

HIGH COURT OF AZAD JAMMU & KASHMIR

[Shariat Appellate Bench]

Family Appeal No: 62/2023.

Date of Institution: 22.02.2023.

Date of Decision: 13.09.2023.

Syed Toqeer Gillani S/o Ghulam Ahmed Gillani caste Syed R/o
Qadir-Abad Tehsil and district Bagh Azad Kashmir.

.....Appellant

Versus

Syeda Muneeba Gillani W/o Syed Toqeer Gillani caste Syed R/o
Qadir-Abad Tehsil and District Bagh Azad Kashmir.

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FAMILY APPEALS

***Before:* Justice Sadaqat Hussain Raja, CJ**

Justice Syed Shahid Bahar, J.

Justice Sardar Muhammad Ejaz Khan, J.

(Larger Bench)

PRESENT:

Sardar Azam Haider Khan and Ms. Salma Tariq Sadozai,
Advocates for the appellant-Syed Toqeer Gillani.

S.M. Gulbaz Khan Sadozai, Advocate for the respondent-Syeda Muneeba Gillani.

Judgment:-

(Justice Syed Shahid Bahar, J.) The instant appeals under **Section 14** of the **Azad Jammu and Kashmir Family Courts Act, 1993 [Act XI of 1994]** call into question the consolidated judgment and decrees ordained by the learned Additional District Judge empowered as Judge Family Court, Bagh dated 23.01.2023, hence, both the appeals have been clubbed up and are disposed of through this single Judgment.

A. CONCISE FACTS

2. Appellant-Toqeer Gillani filed a suit for restitution of conjugal rights on 18.06.2021, whereas respondent-Syeda Muneeba Gillani filed two suits, one for dower and the other for maintenance allowance before Judge Family Court Bagh on 13.08.2021. In the suit for restitution of conjugal rights, plaintiff-appellant, contended that he tied the knot with defendant/respondent on 22.10.2020 in lieu of dower PKR 100,000/- (One Lac). Plaintiff averred that after marriage, she cohabited with him till 25th of January, 2021; after that she left his home and took 125,000/- rupees alongwith her from his house; started living with her parents and never came back. He tried to cohabit her and for the said purpose, when he went to take her back to his home, father of defendant/respondent showed resistance thereby not allowing her daughter to dwell with him.

The plaintiff alleged that in a “Panchayat” conducted by the notables of the area, she came there and openly said that she wanted divorce, but the “Panchayat” gave her time of fifteen days to settle with her husband and after the said time, if she does not want to live with the appellant then in case of divorce, the dower will be given back to her husband. Lastly, the plaintiff/appellant prayed for issuance of decree for restitution of conjugal rights in his favour.

3. The defendant/respondent filed written statement on 13.08.2021, wherein the claim of the plaintiff was denied in toto. She alleged that due to cruel and harsh behavior of plaintiff and of his family members, she left his house. She contended that a bundle of baseless facts is present in his suit, thus, the suit of the plaintiff may be dismissed.

4. In cross suit for recovery of dower filed by the plaintiff/respondent, herein, it was alleged that she tied the knot with defendant/appellant on 22.10.2020 in lieu of dower PKR 100,000/- (One Lac), but the dower is yet outstanding. Defendant No.2 was the guarantor of the dower. She contended that she was duly carrying out her conjugal rights post marriage. She averred that in early days of her marriage, family members of the defendant/appellant were hand and glove with her but after a while, they totally changed and often used to fall foul of her as well as blaming her parents of not giving them dowry articles. At last, on 27.03.2021 she was beaten up by her husband and his

family members and was ousted from the home, hence, she started living with her parents. It has been alleged that dower amount is yet outstanding, thus, decree of dower may be issued in her favour.

5. The defendant refuted the whole claim of the plaintiff by filing written statement.

6. In the suit for maintenance allowance, the plaintiff prayed that a decree of maintenance allowance from 27.03.2021 till date may be issued in her favour while in future 20% annual increase may be ordered.

7. The defendant in reply averred that she herself left the house of defendant/appellant and did not return from her parents' home, hence, she is not entitled for maintenance allowance.

B. ENSUING PROCEEDINGS

8. In light of the pleadings of the parties, the learned Family Judge, Bagh framed relevant issues and after framing of issues, evidence of the parties was recorded. Plaintiff-respondent produced Syed Ghulam Mustafa Shah, Syed Ghulam Mohiuddin Gillani as witnesses before the court and got recorded their statements. She also recorded her statement and also produced 'nikahnama' Exh.PA as documentary evidence and other medical checkup reports etc. whereas, defendant produced Syed Habib Ahmed Gillani and Syed Asim Ajmal as witnesses before the court and got recorded their statements. The trial Court/Family

Court, after hearing arguments of the parties, finally decreed the suit of maintenance allowance in favour of plaintiff/respondent to the tune of Rs.5,500/- per month from 27.03.2021 and in future till validity of Nikah Rs.6,000/- per month alongwith 10% annual increase, while maintenance of minor Hania Batool to the tune of Rs.5500/- per month from 01.11.2021 (date of birth) and future monthly maintenance Rs.5,500/- alongwith 10% annual increase was decreed, besides that, Rs.30,000/- (delivery charges alongwith other traveling expenses) were also decreed in favour of plaintiff/respondent No.1 and the trial Court also decreed the conditional decree of restitution of conjugal rights in favour of plaintiff/appellant in the manner that if the plaintiff pays the dower amount Rs.100,000/-, past and future maintenance allowance alongwith other expenses including delivery charges and separate accommodation, the defendant will perform her matrimonial obligations, vide impugned judgment and decrees dated 23.01.2023, hence, these appeals.

C. APPELLANT'S ASSERTIONS

9. Sardar Azam Haider and Salma Iqbal Sadozai, the learned counsel for the appellant submitted written arguments wherein they proffered that the impugned judgment and decrees dated 23.01.2023 are at odds with the law and facts, hence, liable to be set-aside. The learned counsel staunchly contended that the trial Court has overlooked the evidence and arrived at a wrong conclusion by granting decree in favour of respondent.

They argued that the respondent herself left the house of her husband, hence, she was not entitled to get any maintenance allowance as she failed to perform her matrimonial obligations, in this regard, Apex Court has delivered plethora of verdicts that disobedient wife cannot not be entitled to any maintenance. The learned counsel pointed out that the decree for restitution of conjugal rights was granted in favour of appellant but despite that maintenance allowance and dower was decreed in favour of defendant/respondent, as such both decrees i.e. dower and maintenance allowance are liable to be set at naught.

D. RESPONDENT'S SUBMISSIONS

10. S.M. Gulbaz Khan, the learned counsel for the respondent submitted written arguments; by controverting the arguments of the learned counsel for the appellant contended that dower was pending which was not paid at the time of "nikah" and was mentioned as 'deferred dower'. He submitted that the contents of the "Nikahnama" has got presumption of truth, which cannot be neglected, while, the appellant and his witness Syed Habib Ahmed Gillani admitted that the dower is outstanding. He adamantly contended that the respondent was ousted by the appellant and his parents by battering her and it was only after this agonizing behavior that she started living with her parents. The learned counsel vehemently contended that the judgment and decree of the learned trial Court is quite in accordance with law which needs no indulgence by this court, moreover, the learned

counsel submitted that the appellant has divorced the respondent on 23.01.2023, hence, she deserves to get past maintenance and iddat period maintenance. The learned counsel defended the impugned judgment/ decrees on all four corners and prayed for dismissal of the appeals.

11. *We have considered the written arguments submitted by the learned counsel pro and contra besides taken stock of the record of the case with due care.*

E. DETERMINATION BY THE COURT:-

12. Be that as it may, cursory survey of record reveals that respondent Muneeba Gillani has undergone mental torture; evidence brought on record upon issue No. 2 is crystal clear in this regard. It is useful to reproduce some of the glimpses:

”مدعا علیہ کی والدہ نے مدعیہ کو متعدد بار پھینا اور یہ طعن دیا کہ مدعیہ والدین کے گھر سے جھیز کیوں نہ لائی ہے۔ مدعا علیہ کی والدہ نے اعلانیہ طور پر کہا کہ والدین کے گھر چلی جاؤ جب جھیز کا بندوبست ہوا تو اپنا الگ مکان بنا کر رہائش رکھنا۔ مدعیہ نے مدعا علیہ کو متعدد بار اس نسبت آگاہ کیا لیکن مدعا علیہ نے برملا یہ کہا کہ جو بات میری ماں کہے گی اس پر عمل ہوگا۔ مدعا علیہ اور اسکے والدین کی مار پیٹ اور طعن زنی کے باعث مدعیہ 27.03.2021 سے غیر آباد ہو کر اپنے والدین کے ہاں رہائش پذیر ہے۔“

13. In written arguments, the respondent has also placed on record a facsimile of divorce deed dated 23.01.2023 allegedly given by appellant Toqeer Gillani. Factum of divorce has not been pleaded by either sides, no evidence is available on record. Document has been exhibited/brought on record with written arguments.

14. Leaving apart the divorce deed and without commenting upon the same, it transpires from evidence and available record that respondent was subjected to mental torture, agony and torment; in addition to that, behavior of the appellant with respondent remained cruel.

15. How can a lady be expected or directed to cohabit with an irresponsible person who is not ready to provide her separate shelter and bear her basic needs, particularly when they are at daggers drawn? Factum of cruelty, mental torture as well as apathy shown by the husband is floating from the surface of record, thus, after evaluating the evidence, we are of the considered opinion that the wife is entitled for decree of dissolution of marriage even otherwise on the ground of mental torture. There remains no justification for asking reunion of the spouses particularly when the wife (who underwent mental torture) is no more ready to remain in marital ties.¹

(underlining is ours)

i. **CRUELTY IN CONTEXT OF MARRIAGE**

16. Cruelty is a bodily harm or a reasonable apprehension of bodily harm which endangers life, limb or health and renders marital cohabitation unsafe or improper.² It is the intentional and malicious infliction of mental or physical suffering on a living creature, especially a human which is also

¹. Abid Hussain v. Additional District Judge [2006 SCMR 100]; Mst. Ambreen v. Muhammad Kabeer [2014 SCR 504]; Muhammad Sabil Khan v. Saima Inshad [2014 SCR 718] and Azhar Bashir v. Sadia Shafique [2015 SCR 521].

². Walter Wadlington & Raymond C.O'Brien, Family Law in Perspective 73 (2001).

termed ‘cruel treatment’. Cruelty is of two types i.e. ‘physical cruelty’ and ‘mental cruelty’. Physical cruelty involves actual personal violence committed by one spouse against the other whereas mental cruelty is when one spouse’s course of conduct (not involving actual violence) creates such anguish that it endangers the life, physical health or mental health of the other spouse.³ To prove cruelty, it is not necessary to manifest physical assault/injury; conduct/behavior amounting to mental assault has also been treated by the Courts as cruelty.⁴

ii. **MARRIAGE: A SOCIAL CONTRACT**

17. Nikah is a social contract of very high status and conjoins a couple in a sacred association, with mutual rights and obligations, to be performed in a spirit of love and affection that should last life-long.⁵ Such a contract undoubtedly has spiritual and moral overtones and undertones⁶ but legally, in essence, it remains a contract between the parties which can be the subject of dissolution for good cause.⁷

18. Quran declares that women have rights against men, similar to those that the men have against women according to the well-known rules of equity i.e. **ولهن مثل الذى عليهن بالمعروف**⁸

³. Black’s Law Dictionary, 11th Edition.

⁴. Mehvish Kazmi v. Parvaiz Hussain [PLD 2022 SC (AJ&K) 1]; Zaheer-ud-Din Babar v. Shazia Kausar [2016 CLC 332] and Mst. Ambreen v. Muhammad Kabir [2015 YLR 170].

⁵. Al-Quran, Surah Al-Baqara (2) verse 228; Surah An-Nisa (4) verse 19 and Surah Ar-Rum (30) verse 21.

⁶. Mst. Khurshid Bibi v. Baboo Muhammad Amin [PLD 1967 SC 97].

⁷. Zubair v. Senior Superintendent Police, Jhelum Valley [PLD 2023 High Court (AJ&K) 89].

⁸. Al-Quran, Surah Al-Baqarah (2) verse 228.

Quran expressly says that the husband should not cling to the woman, in order to cause her injury i.e. *ولا تمسكوهن ضرار لتعتد*⁹
 A hadith declares *لا ضرر ولا ضرار*¹⁰ which translates as “Let no harm be done, nor harm be suffered.”

19. In our estimation, where mutual respect has lost and extreme hatred has developed between the spouses, decree for restitution of conjugal rights will certainly enhance the mental agony and spoil the lives of spouses. (*Emphasis supplied*).

20. Suits filed by the respondent Muneeba Gillani are aftermath of the cruel treatment meted out by the appellant and his mother, callousness shown by the appellant as per evidence does not warrant reunion at all.

21. Before parting with the decision, we would like to point out the flaws in the process of execution of decree under the umbrella of **AJ&K Family Courts Act, 1993** and rules made thereunder i.e. **AJ&K Family Court Procedure Rules, 1998**. It is useful to reproduce the preamble clause of the AJ&K Family Court Act, 1993:-

“Whereas it is expedient to make provision for the establishment of Family Courts for the expeditious settlement and disposal of disputes relating to the marriage and family affairs and for matters connected therewith”

22. It is trite under Section 17 of the aforesaid Act that provisions of Qanoon-e-Shahadat Order and Code of Civil Procedure are not applicable to the proceedings before any

⁹. Al-Quran, Surah Al-Baqarah (2) verse 231.

¹⁰. Sunan Ibn Majah, Hadith No. 2341.

Family Court, while the Govt. under Section 22 is empowered to make rules to carry into effect the provisions of said Act. As per Section 22 *ibid*, the AJ&K Family Court Procedure Rules, 1998 have been framed, but no specific and satisfactory mode of execution is provided in the parent law or for that matter in the said rules; resultant of which the execution proceedings are dealt with seemingly in the same manner as provided in the Civil Procedure Code. Thus, a fresh round of litigation takes its way once again which *ex-facie* frustrates the very purpose of special law, particularly Section 12(2) of the Family Courts Act, 1993 becomes redundant which provides 4 months period for adjudication of such like matters.

23. Application of General law quo execution of decrees under special law meant for expeditious adjudication is not proper and justified. Under AJK Financial Institution (Recovery of Finances) Adaptation and Enforcement) Act, 2002, method of automatic execution is provided i.e. after passing the decree no fresh application is required to be filed by the decree holder to get the same executed as the decree automatically stands converted in the execution application, resultant of which execution proceeding takes its way.

24. No specific mechanism quo execution of decree is provided in the statute i.e. The Family Court Act, 1993 nor Rules made thereunder recognize the mode in this regard, resultantly the Family Courts opt to follow the procedure provided in

General law, which takes too much time in disposal of the matter and ex-facie frustrates the wisdom of the special law. In our estimation, it is a major flaw in the family law, when such like flaw is found in the Statute, Courts of law should try to limit the solution to the problem.

25. It is well settled principle of law that where an Act or Rule prescribes a specific mode for performance of an act then such act should be performed in that manner otherwise it would be deemed to have not been performed.¹¹

26. It is not stated anywhere in the Constitution that only Maxwell's principles of interpretation can be utilized, Court can utilize any system of interpretation which can help to resolve a difficulty. Principles of interpretation are not principles of law but are only methodology for explaining the meaning of words used in the test.¹²

27. Recourse to general law is permissible when special law is silent on a particular point except where the provision of General law is inconsistent with the provision of special law.¹³ Where both General law and Special law are applicable preference should be given to the provisions of special law. Recourse to the General provision of statute for nullifying the special provision of such statute is not permissible.¹⁴ Admittedly the procedure provided in the Code of Civil Procedure does not

¹¹. Multan Jan v. The State [2020 P.Cr.LJ 88].

¹². B. Premanad vs. Mohan Koikal [AIR 2011 SC 1925].

¹³. Muzaffar Ali v. Mst. Mehran Nisa [1989 CLC 1805].

¹⁴. Muhammad Yaseen v. The State [2001 YLR 289].

match with the scheme of special law i.e. the Family Courts Act, 1993. It amounts to link the horse with the cart having heavy iron wheels. *(Emphasis added).*

28. Automatic execution will serve the very purpose of special law and will shrink the process of execution and expedient the matter qua providing fruit of the litigation to the decree holders.

29. **Special law meant for special purpose and aimed to adjudicate the related matter (indicated in it) within a stipulated period is seemingly thirsty without providing expeditious disposal of the execution. When the special law has restricted the zone of adjudication of cases within a prescribed period and specifically excluded the application of General law rather than applying the rational of special law, law requires to be beautified by inserting amicable expeditious and specific mode of execution of decree.**

F. SUGGESTIONS

30. By entering in the area of legislative flaw/ambiguities, we are duty bound to eliminate hardships in order to enhance the vigour and strength of special law. In such like eventuality, in order to fill gaps and lacunas, Court can exercise discretion.¹⁵

31. In this vista of the matter, we would like to suggest insertion as infra:-

¹⁵. Sheikh Saeed Ahmed v. Abdul Wahid [1999 SCMR 1852].

“Upon pronouncement of judgment and decree by Family Court, the suit shall automatically stand converted into execution proceedings without need to file a separate application and no fresh notice need to be issued to the parties in this regard; the case will be heard by the Family Court for execution of its decree after expiry of 30 days from the date of pronouncement of decree. It is also suggested that in order to beautify the special law, time frame of 45 days and adjournments for only 5 days is also plausible.”

In order to liquidate the huge backlog, some other suggestions are quoted below:-

“(1). Unnecessary and frequent adjournments are fatal to the objective of the special law, thus, frequent adjournments shall be frowned upon. Time period of adjournment of the case 7 days seems plausible.

(2). In execution proceedings, depositing installment (or in toto) of decretal amounts directly in the Court is not plausible, thus, it is suggested that instead of such practice, the decretal amount (or any other amount in this regard) shall be deposited in the indicated account of decree holder (whom it is legally to be paid) and challan/receipts of the same be submitted before the Court as a proof.

Section 13 of the Family Courts Act is pertaining to enforcement of decrees of the Family Court. Subsection (4) of Section 13 Family Court Act, 1993 reads as infra:-

13(4); The decree shall be executed by the Court passing it or by such other civil Court as the District Judge, may by special or General order direct.

Thus, special/summary and judicious procedure is required to be adopted by revisiting the procedure rules.”

32. Thus, keeping in view the requirement of special law and in order to satisfy the very purpose of it, AJ&K Government is directed to revisit the AJ&K Family Court Procedure Rules, 1998 in order to provide specific procedure for expeditious

execution of decrees by way of introducing automatic execution and needful shall be done within 02 months. Compliance report shall also be submitted before Registrar of this Court.

G. CONCLUSION

33. The whys and wherefores lead us to an irresistible conclusion that the appellant has failed to make out a case in his favour. Decree in favour of the appellant qua restitution of conjugal rights is not passing muster, thus, same is set aside to that extent, rest of the judgment and decree is upheld, version of the appellant is discarded. Appeals are accordingly disposed of. Files be kept in archive.

Copy of the instant judgment be sent to the Chief Secretary of Azad Govt. of the State of Jammu and Kashmir for compliance.

Muzaffarabad,

13.09.2023.^(AR)

CHIEF JUSTICE JUDGE JUDGE
(S) (E)

Approved for reporting

CHIEF JUSTICE JUDGE JUDGE
(S) (E)