

IN THE HIGH COURT OF SINDH AT KARACHI

C.P. No.S-793 of 2023

[Mst. Shamsa Kanwal & anotherv.....Amjad Hussain & others]

&

C.P. No.S-996 of 2023

[Amjad Hussainv.....Mst. Shamsa Kanwal & another]

Date of Hearing : 13.05.2024

Petitioner through : Mr. Mirza Mahmood Baig, Advocate for petitioner in C.P. No.S-793 of 2023 and for respondent No.1 in C.P. No.s-996 of 2023.

Respondents through : Mr. Bahri Kamal, Advocate for respondent No.1 in C.P. No.S-793/2023 and for petitioner in C.P. No.S-996 of 2023.

ORDER

Zulfiqar Ahmad Khan, J:- This common order shall dispose of these two petitions as the same has challenged common judgment dated 24.07.2023 passed by learned respondent No.2 in two Family Appeals Nos. 26 & 30 of 2023 filed by the petitioner as well as respondent No.1. The petitioner Mst. Shamsa Kanwal (in C.P. No.S-793 of 2023) is respondent No.1 in C.P. No.996 of 2023 while petitioner Amjad Hussain (in C.P. No.S-996 of 2023) is respondent No.1 in C.P. No.S-793 of 2023, therefore, to avoid any confusion, Mst. Shamsa Kanwal will be referred to as petitioner, whereas, Amjad Hussain will be referred to as respondent No.1.

2. Petitioner filed a suit No.73/2021 for dower amount, dowry articles and maintenance against the respondent No.1 before the Family Judge Malir, Karachi which was decreed vide Judgment & Decree dated 01.08.2022 and the learned trial Court directed the

respondent No.1 to handout dower as per the Nikahnama as well as past and future maintenance of the petitioner as well as minor. The respondent No.1 impugned the said Judgment & Decree of the learned Family Judge before the learned respondent No.2 by filing Family Appeal No.26/2023 and that the learned Appellate Court modified the Judgment of the learned Trial Court, however, the condition to hand out dower as per Nikahnama was maintained, however, the modification to the extent of maintenance of the minor was made from Rs.7000 to Rs.5000 per month vide impugned Judgment dated 24.07.2023, hence the petitioner is before this Court against the impugned Judgment & Decree.

3. Learned counsel for the petitioner contended that the learned trial Court decreed the suit filed by the petitioner for payment of dower but the learned Appellate Court modified the Judgment & Decree of the learned trial Court to the extent of maintenance of the minor from Rs.7000/- per month to Rs.5000/- which is hardly bearable and a child cannot be grown in a sum of Rs.5000/-, therefore, interference by this Court is sought.

4. Learned counsel for the respondent No.1 supported the impugned Judgment and contended that the directions were also given by the learned trial Court as well as learned Appellate Court to the petitioner to join the respondent No.1 and that the maintenance of the petitioner was granted to be paid subject to performance of conjugal rights.

5. I have heard learned counsel for the parties at length and have also scanned the available record. It is considered pertinent to initiate this deliberation by referring to the settled law that learned

trial Court i.e. Family Court is the fact finding authority and the purpose of appellate jurisdiction is to reappraise and reevaluate the judgments and orders passed by the lower forum in order to examine whether any error has been committed by the lower court on the facts and/or law, and it also requires the appreciation of evidence led by the parties for applying its weightage in the final verdict. It is the province of the Appellate Court to re-weigh the evidence or make an attempt to judge the credibility of witnesses, but it is the Trial Court which is in a special position to judge the trustworthiness and credibility of witnesses, and normally the Appellate Court gives due deference to the findings based on evidence and does not overturn such findings unless it is on the face of it erroneous or imprecise.

6. The facts leading to the filing of the instant petition have been set out in sufficient detail in operative part, and need not be recapitulated. The delivery of dower/Mahr is one such right, the duty of which is bestowed upon the husband for the financial support and stability of his wife. Such entitlement to dower has the origin in the Holy Quran, and the inspiration of the same entitlement has been made part of the statutory law. The Holy Quran presses upon the presentation of dower to wife by commanding: “present them ‘their Mahr’” (the Quran IV:4). The inspiration of the guiding principles of the Holy Quran is made part of Section 5 of the Dissolution of Muslim Marriages Act, 1939 (the “Act”), which reads as under:

“5. Right to dower not be affected. Nothing contained in this Act shall affect any right which a married woman may have under Muslim law to her dower or any part thereof on the dissolution of her marriage” .

7. Dower, therefore, is a right rendered by Islam and has a footing in statutes. It is a well-known fact that no estoppel lies against a statute and it has been held by Hon'ble Supreme Court in the case of Bahadur Khan and others v. Federation of Pakistan [2017 SCMR 2066], that there could be no estoppel against the statute or the rules having statutory force. Since right to dower has its footing in Section 5 of the Act, therefore, a wife cannot be estopped from such right. The learned trial Court which is a fact finding body having examined the evidence so produced by the litigating parties reached to the conclusion that no dower paid by the respondent No.1 to the petitioner. The respondent No.1 during the course of cross-examination admitted to have not paid the dower of one floor of house No. 8/D-78 along with 04 tola gold. It is considered expedient to reproduce the relevant excerpt of the admission of respondent No1 hereunder:-

“It is correct to suggest that as per the contents of Nikahnama dower amount is unpaid.”

“It is correct to suggest that one portion of said house was in dower amount of plaintiff”

8. It is gleaned from appraisal of the foregoing that the respondent No.1 admitted to have not paid the dower to the petitioner which is a right of every women in Pakistan as observed supra and the learned trial Court as well as learned Appellate Court went on to hold that the dower is unpaid hitherto.

9. Reverting to the issue of maintenance of the minor baby Noor-e-Jannat. It is well settled that it is the sacrosanct duty of the father to provide maintenance to his child and to fulfill this obligation, the father is required to earn money even by physical labour, if he is

able-bodied, and could not avoid his obligation. The minor/petitioner No.2 now approximately 5 years old, must be schooling and attempting to live a reasonably acceptable living standard. UNICEF Report¹ suggests that a great number of minors in Pakistan are malnutritioned, hardly receiving the minimum threshold of 1,200/- calories per day. In the given circumstances, maintenance of Rs.5,000/- is barely acceptable.

10. Now, advertng to the issue of dowry articles. The facts leading to the filing of the instant petition have been set out in sufficient detail in operative part, and need not be recapitulated. Section 5 of the West Pakistan Family Court Act 1964, provides that Family Courts have exclusive jurisdiction to entertain, hear and adjudicate upon matters specified in Part-I of the Schedule to the said Act. “Personal property and belongings of a wife” is one of the subjects/items in the Schedule to the said Act over which the Family Court has been given exclusive jurisdiction. All gifts (not limited to bridal gifts) given to a wife during the subsistence of the marriage become her personal property and belongings. Therefore, a suit with respect to personal property and belongings of a wife is to be filed before a Family Court.

Reference in this regard may be made to the following case law:-

(i) In the cases of Major Muhammad Khalid Karim v. Mst. Saadia Yaqoob (PLD 2012 SC 66), and Ejaz Naseem v. Fareeha Ahmad (2009 SCMR 484), it has been held inter alia that under section 5 of the WP-FC Act, the Family Court has exclusive jurisdiction to entertain hear and adjudicate all matters which fall within the First Schedule to the said Act.

(ii) In the case of Shamim Akhtar v. District Judge (2016 MLD 242), it has been held that “8. Bridal gifts fall within the ambit of personal property and belongings of a wife i.e. Item No.9 of the Schedule

¹ UNICEF Report Titled “Cost of the Diet Analysis Report in Pakistan-2018.

in terms of Section 5 of the Family Courts Act, 1964 which confers exclusive jurisdiction upon the Family Court to hear the claim of such matters. The term "personal property and belongings of a wife" has already been explicated by this Court in the case titled Muhammad Akram v. Hajra Bibi (PLD 2007 Lah. 515) and maintained by the Hon'ble Supreme Court of Pakistan in the case titled Syed Mukhtar Hussain Shah v. Mst. Saba Imtiaz and others (PLD 2011 SC 260)."

(iii) In the case of Taimoor Aslam Satti v. Mst. Aalia Bibi (2016 YLR 765), it has been held that a suit for recovery of dower as well as personal property and belongings of a wife came within the domain of a Family Court under Part-I of the Schedule of the WP-FC Act. Furthermore, it was held that property gifted to a wife came within the definition of "personal property and belongings of a wife".

(iv) In the case of Mst. Nomial Zia v. Adnan Riaz (2014 CLC 87), it has been held by this Court that a claim pertaining to recovery of bridal gifts or personal property of a wife fell within the jurisdiction of a Family Court, and that a suit for the recovery of bridal gifts filed by a husband was competent before a Family Court.

11. Sections 2(a) and 5 of the Dowry and Bridal Gifts (Restriction) Act, 1976, are reproduced herein below:-

(a) 'Bridal gift' means any property given as a gift before, at or after the marriage, either directly or indirectly, by the bridegroom or his parents to the bride in connection with the marriage but does not include Mehr;"

"vesting of dowry etc., in the bride.--- All property given as dowry or bridal gifts and all property given to the bride as a present shall vest absolutely in the bride and her interest in property however derived shall hereafter not be restrictive, conditional or limited."

12. The conjoint reading of the said Sections show that presents and gifts given to the bride at or after marriage by the bridegroom or his parents vest absolutely in bride. On the basis of the said provisions of the Dowry and Bridal Gifts (Restriction) Act, 1976, the Superior Courts have consistently held that bridal gifts given by a husband are the absolute property of a wife and cannot be taken

away from her. A bride can always recover the articles of bridal gifts, “WARI” and presents given to her by a bridegroom or his family at the time of the marriage. Reference in this regard may be made to the following recent cases:-

(i) In the case of Dawlance United Refrigeration Industries Private Ltd. v. Muhammad Asim Chaudhry (PLD 2016 Lahore 425), it has been held that in view of Section 5 of the Dowry and Bridal Gifts (Restriction) Act, 1976, it is the bride who is to be considered as an absolute owner of the items of dowry and bridal gifts.

(ii) In the case of Abdul Sattar v. Chairman Railways (2011 YLR 1033), the Hon'ble Peshawar High Court has held that a woman was absolute owner of all the property given to her as dowry or bridal gifts to the exclusion of her husband under section 5 of the Dowry and Bridal Gifts (Restriction) Act, 1976.

(iii) In the case of Gul Sher v. Maryam Sultana (2011 YLR 1000), it has been held that section 5 of the Dowry and Bridal Gifts (Restriction) Act, 1976 provides that all property given as dowry or bridal gifts to a bride shall vest absolutely in her and that her interest in the said property, however derived shall not be restrictive, conditional or limited. In the said section, there is no limitation of Rs.5,000 either for dowry or for wari. On the other hand, it has been provided therein that such property shall be owned by her absolutely and to the exclusion of the bridegroom without caring for the source through which it has come and without limitation of any amount. Therefore, it is quite clear that in spite of the restriction imposed in section 3, a bride is the owner of the dowry and wari articles irrespective of their value and she is entitled to retain it forever and to claim its return or the value thereof, if the same is kept back by her husband or any other person. In this regard I rely upon 'Masud Sarwar v. Mst. Farah Deeba' 1988 CLC 1546 (Lahore)."

(iv) In the case of Tariq Mehmood v. Farah Shaheen (2010 YLR 349), it has been held that gold ornaments mentioned in column No.16 fell within the ambit of gifts which, under the injunctions of Islam, are not to be returned as gifts become the property of the donee.

(v) In the case of Muhammad Nawaz v. Mst. Abida Bibi (2010 MLD 352), it has been held that gifts did not fall within the ambit of Zar-e-khula, and were not something that could be recovered under the injunctions of Islam. Furthermore, it was held that once the bridegroom acknowledged that gold jewelry was given as gifts, he could not claim the recovery of the same especially if they find no mention in the Nikahnama. In paragraph-10 of the said report, it has been held that once the petitioner acknowledges that the 4 tolas of gold jewellery he wants back from respondent No.1 were gifts he cannot claim the recovery of the same. Hiba (gift) cannot be consideration of the contract of marriage in this particular case as under the Muhammadan Law Chapter XI section 138 it is categorically stated "Hiba means transfer of property in substance by one person to the other "without" consideration which is a condition to be fulfilled in order to make a valid gift". Under section 148 it is mandatory that the donor relinquish all rights and dominion over the gift. He has to divest himself totally of all ownership over the subject of the gift. No condition can be attached to the gift. Condition in this particular case would also cover return of the same in case of Khula, whether implied or implicit, because a condition would derogate from the completeness of the grant. Under section 167 the issue of revocation of gift is addressed. A gift can be revoked before delivery of the same to the donee. However, the second proviso of this section clearly enunciates that a gift given by a husband to his wife and vice versa can be revoked after delivery only under the decree of a Court of competent jurisdiction. In present matter the gift is not falling in the ambit of hiba bill awaz either because there is no mention of it in the Nikahnama. So the upshot would be that only a gift given in lieu of dower amount would be recoverable through a decree of the Court."

13. Since there are plenty of case law in support of the proposition that the gifts or benefits given to a wife at the time of the marriage or during the subsistence of the marriage become her personal property and belongings, therefore, the learned lower fora are concurrent on the point of return of dowry articles or its equivalent amount of Rs.200,000/-

14. In view of the rationale and deliberation delineated above, the petition filed by petitioner bearing C.P. No.S-793 of 2023 is allowed, whereas, petition filed by respondent No.1 bearing C.P. No.S-996 of 2023 is dismissed alongwith pending applications.

Karachi
Dated:13.05.2024

JUDGE

Aadil Arab.