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Judgment Sheet

IN THE LAHORE HIGH COURT, BAHAWALPUR BENCH BAHAWALPUR

JUDICIAL DEPARTMENT

W.P. No.7630 of 2018

Muhammad Ghause

Versus

Additional District Judge, Bahawalpur & 02 others

JUDGMENT

Date of hearing	06.02.2024
Petitioner by:	Malik Shah Muhammad Khokhar, Advocate.
Respondent No.3 by:	Ms. Samina Qureshi, Advocate.

SHAKIL AHMAD, J.: This is a petition that has been filed under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 to assail judgments and decrees passed by learned Judge Family Court and learned Additional District Judge, Bahawalpur, whereby suit instituted by Mst. Salma Shahzadi (*hereinafter referred to as "respondent"*) against Muhammad Ghaus *(petitioner)* for recovery of Rs.5,00,000/- as additional dower was decreed vide judgment and decree dated 23.06.2017 and same was upheld by learned Appellate Court vide judgment and decree dated 04.05.2018.

2. Precisely, facts forming background to the filing of instant petition, are that respondent filed suit against petitioner for the recovery of Rs.5,00,000/- in terms of stipulation as contained against column No.17 of Nikah Nama, whereunder, it was settled that if husband would contract second marriage or pronounce divorce upon his wife, he would be liable to pay an amount to the tune of Rs.5,00,000/- as additional dower on demand. Petitioner contested the matter by filing written statement. In answer to the claim *qua* additional dower, petitioner took the stance that stipulation contained in Nikah Nama was the result of fraud and forgery done

by the father of respondent in connivance with *Nikah Khawn*. Learned Judge Family Court, in view of divergent pleadings of the parties, framed necessary issues. Both the parties led their oral as well as documentary evidence and learned Judge Family Court finally decreed the suit, whereby respondent was held entitled to receive Rs.5,00,000/- as additional dower from the petitioner. Judgment and decree of the trial court was assailed by petitioner by way of filing appeal, the same was dismissed by learned Additional District Judge, Bahawalpur vide judgment and decree dated 04.05.2018, hence this petition.

3. Heard learned counsel for the parties and record so annexed with the petition perused.

4. Petitioner's marriage with respondent was solemnized on 29.09.2013 and after *Rukhsti* the spouses started living together. Matrimonial life, as per contents of plaint, did not remain peaceful and happy owing to insistence of petitioner to respondent qua demand of Rs.20,00,000/-from her parents and on her refusal to accede to such demand, matter culminated in expulsion of respondent by the petitioner from his home that prompted the respondent to file suit for recovery of dower, maintenance and dowry articles and same was finally decreed. Subsequent to the passing of that decree, petitioner divorced the respondent on 24.06.2015. On facts, petitioner contested the matter admitting the fact qua pronouncing of divorce upon respondent with the explanation that actually he pronounced divorce on the insistence of respondent. Factual controversy with regard to insertion of additional dower in case of divorce or contracting of second marriage, has been resolved by the courts below after considering the evidence produced by the parties at trial. Undeniably, petitioner who is signatory of Nikah Nama, did not himself enter in the witness box to depose his stance taken in the written statement that the stipulation was subsequently added in the Nikah Nama at the behest of respondent's father being in league with the *Nikah Khawn*. Even no proceedings whatsoever, were initiated either against *Nikah Khwan* or any other person in respect of any wrong entry made in the Nikah Nama. Had it been the stance of petitioner that the entry in respect of additional dower was the result of fraud and forgery, petitioner should have approached the controlling authority i.e. Deputy Commissioner

concerned seeking correction in the entries of Nikah Nama besides initiation of appropriate proceedings against the wrongdoers. However, no such effort whatsoever was made either by petitioner or any other person on his behalf. Both the courts below, thus rightly brushed aside the stance taken by the petitioner. The findings over factual controversy recorded by both the courts below having jurisdiction to decide the matter can hardly be reviewed while invoking the extraordinary constitutional jurisdiction of this Court. In case *"Shajar Islam v. Muhammad Siddique"* **(PLD 2007 SC 45)**, the Supreme Court observed that this Court should not interfere with the findings on controversial questions of facts based on evidence even if those findings were erroneous. While elucidating the scope of judicial review under Article 199 of the Constitution, it was observed as under: -

> *"...that the scope of judicial review under Article 199 of the Constitution in such cases was limited to instances of misreading or non-reading of evidence or when the finding was based on no evidence, leading to miscarriage of justice and that the high court should not disturb findings of fact through a reappraisal of evidence in its constitutional jurisdiction or use this jurisdiction as a substitute for a revision or appeal and that an interference with the lower courts' findings of fact was beyond the scope of the high court's jurisdiction under Article 199 of the Constitution. ..."*
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> (Underlining is to supply emphasis).

Recently, in case "*Mst. Tayyeba Ambareen and another v. Shafqat Ali Kiyani and another"* **(2023 SCMR 246),** it was further observed by the apex Court that the objective of exercising jurisdiction under Article 199 of the Constitution is to foster justice, preserve rights and to correct the wrong. Learned counsel for petitioner remained unable to point out any jurisdictional defect or blatant illegality committed by both the courts below while resolving the factual controversy qua additional dower as mentioned in Nikah Nama. Findings of both the courts below to that extent, therefore, cannot be taken to any exception.

5. Adverting to the submission of learned counsel for petitioner that if stipulation hinted against column No.17 of the Nikah Nama is believed to have been incorporated with consent of the petitioner, even then respondent was not

entitled to the grant of decree as the said stipulation is against the injunctions of Islam for the reason that the same created impediment to exercise the right of pronouncing divorce and contracting second marriage which even otherwise was available to petitioner in accordance with the injunctions of Islam. Before dilating upon the proposition, it seems apt to reproduce hereunder the stipulation as hinted against column No.17 of Nikah Nama: -

"اگر دوسری شادی کرے گا یا طلاق دے گا تو مبلغ پانچ لاکھ روپے اضافی مہر عند الطلب ادا کرے گا۔ اگر دلہن کی طرف سے طلاق کا مطالبہ ہوا تو تمام شرائط ختم ہوں گی"

From the bare perusal of above, it transpires that both the parties agreed upon the stipulation qua payment of additional dower in the event of contracting second marriage by the petitioner or pronouncing divorce upon respondent by the petitioner. It has further been stipulated that if divorce is demanded at the behest of bride then these stipulations would be deemed to have been cancelled. Narration given against column No.17 of Nikah Nama qua the additional dower can legitimately be counted as deferred dower that was to become payable on happening of any of the events so mentioned therein. In the instant case since petitioner himself divorced the respondent, the latter was entitled to the decree for the additional dower to the tune of Rs.500,000/-. Needless to observe that the stipulation agreed between the parties qua payment of certain amount by petitioner to the respondent on the event of divorce or contracting of second marriage, in no way curtail the right of husband to pronounce divorce or even to contract second marriage. Any stipulation or condition agreed between the parties mutually and with their free consent cannot be considered as an absolute bar to either pronounce divorce or to contract second marriage. In case *"Ghulam Shabbir v. Mst. Abbas Bibi and others"* **(2022 CLC 963)** the moot point, whether any condition incorporated in the Nikah Nama qua payment of compensation to wife in case of divorce was contrary to the law and Islamic injunctions or not, was taken up and resolved in the following terms: -

> *"3…… The vires and constitutionality of the Muslim Family Law, Ordinance, 1961 and schedule thereto, which included to Nikah Nama, were variously subjected to challenge successfully. Clause 19 forms part of Nikah Nama - Form-II, added in terms of Rules 8, 10, 11 and 12 of the W.P. Rules under the Muslims Family Law Ordinance,*

1961.

4. Clause 19 of Nikah Nama in this case is grossly misconstrued. The financial benefits agreed mutually are in the nature of reasonable financial support for setting her free. There is no cavil that terms of Nikah Nama constitutes a civil contract between the parties, both of which are at liberty to agree to the terms of arrangement. Clause-19, as available in Nikah Nama, is not in the nature of absolute bar qua right to divorce. It is not disputed that petitioner had divorced the wife - which manifest that no bar to divorce was imposed.

5. As far as contractual obligation in column 19 is concerned, it was agreed and factum of Nikah Nama is not disputed. The amount agreed in terms of clause-19 of Nikah Nama is spousal support - having all the attributes of alimony - wherein reasonable benefits were offered to enable ex-wife to have dignified and comfortable life. There is no restriction that husband cannot agree to arrange for maintenance or agree to extend fiscal advantage to the wife, even after the divorce. This nature of the benefit / advantage, which is not in any manner is restricting right of divorce, is in fact an act of bestowing benefit or gift upon wife to support her, hence, cannot be termed as illegal or contrary to the spirit of ISLAM and teachings of Quran."

An agreement for dower was nonetheless binding on the petitioner as the same was made at the time of solemnization of marriage[1]. Even as per para 336(2) of the Principles of Muhammadan Law by D.F. Mulla, if the marriage was consummated, the wife becomes entitled to immediate payment of whole of the unpaid dower both prompt and deferred.

6. Dower is a sum of money or other property which wife is entitled to receive from husband in consideration of marriage. The word 'consideration', however, cannot be deemed at par with the sense in which the word is used under the provisions of the Contract Act, 1872. A marriage is valid although no mention be made of the dower by the contracting parties as the term Nikah in its literal sense signifies a contract of union which is fully accomplished by the bond of a man and woman. Moreover, payment of dower is enjoined merely as a token of respect, therefore, the mention of it is not absolutely essential to the validity of marriage[2]. The command of Allah the Almighty as to giving of dower to woman as ordained in *Surah Al-Nisa* verse No.4 reads: -

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1 Para 45 Anglo-Muhammadan Law By SIR ROLAND KNYVET WILSON (Fifth Edition). Published in 1921 by CALCUTTA AND SIMLA, THACKER, SPINK & CO, LONDON: W.THACKER & CO., 2, CREED LANE, E.C. **AND** Book 2 Chapter 3 of Second Edition of THE HEDAYA OR GUIDE A COMMENTARY on the MUSLIM LAWS by Charles Hamilton.

2 Second Edition of THE HEDAYA OR GUIDE A COMMENTARY on the MUSLIM LAWS by Charles Hamilton

> *4. "And give unto the women (whom ye marry) free gift of their marriage portions. But if they of their own accord remit unto you a part thereof, then ye are welcome to absorb it (in your wealth)[3]".*

In *Sura Al-Maida* Verse No.5 it has further been enjoined qua due *mahr* in the following terms: -

> *"This day are (all) good things made lawful for you. And the food of those who have received the Scripture is lawful for you, and your food is lawful for them; and so are the virtuous women of the believers and the virtuous women of those who received the Scripture before you (lawful for you) when ye give them their dowries and take (them) in marriage, not in fornication, nor taking them as secret concubines. And whose denieth the faith, his work is vain and he will be among the losers in the Hereafter[4]".*

No classification of dower either as prompt or deferred has been found to be given in the Holy Quran. Even, in case "*Dr. Sabira Sultana v. Maqsood Sulari, Additional District and Sessions Judge, Rawalpindi and 2 others"* **(2000 CLC 1384)**, this Court went on to observe that there being no classification of the dower as prompt and deferred in the Holy Quran and Sunnah, the deferment of payment of dower for an indefinite period with the consent of the wife was not prohibited. Relevant excerpt reads as under: -

> *"There being no classification of the dower as prompt and deferred in the Holy Qur'an and Sunnah, the deferment of the payment of dower for an indefinite period with the consent of the wife is not prohibited, but if a wife makes demand of its payment, the husband being under an obligation to make payment of the same, cannot further defer it on any excuse. The provisions of section 6(5) of the Muslim Family Laws Ordinance, 1961 being not in conflict with Islam, it is mandatory for a husband to pay entire amount of dower, whether prompt or deferred, in case of entering into contract of second marriage in presence of first wife without her permission."*

Any amount/property agreed to be paid by the husband to wife on the happening of some future event, by all intents and purposes be counted as a deferred dower to be paid by the husband on the happening of such event. While

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[3] Translation of the Holy Quran by Marmaduke Pickthall
[4] Translation of the Holy Quran by Marmaduke Pickthall

discussing the scope and nature of prompt and deferred dower, Syed Ameer Ali, a prominent jurist of his age, in his celebrated compilation Mohammedan Law (Volume II) that was published in 1965 by All Pakistan Legal Decisions, Lahore while defining prompt and the deferred dower observed as under: -

> *"**Prompt and deferred dower.***
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> *As there is nothing in the Koran or in the traditions tending to show that the integral payment of the dower prior to consummation is obligatory in law, the later jurisconsults have held that a portion of the mahr should be considered payable at once or on demand, and the remainder on the dissolution of the contract, whether by divorce or the death of either of the parties. The portion which is payable immediately is called the mahr-i-mu'ajjal, "prompt" or "exigible"; and a wife can refuse to enter the conjugal domicile until the payment of the prompt portion of the dower. The other portion is called mahr-i-muwajjal "deferred dower" which does not become due until the dissolution of the contract. It is customary in India to fix half the dower as prompt and the remaining moiety as deferred or "postponed:" but the parties are entitled to make any other stipulation they choose. For example, they may allow the whole amount to remain unpaid until the death of either of the husband or the wife. Generally speaking, among the Musulmans of India, the deferred dower is a penal sum, which is allowed to remain unpaid with the object of compelling the husband to fulfill the terms of the marriage-contract in their entirety."*
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> (Underlining is to supply emphasis).

In case *"Sultan Begum v. Sarajuddin"* **(AIR 1936 Lahore 183)** while discussing the spirit and importance of the dower it was observed as under: -

> *"Dower has important uses which affect the domestic life of the Muhammedans. The law giver of Islam was anxious to safeguard the wife against the arbitrary exercise of the right of divorce by the husband. If she survived her husband and his other heirs illtreated her, she could not be thrown into street but would be able, apart from her legal share, to enforce against them her claim for dower which must be paid out of the heritage before the assets of the husband are distributed among the heirs. This is the keystone of the Muhammedan Law of dower in its purity."*

Faiz Badruddin Tyabji in para 98 of his famous work 'Muhammadan Law'[5], defined the terms prompt and deferred dower in the following words: -

> *"Mahr may be (a) either prompt, or exigible (in Arabic mu'ajjal) i.e., payable immediately on marriage if demanded by the wife or (b) deferred (in Arabic muwajjal) i.e., payable on the dissolution of marriage, or the happening of some specified event".*
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> *(emphasis supplied)*

In view of above, it can very conveniently be resolved that where no specific or definite period is settled for the payment of deferred dower, wife would become entitled to dower at the event of dissolution of marriage or on the death of any of the spouses. If deferred dower is agreed to be paid on the happening of some specified event, the same would become payable on the occurrence of that specified event. In the instant case, there was a specific stipulation in the Nikah Nama that in case of contracting of second marriage or divorcing the respondent, petitioner would pay an additional dower to the tune of Rs.500,000/-. Undeniably, petitioner has divorced the respondent, therefore, respondent was entitled to the dower to the tune of Rs.500,000/-as stipulated in Nikah Nama. It would not be out of context to mention here that initially petitioner did not admit the insertion of additional dower in Nikah Nama, therefore, he cannot argue that divorce was given by him on the asking of respondent and her father. Since it has been resolved by the courts below that the entry qua additional dower was a genuine entry, the same would be construed strictly and as a whole, therefore, stance taken by petitioner in his written statement that he pronounced divorce on the asking of respondent and her father needs to be taken up and resolved in view of evidence adduced by petitioner at trial. Petitioner simply failed to substantiate his stance as taken in his written statement in reply to paragraph No.5 of the plaint qua pronouncing of divorce upon respondent on her insistence. Neither Muhammad Akhtar nor Muhammad Amjad who were claimed to be the witnesses of the happening whereby respondent and her father insisted the petitioner for giving divorce to respondent, have been produced to substantiate the said version. Muhammad Ashiq DW-2 even did not say anything about demand allegedly made by respondent or her father for

[5] third edition published by N.M. Tripathi & Co., Bombay 1940

pronouncing divorce upon the respondent. In this view of the matter, it can conveniently and legitimately be resolved that petitioner at his own divorced the respondent and the sentence qua divorcing respondent on her asking as mentioned in the written statement was an afterthought tale presumably added by a design to counter in anticipation the stipulation mentioned against column No.17 of the Nikah Nama.

7 Last but not the least, this Court in its extraordinary constitutional jurisdiction would not take any exception to the judgments passed by the courts having jurisdiction and lawful authority to decide the matter on merits unless some jurisdictional error or blatant illegality has been shown to be committed causing miscarriage of justice. It has been observed by the Supreme Court of Pakistan in case titled *"M. Hamad Hassan v. Mst. Isma Bukhari and 2 others"* **(Civil Petition No.1418 of 2023)** that once a matter has been adjudicated upon on facts by the trial and the appellate courts, this Court in its constitutional jurisdiction cannot exceed its powers by reevaluating the facts or substituting the appellate courts' opinion with its own. It has further been observed by the Supreme Court of Pakistan that the acceptance of finality of the appellate courts' findings is essential for achieving closure in legal proceedings conclusively resolving disputes, preventing unnecessary litigation, and upholding the legislature's intent to provide a definitive resolution through existing appeal mechanisms. In case *"Arif Fareed v. Bibi Sara and others"* **(2023 SCMR 413)**, the Supreme Court of Pakistan observed as under:-

> *"7. ... The legislature intended to place a full stop on the family litigation after it was decided by the appellate court. However, we regretfully observe that the High Courts routinely exercise their extraordinary jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 as a substitute of appeal or revision and more often the purpose of the statute i.e., expeditious disposal of the cases is compromised and defied. No doubt, there may be certain cases where the intervention could be justified but a great number falls outside this exception. Therefore, it would be high time that the High Courts prioritize the disposal of family cases by constituting special family benches for this purpose."*

Learned counsel for the petitioner failed to point out even a single circumstance of any patent illegality or jurisdictional error in the impugned judgments and decrees. No case warranting any interference in the impugned judgments & decrees at all is made out.

8. The upshot of above discussion is that petition in hand is devoid of any merits, the same is dismissed.

(SHAKIL AHMAD)
JUDGE

Approved for reporting.

Judge

*Azhar**