

*Judgment Sheet*

**IN THE PESHAWAR HIGH COURT,**  
**PESHAWAR**

**[JUDICIAL DEPARTMENT]**

**Writ Petition No. 4841-P/2016.**

**Date of hearing..... 11.3.2019 & 13.3.2019.**

**Petitioner(s):- Mst. Tuharat Firdos by Mr. Attizaz Mansoor, Advocate.**

**Respondent(s):-Imtiaz Khan by Mr. Muhammad Azam Khan,**  
**Advocate.**

**J U D G M E N T**

**SYED AFSAR SHAH, J.-** Through the instant petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, Mst. Tuharat Firdos, the petitioner, has made a prayer that:-

**“On acceptance of the instant writ petition the impugned judgments & decrees passed by both the courts below may kindly be set aside and suit of the petitioner may kindly be decreed as prayed for and decree for restitution of conjugal right passed in favour of defendant/respondent No.1 be also set aside.”**

2. **Having heard** learned counsel for the parties, it appears from the record available on file that on 07.7.2014, Mst. Tuharat Firdos, the petitioner, filed a suit against Imtiaz Khan, the respondent, for dissolution of her marriage on the ground of cruelty and recovery of dower, consisted of cash amount of Rupees one lac, five tola gold ornaments alongwith house, measuring 10 mls.

3. **As per facts** of the case, the petitioner/plaintiff was married to the respondent/defendant on 03.12.2010 in lieu of

dower mentioned above and in which respect a proper *nikah nama* was also executed. The respondent/ defendant was abroad in connection with earning of his livelihood, while she herself being employee of health department was residing in Kalabat, however, the attitude of the respondent/defendant towards her from the very start was very cruel as he always used to beat her. She is disable with one leg. She made efforts for the restoration of cordial relation with the respondent through elders of the locality, but in vain, however, as per her version, she was divorced orally.

4. When put on notice by the Court, the respondent contested the suit, *inter alia*, on the ground that the dower had already been paid to the petitioner/plaintiff and so far as the divorce, as alleged by the petitioner, is concerned, he has outrightly denied the same. He also made a prayer for the grant of decree for restitution of conjugal right and recovery of cash amount allegedly taken by the petitioner at the time when she was deserting her conjugal domicile. According to him, he has sent so many Jirgas to the petitioner for her settlement, but with no fruitful results. The learned lower court after recording evidence of the parties for and against dismissed the suit of the petitioner/plaintiff, while claim of the respondent/defendant for restitution of conjugal right was allowed, vide judgment recorded on 9.5.2015. The judgment/decree of the learned lower court was impugned by the petitioner before the appellate forum.

The learned Additional District judge-IV, Swabi, vide its judgment rendered on 27.9.2016, dismissed the appeal and aggrieved of the same, the petitioner has come to this court by filing the instant petition.

5. As is evident from the record, the petitioner has made a prayer for dissolution of her marriage on the ground of cruelty and recovery of dower which, as per *nikah nama*, placed on record, is consisted of rupees one lac in cash, five tola gold ornaments and a house, measuring 10 mls.

First of all, I would like to refer to the factum of oral divorce as alleged by the petitioner. She in Para 7 of the plaint specifically stated that she was orally divorced by the respondent, but so far as record of the case is concerned, I have gone through the same from cover to cover but the stance of oral divorce as taken by the petitioner is not established on record. The petitioner in her plaint and court statement has stated about the cruelty on the part of the respondent and, in the back drop, she has made a prayer for dissolution of her marriage on the same ground but, if one goes through record of the case, one could reach to an irresistible conclusion that the petitioner has not been able to prove the element of cruelty on the part of her husband. Moreover, it is a question of fact, which has concurrently been decided by the fora below against the petitioner and, therefore, in the given circumstance, I also agree with the findings recorded by the courts below.

Now the question before the court is the re-union/matrimonial life of spouses. It is cardinal principle of Islam that the spouses cannot be forced to a life devoid of harmony and happiness and if the parties cannot live together within the limits ordained by Almighty Allah, then the proper course is separation. Admittedly, the petitioner is the second wife of the respondent, but their strained relation, as is evident from the record, has been reached to the point of no return. When asked in the Court, the petitioner categorically stated that she is not ready to live with the respondent at any cost. Even in her court statement, she stated that she is not ready to live with the respondent because she has been divorced by him which, no doubt, is not established, but in the given circumstance, they could not live as husband and wife within the limits ordained by the Almighty Allah, resultantly, the marriage between the parties is dissolved on the ground of 'khula'.

6. Next question is that of the return of benefits received by the petitioner. In the present case, the dower has been fixed as five tola gold ornaments, cash amount of rupees one lac and constructed premises, measuring ten marla. It is duly entered in the nikah nama and even otherwise admitted by the respondent. He, however, stated that he has paid the entire dower to the petitioner, including the house, measuring ten marla. During the course of arguments, when asked about the return of benefits received by the petitioner, she stated that if her marriage

is dissolved on the basis of khula, she will return cash amount of rupees one lac and five tola gold ornaments, but in any case is not ready to return the house as according to her it is purchased by her, however, in view of the statement of buyer Ijaz (DW-3) her claim stands to no sound reason. On the other hand, the respondent/husband stated that he is ready to divorce the petitioner in lieu of waiving of cash amount of rupees one lac and five tola gold ornaments, but he was not ready to waive the claim with respect to the house. In the backdrop, the moot question requires consideration before the court would be the return of benefits to the respondent received by the petitioner in lieu of dower. Learned counsel for the respondent vehemently urged that khula could not be granted without the return of dower and other benefits received by the bride at the time of her nikah. I think the learned counsel has misconceived the situation in that if his arguments are accepted, then a destitute wife, who is otherwise found entitled to the dissolution of marriage on the ground of khula would be deprived of the right simply because of her incapacity to return the benefits, which will not be fair. After all, the principle of reciprocal benefit is also there. There is no cavil to the proposition that if the husband is not at fault there has to be restoration of property received by the wife and, ordinarily, it will be of the whole of the property, however, the court may take into consideration reciprocal benefits received by the husband and continuous living together also may be a benefit

received and while going for divorce, the court can adjust the financial matters so as to direct partial or total restoration of the benefits received by the wife. In the present case, the petitioner belongs to a poor family. She remained as wife with the respondent, who had received benefits and when so, I, in the peculiar facts and circumstances of the case, direct the petitioner to return the cash amount of rupees one lac and five tola gold ornaments to the respondent in lieu of her marriage on the ground of khulla, while she is allowed to retain the house, keeping in view the principal of reciprocal benefits.

Dispose of accordingly.

Announced

**13.3.2019**

\*M.Zafra P.S\*

**J U D G E**

(SB Hon'able Mr. Justice Syed Afsar Shah)