Judgment Sheet

IN THE PESHAWAR HIGH COURT, PESHAWAR
JUDICIAL DEPARTMENT

WP No.2143-P/2018.

Mst. Momina
Vs
Fahad Sajjad,etc

JUDGMENT

Date of hearing 16.02.2021.

Petitioner (s) by: Mr. Amir Javed Advocate.

Respondent(s) by: Mr. Moeenuddin Ghauri Advocate.

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S M ATTIQUE SHAH, J.- Through the instant petition filed under Article 199 of the Constitution of Islamic Republic of Pakistan 1973, petitioner has prayed for the following relief: -

> *"That on acceptance of this writ petition, this Hon'ble Court may be pleased to:*
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> *A. Declare that order dated 26.03.2018 passed by learned Family Court No.IV, Peshawar is illegal, without lawful authority and of no legal effect.*
>
> *B. Set aside/ quash the order dated 26.03.2018 passed by Family Court No.IV, Peshawar.*
>
> *C. Dissolve the marriage between the petitioner No.1 and respondent No.1 under Section 10(4) of the Family Court Act 1964 forthwith.*

D. Any other relief appropriate in the circumstances but not specifically asked for may also be granted as this Court deems appropriate.

2. Record depicts that marriage between parties solemnized on 18.4.2015 and; dower of petitioner was fixed to be Rs.50,000/- alongwith half share of respondent No.1 in the legacy of his deceased father's house; as well as, 12 tolas gold ornaments; out of which, 7 tolas was given to the petitioner at the time of Nikah; while 5 tolas still remains to be paid by respondent No.1; later on due to strained relation between the spouses, petitioner was expelled by respondent No.1 from house on 12.09.2015; which led to institution of Suit No.33/FC of 2017 for dissolution of marriage, recovery of dower, maintenance etc before the learned Family Court Peshawar. The suit was contested by respondent No.1 through filing written statement denying therein the stance of petitioner by raising various legal and factual objections. During pendency of the suit; as well after failure of efforts for pre-trial reconciliation; petitioner filed an application for dissolution of marriage under Section 10(4) of Family Courts Act 1964. The said application was contested by respondent and; after hearing parties, the same was dismissed by learned Judge, Family Court vide order dated 26.03.2018, hence instant writ petition.

3. Arguments heard; record perused.

4. Scanning of record depicts that petitioner filed a suit before the learned Judge, Family Court, for dissolution of marriage on the basis of cruelty alongwith recovery of dower, maintenance etc against the respondent No 1; which was contested by him through filing written statement; subsequently, after failure of reconciliation between the parties; petitioner filed an application for dissolution of her marriage forthwith under the provisions of Section 10(4) of Family Court Act, 1964; which was contested by respondent No 1 and; after hearing the parties, the same was dismissed by learned Judge, Family Court vide impugned order dated 26.3.2018, by holding that:-

> ***"So it is not justified rather self contradictory stance of the plaintiff that she is desirous of dissolution of her marriage at this preliminary stage on ground of cruelty and equally she is refusing to restore/ return the dower to defendant which on the fact of it is against the provisions of Section 10(4) of Family Court Act, 1964, which if done, the very purpose of this enactment would be defeated and it would be mockery of law. Basic law on the subject is very clear that Court is bound to dissolve marriage at pre-reconciliation stage if failed but simultaneously shall restore the dower to the husband, which like situation is not involved in the instant case.***
>
> ***Further more, there is plea of restitution of conjugal rights by the defendant which shall also be determined in light of pro and contra evidence and if marriages dissolved on the basis of cruelty without recording of evidence then it would be amounting to cause serious***

prejudice to defendant which is not the spirit of law hence, in any case marriage on the basis of cruelty cannot be dissolved at this stage.

In view of above findings application being devoid of merit is dismissed."

5. Learned counsel for petitioner fervently attacked the impugned order on the ground of its being illegal and; against the mandate of law. For the sake of convenience, Section 10(4) is reproduced as under: -

10(4). If no compromise or reconciliation is possible the Court shall frame the issues in the case and fix a date for recording of the evidence.

Provided 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 shall also restore to the husband the Haq Mehr received by the wife in consideration of marriage at the time of marriage."

Now the precise question for consideration of this Court is that whether in presence of other pending issues between the parties, marriage could not be dissolved forthwith upon the demand of the wife, after failure of reconciliation. The ibid question came up for hearing before this Court in case of ***"Mst .Saima Irum & 3 others Vs Tariq Javed and another" (2006 MLD 83 Peshawar),*** wherein the ibid provision had been interpreted in the following manner:-

7. In this case, the learned Judge Family Court vide order dated 26.02.2004 has not only dissolved the marriage between the parties without

specifying as to whether the marriage is being dissolved on the ground of 'Khula' or otherwise, but a look at the plaint of the petitioner/ wife would also reveal that she has not at all asked for "Khula" divorce and merely sought it on the grounds of cruelty, non-maintenance, non-payment of dower, desertion/ separation for more than one and a half year and failure upon respondent/husband to perform his marital obligation without any reasonable cause, reason and fault on the part of petitioner/ wife. In such a situation, if the leaned Judges of the Family Court are correct in dissolving the marriage between the spouses in the pre-trial conciliation proceedings by invoking the provisions of the added proviso to Section 10 of the Family Court Act, 194, they are wrong on the point of restoration of the dowered property, because neither the case would be proceeded only for adjudging the entitlement of the husband to the restoration of the Haq Mehr, nor the issue of dower would become redundant, but it would proceed for proper determination of the entitlement of both the parties to the receipt of dower even if the marriage is dissolved on the ground of Khula.

8. For the aforesaid reasons, we accept this writ petition and set aside both the impugned orders of the learned Family Court with the directions to proceed with the case in accordance with law and the observations made hereinabove. No order as to costs. The parties are directed to appear before the Family Court on 2.12.2004.

9. The office is directed to send copies of this judgment to all the District Judges and Family Courts in the provinces for future guidance."

Subsequently, the ibid question once again considered by this Court in the case of ***" Dr. Fakhr-ud-Din Vs Mst. Kausar Takreem and another" (PLD 2009 Peshawar 92);*** which was dealt with in the following manner: -

> ***"On the basis of the above principles, therefore, it has become imperative to give the proviso in question that meaning, the legislature wanted to give i.e, timely dissolution of marriage. Accordingly, it is held that the Family Court may grant decree for dissolution of marriage on the basis of "Khula" when pre-trial reconciliation efforts fail. However, the Court while granting decree for dissolution of marriage on the basis of "Khula" shall record sound and cogent reasons in support thereof and shall also state that after holding trial if the wife is found liable to pay back the considerations determined by the Court which she had received, the same are to be returned to the husband. However, the Family Court cannot defer the grant of decree on the basis of "Khula" for disruption of marriage because the parties are not in agreement on the payment of dower and the decree of "Khula" shall remain effective from the date on which it is pronounced."***

Likewise, in case of ***"Mst.Yasmeen Bibi Vs Muhammad Ghazanfar Khan and others" (PLD 2016 SC 613),*** the ibid question was dealt with by the august apex Court as under: -

> ***"15. In the case of dissolution of marriage on the basis of "Khula" a full bench of the High Court in the case of "Dr.Fakhr-ud-Din Vs Mst. Kausar Takreem and another(PLD 2009 Peshawar 92) while interpreting and construing all these new provisions introduced in the Family Court Act held that the relevant provisions of the Family***

Courts Act, 1964 and that of Muslim Family Laws Ordinance, 1961, were ultra-vires to the marriage on the basis of Khula because under the Islamic injunction and according to the relevant verses of Holy Quran the wife has only to return the other benefits, gives to her by way of gift etc and not the dower amount because that is most essential consideration for valid contract of marriage being a civil contract, which cannot become binding and valid unless the consideration is paid. In the said judgment, many guidelines and principles have been laid down and till date the said judgment holds the field, which needs to be followed and regarded without any exception unless and until it is set aside by the Supreme Court."

6. In view of above, it is crystal clear that whenever an application is filed by plaintiff for dissolution of her marriage; upon; failure of pre-trial reconciliation; then marriage is to be dissolved forthwith, through a speaking and reasonable order; after summary hearing and; the same could not be withheld or refused merely upon pendency of other contesting issues between the parties qua recovery of payment of dower, maintenance or other ancillary matters; which could at best be adjudged after recording pro & contra evidence of the parties. Albeit, if the marriage tie is kept intact on account of other ancillary issues; then, it would be denial of the right so conferred upon the wife by the law, as the very purpose and object of ibid provision is to salvage the wife from hateful union and; she should not be compelled in any circumstances to stay in the marriage

contract against her will and consent; which would be amounting to keep the tie of marriage forcefully intact, which is against the concept and notion of the ibid provision of law. The decree so passed shall be treated as a preliminary decree; which shall be merged into final decree, after recording of pro & contra evidence of the parties as the case may be, keeping in view the peculiar facts and circumstances of a case. Learned trial Court has wrongly construed the ibid provision, while dismissing the application of the petitioner and; thus, fallen into grave illegality.

7. Consequently, instant petition is allowed, the impugned order of learned Judge Family Court is set aside and; application of petitioner for dissolution of marriage is allowed; thereby the marriage between the spouses is dissolved forthwith; which order shall be merged into final decree, passed after recording pro & contra evidence of the parties.

Announced.
16.02.2021.

CHIEF JUSTICE

JUDGE