

IN THE HIGH COURT OF SINDH AT KARACHI

C.P. No. S-484 OF 2004

C.P. No. S-485 OF 2004

J U D G M E N T

Dates of hearing : 14.03.2006,

Petitioners through Ms. Sultana Parveen, advocate.

Respondent. None for the Respondents

-

YASMIN ABBASEY, J: Facts leading to these petitions are that on 21.08.1998 Petitioner and Respondent No.3 were married. Subsequently, due to differences and on account of alleged harsh and cruel conduct Petitioner was forced to file a suit for dissolution of marriage and recovery of dowry articles. Simultaneously she had also filed a suit for recovery of dower amount of Rs.1,00,000/- and maintenance at the rate of Rs.3,000/- per month from April, 1997. Both the suits were decreed vide judgments dated 24.04.2003 and 29.01.2001.

Family Suit No.1592/2002 for dissolution of marriage was decreed on the ground of Khula with the observation that the Petitioner will not claim her dower amount. In consequences of the order in Family Suit No.1592/2002 dated 24.04.2003 the Execution Application bearing No.21/2001 filed for execution of Family Suit No.908/2000 for dower and maintenance was dismissed as infructuous to the extent of dower amount. Being aggrieved by the judgment dated 24.04.2003 in Family Suit No.1592/2002 and in Execution Application No.21/2001 of Family Suit No.908/2000, on 26.05.2003 two separate appeals were filed bearing No.75/2003 and

76/2003. By judgement in Family Appeal No.75/2003 and 76/2003 dated 12.2.2004 impugned judgement and order were upheld.

After institution of these Constitutional Petitions notices were issued to Respondent No.3 but instead of Respondent No.3, one Rashid Hussain, the brother of Respondent No.3 appeared before the Court and had made a statement that Respondent No.3 is not residing at the address mentioned in the Nikahanama, and for the last about four and half years he is on ship. Rashid Hussain was asked to provide the residential address as well as the address and particulars of the shipping company in which Respondent No.3 was working within 15 days with the clear observation that in case of failure to provide the particulars service on Respondent No.3 at the same address would be held good. It appears that in spite of these directions Respondent No.3's brother failed to provide the address as directed, therefore, on 18.04.2005 service was held good against Respondent No.3. As such Respondent No.3 from the initial stage of Family Court, Karachi to this Court remained un-represented in spite of opportunities provided to him from time to time.

As the issue involved in both the matters is interdependent to each other, therefore, both these matters are taken up together for disposal.

The point for determination in the matters is that whether the learned Family Judge while disposing of the suit for dissolution of marriage can entertain the ground of Khula exercising his own discretion when the same has not been prayed for. It is argued by learned counsel for the Petitioner that in the suit for dissolution of marriage and recovery of dowry articles she has sought dissolution of marriage because of harsh and cruel conduct, illegal demand from Petitioner's parents and physical and mental torture to Petitioner by Respondent No.3/Defendant. In para-10 as well as in para 16 clause (i) Petitioner has specifically stated for dissolution of marriage on the grounds agitated by her in the plaint. He further pointed out that not in the single para the ground of Khula was raised by the Petitioner, therefore, the learned trial Court ought to have decided the suit on the grounds raised by the Petitioner in the plaint. Depriving the Petitioner from her legal right of dower without any just reason mere on the ground of statement of Petitioner that it is not possible for her to live with the Respondent No.3/Defendant within the limits prescribed by God due to reasons assigned by her, is beyond the prayer, on the basis of fact, sought by her. To support his arguments, learned counsel for Petitioner has referred the case of MUKHTAR AHMED VS. ANSA NAHEED AND 2 OTHERS (PLD 2002 SC 273), wherein it is observed that:

“A woman married under Muslim Law is entitled to obtain a decree for the dissolution of her marriage on any one or more of the grounds available

under the law. Each ground is separate and enough for dissolution. If marriage is dissolved on other grounds also it means that the result would have been the same irrespective of the fact that the plea of Khula was raised or not. Legal rights cannot be curtailed by implication. ”

It is further urged by learned counsel for the Petitioner that because of these observations of learned Family Court, which have been upheld by the learned appellate Court vide judgment dated 12.02.2004, she has been deprived of her legal right of dower of Rs.1,00,000/-. To meet with the situation the same authority i.e. MUKHTAR AHMED VS. ANSA NAHEED AND 2 OTHERS (PLD 2002 SC 273) has been referred, wherein in spite of prayer of Respondent for dissolution of her marriage on the ground of Khula besides other grounds taken up by her, it is observed that:

“It is an admitted fact that her marriage with the appellant was dissolved on various grounds, including Khula. Once the marriage is dissolved on other grounds also the wife would be entitled to recover the amount of dower and dowry. ”

The perusal of judgment in Family Suit No.1592/2002, shows that on the basis of statement of respondent No.3, which has not been placed on record, it is observed that petitioner has raised a new ground of taking of intoxicants by respondent No.3, which has not been proved by her and that from record of Family Suit No.908/2000 it appears that Respondent No.3 was trying to reunite but the same was not accepted by the Petitioner. Thus according to learned presiding officer when Petitioner is not ready to reside with the Respondent No.3 at any cost, her marriage should be dissolved by way of Khula. Such observations without considering the grounds raised by the Petitioner of cruel conduct, mental torture and illegal demands are not proper because if separate allegations are taken by a wife for dissolution of her marriage, the same should had been discussed separately. Without considering and discussing the same there appears no justification in dissolving the marriage by way of Khula without praying for the same, because it is the bounden duty of the judicial forum to restrict itself to the evidence on record, and decide the matter on the available facts and circumstances. In deciding the dispute, Courts are not expected to act in an arbitrary, capricious or whimsical manner. Reliance is placed on the case of LAL MUHAMMAD VS. MST. GUL BIBI AND ANOTHER (PLD 1986 QUETTA 185).

In view of the dictum laid down by the apex Courts and the case law referred and the reasons discussed above the impugned judgments of both the learned Courts below in Family Suit No.1592/2002 and Execution No.21/2001 on 24.4.2003 are hereby set aside. The case No.1592/2002 is remanded back to the learned trial Court for retrial. The learned trial Court is directed to give his observations on each and every grounds taken up by the Petitioner in her suit for dissolution of marriage and pass appropriate order in accordance with evidence produced before it.

With these observations both the Constitutional Petitions are disposed of as allowed.

Karachi,

Dated: _____

J U D G E