

Judgment Sheet

**IN THE PESHAWAR HIGH COURT, PESHAWAR
JUDICIAL DEPARTMENT**

W.P.No. 1871/2009 with C.M.No. 928/2009.

JUDGMENT

Date of hearing.....**25.03.2010**.....

Petitioner. (Khawaja Muhammad Afnan Sethi) By Mr. Abdur Rauf Rohaila,
Advocate.

Respondents. (Mst. Asma Durrani & others) By Mr. Niaz Wali Khan, Advocate.

DOST MUHAMMAD KHAN, J.- This single judgment

shall also decide the connected **Writ Petition No.**

690/2010 entitled "*Mst. Asma Durrani Vs. Muhammad*

Afnan Sethi & others" because both have arisen out of

common judgment of the learned District Judge Peshawar.

2. Arguments heard and record perused.

3. The record reveals that the parties developed

sentimental attachment to each other, resulting into a love

marriage on 14.03.2001. Proper "Nikah Nama" was

executed by the parties along with a dower deed Ex. PW-

1/1 and Ex. PW-2/1 respectively. An amount of

Rs.1,50,000/- was fixed in cash as a dower, besides 25

tolas gold ornaments to be given at the time of "Rukhsati".

Also a house measuring 10 Marlas situated in Peshawar after being built and renovated was promised to be given as part of the dower. It was further promised that in case of temporary separation, on account of strained relation, the petitioner would be liable to pay Rs.2,000/- per month along with other expenditure to the respondent, the former wife.

4. After marriage, the couple enjoyed a colourful life, however, with the passage of time, as has been alleged, the behaviour of the petitioner became cruel and unbearable beating, abusing and torturing the respondent.

5. It is alleged in the plaint and has also come in evidence that when the respondent was subjected to severe torture, intolerable in nature, she demanded her dower; but instead she was kicked, thus, took shelter in her parents house from 29.03.2004. During this period, she was neither paid the dower nor the maintenance allowance.

6. In view of the above circumstances, the respondent was peddled-up to approach the family Court for the

dissolution of marriage, recovery of maintenance as well as dower allowance and dowry articles.

7. The suit was contested on various grounds by the petitioner, thus, the family Court framed issues from the pleadings and held trial. At the conclusion, the same was decreed on 30.04.2005, dissolving the marriage, allowed the recovery of dower and maintenance allowance while cross claim / suit of the petitioner for restitution of conjugal right was dismissed. Similarly, the prayer of the respondent for recovery of dowry articles was also refused. Two cross appeals were filed by the parties but both were dismissed by the learned District Judge on 06.09.02005, however, the High Court in W.P.No. 1730/2005, filed by the petitioner, and in the cross W.P.No. 1706/2005, filed by the respondent, vide order dated 21.12.2006 set-aside the judgment and decree of the appeal Court and remanded the case to it to re-decide the same after making appraisal of the entire evidence.

8. After remand, the learned District Judge allowed the appeal of the petitioner on 16.07.2007 and set-aside the

decree of the Judge Family Court with regard to the grant of dower and maintenance allowance while the appeal filed by respondent for recovery of dowry articles was dismissed.

9. Once again, the High Court in W.P.No. 1334/2007 set-aside the judgment and decree of the appeal Court vide judgment dated 21.01.2009 and for the second time remanded the case with certain specific hints / guidelines given to the Appellate Court with direction to attend to those aspects of the case.

10. This time, the learned District Judge vide impugned judgment dated 18.07.2009 maintained the judgment and decree of the learned Judge Family Court and dismissed appeal of the petitioner as well as of the respondent with regard to the dowry articles.

11. Learned counsel for the petitioner vehemently contended that because of self imposed desertion, the respondent failed to fulfill conjugal obligation for no plausible reason, therefore, she was not entitled to the decree, thus, granted. It was further contended that the

parents of the respondent have given a fatal jolt to the happy union of the parties and because acting under influence of her parents, respondent broke the union without just cause, thus, she being on the wrong side, was not entitled to any relief.

The main stress of the learned counsel was that if at all the two Courts below were of the view that happy reunion was not possible then, in that event, the marriage should have been dissolved on the basis of "Khula" and not otherwise, moreso, when both the Courts below were of the view that mental and physical torture / cruelty alleged by the respondent, was not fairly established. He urged that the relationship between the spouses was cordial; however, she was misled by the parents. He referred to certain E-mails and Cell-phone SMS, transcripts of which have been annexed with this petition and contended that during the temporary separation, the respondent was more desperate in love with the petitioner but the hostility was indeed created by her parents and she was not allowed to return back and that the petitioner has

made every effort to persuade her for the reunion but all his efforts did not bear fruit. He also referred to a letter Ex. PW-2/X-1, addressed to the SHO of Police Station Gulbahar, Peshawar, by respondent No.1, stating therein, that she was willingly leaving the house of the petitioner, thus, in the circumstances, the respondent, on the principle of law and justice and keeping in view the Islamic injunctions, was not entitled to the decree granted.

12. To the contrary, learned counsel for the respondent referred to the evidence on record. The pivot of his entire arguments was the "Nikah Nama" and the dower deed, wherein, the petitioner has given solemn commitments and undertakings to pay the dower in full, on demand, which was in cash, in the shape of gold ornaments and a house, as discussed earlier, besides the payment of maintenance allowance and vehemently argued that not a little proof has been adduced by the petitioner to have paid the same, thus, it is fully established that the respondent was yet to receive the dower in three kinds and when it was demanded from

the petitioner, the same was denied to her and she was treated cruelly giving her inhuman treatment.

He further contended that the petitioner has fraudulently withdrawn a handsome amount from the account of the respondent which was jointly run albeit, the respondent was a professional woman and a serving officer, thus, being an earning hand, while the petitioner, a petty official, encashed the amount and misappropriated the property of the respondent which is an additional ground, justifying the dissolution of marriage.

He further argued with considerable vehemence that because of iron clad traditions and customs of the society particularly, in this class of family, invariably costly and expensive dowry articles are essentially given by the bride parents, without that, the wife is cursed and treated with contempt by her in-laws. These articles are normally displayed before the relatives / friends to take a pride for the same, therefore, in his view, the two Courts below failed to attend to this aspect of the case and unreasonably denied the decree for the recovery of dowry articles, the

list of which was brought on record in proper legal manner which was not specifically denied, however, a special plea was taken by the petitioner providing money for purchase of these articles and bridal's gifts. The onus to prove was on the petitioner but he failed, thus, the impugned judgment and decrees require to be modified to this extent and the relief for recovery of dowry articles or its market value may also be granted.

13. We have attended to the submissions made at the bar and have minutely gone through the evidence, both oral and documentary available on record which was adduced at the trial.

14. In our writ jurisdiction, the High Court has to see as to whether the lower Courts have committed jurisdictional error, uncondonable in nature or in the exercise of jurisdiction had committed patent legal error, causing serious miscarriage of justice because the Hon'ble Apex Court has consistently held that the High Court in its constitutional jurisdiction is not supposed to decide such matters, as a Court of appeal by making reappraisal of the

evidence and to form a different opinion from the one held by the Courts below, even if it is possible.

15. The learned District Judge as well as the learned Judge Family Court have attended to all the material aspects of the case and have considered each and every important piece of evidence and after its proper appraisal recorded concurrent findings on each and every issue.

16. We have minutely attended to both the impugned judgments but could not discover any gross misreading or nonreading of evidence, causing miscarriage of justice to attract the extra ordinary writ jurisdiction of this Court.

17. It is established on record that the parties after coming into contact, were considerably moved by sentimental attachment for each other, the level and degree of love for each other went to the high peak whereafter, they entered into wedlock but with the blessing of their respective parents.

18. It also appears from the evidence that the respondent was driven too much by love because, even after temporary separation, despite of cruel behaviour and

conduct of the petitioner, she used to send electronic messages / cell phone SMS expressing her deep love for the petitioner but it was the petitioner who did not reciprocate nor made a meaningful and objective effort to retrieve the respondent and to restore happy reunion.

19. It is also established beyond doubt that the dower was not paid to the petitioner, as in the “Nikah Nama” and dower deed it was of prompt kind and was payable on demand and once it was demanded by the respondent, the petitioner was under legal obligation to have paid the same there and then but he did not discharge the liability, he had incurred under the written documents, referred to above.

20. Both the Courts below, as mentioned above, have recorded concurrent findings to the above effect. These findings are sacrosanct being based on proper appraisal of the entries contained in the two documents, therefore, no exception could be taken to it and that too, in extraordinary writ jurisdiction when these are neither perverse nor illegal, causing miscarriage of justice.

21. The Family Court is a Special Tribunal, constituted with the object to decide domestic disputes. It has the benefit of reading the mind of the spouses during pre-trial and post trial reconciliation, besides noting the demeanor of the witnesses and conduct of the parties during the trial. Similarly, the Court of appeal is a Court of fact and law both and when both such Courts decide any dispute in a legal manner then, the High Court has to exercise maximum restraints in interfering with findings of these Courts, unless and until it is shown that these were the result of misconstruction of duly executed documents and / or based on misreading and nonreading of material evidence, resulting into miscarriage of justice, in our view, the case in hand does not fall within that category.

22. So far as the connected writ petition filed by the respondent for recovery of dowry articles is concerned, while apply the above principle of law, we are unable to interfere with the concurrent findings recorded by the two Courts below albeit, we have some reservations and exceptions to such findings but again substituting our own

opinion on re-appraisal of evidence, we would be entering into the field of determining the question of facts like a Court of appeal which is not permissible in writ jurisdiction.

23. The plea that the marriage should have been dissolved on the basis of “Khula” is based on entire misconception because the prompt dower was not paid to the respondent, hence, she was entitled to refuse herself for performing conjugal obligation and to live separately from the husband and when the petitioner has failed to prove that he has paid the dower and the maintenance allowance for the stated period, the respondent was staying in her parents house for a long duration, then, in the circumstances, she was fully entitled to ask for dissolution of marriage otherwise than “Khula”. Both the Courts below have committed no serious legal error, granting the decree for dissolution, dower and maintenance allowance. The plea of the petitioner in this regard is absolutely untenable and misconceived one.

24. This Court has already directed the Law Division, Government of Pakistan, Islamabad to amend the Rules if it is necessary and to reprint the form of “Nikah Nama” wherein the entries in Column No. 15 & 16 shall be fully clarified and while doing so it is suggested that the kind of dower in cash and in kind be clearly bifurcated and if its different kinds are promised to be paid, the entries to that effect printed in Column No. 15 & 16 shall speak clearly about that. This Court also directed the Law Division that in cases of this nature, the wife in each case is subjected to unbearable heavy burden to prove various articles of dowry which are ordinarily purchased from different shops and even from different districts, it becomes almost impossible for the wife to produce each and every shopkeeper to prove the receipts or the dowry articles purchased from them and it was directed that independent and spacious Column in addition to the present one be provided in the “Nikah Nama” wherein the descriptions of the dowry articles are mentioned along with its market price because “Nikah Nama” is executed by the parties and is signed by them as well as the witnesses, in this way the onus of proof would be considerably reduced and would remain confined to a single document and there would be no need to produce many witnesses / shopkeepers etc in this regard, however, the Law Division, as so far not

responded as to what progress has been made by it in that regard, therefore, it is once again directed that the Law Division, Government of Pakistan, Islamabad shall move quickly in the matter and to arrange the reprinted / amended proforma, as suggested above, within two months at the most because in this case too due to non-production of many shopkeepers, from whom dowry articles were purchased, the respondent has lost her case which is injustice to her.

The Registrar of this Court shall pursue the matter with the Law Division, Government of Pakistan, Islamabad till the object is achieved within the given time.

For what has been discussed, both this petition and the connected one, mentioned above, are dismissed with no order as to cost.

Announced:
25.03.2010.

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