P L D 2019 Peshawar 218

Before Syed Arshad Ali, J

AJMAL KHAN and another---Petitioners

Versus

Mst. FALAK NEGAR BIBI and 2 others---Respondents

Writ Petition No.483-M of 2017, (with Interim Relief) decded on 31st January, 2019.

(a) Family Courts Act (XXXV of 1964)---

----S. 5, Sched---Dissolution of Muslim Marriages Act (VIII of 1939), S.2---Suit for dissolution of marriage and recovery of dower---Rukhsati having not been effected---Effect---Family Court conditionally dissolved the marriage and passed decree for half dower in favour of wife---Validity---Wife would be entitled to whole dower upon consummation of marriage or death of the husband and valid retirement---Wife could not ask for her dower before rukhsati---When husband had divorced his wife before consummation, he had to pay half of the dower but said principle was not applicable when before consummation wife was asking for dower---Wife before consummation was not entitled to ask for dissolution of marriage on the grounds provided in S.2 of Dissolution of Muslim Marriages Act, 1939---Wife was not entitled for dower before rukhsati and valid retirement---No ground existed for the wife to ask for dissolution of marriage in circumstances---Impugned judgments passed by the Courts below were against law---When parties were not ready to settle and live their lives in accordance with Islam, their marriage was dissolved on the basis of khula---Impugned judgments and decrees passed by the Courts below were set aside---Constitutional petition was allowed, in circumstances.

Majmooa Qawaneen-e-Islam by Justice (Rtd.) Dr. Tanzeel-ur-Rehman, Kitab-ul-Fiqh Ala-al-Modahibe-al-Arba'ah by Abdur Rahman Aljazairi and Holy Quran, Ayat: No.237 of Sura-e-Baqara rel.

(b) Islamic law---

----'Dower'---Meaning.

Dower (Mahr) is something which has some value in the terms of money and the wife is entitled to receive it as a gift from her husband for entering into a contract of marriage.

Mahr is either a sum of money or other form of property to which the wife becomes entitled by marriage. It is not consideration proceedings from the husband for the contract of marriatge but it is an obligation imposed by the law on the husband as a

mark of respect for the wife as evident from the fact that non-specificaiton of dower at the time of marriage does not affect the validity of marriage. [p. 223] B

Mohammedan Law authored by D.F.Mulla and Hidaya Famous Book of Islamic Fiqah Translated by Charles Hamilton rel.

Aurangzeb for Petitioners.

Muambar Khan and Shah Wazir for Respondents.

Date of hearing: 31st January, 2019.

JUDGMENT

SYED ARSHAD ALI, J.---Through the instant writ petition, the petitioners seek constitutional jurisdiction of this Court with the following prayer:-

"It is humbly prayed that by acceptance of the instant writ petition, the impugned judgment/decree/order dated 13.06.2017, passed by respondent No. 2 and judgment/decree dated 02.11.2016 passed by respondent No. 3 be declared illegal and unconstitutional and suit filed by respondent No.1/ plaintiff may kindly be dismissed throughout.

Any other remedy which is just and efficacious may also be awarded to petitioners though not specifically prayed for."

2. Essential facts of the case are that the plaintiff/respondent No. 1 Mst. Falak Negar Bibi had filed a suit against the defendant/present petitioner No. 1 Ajmal Khan before the learned Family Court for the following reliefs:-

i. Decree for dissolution of marriage.

ii. Decree for recovery of dower 12-1/2 tolas gold and half share in a house situated at Kass Madyan or its current market price.

iii. Decree for maintenance allowance @ Rs. 6,000/- per month from the date of Nikah i.e. 09.01.2011 till decision of the suit.

3. It is averred in the amended plaint that the Nikah between the parties was solemnized on 09.01.2011 in lieu of dower i.e. 25 tolas gold and a house situated at Kass Madyan but the rukhsati ( ) has not yet taken place, which shows mala fide intention of the defendant as he is not willing to marry the plaintiff.

4. On being summoned, the present defendant/petitioner No.1 contested the suit in his written statement asserting therein that the plaintiff No.1 is a disobedient wife who is not ready to live as wife with him, therefore, she is not entitled to the maintenance allowance. He has also prayed for a decree for restitution of conjugal rights against the plaintiff. In respect of the dower, it was asserted by the defendant/petitioner No. 1 in his written statement that the same has already been paid to the plaintiff/respondent No. 1.

5. From divergent pleadings of the parties, the learned Family Court framed as many as ten (10) issues. Accordingly, the parties were asked to produce their evidence and on closure of the evidence, the learned trial Court vide judgment and decree dated 02.11.2016 has conditionally decreed the suit of plaintiff/respondent No.1 to the extent of dissolution of marriage and half of the dower, whereas, rest of the suit of the plaintiff/respondent No. 1 was dismissed. Similarly, the decree for restitution of conjugal right was granted in favour of the defendant/petitioner No. 1 subject to the payment of dower within a period of 6 months.

6. Feeling aggrieved from the judgment and decree of the learned Family Court, the defendant/petitioner No. 1 preferred an appeal before the learned appellate Court.

The learned appeal Court vide impugned judgment and decree dated 13.06.2017 has also dismissed the appeal thereby affirming the findings of the learned trial Court. Hence, the present petition.

7. Arguments heard and record of the case was perused with the valuable assistance of learned counsel for the parties.

8. It is evident from the evidence produced by the parties that admittedly the parties are related to each other. It is also admitted fact that Nikah between the parties was solemnized on 09.01.2011, however no rukhsati ( ) so far has taken place. In her plaint, the plaintiff has prayed for dissolution of marriage, recovery of half agreed dower and maintenance. In para-3 of the plaint, the plaintiff asserts that she is ready to reside with the defendant provided her dower is paid to her first. She has further stated that since the defendant is not interested to take her home, therefore she is entitled for dissolution of marriage. Similarly, in para-7 of the plaint, she has once again stated that the defendant was time and again asked through Jirga that he should pay her dower and on such payment of dower, rukhsati ( ) of the plaintiff be finalized, however, the defendant has not agreed to the same.

9. Against that the claim of the defendant/petitioner No. 1 in his written statement was that indeed father of the plaintiff is the main hurdle in the rukhsati ( ) of the plaintiff. However, he has denied in his written statement that the disputed house was also part of the dower. The learned Trial Court from divergent pleadings of the parties has framed nine (09) issues.

10. The plaintiff in support of her claim herself appeared as PW-1. In her statement, she has admitted that:-

She has produced Mumtaz Ahmad as PW-3. According to his testimony, he was present at the time of Nikah. He has stated in his statement that the Nikah was performed by Molvi Sher Muhammad against the dower of 25 tola gold ornaments and one house. The witnesses of Nikah were Muhammad Zarin and Bakht Sherin, whereas the defendant No. 2 father of the defendant No. 1 was a guarantor for the defendant No. 1. Muhammad Zarin who is a witness to the Nikah has appeared as PW-3 who has also stated that the Nikah between the parties was performed in lieu of 25 tola gold ornaments and a house. He has also stated that father of the defendant No. 1 Liaqat Ali was a guarantor for bridegroom regarding the payment of dower. Muhammad Khaliq appeard as PW-4 who also supported the claim of the plaintiff.

11. In defence, the defendant Ajmal Khan appeared as DW-l. Dr. Inamullah appeared as DW-2 who has stated about the Jirga between the parties for rukhsati ( ) Anwarzeb appeared as DW-3 who has supported the statement of the defendant No. 1. Jibran appeared as DW-4 who has also supported the case of the defendant No. 1. However, the other witness to the Nikah Bakht Sherin appeared as APW-1, whereas one Molvi Fath-ul-Islam appeared as ADW-1 who has stated that a Jirga was convened to make the father of the plaintiff to agree for rukhsati ( ) of the plaintiff, however the Jirga failed because father of the plaintiff was insisting upon the payment of dower first before rukhsati ( ).

12. It appears from the evidence that the main bone of contention between the parties was the house which according to the plaintiff was agreed as a part of dower at the time of Nikah, whereas the defendant No. 1 does not admit the same. In this regard, the plaintiff has placed on file Nikahnama dated 09.01.2011 exhibited as Ex

PW 1/1. However, the defendant also filed Nikahnama of the same date accompanied with two surety bonds. In one surety bond, the house is part of the dower, whereas the other surety bond does not contain the house as part of the dower. Interestingly in both the surety bonds Muhammad Zarin and Bakht Sherin are the witnesses to the said Nikah. However, in the present case, neither the Nikah Khwan could be produced because he was abroad, whereas the Nikah Registrar could also not be produced because of his illness. Since, the witnesses of Nikah are unanimous on the fact that the house was part of the dower, therefore the findings of the learned Trial Court that the house was part of the dower are correct and based on correct appreciation of evidence.

13. The main controversy between the parties was that father of the plaintiff was insisting that the said house and the dower be first given to the plaintiff and thereafter, he is ready on rukhsati ( ). In this regard, reconciliation between the parties not only failed before the learned Trial Court but even before this Court. On the date of hearing, the defendant No. 1 had agreed that he will provide the entire gold ornaments and also another piece of land, where upon he will construct a house for the plaintiff. However, father of the plaintiff who was present in the Court had flatly refused the said offer by stating that in all circumstances unless the house is given to the plaintiff before rukhsati ( ), he is not prepared on the rukhsati ( ) of his daughter. However, he has shown his readiness that even if half of the gold ornaments was provided, he will make rukhsati ( ) of his daughter but shall not compromise on providing of the disputed house before rukhsati ( ). At this juncture, it is worth mentioning that the house which the plaintiff claims as her dower indeed belongs to the father of the defendant No. 1.

14. In such circumstances, the learned Trial Court had passed a conditional decree, whereby suit for restitution of conjugal rights was decreed in favour of the defendant No. 1 provided he pays the entire dower to the plaintiff before rukhsati ( ) within six months and in the event of default, the marriage shall stand dissolved against the payment of half dower.

15. Thus, the following legal proposition cropped up in the matter:-

i. Whether the plaintiff is entitled to claim the entire dower before rukhsati ( ).

ii. Whether non-payment of such dower before rukhsati ( ) entitles the plaintiff' to ask for dissolution of marriage against half dower.

My findings on the aforesaid two issues are as following:-

i. The word dower has been explained in the Principles of Mohammedan Law authored by D.F Mulla as "dower (Mahr) is something which has some value in the terms of money and the wife is entitled to receive it as a gift from her husband for entering into a contract of marriage." In the Hidaya, the famous book of Islamic Fiqah translated by Charles Hamilton, the word dower (Mahr) has been defined as "Mahr is either a sum of money or other form of property to which the wife becomes entitled by marriage. It is not consideration proceedings from the husband for the contract of marriage but it is an obligation imposed by the law on the husband as a mark of respect for the wife as evident from the fact that non-specification of dower at the time of marriage* does not affect the validity of marriage. "

   Since, in the present case, the dower is fixed, therefore I need not to further go in details about the classes of dower. Reverting to the main controversy i.e. at what time the dower becomes payable. In this regard, I will first refer to the

Principles of Mohammedan Law. In rule 89 of the said book, it has been mentioned that dower is confirmed and the wife is entitled to it in any one of the following three circumstances:-

a) On consummation of a marriage,

b) On the death of either party whether marriage is consummated or not,

c) On valid retirement.

Similarly, in Hidaya authored by Sheikh Burhanuddin Abi Al-Hasan Ali Marghinani translated by Charles Hamilton, regarding the entitlement of the wife to her whole dower, the same position has been stated that the wife is entitled to her whole dower upon the consummation of the marriage or death of the husband and Khulwat-Saheeh i.e. a valid retirement. Simi-larly, this view has also been further elaborated by the Majmooa Qawaneen-e-Islam authored by Justice (Rtd) Dr.Tanzeel-ur-Rahman the Hon'ble Judge of the Sindh High Court. The Hon'ble Judge in Para-72 of the said book has stated that:-

(In this regard, reference has been given to Kitab-ul-Fiqh Ala-al-Madahibe-al-Arba'ah authored by Abdur Rahman Aljazairi).

Thus, it is basic principle of Islamic jurisprudence that before rukhsati ( ) the wife cannot ask for her dower, therefore her claim for dissolution of marriage on failure of the defendant No.1 to provide complete dower was not tenable.

ii. Whether non-payment of such dower before rukhsati ( ) entitles the plaintiff to ask for dissolution of marriage against half dower?

The genesis of half dower before rukhsati ( ) lies in Ayat No. 237 of Sura-e-Baqara which reads as following:-



In Hidaya, this divine command has been elaborated as follow:-

"And to one-half, upon divorce before consummation

If the husband in the case now stated, were to divorce his wife before consummation, or Khulwat Saheeh, she in this case, receive half her specified dower; Allah having command, saying "If you divorce them before you have touched them, and have already settled a dower on what you shall pay them one-half of what you have settled".

Objection: It would here appear that the whole dower should of right drop, because the object of the contract reverts to the woman untouched, the same

as in sale, where the whole price drops, if the buyer and seller break off the contract.

Reply: There are two analogical conclusions applicable to this subject.

First: What is recited in the above objection.

Secondly: It would appear that the whole dower is due because the husband did not make use of his possession, but suffered it to pass from him untouched of his own choice; as in sale, where the whole price of a purchase is due. If the purchaser suffers the goods to perish in hands of the seller; and these two conclusions directly contradicting each other, they are both abandoned, and we adhere to the sacred as above. This case supposes the divorce to take place before Khulwat, or retirement, because that with a wife is held by our doctors to amount to carnal knowledge as shall be hereafter explained"

16. There is no ambiguity in the law that when the husband divorces his wife before consummation, he has to pay half of the dower. However, this principle is not applicable when before consummation of the marriage wife is asking for dower. The reason is that before consummation, the wife is not entitled to ask for dissolution of marriage on the basis of the grounds for dissolution of marriage as elaborately

provided in section 2 of the Dissolution of Muslim Marriage Act, 1939. The same is reproduced as under:-

2. Grounds for decree for dissolution of marriage.

A woman married under Muslim Law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely:

(i) that the whereabouts of the husband have not been known for a period of four years;

(ii) that the husband has neglected or has failed to provide for her maintenance for a period of two years,.

(ii-A) that the husband has taken an additional wjfe in contravention of the provisions of the Muslim Family Laws Ordinance, 1961;

(iii) that the husband has been sentenced to imprisonment for a period of seven years or upwards;

(iv) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;

(v) that the husband was impotent at the time of the marriage and continues to be so;

(vi) that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease;

(vii) that she, having been given in marriage by her father or other guardian before she attained the age of sixteen years, repu-diated the marriage before attaining the age of eighteen years..

Provided that the marriage has not been consummated;

(viii) that the husband treats her with cruelty, that is to say,

(a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or

(b) associates with women of evil repute of leads an infamous life, or

(c) attempts to force her to lead an immoral life, or

(d) disposes of her property or prevents her exercising her legal rights over it, or

(e) obstructs her in the observance of her religious profession or practice, or

(f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran,

(ix) on any other ground which is recognized as valid for the dissolution of marriages under Muslim Law, Provided that:

(a) no decree passed on ground (i) shall take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorized agent within that period and satisfies the Court he is prepared to perform his conjugal duties the Court shall set aside the said decree; and

(b) before passing a decree on ground (v) the Court shall, on application by the husband, make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfied the Court within such period, no decree shall be passed on the said ground.

17. As stated in para No. I of my findings, since the wife is not entitled to dower before rukhsati ( ) and valid retirement, there exists no ground to her to ask for

dissolution of marriage. Thus, in my humble view both the learned Courts below have misconstrued the law on the subject and passed the impugned judgments.

18. In view of the above and the close perusal of the evidence where it appears that father of the plaintiff had not only initiated criminal proceedings against the defendant/petitioner but has also filed two civil suits against him for compensation, damages etc and despite various Jirgas convened between the parties, it is not possible among the parties to settle and live their lives in accordance with the Sharia of Islam, then the appropriate way is to dissolve their marriage on the basis of Khula. The approach of the learned Trial Court with due respect by conditionally dissolving the marriage is neither in accordance with law nor in accordance with Islamic jurisprudence.

19. Therefore, by allowing this petition, both the impugned judgments and decrees are hereby set aside and the marriage between the parties is dissolved on the basis of Khula. Since, the marriage has not been consummated, therefore the plaintiff is not required to undergo the iddat period.

ZC/98/P Petition allowe

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