

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

C. P. No. S - 65 of 2022

Petitioner : Javed Ali Memon, through
Mr. Muhammad Ali Napar, Advocate.

Respondents : Mst. Sadia Kanwal Memon & others
No.1 to 3 (Nemo)

Date of hearing : 05.09.2022
Date of order : 05.09.2022

ORDER

ZAFAR AHMED RAJPUT, J. - The respondent herein filed Family Suit No.254 of 2019 before the Court of learned Family Judge, Sukkur for maintenance @ Rs.30,000/- per month of her iddat period from 22.01.2019 to 22.05.2019 and dower amount Rs.30,00,000/-. Subsequently, the petitioner filed Family Suit No.265 of 2019 against the respondent before the said Family Judge seeking restitution of conjugal rights. Both the petitioner and respondent contested the suits filed against each other by filing their respective written statements. In his written statement filed in family Suit No.254 of 2019, the petitioner claimed to have paid the dower amount on 23.11.2018 in presence of witnesses, namely, Ghous Bakhsh and Saeed Ahmed Mangi at Flat No.101, Hi-Life Plaza, New Goth, Sukkur. The petitioner also made admission with regard to divorce, but he further stated that soon after divorce and before expiry of *iddat* period, reconciliation was made between the parties and the respondent joined him as his wife. The petitioner also sent a letter to the Chairman Union Council for withdrawal of divorce deed; thereafter, they were residing together. Later, the respondent demanded the petitioner to pronounce divorce to his first wife and on refusing to do so, she failed to perform marital obligations with the petitioner, for which he filed the aforesaid suit for conjugal rights. The respondent, in her written statement, denied the averments of the petitioner by

submitting that till date no dower has been paid by the petitioner. She further submitted that the petitioner had divorced her and the claim of the petitioner that she was still his wedded wife was against the injunctions of Islam. Moreover, she has filed suit for maintenance and recovery of dower.

2. The learned trial Court, vide order dated 20.04.2021, consolidated both the suits. Family Suit No.254 of 2019 being filed earlier in time was treated as the leading suit. Out of divergent pleadings of the parties, the following issues were framed by the learned trial Court:

1. *Whether the suit is maintainable under the law?*
2. *Whether the marriage tie is still exists between the parties or defendant after giving divorce to the plaintiff has not joined her and now the defendant is no more wife of him?*
3. *Whether the defendant is entitled for restitution of conjugal rights?*
4. *Whether the plaintiff is entitled for maintenance? If yes, since when and for what period and what rate?*
5. *Whether the plaintiff is entitled for the dower/haq mahar as mentioned in the Nikkahnama?*
6. *Decision?*

3. The learned trial Court after recording pro and contra evidence and hearing the parties decreed the suit of the respondent bearing Family Suit No.254 of 2019 and dismissed the suit of the petitioner bearing Family Suit No.265 of 2019 vide consolidated judgment and decree, dated 30.04.2021. Being aggrieved, the petitioner preferred Family Appeal No.15 of 2021, which was heard and dismissed by learned District Judge, Sukkur vide judgment dated 28.01.2022 and decree drawn on 04.02.2022. It is against those concurrent findings of the Courts below, the instant Constitution Petition has been preferred by the petitioner.

4. Learned counsel for the petitioner has contended that the Courts below failed to appreciate the evidence adduced by the parties; that the Courts below also ignored the oral evidence of the natural witnesses on the point of reconciliation between the spouse; that the respondent in her evidence failed to produce any document in support of her claim, while it clearly reflects from divorce deed that she has already received the dower amount in presence of witnesses; that she has admitted in her cross-examination that it is mentioned in divorce deed that the applicant gave her Rs. 30,00,000/- and such fact she has not denied in her written statement filed in connected case; that the respondent did not file any suit for cancellation of divorce deed under section 39 of the Specific Relief Act, 1877.

5. Heard, record perused.

6. As far as, contentions of learned counsel with regards to reconciliation are concerned, it may be observed that once the petitioner pronounced three divorces to respondent vide divorce deed, dated 25.02.2019, no question of rejoining arises. In this regard, the learned Court has rightly referred to the dictum laid down in the case of Zubaida Khatoon v. Administrator Union Council Uch Gillani, Tehsil and District Bahawalpur and another (1996 MLD 1689) that “according to Islamic law when the talaq pronounced by the husband thrice become “bain” and after that husband has no right of its revocation and to that extend provision of section 7 of Muslim Family Law Ordinance, 1961 would give its way to those injunction as enshrined in the constitution. Such talaq being irrevocable, Administrator Union Council is bound to issue certificate regarding its effectiveness.” Besides, on said issue, the learned Appellate Court has appropriately referred to the case of Mst. Anila v. Muhammad Munir and others (PLD 1996 Lahore 65), Ms. Roheela Yasmin v. Ms. Neelofar Hassan and 6 others (2014 YLR 2315)

wherein it has been observed, *inter alia*, that Talaq-e-Bain becomes irrevocable immediately on its pronouncement irrespective of Iddat.

7. So far the claim of the petitioner regarding payment of dower amount is concerned, the Appellate Court has observed that *burden to prove the above point lies upon the appellant as the respondent in her plaint, as well as, during evidence stated that the appellant failed to pay the dower in shape of cash of Rs.30,000,00/-*. It is held in 2017 CLC 1597 (Re: Muhammad Zaheer v. Saima Bibi) that *onus of payment of dower was on the husband. The respondent was shown clause 1 of the divorce deed, which find mentioned that the Haq Mahar was paid by the appellant in presence of witnesses Ghous Bux and Saeed Ahmed Mangi but she has deposed that it is falsely mentioned in the divorce deed. After denial of the respondent, the appellant was liable to have proved the payment of Haq Mahar to the respondent. According to the appellant, he paid the dower amount to respondent in presence of Ghous Bux and DW Saeed Ahmed Mangi but he has examined only Ghous Bux and failed to adduce evidence of Saeed Ahmed Mangi. The appellant failed to give any reason for not adducing evidence of Saeed Ahmed Mangi. DW Ghous Bux during his evidence deposed that he was unaware as to wherefrom the appellant withdrawn such huge amount. The appellant during his evidence deposed that the marriage was consumed on 22.11.2018 and witnesses of Nikah belonged to Pindi and he paid the dower amount to the respondent on 23.11.2018 at Sukkur whereas, the distance between Pindi and Sukkur is about 12 to 14 hours. During his cross examination, he admitted that witness Saeed Ahmed did not come for his evidence as there was some dispute with him. According to him, he paid the amount in cash and he failed to produce any proof with regard withdrawing such huge amount of Rs.30,000,00/- and no such receipt with regard payment of dower amount was produced. Admittedly, dower amount is mentioned in nikahnama as "Ind-al-talab", which means payable on demand. The appellant failed to prove the source from which he arranged such huge amount particularly when, he deposed during cross examination that he took 30 to 40 thousand for dower amount at the time of marriage and he paid*

Rs.30,000,00/- on just next day of the marriage without expressing the source of arranging such huge amount, and the Family Court rightly held that a person having earning of Rs.60,000 to Rs.70,000/- per month was liable to have explain that how he managed such huge amount of dower in cash. The evidence of witness Saeed Ahmed was withheld by the appellant, for which, inference can be drawn against him. Reliance in this regard is placed upon 2017 CLD 1593 (Re: Muhammad Shafi v. Ashique Hussain) wherein, best evidence was withheld and inference was drawn against defendant. Inference in terms of Article 129(g) of Qanun-e-Shahadat Ordinance, 1984 to the effect that if he would appear in witness box he would have adversely deposed against the appellant. The reliance in this regard is also placed upon 2021 P. Cr.LJ Note 52 (Re: Allah Bachayo v. Leemo). Sole evidence of Ghous Bux with regard payment of dower amount was rightly discarded by the Family Judge being close friend of the appellant since 2002 and his affidavit in evidence was silent about the source with regard the appellant managed such huge amount.

8. The learned counsel for petitioner failed to rebut aforementioned observations of the learned Appellate Court, even he could not satisfy the Court on the query regarding source of arranging dower amount i.e. Rs. 30,00,000/- on the very next day of the marriage by the petitioner, whose source of monthly income is too meager to enable him to pay such a huge amount. The points raised by the learned counsel for the applicant in his arguments have already been discussed by the learned Appellate Court with sufficient reasoning which do not need reappraisal of this Court.

9. As regards non-filing of a suit for cancellation of divorce deed under section 39 of the Specific Relief Act, 1877 suffice it to say that a void instrument does not acquire any validity and remains ineffective even though a suit for its cancellation wholly or partly under section 39 and 40 of the said Act is not filed.

10. For the foregoing facts and reasons, as no case is made out on the ground of any irregularity or illegality, the impugned judgments and decrees of the Courts below do not call for any interference or exercise of discretion on any point of law in the case in hand. Accordingly, the instant Constitution Petition is dismissed in *limine* along with pending applications with no order as to costs.

11. Above are the reasons of my short order, dated 05.09.2022.

J U D G E

Abdul Basit