

Judgment Sheet

**IN THE PESHAWAR HIGH COURT,
PESHAWAR**

Judicial department

J U D G M E N T

Writ Petition No.3548-P/2015

Date of hearing.....20.02.2017

Noor Hussain Shah

Vs

Mst. Asma Bibi

Petitioner(s) by: Mr. Siraj Hussain, Advocate

Respondent(s) by: Mr. Muhammad Zaiullah, Advocate

MUHAMMAD YOUNIS THAHEEM, J:-

Through this single judgment this Court shall decide the instant writ petition alongwith connected ***W.P No.3972-P/2016 titled Noor Hussain Shah Vs Mst: Asma Bibi & others***, arising out of same judgments and between the same parties, whereby present petitioner had challenged the judgment and decree dated 25.07.2015, passed by the learned trial Court of Family Judge-IV, Peshawar, to the extent of dissolution of marriage on the basis of cruelty and the judgment and decree dated 21.07.2016,

passed by learned Additional District Judge-X, Peshawar, with the prayer that judgments and decrees passed by two Courts of respondents No.3&4 are against law, without lawful authority, so be set aside. It is pertinent to mention that to the extent of decree for dissolution of marriage after lapsing period of Iddat had attained finality, so to this extent this petition had already been dismissed in limine vide order of this Court dated 30.01.2017.

2. Brief facts of both the petitions between the parties are that respondent No.1 for herself and on behalf of respondent No.2 filed family suit for dissolution of marriage and other reliefs as following:-

“A. Dissolution of marriage on the ground of cruelty, non-performing of marital obligation, nonpayment of dower and maintenance allowance and etc.

B. Recovery of 15 tolas gold ornaments and one lac rupees as dower.

C. Recovery of dowry articles which were given to the plaintiff No.1 by her

parents at the time of marriage as per list.

D. Recovery of Rs.60,000/- as maintenance allowance of plaintiff No.1 (from September 2013 till date) and Rs.10,000/- per month (or any other excessive amount keeping in view the financial condition of the defendant and the present rates of inflation and necessities of the plaintiff) onward and till decision/execution of the Court and till her marriage.

E. Recovery of 3 ½ tolas gold ornaments of plaintiff as personal property in illegal possession of defendant.

F. Recovery of Rs.10,000/- as medical expenses of plaintiff No.1.

G. Recovery of Rs.10,000/- as medical expenses of plaintiff No.2.”

3. The learned trial Court summoned the present petitioner who contested the suit by filing written statement and the learned trial Court after framing of issues, recording of evidence partially decree the family suit as following:-

Relief:-

“As sequel to my issue wise findings, the suit of the plaintiffs against the defendant stands partially decreed

and they are held entitled for the relief as follows:

1. *Prayer "A" regarding dissolution of marriage stands decreed and the martial tie between plaintiff No.1 and the defendant stands dissolved under section 2[(viii)(a)] of Dissolution of Muslim Marriages Act,1939.*
2. *Prayer "B(i)" regarding recovery of gold ornaments weighing 15 tolas stands partially decreed and plaintiff No.1 is held entitled for recovery of 07 tolas gold of her gold ornaments. Prayer "B(ii)" regarding recovery of Rs. one lac as dower stands decreed.*
3. *Prayer "C" regarding recovery of dowry articles stands decreed.*
4. *Prayer "D" regarding recovery of maintenance allowance stands decreed and plaintiff No.1 is held entitled for recovery of maintenance allowance @ Rs:5,000/- per month from September 2013 till today and onwards at the same rate till completion of Iddat period. The minor plaintiff No.2 is held entitled for recovery of maintenance allowance @ Rs.5000/- from September 2013 till today and onwards at the same rate till her marriage alongwith 10% annual increase.*
5. *Prayer "E" regarding recovery of gold ornaments weighing 3 ½ tolas stands dismissed.*
6. *Prayer "F" regarding recovery of Rs.10,000/- as medical expenses of plaintiff No.1 stands decreed.*
7. *Prayer "G" regarding recovery of Rs.10,000/- as medical expenses of plaintiff No.2 stands decreed."*

4. The present petitioner filed instant writ petition vide which he had challenged the decree for grant of dissolution of marriage on basis of cruelty while his plea for dissolution has already been dismissed in limine, so now the question for determination remains to the extent of granting a decree of dissolution of marriage on the basis of cruelty while the present petitioner had also challenged the partial decree of learned Family Court dated 25.07.2015 before the learned appellate Court of District Judge, Peshawar by filing family appeal No.09/FCA of 2015 and respondent/wife also filed cross objection, both after hearing were dismissed.

5. Learned counsel for petitioner argued that learned Family Court while granting decree for dissolution of marriage on the basis of cruelty is totally misconceived and is the result of misreading, non-reading of evidence and without lawful authority. He added that the

learned trial Court totally overlooked the admission made by the plaintiff/respondent No.1 during recording of his evidence and defence asserted by the petitioner that respondent No.1 with her own consent deserted from his house, so is not entitled for decree of dissolution of marriage on the ground of cruelty and maintenance as she failed to prove physical torture, cruelty and forcible ousting. He argued that petitioner also filed family suit for restitution of conjugal rights at Abbottabad and learned trial Court should have framed issue in this respect but not had done so, which is material irregularity. He contended that decree for dissolution of marriage on the basis of cruelty may be converted into Khula and in that case the paid 15 tola gold ornaments be returned to the petitioner while he did not press his petition to the extent of other reliefs granted by the trial Court and upheld by the appellate Court for the minor daughter. Learned counsel for petitioner relied on the

case law, **PLD 2014 Peshawar 194, 2011 CLC 566 Lahore, 2014 YLR 1743, 2013 MLD 537, PLD 2013, Peshawar 12, 2013 CLC 897 Lahore and PLD 2005 SC 293**. He lastly argued that his petitions be allowed as argued and prayed.

6. On the other hand learned counsel for respondents in both the writ petitions argued that judgments and decrees passed by the two Courts below are based on proper appreciation of evidence and law with all jurisdictional competence. He added that findings on issues No.7 are correct based on proper appreciation of evidence and the respondent No.1 had not made any admission against her own stance. The harsh and cruel behavior and forcible ousting of respondent No.1 after beating from his house has been proved through evidence by producing PW-2 Munsif Khan and PW-4 Adnan Khan. He further argued that after giving physical torture, respondent got treatment from Accident & Emergency

Service Department, Ayub Teaching Hospital, Abbottabad and in this respect medical prescription has been produced as Ex PW3/2 which is sufficient proof for his cruel behavior; more so, when petitioner appeared as DW-1 had admitted slapping of her. He added that specific plea of conjugal rights was not taken in the written statement, so issue in this respect was rightly not framed by the learned trial Court. He neither sought any relief for custody of minor nor even for visitation rights. So at this stage petitioner cannot raise such pleas as, now he is estopped. He placed reliance on **PLD 2015 Lahore 405, 1999 CLC 514, 2013 MLD 1104 and 2013 CLC 1203**. He lastly prayed that the judgments and decrees passed by the two competent Courts below had attained finality so same could not be challenged by invoking constitutional jurisdiction of this Court by considering it as an appellate Court and prayed for dismissal of both petitions.

7. Arguments heard and record perused.

8. From the perusal of record it transpires that respondent No.1 (Mst. Asma Bibi) during exparte proceedings appeared as PW-1 and stated same facts as she alleged in her plaint. Her important depositions are that her Nikah with the petitioner was solemnized vide Nikah Nama Ex PW1/1. From the perusal of Nikah Nama it reveals that 15 tola gold ornaments as prompt and Rs. one lac in cash as deferred dower vide clause No.13 & 14 of the above said Nikah Nama was fixed. She stated that instead of 15 tola gold she was given 08 tola gold ornaments at the time of marriage and that was also taken back by the petitioner on the pretext that he wants to start business. She claimed one lac and 15 tola gold ornaments due upon him. She further stated that her parents gifted her gold ornaments set weighing 3 ½ tola which is also in possession of present petitioner. She also

narrated other facts, however she again appeared as PW-3 after setting aside of exparte proceeding and recorded her statement as PW-3, wherein she endorsed list of dowry articles Ex PW3/1, Nikah Nama already Ex PW1/1 and receipt of dowry articles placed on record as Ex PW1/3 (16 sheets) mark exhibited during exparte proceeding and also Ex PW3/4. She was cross examined by the defendant side, wherein she admitted the Jirga proceeding. During cross examination she was put specific question, whether she is ready to take Oath on Holly Quran that gold is not in her possession and is in the possession of her family, upon this she replied as following:-

"جی میں نے خدا کو حاضر نا
 ظر جان کر ہی آج یہ بیان
 قلمبند کروایا ہے جو کہ برحلف
 ہے۔ جی میں قرآن پاک پر
 ہاتھ رکھ کر یہی کہنے کو تیار
 ہوں کہ میں اپنے ساتھ کچھ
 بھی نہیں لائی۔"

9. Plaintiff/respondent No.1 in her support produced her brother Syed Adnan Shah as PW-4 at the time of exparte proceedings and was cross examined after setting aside of exparte proceeding on 13.12.2014. During cross examination nothing came out favourable to petitioner. He negated the suggestion that Hospital chit Ex PW3/2 is fake.

10. Defendant/husband i.e present petitioner appeared as DW-1, who admitted the Nikah Nama and stated that he had paid 15 tola gold ornaments according to the condition of Nikah Nama, the prompt dower worth 15 tola and an amount worth Rs. one lac which was fixed as deferred dower was forgiven/remitted in his favour on the very first night of the marriage by his wife/plaintiff No.1. He stated that the ornaments which were given to the plaintiff No.1/wife were taken by her when she left his house and negated the allegations of beating and physical torture. He further stated that gold ornaments are

lying with the brother of plaintiff No.1 namely Adnan Shah. He stated that due to retaliation she was given slaps. The portion of cross examination where he admitted slapping of his wife is reproduced as under:-

"میں نے مدعیہ کو تین دفعہ
اولاً زبانی طور پر سمجھایا کہ
تم جھگڑا مت کرو جس پر
مدعیہ بار بار بھائیوں کی
دھمکیاں دے رہی تھی جس پر
میں دلبرداشتہ ہو کر مدعیہ کے
طرز عمل کے ری ایکشن میں
ایک دو تھپڑ مدعیہ کو رسید
کیئے۔"

11. Examining of findings on issue No.7 decided alongwith issue No.8 it were found based on proper appreciation of evidence and law. No misreading or non-reading has been observed by this Court. Similarly, when the appellate Court reappraised the evidence the same Court also reached to the same conclusion and dismissed the appeal of the present petitioner alongwith cross objection.

12. This Court after going through the entire record also reached to the

conclusion that both the judgments of learned Courts below of respondents No.3 &4 are well reasoned based on proper appreciation of evidence and law with lawful authority being family Court and learned appellate Court. The case law referred by the learned counsel for petitioner could not be pressed into service as the facts and circumstances of the referred cases are different to the instant case. So, this Court observed no infirmity in the judgments particularly findings regarding issue No.7 as evidence adduced before the family Court could not be evaluated and appraised in a manner as it is appreciated in civil and criminal cases governed by Civil and Criminal Procedure Code, while the provision of Qanoon-e-Shahdat 1984 are not applicable in stricto sensu for the proceeding conducted by the Family Courts. In this respect reliance is placed on the judgment cited as **PLD 2015 Lahore 405**.

13. So far as, the arguments of learned counsel for petitioner that the learned

trial Court should have passed decree on the basis of Khula and not on the ground of cruelty and non framing of issue regarding restitution of conjugal rights is concerned, suffice is to say that the arguments of petitioner are not convincing as the evidence produced by the plaintiff/respondent No.1 proved the factum of persistent mental and physical torture, even beating due to which she was forced to get treatment from Accident & Emergency Service Department, Ayub Teaching Hospital, Abbottabad and in this respect medical prescription Ex PW3/2 placed on record is a proof of torture which is sufficient in the family matter. Nothing has been brought by the petitioner in rebuttal in this respect, this cruelty is proved and decree for dissolution of marriage on the ground of cruelty could not be converted into Khula being neither asserted by the petitioner in his written statement nor even pleaded by plaintiff No.1 nor proved by petitioner. Similarly, petitioner though filed family suit at

Abbottabad for restitution of conjugal rights but admittedly that was dismissed in default vide order dated 04.06.2014, passed by the Civil Judge-VIII/Judge Family Court-I, Abbottabad, so issue in this respect was correctly not framed here in this respect learned trial Court had committed no irregularity or illegality.

11. Thus, in view of above discussion, both the petitions being bereft of merits are dismissed with no order as to cost.

Announced
20.02.2017.

J U D G E