

ORDER SHEET
IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD

C.P. No. S- 340 of 2014

Date of Hearing : 7.8.2015

Date of Announcement : 21.8.2015

Petitioner : Kashif Ali
Through Mr. M. Asif Shaikh, Advocate

Respondent : Mst. Hina Zafar
Through Mr. Abdul Mueed Shaikh,
Advocate

Official Respondents : Through Mr. Allah Bachayo Soomro,
Additional Advocate General, Sindh

ORDER

NAZAR AKBAR, J.- The petitioner through the instant constitutional petition has prayed for setting aside the judgment and decree dated 8.3.2014 and 10.3.2014 respectively passed by learned Vth Additional District Judge, Hyderabad in Family Appeal No. 76 of 2013 whereby while maintaining the judgment and decree both dated 20.11.2013 passed by Family Judge, Hyderabad in Family Suit No. 557 of 2012, the appellate court has granted maintenance of Rs.3000/- only for “iddat” period to the respondent.

2. Brief facts of the case are that respondent, Mst. Hina Zafar, filed Family Suit No. 557 of 2012 for dissolution of her marriage, recovery of dower amount, return of dowry articles and maintenance against the petitioner in the court of Family Judge, Hyderabad. She averred in the plaint that she was married with petitioner on 11.4.2008 against the dower of 6-1/4 tola gold ornaments which had not been paid. At the time of marriage she was given dowry articles of Rs.2,50,000/- and gold ornaments of Rs.5,00,000/- which are also in the possession of the petitioner. There are two daughters from the wedlock who are with the petitioner. It was further averred in the plaint that the petitioner was cruel and humiliating, he had failed to provide maintenance to her and her minor children and the petitioner has contracted second marriage without consent of the respondent. When she objected to the second

marriage she was ousted by the petitioner from his house. The petitioner filed written statement wherein he denied the allegations levelled in the plaint. The petitioner contended that the dower amount had been paid at the time of nikah and this fact is mentioned in the nikahnama. It is further stated that respondent herself left the house of petitioner on 6.6.2011 and took away the articles and gold ornaments, when the petitioner and his family were at Red Crescent Hospital, where his father was under treatment. According to the petitioner, the respondent refused to join her, therefore, she was not entitled for any maintenance. As the pre-trial proceedings failed, therefore, the learned trial court from the pleadings of the parties framed following issues:

1. Whether the plaintiff is entitled to dissolution of marriage, if yes, on what ground and consideration?
2. Whether the defendant has paid the dower amount?
3. Whether the plaintiff is entitled for maintenance, if yes, since when and at what rate?
4. Whether the plaintiff is entitled for return of her dowry articles including gold ornaments as per list?
5. What should the decree be?

3. The respondent in support of her claim produced list of dowry articles during her statement on oath. The petitioner in rebuttal examined himself. Post-trial proceedings also failed and the trial court after hearing the arguments of the counsel for the parties decreed the suit by allowing the dissolution of marriage by way of khula (prayer A) and return of only dowry articles except gold ornaments (prayer D) and denied other relief(s) sought by the respondent. The respondent No.3 and the petitioner both being aggrieved filed Family Appeal No. 75 of 2013 & Family Appeal No. 76 of 2013 respectively, which were disposed of by common judgment. The instant petition has been preferred only by the petitioner (husband) challenging the findings of the two courts below.

4. This constitution petition is directed against the concurrent findings of the Trial Court and the Appellate Court and therefore, learned counsel was required to satisfy the Court on the question of maintainability of this petition. The counsel has placed on record the following case law in support of his contention that this petition is maintainable.

- (i) Mst. Shah Jahan v. Additional District Judge, Rawalpindi and another (2008 MLD 1692)
- (ii) Muhammad Saddiq v. Additional District Judge, Arifwala and 3 others (2006 MLD 853)
- (iii) Umar Farooq v. Mehnaz Iftikhar and 2 others (2006 MLD 555)

The perusal of case law reported in 2008 MLD 1692 on the question of maintainability of the petition shows that the petition under Article 199 of the Constitution against the order / judgments from the Family Courts is not permissible as a matter of right as its scope is limited. The relevant para-8 from the judgment is reproduced below.

“ 8. So far as the entertainment of this writ petition is concerned, it is true that under Article 199 of the Constitution of Islamic Republic of Pakistan interference in such matters is not as a matter of right. This Court in a number of cases has held that the writ jurisdiction can be exercised if the subordinate Courts have not properly exercised their jurisdiction and the decision is for the reason of misreading or non-reading of the evidence. In other words illegal order can be interfered with and be set aside under writ jurisdiction. Reference can be made to the case of “(1) The Secretary to the Government of West Pakistan, Communication and Works Department v. Gulzar Muhammad” reported as PLD 1969 Supreme Court 60.”

5. Examining the case of the petitioner on the touchstone of the above observation from 2008 MLD 1692, no case of misreading or non-reading of evidence has been pleaded by the petitioner in his memo of petition or in the arguments at bar. The question of return of jewellery given to the respondent as gift on dissolution of marriage by way of ‘khula’ has been elaborately discussed by the trial Court while dealing with the Issue No.2 that whether the Defendant had paid the dower amount. It has been decided by the Trial Court by following the law laid down by High Courts reported in **Manawar Iqbal Satti v. Mst. Uzma Satti and 2 others (PLJ 2003 Lahore 760)** and **Muhammad Zafar v. Judge, Family Court and another (2005 CLC 1844)** and also on the basis of pleading and evidence of the Defendant / Petitioner. In his entire case before the Trial Court and even in his evidence, the petitioner had not claimed or asked the respondent / Plaintiff to return the dower amount which means the petitioner has waived of his claim of return of

dower in lieu of grant of khula. Learned counsel has not been able to show from the record that the findings of facts on the basis of his own pleadings and supported by the case law referred to by the trial Court was a result of misreading or non-reading of evidence or there was any error in such findings. Therefore, even on the touchstone of the case law relied upon by the learned counsel for the petitioner at the bar no case is made out for interference. The other two case law relied upon by the petitioner are irrelevant to the facts of this petition. In both the citations, the petition was found maintained by the Court simply on the ground that the impugned orders therein were short of application of mind by the learned courts, which is not the case in the petition in hand.

6. The other aspect of this case is that the Appellate court while modifying the finding of the trial Court on the question of maintenance has awarded only Rs.3000/- per month as maintenance for the “iddat” period only to the respondent. The Appellate Court has denied past maintenance to the respondent and awarded maintenance only for iddat period on the ground that the Respondent has refused to join the appellant/petitioner on the condition may be imposed by the respondent/ wife herself. The discretion exercised by the Appellate Court in awarding limited maintenance for the iddat period appears to be justified as the iddat period is the time provided in shariah in which a woman is not allowed to exercise her right of living as wife of somebody else in accordance with law. Therefore, maintenance of wife during her iddat on account of ‘khula’ / divorce as the case may be is about the time in which she has already performed her obligation as wedded wife of the petitioner.

7. That upshot of above discussion is that no illegality has been shown in the trial court’s order therefore, this petition is dismissed as not maintainable with no orders as to cost.

JUDGE

Karar/-