

Journal

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Court

SINDH HIGH COURT

Date

2006-03-06

Appeal No.

CIVIL TRANSFER APPLICATION NO. 10 OF 2005

Judge

SARMAD JALAL OSMANY

Parties

ABDUL SATTAR APPLICANT VERSUS MST. KALSOOM (RESPONDENT)

Lawyers

FAIZ MUHAMMAD BROHI FOR APPLICANT. ARBAB ALI CHANDIO AND MUHAMAMD YAKOOB LAKHAIR FOR RESPONDENT.ABDUL QADIR SHAIKH AS AMICUS CURIAE.

Statutes

WEST PAKISTAN FAMILY COURTS ACT (XXXV OF 1964) - SS. 5, 10(4), PROVISO DISSOLUTION OF MUSLIM MARRIAGES ACT (VIII OF 1939) - S.2 ISLAMIC LAW

Judgment

S ARM AD JALAL OSMANY, J.-Vide this Transfer Application it has been prayed that Family Suit No.77 of 2005 filed by the respondent against the applicant for dissolution of marriage on the basis of Khula' pending with the learned 1st Senior Civil Judge, Sukkur be transferred to any Family Court in District Naushahro Feroze on the grounds mentioned therein. Vide order dated 10-10-2005, .the Transfer Application was dismissed. However, learned counsel were directed to address the Court on the issue regarding dissolution of marriage between the parties upon failure of pre-trial proceedings, in terms of the proviso to section 10(4) of the Family Courts Act. 1964 as the respondent had stated before myself that although such pre-trial had failed between her and her husband (the applicant) yet the learned Family Court had not decreed her suit on the basis of Khula'. Mr. Abdul Qadir Shaikh was requested to assist the Court as Amicus Curiae. Comments were also called from the learned Family Court.

2. In this regard learned counsel for the respondent has submitted that per the diaries of the learned Family Court on 5-9-2005, pre-trial had failed between the parties and hence in terms of the proviso to section 10(4) of West Pakistan Family Courts Act, 1964, the Suit filed by the respondent against the applicant being Family Suit No. 77 of 2005 before the learned 1st Senior Civil/Family Judge, Sukkur should have been decreed on this ground alone. Per learned counsel this was the only course left open to the learned Family Court as the issue regarding dower amount (Haq Mahr) was not contested and so also no other issues had been raised between the parties.

3. Mr.Abdul Qadir Shaikh learned Amicus Curiae has firstly stated that according to the learned religious scholars, the only consideration for grant of Khula' is remission of dower if not received by the wife and if so received an offer to return the same to the husband. If this be done then Khula' can be granted. However, under no circumstances is the wife obligated to return gifts etc.; given to her by the husband other than by way of dower. Per learned counsel even under the Bridal Gifts and Dowry Articles Act, 2004, all the benefits received by the wife from the husband prior to and after the marriage other than dower amount is not to be returned to the latter upon a divorce between the parties. In this regard learned counsel has referred to Bayan-ul-Quran by Hazart Moulana Ashraf Ali Thanvi and Ahsan-ul-Khitaba by Mufti Rasheed Ahmed Khan. Furthermore in Bahishti Zewer authored by Moulana Thanvi, it has been stated that where the husband is at fault, he should never even demand the return of dower amount from his wife upon divorce taking place between the parties. In this respect he has also cited Muhammad Zafar v. Judge Family Court 2005 CLC 1844. Insofar as the proviso to section 10(4) of the Act is concerned, learned counsel has submitted that where the only issue before the learned Family Court is that of dower and the same is not disputed between the parties, then in terms of the said proviso a decree for dissolution of marriage is to follow immediately upon pre-trial proceedings having failed However, where this issue is disputed, it has to be resolved before any decree for dissolution of marriage can be passed by the learned Family Court. Similarly per learned Amicus Curiae, even where the issue of dower is not disputed but other issues have been raised in the matter before the Family Court viz.

custody of children, return of dowry articles and/or maintenance, again these would have to be resolved before a decree could be passed since no preliminary decree can be passed in family suits as per section 17 of the Act, the C.P.C. is not applicable.

4. I have heard both the learned counsel as well as learned Amicus Curiae. It would be seen that the West Pakistan Family Courts Act, 1964 was amended in 2002 with a view to expediting family suits and also allowing the wife, in a Suit for dissolution of marriage, to claim return of dowry articles/personal property, maintenance, custody of children, visitation rights etc. In this regard reference can be made to the newly added proviso to section 7(2) of the Act. So also vide section 12(a) a family Suit is to be disposed of within a period of six months from the date of institution. Finally per the proviso to section 10(4) of the Act in a suit for dissolution of marriage, where the pre-trial fails between the parties, then a decree for dissolution is to be passed forthwith and at the same time the Family Court shall restore to the husband the Haq Mahr (dower amount) received by the wife. This amendment is in consonance with Islamic law as under the same, marriage is a civil contract and like other civil contracts can be terminated at the behest of either party, although in the eyes of Allah Almighty divorce is one of the most abhorrent of acts. Hence the wife can obtain dissolution of her marriage by remitting the dower amount if not received and paying it back to the husband if so received. Consequently, where there is no dispute between the parties on the issue of dower, then in terms of the proviso to section 10(4) of the Act a decree for dissolution of marriage on the basis of Khula' or on any other ground is to be passed immediately upon the failure of pre-trial proceedings between the parties. However, where a dispute arises on this issue between the parties as to the payment/receipt/remission of dower then the same would have to be resolved by the Family Court. In this situation if the wife is willing to deposit the dower amount in Court, then too a preliminary decree for dissolution of the marriage should be passed by the Family Court whereafter the disputed issue regarding the dower amount could be resolved. Of course if the wife does not deposit the dower amount in Court; the matter would have to be decided upon taking evidence whereafter the decree should be passed accordingly. In this connection it would be seen that where the husband asserts payment but the same is denied by the wife, he would have to prove the same because the onus of proof is always upon the person who alleges a fact. Reference can also be made to *Mulkhan Bibi v. Muhammad Wazir Khan PLD 1959 (W.P.) Lahore 710*. As regards section 17 of the Family Courts Act, 1964, which provides that the Qanun-e-Shahadat, 1984 and the Code of Civil Procedure, 1908 shall not apply to proceedings before the Family Court, in my opinion the same does not debar such Court from passing a preliminary decree dissolving the marriage on the basis of Khula' or any other ground. The provision of section 17 as to non-applicability of the Qanun-e-Shahadat Order and Civil Procedure Code in my view, is to expedite the proceedings before the Family Court so that the same are not delayed for lack of procedural formalities as contained in the aforementioned laws. The same cannot be construed so as to defeat the purposes of the Family Courts Act, 1964 which is a beneficial piece of legislation designed to expedite family cases. It may also be observed that per settled law the only consideration for dissolution of marriage on the ground of Khula' is the remission of dower amount by the wife if not received or payment to the husband if received. All bridal gifts etc.; given to the wife before or after the marriage are not to be returned to the husband.

5. Insofar as other issues agitated by the wife before the Family Court in a suit for dissolution of marriage viz. return of dowry articles, custody of children and maintenance etc.; where these are disputed by the husband obviously such contentious issues could only be resolved after evidence has been recorded and the decree would follow. However, where the issue of dower is not contested, in my opinion, a preliminary decree

dissolving the marriage can be passed upon the failure of pre-trial proceedings whereafter the other issues as stated above could be decided by the learned Family Court. Again the same result would follow if the wife deposits the dower amount in Court where this is a contested issue whereafter the same could be decided.

6. From the foregoing discussion the following broad principles can be laid down vis-a-vis the procedure to be followed by the Family Court in suits for dissolution of marriage on the basis of Khula' or on any other ground filed by a Muslim wife where pre-trial proceedings fail.

(a) Where the only relief sought by the wife in her suit is dissolution of marriage on the basis of Khula' or on any other ground and pre-trial proceedings fail between the parties, then the Family Court is bound to decree the suit dissolving the marriage where there is no dispute between the parties as to the dower amount. However, where such a dispute arises, and the wife deposits the dower amount in Court, a preliminary decree for the dissolution of marriage should be passed whereafter this issue would be decided by the Family Court upon taking of evidence. Of course where the wife does not deposit the disputed amount of dower in Court then no preliminary decree can be passed and the matter would have to be decided after taking evidence. In this context it is important to note that dissolution of marriage by way of Khula' is only premised on remission of dower amount if not received and payment of the same to the husband if so received by the wife. She is not bound to return gifts received before or after the marriage to the husband.

(b) Where besides dissolution of marriage, the wife in her suit seeks other reliefs viz. custody of children, maintenance and return of dowry articles etc.; then again if the issue of dower is not disputed, a preliminary decree can be passed dissolving the marriage where the pre-trial proceedings fail. Again where this issue contested and the wife deposits the dower amount in Court a preliminary decree should be passed dissolving the marriage. Thereafter this issue could be resolved through evidence along with other disputed issues if any i.e. custody of children, return of dowry articles and maintenance etc. However, if the wife does not deposit the dower amount in Court, then no preliminary decree can be passed for dissolution of marriage in which event this issue along with other contested issues would have to be decided by the Family Court after taking evidence.