

Order Sheet

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

C. P. No. S – 255 of 2019

Date of hearing: 27-09-2021

Date of decision: 27-09-2021

Mr. Asif Aman, Advocate for the Petitioner.
Mr. Fayyazuddin Rajper, Associate of Mr. Shamsuddin Rajper,
Advocate for respondent No.1.
Mr. Saeed Ahmed Wassan, Assistant Advocate General Sindh.

ORDER

Muhammad Junaid Ghaffar, J. – After affording a brief hearing, and in view of the fact that apparently no case for interference was made out, Counsel for the petitioner was given an option withdraw the petition, failing which cost(s) may be imposed, if finally, the petition is dismissed; however, Counsel has not taken this option and has pressed the petition. After hearing the respective Counsel, petition was dismissed in the earlier part of the day by means of a short order by imposing cost of Rs.5,000/- and these are the reasons thereof.

2. Through this Petition, the Petitioner has impugned judgment dated 09-08-2019 passed by the Civil Model Appellate Court / 2nd Additional District Judge, Sukkur, in Family Appeal No.02 of 2019, whereby, while dismissing the Appeal, the judgment dated 10-12-2018 passed in Family Suit No.64 of 2018, through which the Suit of the Petitioner was decreed partly, has been maintained.

3. Counsel for the Petitioner has argued that both the Courts below had failed to appreciate the evidence; that the Petitioner had produced medical record, receipts and test reports to substantiate her claim; that Issues No.2 and 5 also ought to have been decided in favour of the Petitioner; that it is a case of misreading and non-reading of the evidence, and therefore, this Court is fully competent to grant the relief.

4. On the other hand, Respondent's Counsel has supported the impugned judgment.

5. I have heard the learned Counsel and perused the record.
6. The Petitioner had filed Suit seeking various reliefs, wherein, the Suit was decreed partly, and out of the 6 issues, 2 issues were decided against the Petitioner i.e. Issue No.2 (*Whether the plaintiff is entitled for maintenance, if yes, at what rate and upto what period?*) and Issue No.5 (*Whether the defendant had paid dower amount to the plaintiff in shape of gold?*).
7. The finding of the learned Trial Court in respect of Issues No.2 and 5 is as under:

“ISSUE NO.02 & 03

Since both issues are interlinked and interconnected with each other thus discussed together. Plaintiff claims for her maintenance since June 2016, onus to prove lies upon the shoulder of Plaintiff. Plaintiff has submitted that in month of June she was diagnosed with appendix and got operated in this regard she has produced discharge card of Patient/Plaintiff of Hospital red crescent, perusal of discharge card reveals that title of patient is mentioned as Mrs. Farooq and such fact is also admitted by the Plaintiff/attorney Muhammad Masood/attorney at Exh...P/1 that defendant has put his signature on the form provided by hospital administration for appendix operation which shows that she got operated in presence of defendant, thereafter she returned back at the house of defendant but again in July 2016 she was ousted by the defendant at that time she was pregnant. Admittedly parties were remained in matrimonial tie same was ended by way of Khula vide order dated 02.02.2018 and Plaintiff claims that defendant has maltreated her and failed to provide maintenance, in this regard the Plaintiff has not produced any medical certificate or independent witness of vicinity who could reveal that she was ousted by the defendant after maltreatment, rather, record shows that defendant filed suit for conjugal rights before Court of learned 2nd Family Judge, Sukkur which was succeed via pre trail talks but after span of short period Plaintiff filed instant suit to dissolve her marriage by way of Khulla which shows that she is not willing to live with defendant. Under circumstances Plaintiff has failed to produce any cogent proof that she was ousted by the defendant after maltreatment and he failed to maintain her during that period, it is well settled principle of law wife would not be entitled to claim her maintenance when she chooses to live apart from her husband with put any reasonable excuse and not performing her marital obligations, reliance placed on 2011 MLD 571. Therefore, she is not entitled for the claim of maintenance but she is entitled for iddat maintenance at Rs.4,000/- per month Rs.12,000/- as whole of three months. Issue replied negative.

As far as claim of maintenance of minor Urooj is concerned. Admittedly, the defendant is the father of minor and he is legally bound to maintain his own child for the purpose of his subsistence which meant to support their life. Requirements include food, clothing, lodging, education, medical care and some amount for extracurricular activities of the minor etc. The criteria for determining the quantum of maintenance is

the income and status of the father as well as the social standing of the parties. From the pleadings of both the parties it has come on record that the defendant has business of whole sale clothes and he earns handsome amount. In the light of whatever discussed above, I am of the humble view that the minor Urooj is entitled for his past maintenance at the rate of Rs.3,000/- per month since institution of suit till disposal of the case and future maintenance at the rate of Rs.4,000/- per month till legal entitlement with the increase of 10% per annum. Issue replied affirmative.

ISSUE NO.05

Plaintiff claims for dower amount and it is matter of record marriage between the parties have been dissolved by this court vide order dated 02.02.2018 since dower was disputed hence Issue was framed. Onus to prove lies upon the shoulder of Plaintiff/(attorney) during cross examination deposed that, haq Mahar was written as Four Tola Gold and defendant had sent bridal dress and gold ornaments to the Plaintiff at the time of marriage he voluntarily said that but same was not disclosed as such gold ornaments were given in shape of dower amount. Burden to prove shifts upon the shoulder of defendant, during cross examination he deposed that he paid dower amount to the Plaintiff at the time of Nikkah. Admittedly, Nikah is documentary proof and same is on record where in dower amount is written as Moa' Jal "معجل" which means prompt paid earlier. Therefore, Plaintiff is directed to return the dower amount to the defendant. Issue replied affirmative."

8. The petitioner was aggrieved to this extent, whereas, the Respondent had not filed any appeal and the Appellate Court while dismissing the Appeal through impugned judgment has been pleased to hold as under:

"My findings on the above referred points for determination along with reasons are as under:-

Perusal of case file and available documents in the R & Ps makes it abundantly clear that the appellant has herself sought dissolution of marriage by way of khulla from the trial court and same was granted in her favour. Once a lady preferred to obtained khulla from court then automatically her right of dower amount relinquishes, therefore the findings of the trial court in this regard are aligned with the settled principle of law on the subject, therefore need no interference. So far the exchange articles are concerned, it is admitted by the appellant during her evidence that she voluntarily and with her consent and willingness exchanged such articles comprising her dowry with her in laws therefore the claim of the appellant for recalling the same was unfounded and was correctly declined by the trial court. So far maintenance amount is concerned, it is also well settled principle of law that maintenance amount as per pronouncement of Hon'able apex Courts is always to be determined "per gratia" therefore no evidence was produced by the appellant during her evidence on record that the respondent income is so that he is able to pay amount of maintenance at Rs.20000/- to the appellant and Rs.25000/- to the minor baby Urooj per month. The trial court was correct to hold that looking into the financial circumstances of respondent an amount of Rs.3000/- and Rs.4000/- respectively was awarded in favour of the appellant till her iddat period and for minor baby Urooj. I do not find myself in a position to even disturb such findings of trial court. As a whole the impugned judgment is well reasoned and at par with the available material placed by the appellant on record, therefore

same does not provide room for interference at this stage. Accordingly, the impugned judgment and decree stands maintained and as natural corollary appeal in hand is dismissed with no order as to the costs.”

9. Perusal of the aforesaid observations of the two Courts below clearly reflects that the Petitioner had failed to lead proper evidence which could inspire the Court(s) to pass a decree in her favour to the extent of Issue Nos.2 & 5. It is a matter of record that after being operated, the Petitioner had returned to the house of the Respondent, whereas, even after another dispute she returned to the house of the Respondent in his suit for conjugal rights on her own and finally she took Khula. Naturally for this period the maintenance demanded was rightly refused by the Courts below. Similarly, as to the other issue regarding claim of dower amount the Petitioner had not been able to lead any confidence inspiring evidence; hence the said relief was also correctly declined. While confronted, the Petitioner’s Counsel has vehemently argued that enough evidence was led and he has tried to refer to various medical record, receipts, etc. with an attempt to seek the relief in this constitutional jurisdiction which has been so declined.

10. I have confronted the Petitioner’s Counsel as to how both these concurrent findings can be upset on the basis of these documents, which have not been proved in the evidence, and to this, he has not been able to satisfactorily respond, except that this is a case of misreading of evidence. With respect this is completely not so and is rather misconceived. He has even made an attempt to read out the memo of petition.

11. It is settled law that even in matters coming up as a revision, under Section 115 CPC conferring jurisdiction on this Court (though limited) interference in the findings of facts concurrently arrived at by Courts should not be lightly made, merely for the reason that another conclusion shall be possibly drawn on the reappraisal of evidence; rather, interference is restricted to the case of misreading and non-reading of material evidence which has bearing on the fate of the case¹. Though this Constitutional jurisdiction can be regarded as being on a higher pedestal as against the jurisdiction under section 115 CPC. However, that may be, it is wholly wrong to consider that the above Constitutional provision was designed to empower the High Court to interfere with the decision of a Court or tribunal of inferior jurisdiction merely because in its opinion the decision is wrong. In that case, it would make the High Court's jurisdiction indistinguishable from

¹ Farhat Jabeen v Muhammad Safdar (2011 SCMR 1073)

that exercisable in a full-fledged appeal, which plainly is not the intention of the Constitution-makers². It is not that if no further appeal is provided in law, then a constitution petition can be treated as an appeal and matter could be argued as if this Court is the Appellate Court. Such concept is totally misconceived and uncalled for. The legislature in its own wisdom has restricted further appeal in family matters; therefore, only in cases of exceptional nature and where apparently on the face of it, an order has been passed which lacks jurisdiction and is so patently illegal warranting correction, only then this Court under its constitutional jurisdiction can exercise discretion in favour of an aggrieved petitioner. This Court shall always be slow in exercise of constitutional jurisdiction where the statute has provided appeal and a person has, either availed the remedy or has declined to avail such remedy until and unless it is shown that the action taken, or order passed or intended to be passed is palpably without jurisdiction and is violative of the principles of justice³.

12. The Court could not go behind concurrent findings of fact unless it can be shown that the finding is on the face of it against the evidence or so patently improbable, or perverse that to accept it could amount to perpetuating a grave miscarriage of justice, or if there has been any misapplication of principle relating to appreciation of evidence or finally, if the finding could be demonstrated to be physically impossible⁴.

13. Unfortunately, despite there being a plethora of case law from the Hon'ble Supreme Court as well as the High Court(s), it has become a practice to file Constitutional Petitions, being aggrieved of orders of the forums below, on the ground that since no further remedy of appeal has been provided in law, this Constitutional jurisdiction must be exercised as a matter of right in favor of the aggrieved party and that too acting in a manner, an Appellate Court exercises its jurisdiction. This, as observed is a misnomer. It needs to be curbed and halted as it is burdening the Courts with unnecessary litigation; resultantly, delaying disposal and decisions of other cases involving statutory rights of the litigants. And due to this reason, as already noted, the Petitioners Counsel, after a brief hearing was given an option to withdraw the petition, which option was not exercised.

² Muhammad Hussain Munir and others v Sikandar and others (PLD 1974 SC 139)

³ Ali Muzaffar v Syed Muhammad Ali Abedi (2006 CLC 379)

⁴ Federation of Pakistan v Ali Hussain (PLD 1967 SC 249 and Muhammad Shafi and others v. Sultan (2007 SCMR 1602)

14. In view of hereinabove facts and circumstances this Court is of the view that the case in hand is not of an exceptional nature so as to compel this Court to exercise its discretion as apparently both the Courts below have passed a well-reasoned order / judgment which does not warrant any interference, and as a consequence thereof the Petition being misconceived does not merit consideration; hence, was dismissed by means of a short order in the earlier part of the day by imposing cost of Rs.5,000/.

Abdul Basit

J U D G E