

HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

C.P No.S-107 of 2022

[Mst. Mahnoor versus Fayaz Ahmed & another]

Petitioner : **Through Ms. Samina Ajmaree advocate**
Respondent : **Through Mr. Riaz Ali Panhwar advocate**
Date of hearing : **31.08.2023**
Date of Order : **31.08.2023**

ORDER

MAHMOOD A. KHAN J:- This constitutional petition has been filed by the petitioner claiming being aggrieved from the order of learned trial/family Court as well as appellate Court passed on her family suit for dissolution of marriage and return of dowry articles under Section 14 of the West Pakistan Family Court Act. The learned trial Court was pleased to allow dissolution by way of Khula, while calling upon the petitioner to return the dower as mentioned in the Nikahnama and the same was upheld by the learned appellate Court.

2. Learned counsel for the petitioner states that dower though shown to have been paid at the time of Nikah by way of gold ornaments and established before the learned trial Court but same was taken away and that the mother-in-law of the petitioner herself was wearing the same as is appearing from the photographs and as such conditionality of declaring the khula was not available. She has referred to portions of evidence in this regard, whereby the petitioner had come-up with the evidence that when she returned away from the house of respondent no gold was with her.

3. Learned counsel for the respondent, however, while supporting the impugned orders, contended that delivery of dower was ever present and was duly established and documented in the Nikahnama, which is the basis of whole proceedings and that the above said claim of dower was not brought up by the petitioner in the present form and as such she cannot claim wavering of the condition imposed upon her. Learned counsel has also contended that this petition was filed much subsequent to the final order of the appellate Court and in this regard, as to the pleadings, evidence and appreciation thereof, he has relied upon the case of FAIZ AHMED vs. Mst. SONI and 2 others reported as 2020 C.L.C 148.

4. I have heard the learned counsel and have gone through the record with their able assistance. The claim of the petitioner is restricted to the portion of impugned order for and in respect of return of 09 total gold ornaments or the price thereof;

however, it seems that learned counsels as well as the learned trial Court alongwith the learned appellate Court had failed to appreciate that dissolution of marriage on khula against return of dower is available at the stage of pre-trial with consent and thereafter is/cannot be considered limited or conditional to khula. As such and in other words for the dower to be returned a money decree or a decree for restoration of the dower, as the case may be, is to be granted against the wife in favour of the husband where in case the dower is proved to have been delivered and is in ownership of the wife. This aspect of delivery and ownership arising therefrom is liable to be so understood in the legal sense of ownership i.e both de-jure as well as de-facto as ownership cannot be complete without the same. As such it is observed that the Order passed under Section 10(4) of the West Pakistan Family Court Act, 1964 referred to in Judgment of the trial Court in the paragraph just before the Issues is apparently under misconception of law, which is reproduced as under:

On 06.07.2019 the pre-trial proceedings between the parties were held to reconcile the matter, but the plaintiff did not agree to rejoin the defendant, therefore pre-trial proceedings were declared as failed and Khulla was granted to the plaintiff in lieu of dower amount as dower amount was disputed, hence from the pleadings of the parties following issued were framed:

(Underlined by me for emphasis only)

5. Now coming to the Issues as framed by the trial Court being as follows:

- i) *Whether defendant has snatched the dower gold ornaments 09 total from the plaintiff?*
- ii) *Whether the plaintiff is entitled for recovery of dowry articles as per list from the defendant or alternate value thereof?*
- iii) *What should the decree be?*

Strangely Issue No.(i) is found not to be coming out from the pleadings as apparently no such allegation is present on part of the plaintiff in the plaint. The plaintiff in respect of dower has only stated as follows in her plaint:

That the plaintiff solemnized marriage with the defendant on dated 16-02-2018 with the consent of parents in consideration of dower was fixed 9 Tola Gold Ornaments which is still unpaid by the defendant despite of her repeated demands.

6. The snatching element though coming up in evidence, same can only come after framing of Issues. The above disparity can only be explained by the Presiding Officer but the record and law establishes otherwise.

7. The gold ornaments being the dower and said to have been paid as such at best can be a defense/claim of the then husband i.e the defendant as such onus was on him to prove the same. Irrespectively said issue as framed is not only out of the pleadings, the convenient shifting as to onus of proof is wrong. For a better understanding, I had to go through the whole of evidence where-after being a family

matter it was not found proper to order a remand to make the parties go through process again. In this regard this Court was informed that the respondent/defendant has since got married again.

8. The plaintiff admits the dower having shown to be paid in the Nikahnama and the same also having been given to her but in this regard further states that the same was taken away by the mother of the defendant, the then husband. For her to come to this understanding that as such dower never paid before the stage of pre-trial/evidence is found quite natural. Now the question of quality/reliance, it is observed that the plaintiff in the matter was truthful as no adverse allegation has been made against her by the then husband as to her personal character and taking of some items of dowry is also found present. In this regard supporting evidence of the mother of the plaintiff is also present which refers to photograph of mother-in-law wearing the said gold jewelry on the second day of marriage which perhaps is a very serious allegation in the newly created relationship of mother-in-law, to which apparently there is no disturbance in her cross examination. On part of the husband, however, this denial is present, however for the overt act of his mother i.e the then mother-in-law having preferred not to enter in the witness box there is no direct rebuttal. In this regard it is also observed that during the cross examination of the defendant when a photograph was being attempted to be produced, allegedly showing his mother wearing the gold, the same was ordered by the trial Court be decided at the final stage, however, strangely absence is observed in this regard in the judgment of the learned trial Court. Even otherwise the evidence of the defendant is not confidence inspiring to conclude that the defendant is entitled to claim gold ornaments as failure is found present on his part to prove that the gold ornaments as claimed were taking away by the plaintiff so as to claim recovery thereof, irrespective the acknowledgment of dower having been paid by way of gold ornaments in the Nikahnama as is said to be admitted the plaintiff same has no role as she resided with him. The presumption of a woman keeping her gold with herself though has weight but the same is nevertheless a presumption open to rebuttal and so found present in this matter.

9. Accordingly this petition is accepted to the extent that the portion of judgment and decree as passed by the Courts below as to the return of dower/gold ornaments of 09 tola is found to be perverse and not based upon the evidence as such is illegal and not available in accordance with law and it is so ordered.

Petition stands allowed and disposed of in the above terms.

JUDGE