SUPREME COURT OF AZAD JAMMU AND KASHMIR
[Shariat Appellate Jurisdiction]

PRESENT:
Ch. Muhammad Ibrahim Zia, C.J.
Ghulam Mustafa Mughal, J.

Civil Appeal No.361 of 2018.
(Filed on 13.12.2018)

1. Irfan Ilyas s/o Mohammad Ilyas,

2. Muhammad Azad Khan s/o Muhammad Afsar Khan, caste Maldial, r/o Sahlian Maldialan, Tehsil and District Bagh, Azad Kashmir.

…. APPELLANTS

VERSUS

1. Mst. Neelum d/o Muhammad Mukhtiar Khan, w/o Maqsood.

2. Mst. Zobia Sattar minor daughter of Irfan Ilyas, through mother Mst. Neelum, caste Maldial, r/o Sahlian Maldialan, Tehsil and District Bagh.

…… RESPONDENTS

(On appeal from the judgment and decree of the Shariat Appellate Bench of the High Court dated 16.10.2018 in Civil Appeal No.62 of 2017)

FOR THE APPELLANTS: Sardar Muhammad Iftikhar Baig, Advocate.

FOR THE RESPONDENTS: Syed Sayyad Hussain Gardezi, Advocate.

Date of hearing: 01.07.2019

JUDGMENT:

Ghulam Mustafa Mughal, J.— The captioned appeal has been directed against the judgment and decree dated 16.10.2018, passed by the Shariat Appellate Bench of the High Court in Civil Appeal No.62 of 2017.

2. The facts leading to filing of the captioned appeal shortly stated are that the plaintiff/respondent, herein, filed two suits; one for recovery of dower; and the other, for recovery of maintenance allowance, against the defendants/appellants, herein, in the Court of Additional District and Sessions Judge/Judge Family Court Bagh on 16.02.2017. It was averred that the marriage between the plaintiff and defendant No.1 was solemnized on 27.11.2011 in lieu of dower amounting to Rs.1,60,000/- at Sahlian Maldialan, Tehsil and District Bagh. It was further averred that out of the total dower an amount of Rs.60,000/- in shape of gold ornaments was paid at

the time of *nikah*, whereas, the rest of the dower amount was deferred. It was claimed that the gold ornaments given at the time of *nikah* in lieu of dower amounting to Rs.60,000/- were later on snatched by the husband, hence, the total dower is outstanding. It was further claimed that the defendant/husband use to abuse the plaintiff and torture her both physically and mentally. It was stated that out of the wedlock a minor child was born which is being brought up by the plaintiff. It was further stated that the defendant thrown the plaintiff out of the home in January, 2016, and divorced her on 12.02.2017 but has not paid the dower. It was further stated that the defendant has also neither given any maintenance allowance to the plaintiff from the date of ouster i.e. July, 2015, nor the minor daughter from January, 2016 i.e. the date of birth of the minor. It was prayed that the decree of dower amounting to Rs.1,60,000/- and maintenance allowance may be granted in favour of

the plaintiff. The suits were contested by the other side by filing written statement, wherein, it was stated that the defendant has never maltreated, and the plaintiff has left the home of her husband out of her free will and did not want to populate, hence, is not entitled to any relief. The learned trial Court framed issues in light of the pleadings of the parties and asked them to lead evidence pro and contra. At the conclusion of the proceedings vide judgment and decree dated 10.10.2017, decreed the suit for dower amounting to Rs.1,00,000/-. The suit for maintenance allowance was also decreed in favour of the plaintiff and it was held that the plaintiff is entitled to the maintenance allowance at the rate of Rs.3000/- per month from July 2015 to January, 2017, total amounting to Rs.57000/- alongwith maintenance allowance of *iddat* period at the rate of Rs.3000/- per month total amounting to Rs.9000/-, whereas, the minor daughter is entitled to the maintenance allowance at the rate of Rs.3000/- per

month from her date of birth i.e. January, 2016 to October 2017, total amounting to Rs.66000/- and future maintenance allowance at the rate of Rs.3000/- per month with 20% annual increase. The plaintiff/appellants, herein, felt aggrieved from the judgment and decree passed by the Family Court Bagh dated 10.10.2017 and challenged the same by way of appeal before the Shariat Appellate Bench of the High Court on 10.11.2017. The learned Shariat Appellate Bench of the High Court, after hearing the parties, vide impugned judgment and decree dated 16.10.2018 has dismissed the appeal.

3. Sardar Muhammad Iftikhar Baig, the learned Advocate appearing for the appellants argued that the judgment passed by the learned Family Judge is arbitrary, perverse, capricious and violative of the precedents of this Court, hence, was liable to be recalled but the learned Shariat Appellate Bench of the High Court has endorsed the same without considering the evidence as well as the

case law referred before it. The learned Advocate further argued that willful desertion on the part of the appellant, herein, has not been proved rather the respondent, herein, has left the home of her husband out of her free will and consent, hence, in the circumstances of the case, she is not entitled to any maintenance allowance. The learned Advocate further argued that the learned Family Judge without any reasons has granted the relief by allowing 20% annual increase in the awarded maintenance allowance which was neither prayed nor pleaded, hence, the judgment of the Family Court Bagh, to this effect, is beyond the pleadings and is illegal. In support of his submissions, the learned Advocate has placed reliance on the cases reported as *Mst. Amreen vs. Muhammad Kabir* [2014 SCR 504] and *Mukhtar Hussain & another vs. Farhat Bibi & another* [2017 SCR 1086].

In Mst. Amreen’s case, referred to hereinabove, it was observed that it is the duty of the husband to

maintain his wife till she is faithful to him and is ready to live with the husband at his home and perform matrimonial obligations but if the wife abandons the residence of the husband without any reason and is not ready to live with him as his wife then she is not entitled to the past of future maintenance allowance. It was further held that if a wife is ousted by the husband from his home or she is forced to live with the husband at his residence due to cruelty, physical or mental torture by the husband or the inmates of the home, then she is entitled to the maintenance charges. In this case, a settled principal of law i.e. “if a portion of the statement of a witness goes against a party and that party fails to cross examine on that point then that portion of the statement of the witness shall be deemed to have been admitted.” was reiterated.

In the second case referred to by the learned counsel for the appellant, it was observed that suo moto increase in the maintenance allowance cannot be

awarded by the Family Court if the same is not claimed.

4. Conversely, Mr. Sayyad Hussain Gardezi, the learned Advocate appearing for the respondents argued that the appellant, herein, has failed to produce any evidence regarding willful leaving the home of the husband by the respondent, herein. He referred to page No.6 of the judgment of the Family Court Bagh and submitted that all the witnesses produced by the plaintiff/respondent, herein, have categorically stated that after torture, the plaintiff was thrown out of the home of the appellant, herein, in 2014 and the statement of these witnesses have not been challenged in cross examination. The learned Advocate further argued that as per settled law, the statements of Lal Hussain and Mukhtar Mughal would be deemed to have been admitted and the learned Family Judge has

rightly considered these statements as admitted. The learned Advocate further argued that Muhammad Sadiq and Saleem Khan, witnesses, appeared on behalf of the defendant/appellant, herein, but they have not stated anything about leaving the home of the husband by the respondent, herein, out of her free consent. The learned Advocate submitted that on the basis of the evidence brought on the record, the Courts below have reached the impugned conclusion which is unexceptional, well appreciated and in accordance with law which hardly requires any interference.

5. We have heard the learned counsel for the parties and have gone through the record of the case. It may be stated that the evidence produced by the appellant, herein, regarding the willful leaving the home of the husband by the plaintiff/respondent, herein, has not been proved.

It has rightly been argued by Syed Sayyad Hussain Gardezi, Advocate, that the portion of the statement of the witnesses regarding desertion has not been cross examined by the appellant, herein, therefore, the same would be deemed to have been admitted. In this case, after considering the overall evidence and circumstances of the case, the learned Family Court Bagh has granted the decree of maintenance allowance in favour of the respondents, herein. We are of the view that the award of maintenance allowance by the Family Court is neither fanciful nor arbitrary, however, the grant of 20% annual increase without claim is not proper. Thus, we maintain the judgment and decree of the Family Court Bagh dated 10.10.2017 as well as the impugned judgment and decree of the Shariat Appellate Bench of the High Court to the extent of grant of maintenance

allowance to the respondents, herein, however, set aside the same to the extent of grant of 20% annual increase in the awarded maintenance allowance.

In view of the above, this appeal is partly accepted and the judgments of the Courts below stand modified in the terms indicated above. No order as to costs.

JUDGE **CHIEF JUSTICE**

Muzaffarabad.
02.07.2019.