Constt: Petition No.S-344 of 2013

FOR KATCHA PESHI.

Petitioner:	Rajib Ali Siyal, through Mr.Achar Khan Gabole, Advocate.
Respondent:	Mst.Zoya Asad, through Mr.Abdul Sattar Soomro, Advocate. Mr.Shahabuddin Shaikh, State Counsel.
Date of hearing	18th. March, 2013.

J U D G M E N T

SALAHUDDIN PANHWAR, J:- The petitioner has assailed the Judgment dated 07.1.2013, passed by Family Court, Kandiaro in Family Suit No.74 of 2012 (Re- Mst.Zoya Asad Vs. Rajib Ali), whereby the suit of the respondent No.1 / plaintiff was decreed as Ex-parte and Khulla was granted.

02. Relevant facts, as set-out in the plaint, are that the marriage of the Respondent No.1/plaintiff was solemnized with the petitioner/defendant on 25.3.2012 and such Nikah was performed at Ward No.10 Mehrabpur which was not registered. The Haq Mahar was fixed as Two Tolla Gold but same was not paid; from the said wedlock there was no issue. The petitioner/defendant was maltreating the Respondent No.1/plaintiff on petty matters and always used

abusive language with her. So many times the Respondent No.1/plaintiff complained to her parents regarding behavior, attitude of Petitioner/defendant; about two months back, the petitioner/defendant expelled her from his house. Thereafter the Respondent No.1/plaintiff continued to live with her parents, therefore, the element of love, respect, mutual trust and compatibility of minds was missing between the spouses so she had no option but to come forward for dissolution of marriage as because of hatred in her mind as she was not ready to live with the petitioner/defendant in his house as his wife and, she, even, pleaded, that there was no hope of compromise between the parties, therefore, the suit for dissolution of marriage was filed on the ground of Khula with the following prayers:-

(a) To dissolve the marriage of the plaintiff with the defendant on the ground of Khulla.

(b) To direct the defendant to pay maintenance for last two months till the 'iddat' period at the rate of Rs.5000-00 per month, in case of failure the same may be recovered from the defendant through process of law.

(c) The costs of the suit borne by the defendant.

(d) Any other relief which this Court deems fit and proper be awarded to her.

03. It is further revealed that after institution of suit, summons were issued to the petitioner/defendant by all modes, including publication in daily Kawish but inspite of that the petitioner/defendant did not appear before the trial court and in consequence whereof ex-parte Judgment was passed and marriage of the Respondent No.1/plaintiff was dissolved on the ground of Khulla.

04. Counsel for the petitioner, inter-alia, contended that the impugned Judgment is illegal and not maintainable under the law; same is

managed; the petitioner/defendant had been condemned unheard; infact Nikahanama was registered in respect of marriage of petitioner and Respondent No.1, but respondent No.1 deliberately concealed such fact in order to avoid from restoration of Haq Mahar which is, otherwise, mandatory requirement of law as envisaged U/s 10(4) of Muslim Family Courts Act, 1964; impugned judgment is completely departure of mandatory provisions of law and without recording evidence and restoration of Haq Mahr, trial court was not competent to grant Khulla in exercise of powers U/s 10(4) of Muslim Family Courts Act, 1964; he has relied upon PLD 2006 (Karachi) 308; 2006 CLC 1662, PLD 2010 (Lahore) 308 and PLD 2006 (Karachi) 272.

05. Conversely, counsel for respondent No.1 argued that the impugned Judgment is in accordance with law as alleged Haq Mahar was not received by Respondent No.1 and Nikahanama was not registered; petitioner/defendant has filed an application for setting-aside the Ex-parte Judgment and Decree before the trial court, therefore, the instant petition is not maintainable under the law, as he cannot avail two remedies at the same time.

06. Heard counsel's, perused the record.

07. The learned counsel for the petitioner has insisted much upon the providing clause of section 10(4) of West Pakistan Family Courts Act, 1964 while attacking the judgment and decree of learned Family Court Judge, therefore, it is pertinent to examine said provision and it will be conducive to refer the same for convenience and understanding:

> *"Section 10(4). If no compromise or reconciliation is possible the Court shall frame the issues in the case and fix a date for (the recording of the) evidence.*

*(Provided that notwithstanding any decision or judgment of any or tribunal, the Family Court in a suit for dissolution of marriage, if reconciliation fails, pass decree for dissolution of marriage forthwith and also restore the husband Haq Mehr received by the wife in consideration of marriage at the time of marriag**e**"*

08. The plain reading of the above provision makes it clear that it speaks about the situation where pre-trial proceedings fails between parties and the wife intends to resort to such course only then the Judgment for dissolution of marriage has to be recorded by the Family Judge with direction for restoration of Haq Mehr to husband which the wife has received in consideration of marriage.

09. It is also significant to add here that it is the wife alone, who can ask the Family Court to pass the Judgment of dissolution of marriage by showing her readiness to surrender Haq Mehr, which she received in consideration of marriage because the objective of addition of proviso by virtue of Ordinance LV of 2002 dated 01.10.2002 is nothing but to avoid delay in proceedings and to afford right and remedy available to wife seeking Khula expeditiously.

10. Since it is a matter of record that in the instant case the defendant/ petitioner remained absent despite issuance of process through all modes hence question of failure of pre-trial proceeding does not arise at all. Accordingly, where the judgment and decree is not being passed on move of the wife to the course, enshrined by providing clause of Section 10(4) of the Act, no question of order of compulsory restoration of dower arises.

11. It is also a matter of record that petitioner/defendant has filed an application before the trial court for setting-aside the impugned judgment;

simultaneously he has filed the instant petition. Since the provision of Rule 13 of West Pakistan Family Court Rules, 1965 provides a remedy to the defendant / petitioner to seek setting aside of Ex-parte decree or proceedings on cogent grounds to the learned Family Court Judge which course, has admittedly been resorted to by the petitioner / defendant. In such circumstances it will not be just and proper to take over the jurisdiction of the Family Court to decide an application for setting aside Ex-parte judgment and decree which is, otherwise, competent by Rule 13 of the W.P. Family Court Rules, 1964.

12. Before parting, I would like to respond to the plea of petitioner that according to Nikah-nama a residential plot was transferred in the name of respondent No.1. In that respect, I have examined such registered sale deed, which reflects that same was executed by one Weeran Khan S/o Mashghool Khan Jatoi, in favour of Mst.Zoya Asad (respondent No.1), with sale consideration of Rs.3000-00, therefore, it is pertinent to mention here that such deed has no nexus with the instant matter, however, the petitioner may claim that such document relates to the Be-nami transaction and such plot was purchased by petitioner in the name of respondent No.1, thus, Suffice to say that plea regarding Be-nami transaction cannot be resolved by family court and in order to agitate this issue, jurisdiction lies to the civil court, hence, the petitioner is at liberty to avail remedy before the court, having jurisdiction, if so advised.

13. Regarding case law relied upon by counsel for petitioner, after examining the same, with profound respect: same relates to the exercise of powers U/s 10(4) of Muslim Family Court Act, 1964, but the instant case, as

discussed above, is on different footings, therefore, referred precedent's are not applicable in the instant case.

14. In consequence of what has been discussed above, I find that the petition is not maintainable under the law, consequently same was dismissed with short order dated 18.3.2013.

JUDGE

A.R.BROHI