

C.P.No.S- 1903 of 2012.

Petitioner: Javed Ahmed alias Javed Rasool through Mr.Nisar Ahmed Bhambhro Advocate.

Respondents: Mst.Najma through Mr.GhulamMujtabaJakhar advocate.
Mr.ShuhabuddinShaikh State Counsel.

Date of Hearing: 08thApril, 2013.

JUDGMENT:

SALAHUDDIN PANHWAR,J- Petitioner has assailed the Judgment and Decree dated 22.03.2012 & 24.03.2012 passed by the Court of learned Additional District Judge-III, Khairpur in Family Appeal No.06/2011 (Re.Javed Ahmed v Mst.Najma), whereby maintaining the Judgment and Decree dated 10.-05-2011 passed by the Court of learned Family Judge, Khairpur in Family Suit No.192/2010.

2. Relevant facts, in nut shell, are that the plaintiff was married with the defendant on 18-12.1999 and from this wedlock 3 children were born namely Malhar Rasool aged 13 years, Morial Rasool aged 11 years and Marik Rasool aged 8 years. The plaintiff filed the copy of Nikahnama as annexure-A that at the time of marriage the defendant executed an agreement on stamp paper dated

18-12-1995 and settled some terms and conditions that he will pay the dower amount Rs.500,000/- to the plaintiff in case of Talaq and he is bound to pay the due amount i.e. Rs.1,000,000/ if he turns out the plaintiff from his house. Further the defendant will pay the expenses/maintenance to the plaintiff on every month and he will never prevent the plaintiff from visiting her parents house and the defendant will not contract second marriage without the consent of the plaintiff. The plaintiff filed such copy of stamp paper as annexure-B. She claimed that the dower amount is still unpaid by the defendant and that on 06-12-2009 the defendant contracted second marriage without her consent and ousted the plaintiff from his house after beating her. Since then the plaintiff along with her children is residing at her mother's house and the defendant has failed to pay any single penny as maintenance, who is serving as Assistant Professor and has got handsome salary. The plaintiff's mother is bearing the expenses of the plaintiff and her children for their education, welfare etc but the defendant failed to pay the same since she was ousted from the house for which the plaintiff sent legal notice to the defendant on 30-08-2010 through her counsel for providing maintenance but he refused. The plaintiff filed the copy of the legal notice as annexure-C. That in view of the above facts and circumstances the plaintiff has developed hatred in her mind.

3. It is further revealed that petitioner/defendant filed written statement, wherein, it is contended that he had paid dower amount of Rs.500,000/- to the plaintiff at the time of marriage and the agreement produced by the plaintiff, is forged and fabricated as no such conditions were laid down between and plaintiff and defendant. It is further averred that the defendant is maintaining his parent and children from his salary and the plaintiff left the defendant's house

on her own and she did not return back in spite of efforts made by the defendant.

4. On divergent pleas of both the parties, trial Court framed the following issues:-

1. Whether the plaintiff and her children are entitled for Maintenance, if so, at what rate and from which period?
2. Whether the defendant is entitled for the relief claimed?
3. What should the decree be?

5. Both parties recorded their evidence to substantiate their claim and the trial court after hearing the parties decreed the suit of plaintiff whereby defendant was directed to pay the past maintenance of each minor as Rs.1500/- per month from 06-12-2009 till the date of decree and thereafter Rs.2000/- per month as maintenance of each minor till their legal entitlement with 10% increase per annum. It was further directed to pay the maintenance to plaintiff as her past maintenance at Rs.10, 000/- per month from 06-12-2009 till the date of decree and for future at the same rate with 10% per annum till the existence of marriage between the plaintiff and defendant.

6. It is further revealed that the petitioner preferred appeal before District Judge, Khairpur which was entrusted to 3rd Additional District Judge, Khairpur who dismissed the appeal by recording Judgment and Decree, impugned through the instant petition.

7. Learned counsel for the petitioner, inter alia, contended that both the Judgments are beyond the pleadings; inferior Courts have not appraised the

evidence available on record in accordance with the law; petitioner has proved by leading cogent evidence that both minor kids are residing with him in spite of that such aspect is completely ignored by both the Courts, therefore both the Judgments are not maintainable.

8. Conversely, learned counsel for the respondent while refuting the claim of petitioner's counsel, argued that impugned Judgments are in accordance with the law; petitioner has failed to point out any illegality or irregularity, therefore, instant petition is liable to be dismissed.

9. Before diving into the merits of the case, it is pertinent to say that while exercising constitutional jurisdiction Court is under legal obligation to keep in mind that in family cases and in existence of concurrent Judgments in normal course, question of fact cannot be disturbed but only legal aspect of the impugned Judgment can be considered with regard to an illegality or departure from mandatory provisions of law. Thus except this criterion interference with lower Courts Judgment, passed in family jurisdiction, is unwarranted.

10. Before touching to the available material, I can safely add here that ***it is the husband alone who is legally and morally bound to take care of bread and butter of his family in particularly the children.*** A husband may escape from his such legal, moral and undeniable obligation and duty if he establishes on record that wife was staying away from him without any probable cause or reason. In the instant case it is not disputed that respondent / plaintiff is the wife of the petitioner / defendant and children are from such marital tie. Thus in such

eventuality only it is to be examined whether act of staying of respondent / plaintiff and children were without any probable cause or reason.

11. On careful consideration of contentions raised by counsel for the respective parties and meticulous examination of both Judgments as well as evidence recorded by the parties, it is manifest that counsel for the petitioner has failed to point out any illegality, irregularity or wrong appreciation of evidence committed by both the Courts; moreover, the learned counsel also failed to refer any portion of evidence, led by both the parties, which is contrary to the view taken in both the Judgments. It is pertinent that two basic points were pleaded by Mst.Najma wife of petitioner that petitioner has contracted marriage without her permission and he is not maintaining the respondent in separate house and minor kids are residing with respondent; therefore, she is also entitled for maintenance of the minors. It will be conducive to refer the relevant portion of the judgment as under:-

“Admittedly, the spouses contracted marriage in the year 1995 and three sons born-out to them from that wedlock who are minors. The dispute arose in between spouses when in the year 2009 admittedly appellant contracted second marriage. The version of the appellant looks to be false that he had verbally obtained consent from the respondent Mst.Najma regarding the second marriage as if appellant had obtained the consent from the respondent regarding second marriage then there was no reason of conflict in between spouses, therefore, it is clear that appellant contracted second marriage with another lady without consent and will of the respondent. The appellant himself admitted before this court that there is only one room in the house which is in his custody but another room, the appellant’s mother is residing, therefore, it is also not possible that two wives residing in one room with one husband, therefore, it appears that circumstances were created by appellant in which it became impossible for the respondent to have resided with the appellant with children in one room with another lady which appellant

married without any reasonable cause and without consent of the respondent.
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The children are not residing with appellant/father and merely due to nearer location of the house of the respondent, he has looked-after children and otherwise no body has come forwarded as witness for example mother of appellant, the second wife of appellant that they are themselves looking-after the children or deposed that children are residing with the appellant”.

From the above reasons recorded by the trial Court Judgment, so also perusal of impugned Judgment and the evidence brought on record, it is crystal clear that act of the respondent / plaintiff and children away from the petitioner / defendant was quite justified rather a result of circumstances, so created by the petitioner / defendant himself, therefore, I am of the considered view that the learned Judges have rightly found the respondent / plaintiff and children entitled for maintenance. Further, the learned counsel for the petitioner has failed in establishing any prima facie illegality in exercise of jurisdiction by the learned courts below or departure from any settled principle of law causing prejudice to petitioner so as to justify exercise of Writ Jurisdiction for disturbing the concurrent findings. I find the judgments of both the courts below proper and legal. Consequent to what has been discussed results in dismissal of the instant petition.

12. For the foregoing reasons, the instant petition was dismissed by a short order dated 08th April, 2013.

JUDGE

Akber.