

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Constitutional Petition No.S-415 of 2015

Amrat Lal Matlani Vs Shrimati Pari Bai & others

Petitioner : Through Mr. Muhammad Ramzan
Khushk, Advocate

Respondent No.1 : Through Mr. Parkash Mal, Advocate

Date of hearing : 13.02.2019

J U D G M E N T

Zulfiqar Ahmad Khan, J: This Constitutional Petition, impugns the judgment dated 17.04.2015 passed by learned 6th Additional District Judge, Hyderabad in Family Appeal No.56/2013, where the learned appellate Court allowed the appeal and set aside the Judgment and Decree Dated 31.08.2013 and 10.09.2013 only to the extent of issue No.3 partly relating to 15-tolas gold ornaments.

2. Brief facts of the case are that the respondent No.1 / plaintiff originally filed Family Suit No.65 of 2011 claiming Maintenance, Visitation Rights and Recovery of Personal Property, Dower and Dowry Articles, alleging therein that she was married with petitioner / defendant in the year 1979 at Shahdadpur District Sanghar. At the time of her marriage, parents of the plaintiff gave dowry articles including 30 Tolas of gold ornaments and other valuable house hold articles, which were given to the plaintiff at the time of her marriage with defendant as per Hindu traditions. From the wedlock the plaintiff gave birth to son namely Mukesh Kumar in the year 1982, daughter Arti Bai, Dayawanti, Ashawanti and Ramesh Kumar in the years, 1986, 1988, 1990 and 1992 respectively. However, in the year 1995 the defendant expelled her out in three clothes and kept all the dower and dowry articles and personal property of plaintiff with himself. Hence, the aforementioned suit was filed with the following prayers:-

- a) Defendant do return all the dower and dowry articles viz. 45 Tolas gold and other household articles to plaintiff.
- b) That defendant do pay maintenance at the rate of Rs.10,000/- per month from 01.01.1998 till 28.02.2011 and failure maintenance at the rate to be determined by the Honourable Court.
- c) Direct the defendant to allow plaintiff to live with her children at Dadu in the alternate provide a separate house to plaintiff at Dadu and maintenance amount of Rs.25,000/- per month from 01.03.2011.
- d) Any other relief this Honourable Court deems fit may be granted.
- e) Costs.

3. During pendency of the said suit, the defendant appeared and filed written statement, wherein he denied all the allegations leveled against him and stated that according to him, couple was living happily and passing a harmonies life, but the plaintiff being greedy started demanding the amount from him and on his refusal she left the house alongwith gold ornaments and other dowry articles. The trial Court after framing of issues and hearing the respective parties, partly decreed the suit observing that the plaintiff was not found entitled for recovery of her dowry articles however, she was held to be entitled for past maintenance at the rate of Rs.5,000/- per month for last three years from the date of filing suit and for her future maintenance at the same rate from the decision of suit till her legal entitlement with 25% increase per annum. Being aggrieved by the said judgment, an appeal was preferred by the respondent No.1 / appellant before the learned 6th Additional District Judge, Hyderabad in Family Appeal No.56 of 2013, where, after considering the matter at length and perusing the record, the learned appellate Court allowed the said appeal vide Judgment dated 17.04.2015 holding that the respondent was eligible for 15 tolas of gold ornaments/dowery articles. Against the said judgment, instant petition has been filed.

4. Learned Counsel for the petitioner has argued that the judgment and decree passed by the learned appellate Court is outcome of miss-reading and non-reading of evidence, thus require to be set-aside; that the respondent No.1 / plaintiff stated in Para No.3(ii) of the plaint that in the year 1995 the petitioner / defendant drove out the respondent No.1 / plaintiff in three clothes and took all dower and dowry articles however, in her cross examination, she stated that she

left petitioner / defendant's house on her own accord, but both the courts below have failed to consider such important fact of the case. He further argued that burden of proof was on the shoulder of respondent No.1 / plaintiff with regard to leaving the house of petitioner / defendant, but the same fact was not considered by the courts below. He further argued that despite having failed to produce any proof as to the fact that whether she took away the said ornaments while leaving the house of petitioner / defendant or not, the appellate Court decreed the suit of the respondent No.1 / plaintiff to the extent of 15-tolas gold. In support of his contention, learned counsel for the petitioner relied upon the case of **Javed Iqbal v. Additional District Judge Faisalabad and another** (2017 CLC Note 25).

5. Learned counsel for the respondent No.1 on the other hand while supporting the impugned judgment submitted that the petition is not maintainable; that the impugned judgment is sustainable; that vide order dated 23.12.2014 passed by learned executing Court in Execution Court No.65/2014, petitioner was directed to pay the decretal amount of Rs.4,85,000/-, however, neither the petitioner challenged that order nor complied with the same, therefore, he is not entitled for any relief claimed through instant petition, thus the petition is liable to be dismissed. He relied upon the case of **Tanveer Aslam Dar v. Mst. Rashida** (2017 CLC 758).

6. Heard the arguments of both the respective parties and perused the entire record available before me.

7. Perusal of the trial Court's judgment reveals that the defendant admits having bought 15 tolas gold ornaments for her bride (respondent). While the respondent has failed to produce any witness in support of her contention that she was given 33 tolas gold ornaments by her parents at the time of marriage, whereas the appellate Court in its judgment (impugned herein) observed that:-

“After hearing, I have gone through the material available on record, with reference to issue No.3 of trial court only which vetted that the appellant examined himself to support contention of her plaint. She also examined one witness in support of her one of the version. As per para No.1 (iii) of plaint, respondent/defendant gave her gold ornaments weighing 15 tolas and as per para No.1 (iv) of same her parents gave her gold ornaments weighing 30-tolas and other valuable articles. On the other hand, in rebuttal respondent/defendant admitted the contents of para No.1 (iii) of

plaint, whereas he denied the contents of para No.1 (iv) of plaint in his written statement on the pretext that her father was small shopkeeper, hence no capacity to give 30-tolas gold ornaments and other valuable household articles. In support of averments made in written statement he examined himself, as well examined one witness. In chief-examination he alleged that gold was in possession of plaintiff, but remained silent on the weak financial position of appellant's father, which shows he withdraw from the objection on the financial position of appellant's father. His witness was also supported his version regarding handing of 15-tolas gold to appellant, but he was silent regarding the possession of the same.

Pursuant to above discussion, I am of the humble opinion that appellant/plaintiff has not produced any proof/receipt/witness regarding her claim of 30-tola gold ornaments, whereas 15-toal gold ornaments given by respondent/defendant to her has been established, but it has not been proved that she took away said gold ornaments. Under these circumstances, the findings on this issue is modified that appellant/plaintiff is entitled for gold ornaments at least undisputed 15-tolas and respondent/defendant is responsible to return the same to her or to pay current market value of the same.

In view of the above facts & circumstances, I am of the humble opinion that the impugned Judgment & Decree were not passed with proper appreciation of evidence as well as material available on record, I therefore, set-aside impugned Judgment & Decree to the extent of issue No.3 partly i.e. in respect of 15-tolas gold ornaments, which are to be handed over by respondent/defendant to appellant/plaintiff or its current market value. Resultantly, I allow the appeal in hand with such modification in impugned judgment & decree. Let such decree be prepared accordingly."

8. A review of the record reveals that the trial Court while deciding issue No.3 as to whether the plaintiff was entitled for the gold ornaments of 30 tolas and other dowery articles and dower, gave negative finding for the reasons that the plaintiff had stated that she was given dowery articles including 30 tolas of gold ornaments but neither she examined any witness in respect of her contention with regard to the dowery articles nor produced any receipt of those dowery articles in her evidence and that since defendant had denied that any dowery article including 30 tolas of gold ornaments of the plaintiff were in his possession, the trial Court held that the plaintiff had failed to produce sufficient evidence to prove this issue. Whereas, the appellate Court with regard to gold ornaments concurred with the view of the trial Court that no evidence was brought on record that 30 tolas of gold ornaments were given to the lady by her parents, however, upon the admission of the respondent/petitioner that he gave

15 tolas of gold ornaments to the lady, and as it was not proved that she took away that those 15 tolas of gold ornaments when she left the home in 1995 in three plain clothes. With regard to said 15 tolas gold ornaments, the lady/plaintiff in para-1 (iii) of her plaint stated that at the time of marriage defendant gave dower in the shape of gold ornaments being 15 tolas to her. In written statement, filed by the defendant/petitioner, contents of said para were admitted, meaning thereby it was established that dower in the shape of 15 tolas gold ornaments was given to the lady at the time of marriage.

9. To address the issue with regard to 15 tolas or 30 tolas gold ornaments, it would be relevant to look at the evidence produced by the parties. Petitioner/defendant in support of his contention examined himself as well as D.W. Rajal Das. In his examination-in-chief he has stated that he married the lady in the year 1980 at Shahdadpur and as per their custom he bought 15 tolas gold ornaments and some pairs of clothes and gave the same to her at the time of marriage. He also deposed that such gold was still in the possession of the lady. He stated that he was bestowed with 5 children out of the said wedlock and that the lady finally left his home on 30.05.1995 without his permission alongwith her brother Teekam Das and brother-in-law Jhaman Das. It is pertinent to note that the defendant stated that when the lady left his house in 1995, she took all jewelry, gold and other valuables with her. During cross-examination, he admitted that he bought 15 tolas gold ornaments for the bride, however, he admitted that no receipt of the said gold was available with him. He further admitted that as per Hindu custom brides bring dowery. During the cross-examination, he also stated that “ it is incorrect that the gold ornaments of plaintiff were possess by, he voluntarily stated that she had no gold ornaments rather she took away by gold.” Defendant's witness Rajal Das in his examination-in-chief has admitted that he attended the marriage ceremony and that the defendant gave 15 tolas gold to plaintiff in her marriage. In his cross-examination he admitted that the gold was in the form of different ornaments which were given to the plaintiff at the time of marriage.

10. The plaintiff/respondent Shrimati Pari Bai in her examination-in-chief stated that her parents gave her valuable dowery articles including 30 tolas gold ornaments at the time of marriage and after Rukhsati she started living in the house of defendant at Dadu, where the defendant and his family members were misbehaving with her and even did not allow her to go and see her parents. She further stated that it was only two years thereafter when on the intervention of the Nek Mards, the defendant and his family members allowed her to visit her parents, but they did not allow her to take any article including gold ornaments with her. In her cross-examination she admitted that she has not produced any receipt or proof of purchase of 30 tolas gold ornaments, however, voluntarily stated that such receipt was lying at the house of the defendant. Plaintiff's witness Rupa Mall in his examination-in-chief stated that plaintiff was his maternal cousin and residing at Tilk Incline, Hyderabad. He further stated that the plaintiff left her house 10-15 years ago and she has no other residential house. He further stated that she previously resided at Hala, but after the death of her brother, she came to Hyderabad. He next stated that the plaintiff has full right as per prayer of the present suit. In his cross-examination, Rupa Mall has stated that it is incorrect to suggest that the plaintiff herself came from the house of defendant and took all the valuable articles. *Voluntarily stated that she came empty handed.*

11. It is well known that as per Hindu custom every lady at the time of her marriage brings dowery articles including gold ornaments. For what has been discussed above, in my view while the respondent/plaintiff has not produced any proof or receipt regarding her claim of 30-tola gold ornaments, whereas 15-toal gold ornaments given by petitioner/defendant at the time of marriage to her has been established, but from perusal of entire evidence it has not been proved that while leaving the petitioner's house the lady took away the said gold ornaments with her. In these circumstances, the findings on issue No.3 given by the appellate Court could be rightly maintained that respondent/plaintiff was entitled for 15-tolas gold ornaments and petitioner/defendant be made to return the same to her, or to pay current market value of the same.

12. As regard the case of Javed Iqbal (Supra) cited by the learned counsel for the petitioner, the facts of same apparently support the contention of the respondent rather petitioner's case. Accordingly, the same is not applicable.

13. In view of above, the impugned judgment dated 17.04.2015, passed by learned Additional District Judge-VI, Hyderabad in Family Appeal No.56 of 2013 is maintained and the instant petition is disposed of accordingly.

JUDGE

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