parties in respect of fixation of dower of Rs.500,000/- at the time of marriage, the respondent No.1 disputed its payment while the petitioner contended that in lieu of dower, he transferred property situated at Lasbella at Uthal on the name of the respondent No.1. The trial Court on the basis of evidence on record held that the dower amount of Rs.500,000/- has been received by the respondent No.1 in the shape of property, whilst the appellate Court reversed the findings of the trial Court in respect of issue No.2. The respondent No.1 during cross-examination admitted that on 18th November, 2009, a property situated at Lasbella at Uthal has been transferred in her name and in this respect, the aforesaid facts had also been mentioned in the Talaq Nama dated 16th December, 2009. This finding of the trial Court has been discarded by the appellate Court on the ground that no evidence is available on record to show that the amount of dower was paid, as Talaq Nama dated 16th December, 2009 was not produced or exhibited. The findings rendered by the appellate Court in this respect are based on misconstruction of evidence. The factum of divorce through divorce deed dated 16th December, 2009 arrived at between the parties is neither in dispute, nor the contents whereof are under cloud. In this respect, the respondent No.1 in her statement deposed that:

During cross-examination, she replied as under:

Whereas the contents of divorce deed dated 16th December, 2009 stipulates as under:

9. Admittedly the respondent No.1 in her statement admitted that the divorce had taken place in writing vide divorce deed dated 16th December 2009 and this document was not disputed by her at any stage, therefore, the question of non-exhibiting of the same in evidence will not affect the right of any party, as was an admitted document. Whereas, the transfer of the property on the name of the respondent No.1 is concerned, Ex.D/A and admission of the respondent No.1 during cross-examination, in this regard are sufficient admitted evidence that the plot was transferred in lieu of dower, therefore, non-production of divorce deed through evidence would not change the admitted facts between the parties. The respondent No.1 had admitted the factum of transfer of property on her name, therefore in presence of aforesaid evidence, it could be concluded that the property was transferred in lieu of dower, as the circumstances of the case show the intention of the parties from the inception of marriage till the breaking of tie of marriage through written divorce deed, therefore, the finding of the appellate Court in respect of issues Nos.2 and 3, are reversed and that of the trial Court are upheld.

Whereas the maintenance of daughter Aliza is concerned, which has been fixed by the appellate Court as Rs.3,000/- per month, which has not been assailed by the respondents, therefore, to that extent the findings of the appellate Court are not disturbed, however, the findings of the appellate Court that daughter Aliza is entitled for maintenance till attaining the age of majority is not proper as under Para 370 of Mohammedan Law, it is provided that the daughter is entitled for maintenance till her marriage, therefore, the issue of maintenance is modified accordingly.

In view of the above, the Constitutional Petitions Nos.884 and 885 of 2012, are partly allowed and the findings of the appellate Court to the extent of issues Nos.2 and 3 are set aside, consequently the findings of the trial Court shall hold the field and the findings in respect of maintenance related to minor Aliza are modified as mentioned hereinabove.

With the above modification, Constitutional Petitions Nos.884 and 885 of 2012 are decided accordingly.

HBT/39/Bal.

Order accordingly.