IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Constitutional Petition No.S-452 of 2021
[Muhammad Zahid Khan Vs. Mst. Saiqa]

Petitioner:	Through Mr. Munawar Ali Shah, advocate.
Respondent:	Mr. Allah Bachayo Soomro, Additional Advocate General, Sindh along-with Sadiq Hussain brother of respondent Saiqa.

Date of hearing & order: 07.11.2022.

O R D E R

ADNAN-UL-KARIM MEMON, J.- Through instant constitutional petition, the petitioner challenges the legality of Judgment and decree dated 30.03.2021 passed by learned Appellate Court in Family Appeal No. 09 of 2021 whereby the judgment and decree passed by learned Family Judge in Family Suit No. 1416 of 2019 was modified by issuing direction to the petitioner to return dowry articles as mentioned in the list / purchase receipts, except gold ornaments or to pay cash of Rs.200,000/- to the respondent, being depreciated value of those articles.

2. The facts necessary leading to the present petition are that respondent-Saiqa was solemnized marriage with petitioner against dower amount of Rs.30,000/- which is still unpaid; that the parents of respondent including her relatives gave her valuable dowry articles same were handed over to the petitioner before performing Nikah'; that after Rukhsati the relation between the spouses became strained; therefore the petitioner after maltreatment out the respondent from his house; that on 17.10.2018 respondent gave birth to minor Muhammad Ahsan whose medical expenses were borne by respondent's parents; however, due to amicable settlement respondent with minor again started residing with petitioner but he did not mend his way and again expelled her from the house, and filed suit for conjugal rights, compelling the respondent to file Suit for dissolution of marriage by way of Khulla.

3. After admission of suit petitioner was summoned through all modes including publication in *Ummat* newspaper, but he did not turn up, thus his defence was struck off by the family court vide order dated 05.12.2019 thereafter suit of respondent was decreed ex-party by learned Family Judge-VIII Hyderabad vide order dated 21.12.2019, it was challenged by respondent herself and learned Appellate Court enhanced the amount of dower from

Rs.100,000/- to Rs.200,000/- as stated in para-I supra, and against the said decisions the petitioner has filed the instant constitutional petition.

4. Syed Munawar Ali Shah learned counsel for the petitioner vehemently contended that because of self-imposed desertion, the respondent failed to fulfill the conjugal obligation for no plausible reason, therefore, she was not entitled to the decree granted by the family court; that during pendency of family suit respondent took away her entire dowry articles and such fact was not disclosed; that the parents of respondent gave fatal jolt to the happy union of parties and the respondent broke the union without any cause, thus, she was not entitled to any relief. The main stress of learned counsel was that the two Courts below erroneously dissolved the marriage of couples based on "Khula" ex-parte, in violation of the principle of Audi Altrem Partum; the *petitioner* appeared before the trial court and filed application for recalling the ex-parte judgment on the ground that the process issued by the trial court was not served upon him and that during pendency of suit filed by the respondent, the petitioner had also filed family suit No.814 of 2019 and his address given thereunder is different to that of his address shown in the plaint filed by respondent; more so, mental and physical torture/cruelty as alleged by the respondent in the memo of plaint was not fairly established at all; that the relationship between the spouses was cordial; however, she was misled; that the aforesaid decree of dissolution of marriage is illegal, mala fide, as no pre-trial proceedings took place between the parties; that it has already been settled in several cases that pronouncement of 'khula' by the court would amount to single divorce and the petitioner would be at liberty to re-marry the respondent after solemnization of 'nikah' without the intervention of third person as such he stressed for remitting the matter to the trial court for the aforesaid purposes. He lastly submitted that in the circumstances, reconsideration / re-examination of the impugned judgment and decree by the Family Court is the only expedient option, conducive to the interest of the parties to save the marriage. In support of his contentions, he relied upon the case of *Muhammad Arshad Anjum Vs. Mst. Khursheed Begum [2021 SCMR 1145], Syed Sharafat Hussain and 6 others Vs. Muhammad Bux [2019 MLD 14], Abid Hussain Vs. Judge Family Court and others [2017 MLD 1713] and Major Qamar Zaman Qadir Vs. Judge Family Court Jehlum and others [PLD 2013 Lahore 88]. He also relied upon statement dated 07.11.2022 along-with certain documents.*

5. I have heard learned counsel for the petitioner and also gone through the record as well as the impugned decisions of both the courts.

6. This Court under Article 199 of the Constitution has to see as to whether the lower Courts have committed jurisdictional error causing serious miscarriage of justice; because the Hon'ble Supreme 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 evidence and to form a different opinion from the one held by the Courts below, even if it is possible.

7. It is alleged in the plaint and has also come on record that when the respondent was subjected to severe torture, she demanded her dower and other ancillary relief(s) from the family court; but instead, she was kicked, thus, she took shelter in her parents' house. During this period, she was neither paid the dower nor maintenance allowance. Petitioner claimed that he could not be served in the Suit; record reveals that summons was published in newspapers whereafter service upon him was held good by the trial court. However, he neither appeared nor filed written statement, and accordingly was declared ex-parte. At the conclusion, the suit of respondent was decreed, dissolving marriage between the parties, and allowing the recovery of dower and maintenance allowance while the cross-claim/suit of the petitioner for restitution of conjugal right was dismissed vide order dated 25.1.2020. And at this stage petitioner seeks remand of case to the trial court in terms of Article 10-A of the Constitution as he was allegedly condemned unheard on the subject issues, his assertion is not tenable, for the reason that he opted to remain absent in the proceedings deliberately, though served by way of publication. However, the Family Court is the quasi-judicial forum, which can draw and follow its procedure provided, such procedure should not be against the principles of fair hearing and trial. In the present case, the petitioner contested the matter in family appeal and was heard by learned appellate court on the subject issue but the petitioner failed to convince the appellate court which maintained the judgment and decree of trial court. It is established principle that findings on fact recorded by a competent court in exercise of lawful jurisdiction cannot be agitated by invoking writ jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 unless the same suffers from any legal infirmity, jurisdictional error or perversity causing serious miscarriage of justice.

8. Regarding maintenance during subsistence of marriage between the couples, it is well-settled that when a woman surrenders herself into the custody of her husband, it is incumbent upon him to support her with food, clothing, and lodging whether she is a Muslim or not; according to Islamic injunctions, it is the obligation of the husband to maintain his wife till she

disobeys him without any good cause and that being so, a husband is obliged to pay even the arrears of maintenance if not paid by him during subsistence of marriage; maintenance, the definition whereof in Islam is '*Nafqa*', to the wife is not an ex-gratia grant, but the husband is obliged to maintain her; in all circumstances, maintenance is to be considered as a debt upon the husband in conformity with tenet; and, the wife is entitled to claim maintenance from the date of accrual of cause of action and not necessarily from the date of first seeking redress.

9. So far as maintenance allowance for minor son is concerned, under the law, a father is bound to maintain his children until they attain the age of majority. The intent and purpose of maintenance allowance to a minor child is to enable her/him to continue living at least in the same state of affairs as the child used to live before the separation/divorce between the parents and it would be quite unjust and against the norms of proprietary if due to separation amongst the parents the child has to relegate to a lower level of living standard or he / she has declined the level or standard of education which was achieved by him / her before such happening i.e. separation of parents which admittedly has already taken place between the parties.

10. Learned counsel for the petitioner has failed to point out any appeable reason qualifying interference in the judgment impugned before me. The learned appellate Court has rightly declined the prayer of petitioner; hence, no other exception is called for. As a consequence, this petition is dismissed with cost.

JUDGE

Karar_Hussain/PS*