

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Mr. Justice Sardar Tariq Masood
Mr. Justice Amin-ud-Din Khan
Mr. Justice Muhammad Ali Mazhar

Civil Petition No.3209 of 2019

Against the judgment dated 10.06.2019 passed by
the Peshawar High Court, Peshawar in W.P.No.156-
P/2016

Mst. Tayyeba Ambareen & another

...Petitioners

Versus

Shafqat Ali Kiyani & another

...Respondents

For the Petitioners:

Malik Nasrum Minallah, ASC
Syed Rifaqat Hussain Shah, AOR

For Respondent No.1:

Mr. M. Ajmal Khan, ASC/AOR

Date of Hearing:

03.11.2022

Judgment

Muhammad Ali Mazhar, J. This civil petition for leave to appeal is directed against the judgment dated 10.06.2019, passed by the learned Peshawar High Court, in Writ Petition No.156-P/2016, whereby the writ petition of the petitioners was dismissed.

2. In passing, the minutiae of the instant *lis* are that the petitioner No.1 (wife) filed a suit against the respondent No.1 (husband) for dissolution of marriage on the ground of cruelty, as well as for recovery of dower amount, dowry articles, medical expenses and maintenance for herself and her minor daughter (petitioner No.2). In the written statement filed by the respondent No.1, he also claimed a decree for restitution of conjugal rights. After recording of evidence, the learned Family Court-II decreed the suit of the petitioners *vide* judgment dated 23.07.2014 which was challenged by the respondent No.1 in the Appellate Court. The Appellate Court, *vide* judgment dated 10.11.2015, partially allowed the appeal and dissolved the marriage by way of *Khula* rather than cruelty. As a consequence thereof, the petitioner No.1 was directed to refund 05

tolas gold or, alternatively, its market value to the respondent No.1. The findings recorded in the appellate judgment were thereafter affirmed by the learned High Court.

3. The learned counsel for the petitioners argued that the impugned judgment of the learned High Court as well as the learned Appellate Court are suffering from misreading and non-reading of material available on the record as the petitioner No.1 had satisfactorily substantiated the act of cruelty for dissolution of marriage. The attitude and behavior of the respondent No.1 had developed hatred and resentment in the mind of petitioner No.1. He further argued that the evidence produced by the petitioner No.1 fully supported the stances and series of cruel acts pleaded in the suit and, after going through the evidence, the Family Court rightly passed the judgment and decree which was partially upset by the Appellate Court without any lawful justification more so, the findings of the Appellate Court are not based on evidence, but rather on presumption.

4. In contrast, the learned counsel for the respondent No.1, while rebutting the aforementioned arguments, contended that the learned Family Court failed to discuss the issues separately in the judgment and also ignored the evidence adduced by the respondent No.1 in his support. The reasons assigned in the judgment of the Family Court were based on surmises, whereas the learned Appellate Court rightly modified the judgment of the learned Family Court which was suffering from mis-reading and non-reading of material available on record and the learned High Court has rightly upheld the Appellate Court's judgment. In the end, he argued that the petitioner No.1 herself left the house of the respondent No.1 and also admitted during evidence that she does not want to join the respondent No.1.

5. Heard the arguments. The main disagreement or source of discord between the parties is whether the petitioner No.1 was entitled to claim a decree for dissolution of marriage on the ground of cruelty or not, and whether the appellate forum rightly converted the dissolution of marriage on the ground of cruelty to dissolution by way of Khula. The learned Family Court had settled Issue No.7 specifically for this purpose and also provided ample opportunity to the parties to lead evidence. For the ease of convenience, the gist of Issue No.7 was whether the plaintiff was entitled to the decree for dissolution of marriage on the ground of non-payment of dower, non-payment of maintenance, and cruelty of the respondent no.1/defendant, or, in alternate, by way of Khula.

6. The judgment of the learned Family Court demonstrates that Issues No.3 to 8 were interconnected, therefore the learned Family Judge decided the aforesaid

issues by means of consolidated findings. The preview and analysis of the findings unequivocally articulates that the petitioner No.1 discharged the burden of proving the cruelty of the respondent No.1 and quoted many incidents and her evidence was not shattered during her cross examination. The Family Court had rightly dissolved the marriage on account of cruelty after a thorough examination and consideration of the evidence led by the parties. Whereas the judgment of the Appellate Court reveals that the findings recorded by the learned Trial Court on Issue No.7 were discussed in a slipshod manner and, instead of evaluating and examining the evidence in its true spirit, interpreted the evidence on the basis of assumption rather than considering the evidence in its actual form or in its pith and substance. The Appellate Court could modify or set aside the judgment of the Family Court if it was found contrary to the evidence, but in the case in hand an overwhelming amount of evidence was available wherein the petitioner no.1 in her plaint, as well as in the examination-in-chief, quoted various confidence inspiring instances to prove the allegation of cruelty. There was no justification for any modification made by the learned Appellate Court whereby the dissolution of marriage on the ground of cruelty was converted to the dissolution of marriage by way of Khula with further directions to the petitioner No.1 to return 05 tolas of gold or in alternate, reimburse its market value to the respondent No.1.

7. The purpose of appellate jurisdiction is to reappraise and reevaluate the judgments and orders passed by the lower forum in order to examine whether any error has been committed by the lower court on the facts and/or law, and it also requires the appreciation of evidence led by the parties for applying its weightage in the final verdict. It is the province of the Appellate Court to re-weigh the evidence or make an attempt to judge the credibility of witnesses, but it is the Trial Court which is in a special position to judge the trustworthiness and credibility of witnesses, and normally the Appellate Court gives due deference to the findings based on evidence and does not overturn such findings unless it is on the face of it erroneous or imprecise. No doubt an Appellate Court may re-appreciate the evidence to ensure only that the approach of the Trial Court while recording and appraising the evidence was not flawed or perverse to the well-settled principles of law, but it is not the function of the Appellate Court to interpret the evidence rather than considering it in its plain meaning and determine what was actually testified and deposed by the parties or their witnesses during evidence and it cannot pass the appellate judgment on the basis of presumption or speculation. The turn of phrase "burden of proof" entails the burden of substantiating a case. The meaning of "*onus probandi*" is that if no evidence is produced by the party on whom the burden is cast, then such issue

must be found against him. Lawsuits are determined on preponderance or weighing the scale of probabilities in which the Court has to see which party has succeeded to prove his case and discharged the onus of proof which can be scrutinized as a whole together with the contradictions, discrepancies or dearth of proof. It is the burdensome duty of the Court to detach the truth from falsehood and endeavors should be made in terms of the well-known metaphor, to "separate the grain from the chaff" which obligates the Court to scrutinize and evaluate the evidence recorded in the *lis* judiciously and cautiously in order to differentiate the falsehood from the truth and judge the quality and not the quantity of evidence. The petitioner No.1 in the Family Court proved her case which is profusely translucent from the evidence recorded in the Family Court. We have also scanned the judgment passed by the learned High Court where too the findings of the learned Appellate Court were affirmed without realizing the fact that the allegations of maltreatment and cruelty were satisfactorily proved by the petitioner No.1 during the trial.

8. The object of exercising jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 ("**Constitution**") is to foster justice, preserve rights and to right the wrong. The appraisal of evidence is primarily the function of the Trial Court and, in this case, the Family Court which has been vested with exclusive jurisdiction. In constitutional jurisdiction when the findings are based on mis-reading or non-reading of evidence, and in case the order of the lower *fora* is found to be arbitrary, perverse, or in violation of law or evidence, the High Court can exercise its jurisdiction as a corrective measure. If the error is so glaring and patent that it may not be acceptable, then in such an eventuality the High Court can interfere when the finding is based on insufficient evidence, mis-reading of evidence, non-consideration of material evidence, erroneous assumption of fact, patent errors of law, consideration of inadmissible evidence, excess or abuse of jurisdiction, arbitrary exercise of power and where an unreasonable view on evidence has been taken.

9. The cruelty alleged may be mental or physical, premeditated or unpremeditated, but lack of intent does not make any distinction. Obviously, if it is a physical act then it would be a question of fact, and in the event of mental cruelty, an enquiry is required to be made as to the nature of the cruel treatment to find out the impact or repercussions thereof on the mind of the spouse. Mental cruelty can be largely delineated as a course of conduct which perpetrates mental pain with such a severity and harshness which would render it impossible for that party to continue the matrimonial tie or to live together. The matrimonial relationship is based on a mutual trust between wife and husband

with emotions and it obliges reciprocal respect, love and affection for evenhanded adjustments with the spouse without causing a sense of anguish and disappointment, therefore, while deciding any /s for dissolution of marriage on the ground of cruelty, the Court must adjudge the intensity and ruthlessness of the acts and examine whether the conduct complained of is not merely a trivial issue which may happen in day-to-day married life, but is of such a nature which no reasonable person can endure.

10. The Dissolution of Muslim Marriages Act, 1939 consolidates the provisions of Muslim Law relating to suits for dissolution of marriage by women married under Muslim Law. According to Section 2 of this Act, a woman married under Muslim Law is entitled to obtain a decree for the dissolution of her marriage on any one or more of the grounds mentioned in this Section, but the present controversy is mainly focused on the ground of cruelty, therefore sub-section/Ground (viii) of Section 2 is reproduced as under:-

“(viii) that the husband treats her with cruelty, that is to say,

(a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment”.

11. The perception and perspicacity of cruelty, both physical and/or mental, can be catalogued as under:-

1) **Halsbury's Laws of England (Fourth Edition)**, Volume 13, Para 1269, Page 602

Cruelty Generally

"The general rule in all cases of cruelty is that the entire matrimonial relationship must be considered, and that rule is of special value when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusations or taunts. In cases where no violence is averred, it is undesirable to consider judicial pronouncements with a view to creating certain categories of acts or conduct as having or lacking the nature or quality which renders them capable or incapable in all circumstances of amounting to cruelty; for it is the effect of the conduct rather than its nature which is of paramount importance in assessing a complaint of cruelty. Whether one spouse has been guilty of cruelty to the other is essentially a question of fact and previously decided cases have little, if any, value. The court should bear in mind the physical and mental condition of the parties as well as their social status, and should consider the impact of the personality and conduct of one spouse on the mind of the other, weighing all incidents and quarrels between the spouses from that point of view; further, the conduct alleged must be examined in the light of the complainant's capacity for endurance and the extent to which that capacity is known to the other spouse. Malevolent intention is not essential to cruelty but it is an important element where it exists.

If the court finds that one spouse has, by reprehensible conduct or departure from the normal standards of conjugal kindness, caused injury to health or a reasonable apprehension of it on the part of the other spouse then it is

cruelty if a reasonable person, after taking due account of all the circumstances of the case, would consider that the conduct complained of is of so grave and weighty a nature that the complainant should not be called upon to endure it. The court's principal motive in intervening in the parties' affairs is not to punish one spouse for his or her past conduct but to protect the other for the future, and the object underlying the jurisdiction of magistrates' courts to grant relief in matrimonial causes is to afford a practical alleviation of intolerable situations with as little hardship as may be against the party against whom relief is sought."

2) **American Jurisprudence (Second Edition)**, Volume 24, Chapter: Divorce and Separation, Para 35, Page 217-218

§ 35. Mental Cruelty

In jurisdictions where cruelty is a ground for divorce, and in accord with the view that cruelty need not consist of physical violence or threats of violence, it is generally held, either because of an express statutory provision to that effect or because of the implications from the statutory reference to "cruelty" and the like, that cruelty may consist of mental cruelty, provided, of course, that the misconduct impairs, or threatens to impair physical or mental health. Even where a statute defines the ground for a divorce as "treatment endangering life," the cause of action need not be based on physical violence; a case may be made out by proving mental cruelty which endangers life.

It has been stated that mental cruelty, as a ground for divorce, is a course of unprovoked, offensive conduct toward one's spouse which causes embarrassment, humiliation, and anguish, so as to render the spouse's life miserable and unendurable, and which actually affects the spouse's physical or mental health."

3) **Corpus Juris Secundum, Volume XXV**, at page 16

"Cruel treatment. Any act intended to torment, vex, or afflict, or which actually afflicts or torments without necessity, or any act of inhumanity, wrong, oppression or injustice, the willful infliction of pain, bodily or mental, such as reasonably justifies an apprehension of damage to life, limb or health. Cruel treatment does not always consist of actual violence; but includes mental anguish and wounded feelings."

"Cruelty. Every willful act, omission, or neglect, whereby unjustifiable physical pain, suffering, or death is caused or permitted; any act of a human being which inflicts unnecessary pain; the infliction of great pain or misery without necessity; either actual violence endangering life or limb or health, or conduct creating a reasonable apprehension of such violence. It has been said that the word clearly includes both the willfulness and cruel temper of mind with which the act was done, and the pain inflicted by the act."

4) **Black's Law Dictionary (Ninth Edition)**, at page 434

"Cruelty. (13c) The intentional and malicious infliction of mental or physical suffering on a living creature, esp. a human: abusive treatment; outrage. Cf. ABUSE; INHUMAN TREATMENT; INDIGNITY."

"Mental Cruelty. (1898) As a ground for divorce, one spouse's course of conduct (not involving actual violence) that creates such anguish that it endangers the life, physical health, or mental health of the other spouse.

5) Words and Phrases (Permanent Edition), Volume 10-A**Cruelty** – In general (At page 329 to 331)

"Cruelty," as [the] word is used in divorce cases, is an act that endangers or threatens life, limb or health of aggrieved party, including outrages upon feelings or infliction of mental pain or anguish. *Ingham v. Ingham*, Tex.Civ.App., 240 S.W.2d 409, 411."

"Husband's misconduct, which endangers wife's health to degree rendering it physically or mentally impossible for wife to discharge marital duties properly, constitutes "cruelty" within meaning of divorce statute. *Schwartzmann v. Schwartzmann*, 102 A.2d 810, 813, 204 Md. 125."

"If conduct alleged and shown in suit for divorce on ground of cruelty is of such a nature as utterly to destroy the legitimate purpose and object of the marital relationship, such conduct constitutes "cruelty" and justifies a divorce. *Best v. Best*, Tex.Civ.App., 214 S.W.2d, 806, 808."

"Cruelty" warranting divorce may result from continuing course of abusive and humiliating treatment of one spouse by another, as in case of course of conduct calculated to torture complaining spouse's mental health and emotional nature and affecting his or her bodily health. *Humphreys v. Humphreys*, 281 S.W.2d 270, 281, 39 Tenn.App. 99."

"Cruelty" which will justify divorce, is the willful, persistent infliction of unnecessary suffering, whether in realization or apprehension, whether of mind or body, to such extent as to render cohabitation dangerous and unendurable, and term comprehends conduct endangering life, limb or health or productive of mental anguish, and conduct of nature utterly destructive of purpose of marital relationship. *Gentry v. Gentry*, Tex.Civ.App., 394 S.W.2d 544, 546."

Accusation of infidelity (At page 335)

"The public aspersion of a virtuous wife by her husband, charging her with unchastity, constitutes such cruelty as will entitle her to divorce. *Jones v. Jones*, 60 Tex. 451, 458, 461."

"False accusations of adultery, maliciously made, without probable cause or reasonable grounds for belief, and producing requisite degree of anguish, suffering, and danger to health constitute sufficient cause to warrant limited divorce for "cruelty". *Bostick v. Bostick*, D.C.Mun.App, 163 A.2d 817."

"In a pleading and by testimony in support thereof, accusations by husband or wife that his or her spouse has been guilty of marital infidelity, if false and made maliciously without reasonable cause for suspecting fidelity of other spouse, may amount to "cruelty" and justify granting of divorce, particularly if accompanied by proof of other cruel acts. *Maley v. Maley*, 140 P.2d 262, 265, 18 Wash.2d 766."

"Continual charges to a wife of unchastity with a disavowal of paternity of the children, made continuously in the presence of others and in the presence of the children, would constitute "cruelty" within the meaning of the divorce laws. *Morris v. Morris*, 107 P. 186, 57 Wash. 465."

"Circulation of false and slanderous statements, tending to destroy reputation and harmful to peace of mind and health, may constitute "cruelty" justifying divorce. Williams v. Williams, 291 P. 993, 994, 37 Ariz. 176."

12. The matrimonial bond between a man and woman is a pious relationship which plays an important part and also nurtures between the husband and wife happiness and compassion and the lineage and family heredity also depends on it. Connubial affairs are based on gentle, human and emotional affiliation which requires mutual trust, regard, respect, love and affection with adjustments with the spouse, and the relationship should also be in accordance with social norms. Mental cruelty is a conduct and behavior which inflicts upon the wife such mental pain and anguish making it impossible for her to continue the matrimonial relationship which is also a state of mind caused due to the behavioral pattern of the husband, but this is required to be determined by the Court according to the facts and circumstances of each case and must be more serious than the ordinary, petty or trivial issues or disputes of married life which usually occur in day-to-day married life. According to the injunctions of Islam, the husband is obligated and responsible to provide food, clothing, accommodation and all the other necessities of life to the best of his capability and capacity. A man is expected to treat his wife nicely, with love and affection. Here we would like to quote few excerpts from some verses of the Holy Quran which have direct nexus with the matrimonial relationship ordained under the commandments of the Almighty Allah (SWT):-

1. Men are the caretakers of women, as men have been provisioned by Allah over women and tasked with supporting them financially. And righteous women are devoutly obedient and, when alone, protective of what Allah has entrusted them with. And if you sense ill-conduct from your women, advise them first, if they persist, do not share their beds, but if they still persist, then discipline them gently. But if they change their ways, do not be unjust to them. Surely Allah is Most High, All-Great. (Ref: An-Nisa-4.34-quran.com/en/an-nisa/34)

2. And one of His signs is that He created for you spouses from among yourselves so that you may find comfort in them. And He has placed between you compassion and mercy. Surely in this are signs for people who reflect. (Ref: Ar-Rum-30.21-quran.com/30/21)

3. He is the One Who created you from a single soul, then from it made its spouse so he may find comfort in her. After he had been united with her, she carried a light burden that developed gradually. When it grew heavy, they prayed to Allah, their Lord, "If you grant us good offspring, we will certainly be grateful". (Ref: Al-Araf-7.189-quran.com/en/al-araf/189)

4. O humanity! Be mindful of your Lord Who created you from a single soul, and from it He created its mate, and through both He spread countless men and women. And be mindful of Allah—in Whose Name you appeal to one

another—and honour family ties. Surely Allah is ever Watchful over you. (Reference An-Nisa-4.1- quran.com/4)

5. O you who have believed, it is not lawful for you to inherit women by compulsion. And do not make difficulties for them in order to take [back] part of what you gave them unless they commit a clear immorality. And live with them in kindness. For if you dislike them - perhaps you dislike a thing and Allah makes therein much good. (Ref: An-Nisa- 4.19 legacy.quran.com/4/19)

6. Your spouses are a garment for you as you are for them. (Ref: Al-Baqarah Quran, 2:187- quran.com/al-baqarah/187)

7. Give women you wed their due dowries graciously. But if they waive some of it willingly, then you may enjoy it freely with a clear conscience. (Ref: An-Nisa-4.4- quran.com/an-nisa/4)

13. At this juncture, it would be quite apt and pertinent to quote the teachings and canons articulated by our Holy Prophet Hazrat Muhammad (may Allah's peace and blessings be upon him):

1. Abu Huraira (Allah be pleased with him) reported Allah's Apostle (ﷺ) as saying: He who believes in Allah and the Hereafter, if he witnesses any matter he should talk in good terms about it or keep quiet. Act kindly towards woman, for woman is created from a rib, and the most crooked part of the rib is its top. If you attempt to straighten it, you will break it, and if you leave it, its crookedness will remain there. So act kindly towards women. [Narrated by Sahih Muslim, 1468a, Book No.17, Hadith-80] (Ref: sunnah.com/muslim:1468a)

2. And the Prophet (peace and blessings be upon him) said. "The best of you is the best to his wives, and I am the best of you to my wives and when your companion dies, leave him alone." [Jami at-Tirmidhi, 3895, Book No.49, Hadith-295]- (Ref: sunnah.com/tirmidhi-3895)

3. Prophet Muhammad (PBUH) also said: The believers who show the most perfect Faith are those who have the best behavior, and the best of you are those who are the best to their wives." (At-Tirmidhi)- (Ref: the-faith.com/women-in-islam)

4. It was narrated from Jabir b.Abdullah (R.A) that the Holly Prophet (PBUH) said in his Farewell Sermon:

"Fear Allah concerning women! Verily you have taken them on the security of Allah, and intercourse with them has been made lawful unto you by words of Allah. You too have rights over them, and that they should not allow anyone to sit on your bed whom you do not like. But if they do that, you can chastise them but not severely. Their rights upon you are that you should provide them with food and clothing in a fitting manner" (Narrated by Sahih Muslim, 1218-a) (Ref: sunnah.com/muslim:1218a)

14. The Appellate Court seriously erred in reversing the judgment of the learned Family Court which was founded on the careful exploration and analysis of the concept with regard to mental cruelty, which had resulted in an irretrievable breakdown of the marriage which could not be preserved due to various instances of cruel behavior of the respondent No.1 that developed severe hatred

and aversion in the mind of petitioner No.1 and she totally refused to continue this reluctant relationship any more. The judgment of the Trial Court also reflects that the respondent No.1 had filed a claim for the restitution of conjugal rights, hence the learned Family Court settled various issues in order to resolve the controversy, but Issue No.7 was related to the claim of dissolution of marriage on the ground of cruelty, whereas Issue No.8 was in respect of the claim of restitution of conjugal rights which was rejected while decreeing the suit for dissolution of marriage.

15. According to Sub-paragraph (2) of Paragraph 281 of Chapter XIV of **"Principles of Muhammadan Law"** (Ninth Edition), by D.F.Mulla under the nomenclature **"Marriage"** (M.Mahmood), the *"Cruelty, when it is of such a character as to render it unsafe for the wife to return to her husband's dominion, is a valid defence to such a suit. It may be, too, that gross failure by the husband of the performance of the obligation, which the marriage contract imposes on him (s. 265) for the benefit of the wife, might, if properly proved, afford good grounds for refusing to him the assistance of the Court"*. The judgment of the Family Court depicts various acts which according to the petitioner No.1 caused mental anguish and torture i.e. that around one week of marriage, the behavior of the respondent No.1 started to change and he was pressurizing the petitioner No.1 to arrange money to get a house on rent; when the petitioner No.1 was in a family way, the respondent No.1 and his family members started spreading a false accusation that the petitioner No.2 was not the child of the respondent No.1 which further worsened the situation and the petitioner No.1 suffered severe mental agony; the respondent No.1 instead of supporting the petitioner No.1, left her deserted in the house at a crucial time when she was in a family way; he neither turned towards her, nor paid any maintenance allowance, nor the delivery expenses which were also borne by the petitioner No.1; the respondent No.1 and his family members also imposed a harsh condition that the petitioner No.1 should deposit her salary into a joint account with the respondent No.1, and if she wants money for personal use, she should ask for the permission of her husband and his family members; despite filing the Family Suit, the respondent No.1's behavior did not change and he started causing more mental anguish and started leveling false accusations against the petitioner No.1 amongst relatives and one more unreasonable condition was imposed that the amount for the house purchased by the petitioner No.1 should be reimbursed to her by her father and the money should be paid to the respondent No.1. What we have noted is that the learned Appellate Court, instead of considering the evidence led by the petitioner No.1, reached a conclusion without any rhyme or

reason that no solid piece of evidence was brought which could show either physical torture or mental agony and on its own motion, while disregarding the evidence, held that the allegation of the petitioner No.1 seems to be based on exaggeration and even at one point, while quoting some piece of evidence in which the petitioner No.1 alleged that even prior to marriage, she was earning a salary six times greater than the respondent No.1's, the Appellate Court dubbed the petitioner No.1 as arrogant and, while considering the acts of cruelty, the Appellate Court observed that they are common in nature and are found in every family in day to day affairs and with these erroneous findings, the Appellate Court converted the decree of dissolution of marriage into a decree for dissolution of marriage by way of Khula with further directions to petitioner No.1 to return 5 tolas (58.5 grams) of gold or its market value. In the same breath, the learned High Court, without considering the evidence led in the Family Court, maintained the judgment of the Appellate Court without correctly analyzing the concept of mental cruelty.

16. While claiming conjugal rights by a husband in response to the suit for dissolution of marriage, dower, dowry and maintenance, it is also an onerous responsibility of the Court to see whether he is sincerely fulfilling his obligations towards his wife, rather than gratifying the urges of male chauvinism. According to Paragraph 277 of Chapter XIV of **"Principles of Muhammadan Law"** (Ninth Edition), by D.F.Mulla under the nomenclature **"Marriage"** (M.Mahmood), *"the husband is bound to maintain his wife (unless she is too young for matrimonial intercourse), so long as she is faithful to him and obeys his reasonable orders. But he is not bound to maintain a wife who refuses herself to him, or is otherwise disobedient, unless the refusal or disobedience is justified by non-payment of prompt (S. 290) dower, or she leaves the husband's house on account of his cruelty."* Whereas Paragraph 281 provides that *"where a wife without lawful causes ceases to cohabit with her husband, the husband may sue the wife for restitution of conjugal rights"*. The lodging of this claim should not be used as weapon to defend or obstruct the claim of dower or maintenance allowance, but must be lodged in good faith and with a *bona fide* intention to reconcile and rectify the issues between the spouses in order to save the matrimonial tie with magnanimity, kindness and through the fulfillment of the husband's obligations and not as a tool to fight out or frustrate the claim of maintenance allowance or dower amount. It is quite a strange situation that the petitioner No.1 approached the Family Court for dissolution of marriage on the ground of cruelty but the respondent No.1, quite the reverse, claimed conjugal rights despite all his ruthless, tyrannical and oppressive conduct or behavior, which claim on the face

of it seems to be motivated with the sole intention to avoid paying the maintenance allowance and the dower amount and he ultimately succeeded in his effort in the Appellate Court whereby the dissolution of the marriage on account of cruelty was converted into a dissolution of the marriage by way of Khula with directions to the petitioner No.1 to refund the dower amount to the respondent No.1.

17. In the wake of the above discussion, we convert this civil petition into an appeal and allow the same. As a consequence thereof, the impugned judgment of the Peshawar High Court dated 10.06.2019, as well as the judgment of the learned Additional District Judge-V, Peshawar dated 10.11.2015 are set aside and the judgment and decree passed by the learned Family Court-II, Peshawar dated 23.07.2014 are restored.

Judge

Judge

Judge

ISLAMABAD
3rd November, 2022
Mudassar.
Approved for reporting