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Court
SINDH HIGH COURT

Date
2013-09-20

Appeal No.
CONSTITUTION PETITION NO. 2875 OF 2012

Judge
ZAFAR AHMED RAJPUT

Parties
SAEED ALAM (PETITIONER) VERSUS FAMILY JUDGE, ROHRI THROUGH ADDITIONAL ADVOCATE GENERAL AND ANOTHER RESPONDENTS

Lawyers
SHAHZAD GUL KALWAR FOR PETITIONER. SIKANDER ALI JUNEJO AND SHUHABUDDIN SHAIKH FOR RESPONDENTS.

Statutes
WEST PAKISTAN FAMILY COURTS ACT (XXXV OF 1964) - SS. 10 (4) AND 5, SCHEDULE MUSLIM FAMILY LAWS ORDINANCE (VIII OF 1961) - FORM II, COLUMN 1 WEST PAKISTAN FAMILY COURTS ACT (XXXV OF 1964) - S. 10 (4) CONSTITUTION OF PAKISTAN - ARTICLE 199

Judgment

ZAFAR AHMED RAJPUT. J- Through this constitutional petition under Article 199 of the Islamic Republic o'.' Pakistan. 1973 the petitioner seeks setting aside of the order dated 1-9-2012, passed by the learned Family Judge, Rohri, District Sukkur in Family Suit No. 24 of 2012 (Old Family Suit No. 85 of 2011).

2. Briefly stated the facts of this petition are that the respondent No.2/ plaintiff Mst. Jamila filed a suit for dissolution of marriage and recovery of dowry articles before the learned Family Judge, Rohri, alleging therein that she solemnized marriage with the petitioner/ defendant on 3 i -12-2010 against the dower/Hag Mahr of Rs. 100.000 (deferred) which is unpaid till now; that at the time of Rukhsati the dowry articles, as per list attached, were given by her mother; that she resided happily with petitioner for about one month, thereafter, the petitioner changed his attitude and started quarrelling on pity matters and the marital relations aggravated to such an extent that in the month of June, 2011 the respondent No.2 was Beaten by the petitioner mercilessly and under such compelling circumstances, she had to leave the house of petitioner in three clothes, therefore, she was not willing to reside with the petitioner due to cruel conduct of petitioner. It is the case of the respondent No.2 that she has developed grave aversion for petitioner to the extent that she cannot live as his wife within the limits prescribed by Al-Mighty God.

3. The petitioner/defendant filed his written statement, wherein he has denied the allegations of respondent No.2 and claimed that he has paid the dower amount of Rs. 100.000 to respondent No.2 in the shape of cash before witnesses during a FAISLA.

The efforts taken by the Family Court at pre-trial for reconciliation were failed, therefore, vide order dated 1-9-2012, the Family Court dissolved the marriage on the basis of 'KHULA' under the Proviso of subsection (4) of section 10 of the West Pakistan Family Courts Act, 1964. (hereinafter referred to as "the Act of 1964") The operative part of the said impugned order reads as under:- "The efforts have been made to reconcile the matter/dispute between the parties (plaintiff and defendant) through negotiations but all in vain. Plaintiff stated that defendant has miserably failed to maintain her properly and use to beaten her, even the defendant has contracted second marriage, .despite the fact she has given more than enough time to the defendant. The plaintiff is not ready to join the defendant on any cost, while defendant is ready to keep the plaintiff as his wedded wife. Under these circumstances and in view of the aforesaid reasons when the plaintiff is not ready to join the defendant on any cost and stated that she has developed a complete hatred towards defendant and it is not possible for her to live with defendant as wedded wife, within the limits prescribed by the Almighty Allah, hence I have no other option except to declare the pre-trial proceedings failed, therefore I hereby declare the pretrial proceedings as failed and dissolve the marriage of the plaintiff with defendant by way of Khula.

Further considering the pleadings of the parties for other reliefs the following issues are framed.

(1) Whether the defendant has paid the dower to the plaintiff and he is entitled for the recovery of same? (2) Whether the plaintiff is entitled for recovery of dowry as per list

annexed with the plaint? (3) What should the decree be?" 4. Being aggrieved by the said order, the petitioner has invoked the constitutional jurisdiction of this Court.

5. I have heard Mr. Shahzad Gul Kalwar. the learned counsel for the petitioner. Mr. Sikander Ali Junejo, the learned counsel for the respondent No.2 and perused the material available on record.

6. Learned counsel for the petitioner has argued that the impugned order has been passed in a very hasty manner without considering the settled principle of law that at the time of passing interim decree for dissolution of marriage, Haq Mahr received by the wife shall be restored: that the word 'shall' so mentioned in section 10(4) of the West Pakistan Family Courts Act, 1964, makes it mandatory in nature as such the learned trial Court has no jurisdiction to use discretionary powers while passing decree for dissolution of marriage by way of 'KHULA' without restoring the amount of dower. In support of his contention, the learned counsel for the petitioner has relied upon the case of Abdul Sattar v. Mst. Kalsoom (PLD 2006 Karachi 272) 7. Learned counsel for the respondent No.2 has opposed this petition and argued that the object and scope of section 10(4) of the Act of 1964 is to avoid delay in proceedings and to afford a remedy to wife seeking Khula expeditiously. He has further argued that the case of the respondent No.2 is that she neither received Haq Mahr from petitioner at the time of marriage nor even thereafter; therefore, while granting Khula, the learned Family Judge framed an issue regarding controversy of the receipt of dower amount by the respondent No.2. hence, the trial Court has not violated the provisions of section 10(4) of the Act of 1964 decreeing the suit for dissolution of marriage on the ground of 'KHULA' without adjudicating controversy regarding payment of 'Haq Mahr'. In support of his arguments, the learned counsel for the respondent No.2. He has relied upon the cases of Mudassar Butt v. Judge Family Court, Lahore and another (2010 CLC 1729) and Haris Bin Hassan Akhtar Jang v. Judge Family Court and others (2013 CLC 94).

8. I have given my conscious appraisal to the material available on record. It appears that the respondent No.2 has stated categorically in her plaint that the petitioner has not paid her the dower amount till date, while, in para-2 and 4 of his written statement, the petitioner claims to have paid the same to the respondent No.2 in cash before witnesses- during 'FAISLA1. Due to such divergent pleadings of the parties, it is obvious that the learned Family Judge refrained from passing an order on 1-9- 2012 for returning of dower amount to the petitioner or depositing it in Court and preferred framing of issue No.I (supra) to resolve the controversy after recording the evidence of the parties.

9. Now I revert to the principles held by this Court in the case of Abdul Sattar (supra), relied upon by the learned counsel for the petitioner, the view was held in said case that where the only relief sought by the wife in her suit for the dissolution of marriage on the basis of 'Khula' or on any other ground and pre-trial proceedings fails 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 the preliminary decree for the dissolution of marriage should be passed where after this issue would be decided by the Family Court upon taking of evidence and 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.

10. Having gone through respectfully the case of Abdul Sattar (supra), I am of the opinion that the principles held by this Court in the said case, are distinguishable so far the facts of the present case are concerned. In the present case contrary to the assertion of respondent No.2 that the petitioner has not paid her dower amount/Haq Malir till that, the petitioner's claim is that he has paid the dower amount in FAISLA. As such the parties have adopted divergent stances on this issue; therefore; it is not possible for Family Court to adjudicate such controversy Without recording proper evidence and providing the parties opportunity to substantiate their claims with material available. Now the precise proposition for the adjudication at .this juncture is to determine the, powers of Family Court in terms of Proviso to section 10(4) of the Act of 1964 regarding restoration of dower amount in favour of petitioner/husband after failure of reconciliation proceedings. So far what I have considered, it is clear from the perusal of available material that the petitioner and respondent No.2 were married earlier and, as per contention of petitioner, the dower amount/Haq Mahr was paid to- respondent No.2 afterward in a FAISLA. It is not mentioned in the written statement filed by the petitioner as to when, where and between whom the alleged FAISLA was made or the same was brought in black and white or not, however, it is clear for the perception of this Court that the dower amount was not paid by the petitioner to respondent No.

2 at the time of marriage. The proviso added to section 10(4) of Family Courts Act, 1964 reads as under:- "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 Mahr received by the wife in consideration of marriage at the time of marriage".

A plain reading of the above proviso has made it ciear that the right to exercise 'KHULA' by wife is dependent upon restoration of dower amount/Haq Mahr to the husband, but it qualifies with the words 'at the time of marriage'. It is not the case of petitioner here that he paid the Haq Mahr at the time of marriage, but that he paid it afterward in a FAISLA and, therefore, the same does not fall within the ambit of purview of proviso to section 10(4) of the Family Court Act, 1964. In fact, the intention of Legislature is very clear, incorporation of the words 'at the time of marriage' correspond with the amount of dower paid at the time of marriage. I would also like to refer here the column No. 15 of the NIKAHNAMA. contained in Form 2 of the Muslim Family Law Ordinance, 1961, which reads as under: - "(15) Whether any portion of the dower was paid at the lime of marriage if so, how much?" Thus, the restoration of Haq Mahr to the husband received by the wife in consideration of marriage at the time of marriage must be in consonance with the amount referred to in column 15 of the NIKAHNAMA. Therefore, the dower paid at any other time except at the time of marriage, cannot be restored at the time of dissolution of marriage when reconciliation fail's. By holding the view, 1 am fortified by the judgment reported in PLD 2009 Lahore 227 (titled as Rana Shahnawaz Khan v. Judge Family Court Lahore and another).

11. Here, I would further like to impart that after promulgation of the Proviso to section 10(4) of the Act of 1964, much water has flows down the bridge. In the case of Dr.Fakhr-ud-Din v. Kausar Takreem and another (PLD 2009 Peshawar 92), the Full Bench of Peshawar High Court, discovering the object and true intent of the Legislature behind

enacting the Proviso of 10(4) of the Act of 1964, and having gone through the entire scheme of the law on the subject including the amendments incorporated into it through Family Courts (Amendment) Ordinance LV 2002, has held that:-- "The terms/words "Haq Mahr received by the wife in consideration of marriage at the time of marriage" are of considerable importance. The word "received" means that the payment of dower has either been established or its payment has been B admitted by the wife at the time of granting such a decree. Only in that case, the Family Court has to simultaneously direct the restoration of dower to the husband. This condition, no doubt, is mandatory but is subject to proof. Now the question the Court is confronted with is as to what kind of procedure the Family Court has to adopt in case the payment of dower to wife becomes a contested issue.

Whether the Family Court has to defer the grant of decree till the time such issue is resolved / determined after holding full dress trial forcing the spouses to live in hateful union crossing the limits ordained by Almighty Allah or it may grant a conditional decree.

In our view, much restricted interpretation of the proviso would certainly render it ineffective and of no utility. The obvious object and intent of the legislature would thus be defeated and family life of the spouses would remain detestable ensuring devastating effects on the society like a hell fire. Such a course would be in derogation of the injunctions of Islam. The impossible could not be made possible .....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 me grant of decree on the basis of 'Khula' for disruption of marriage because the parties are not in agreement on the payment or non-payment of dower and the decree of 'Khula' shall remain effective from the date on which it is pronounced".

AG/S-99/K 12. It will not be out of context to mention here that the provisions of law are to be interpreted as in the manner as not to defeat the very object of the statute. In the instant case the object is to provide the specific remedy without any undue delay so as not to keep the woman in a state where she may be deprived of her right to remarry while she is of marriageable age in addition to the mental agony and tension which is the objective to meet the ends of justice in the light of enactment.

13. For the foregoing reasons, the petition being devoid of any merit is accordingly dismissed.

14. The Family Suit No. 24 of 2012 (Old Family Suit No. 85 of 2011) has already exhausted lots of time since its filing on 29-11- 2011. Therefore, in view of the overall object envisaged by the Legislature for the expeditious dispensation of justice in such cases, vide section 12(a) of the Act of 1964 whereby a Family Suit is to be dispose of within a period of six months from the date of its institution, the learned Family Judge, Rohri, District Sukkur is directed to expedite the said Family Suit and dispose it of preferably within a period of two months, from the date of this judgment.

15. Office is directed to forward the copy of this judgment to the Court of learned Family Judge, Rohri, District Sukkur. The compliance report of the judgment may be intimated to this Court through Additional Registrar of the Court.

Petition dismissed.