SUPREME COURT OF AZAD JAMMU AND KASHMIR

[SHARIAT APPELLATE JURISDICTION]

PRESENT:

Kh. Muhammad Nasim, J.

Raza Ali Khan, J.

Civil Appeal No. 544 of 2019

(PLA Filed on 04.11.2019)

Mehvish Kazmi d/o Syed Shabbir Hussain Shah r/o Kohwan Wala Bagh, Ghari Dupatta Tehsil and District Muzaffarabad.

……APPELLANT

VERSUS

1. Parvaiz Hussain, s/o Imam Ali Shah r/o Village Namli Syedan Tehsil and District Muzaffarabad.
2. Ishtiaq Hussain s/o Imam Ali Shah r/o Village Namli Syedan Tehsil and District Muzaffarabad.

…..RESPONDENTS

[On appeal from the judgment of the Shariat Appellate Bench of the High Court dated 15.10.2019 in family appeals Nos. 20, 21, 22, 23 & 24 of 2019]

APPEARANCES:

FOR THE APPELLANT: Mr. Shahid Ali Awan, Advocate.

FOR THE RESPONDENTS: Ch. Shoukat Aziz, Advocate.

Date of hearing: 30.08.2021.

JUDGMENT:

Raza Ali Khan, J.– The captioned appeal by leave of the Court has been directed against the consolidated judgment, dated 15.10.2019, passed by the Shariat Appellate Bench of High Court of Azad Jammu & Kashmir (hereinafter to be referred as High Court) whereby, the appeals filed by the respondents, herein, have been partly accepted.

2. The brief facts forming the background of the captioned appeal are that the plaintiff-appellant, herein, filed four suits; one for payment of dower of Rs. 4,25,525/-, second for past and future maintenance allowance at the rate of Rs. 12000/- per month, third for dissolution of marriage on the ground of cruelty, non-performance of marital obligations, non-payment of dower and maintenance allowance etc. and fourth for the recovery of dowry articles or as alternate its price i.e. Rs. 1,53,300/-, against the defendants-respondents, herein, before the Judge Family Court, Muzaffarabad, on 25.03.2017 and 19.05.2018, respectively. The respondent, herein, Pervaiz Hussain, also filed a suit for restitution of the conjugal rights before the said Court on 05.05.2017. The learned Family Court consolidated all the suits

which were resisted by the rival parties by the filing written statements. The learned Family Court in the light of pleadings of the parties framed issues and after recording of the evidence and hearing the parties, vide consolidated judgment and decrees dated 29.12.2018, four decrees were passed in favour of the plaintiff-appellant. The suit for recovery of deferred dower was decreed at the rate of Rs. 3,25,525; second suit for recovery of the maintenance allowance was decreed at the rate of Rs. 2000/- per month from the date of institution of the suit till the date of decision alongwith the Iddat period. The suit for dissolution of marriage was decreed on the basis of cruelty and the other suit for recovery of dowry articles was also decreed. Whereas, the cross suit filed by Pervaiz Hussain, for restitution of conjugal rights

was dismissed on the basis of decree of dissolution of marriage. Feeling aggrieved, the respondents, herein, filed five appeals before the Shariat Appellate Bench of the High Court. The learned High Court through the impugned judgment and decree while partly accepting the judgment and decrees of the Family Court, modified the same while observing that: the plaintiff-appellant, herein, shall be entitled to receive maintenance allowance for the period of Iddat, only; her marriage is dissolved in lieu of consideration of 'Khula', amounting to Rs. 100,000/- which shall be returned to the respondent, herein, and the appellant, herein, shall be entitled to take items of dowry articles mentioned in paragraph No. 12.

3. Mr. Shahid Ali Awan, the learned Advocate for the appellant argued the case with full vehemence

and submitted that the impugned judgments of the learned High Court is against law, the facts and the record of the case. He argued that the Family Judge has rightly passed the judgments and decrees which have been modified by the learned High Court in an arbitrary manner which is liable to be set-aside. He further argued that the impugned judgment and decrees passed by the learned High Court are result of mis-reading and non-reading of the evidence. He submitted that it is proved from the evidence that the appellant left her husband's home due to his cruel behavior which remained continued through different the tactics as is evident from the FIR lodged by the respondent against the appellant, but the learned High Court overlooked this important aspect of the case. He further submitted that the learned Family

Judge dissolved the marriage on the basis of cruelty but amazingly, the learned High Court has modified the same and converted the same as dissolved on the basis of Khula, which is totally against law and record of the case and no legal justification has been mentioned for adjustment of the dower amount of Rs. 100,000/- as consideration of Khula. He contended that the appellant has proved with cogent evidence that her parents gave her dowry articles at the time of marriage and the same are under possession of the respondent, therefore, the modification in the decree for recovery of dowry articles is liable to be set-aside. He further contended that this Court in its various pronouncements has declared that the cruelty or torture is not only confined to the physical assault rather it also includes the mental torture. The

appellant has sufficiently proved the torture during the trial and this sole ground is sufficient to pass a decree for dissolution of marriage. He contended that total dower was fixed as 4,25,525- out of which, the ornaments worth Rs. 100,000/- were also given at the time of "Rukhsati" which, later on, were stolen by respondent No.1, and remaining dower was also not paid, hence, the whole dower was liable to be paid. He further contended that the learned Family Court has passed the decree for recovery of dowry articles, which are lying at the residence of the respondent, hence, has not committed any illegality. He emphasized that there was no justification under law that after dissolution of marriage, the appellant was not entitled to receive maintenance allowance for the period of 'Iddat', therefore, the learned Family Court

rightly granted the same in favour of the respondent. He further emphasized that the respondent No.1, herein, has also got registered FIR against respondent about stealing ornament, which caused mental torture to the appellant, hence, the Family Court has correctly passed a decree for dissolution of marriage and dismissed the suit filed for restitution of conjugal rights. He finally submitted that the judgment and decrees of the learned Family Judge are quite in accordance with law which have wrongly been modified by the learned High Court. Therefore, this appeal may be accepted and the impugned judgment and decrees may be set-aside. The learned Advocate placed reliance on the case reported as *Muhammad Sabil Khan and another vs. Saima Inshad [2014 SCR 718], Nazish Shabir vs. Basit Ibal Khan & another [2015*

SCR 400], Khalid Mahmood vs. Parveen Akhtar & another [2015 SCR 512], Muhammad Rafique vs. Mst. Gul Taj [2006 SCR 260] and Syed Iqbal Shah vs. Syeda Tahira Bibi & others [2019 SCR 295].

3. Conversely, Ch. Shoukat Aziz, Advocate, the learned counsel for the respondents forcefully defended the impugned judgment and submitted that the impugned judgment and decrees of the learned High Court are quite in accordance with law. He submitted that the judgment and decrees passed by the Family Judge were result of mis-reading and non-reading of evidence, hence was rightly modified by the learned High Court. He further argued that the plaintiff-appellant, herein, leveled allegations of advances for making illicit relations with her by the brother-in-law of the respondent which could not be

proved and the learned High Court after reproducing the evidence of the witnesses of the plaintiff in its decision rightly reached at the conclusion that the allegation levelled against brother-in-law is not proved in the light of evidence available on record. He further submitted that the learned High Court while dealing with the question of maintenance rightly declared that she herself left the house of the husband with her own free will and all her witness admitted this fact that she went with her father from the house of the defendant, hence, she failed to prove the cruelty of the defendant. He added that she is not entitled for any maintenance allowance of past and future and the decree of the Family Court was rightly set-aside by the High Court in this regard. He argued that the learned Family Court has failed to appreciate the statements

of the witnesses in true perspective as well as misread-and non-read the statements of the parties, whereas, the learned High Court after detailed scrutiny of the statements of the witnesses of both the parties rightly reached at the conclusion and modified the judgment and decrees of the Family Court. He further submitted that all the witnesses except, Mazhar Hussain Shah, gave parrot like statements and deposed that during 'Punchayat' at Police Station, they were told about advances for making illicit relations with the plaintiff by brother-in-law of the defendant, whereas, Mazhar Hussain Shah plaintiff witness, deposed that plaintiff told him about the aforesaid incident in separation, hence, there is contradiction in the statements of the plaintiff's witnesses. He stated that total dower was fixed as Rs.

425,525, out of which, gold ornaments worth Rs. 100,000/- were given at the time of Rukhsati, which later on, were stolen by the appellant and are in her possession. He further stated that after some time of marriage, the father of the appellant, herein, demanded remaining dower, because he had borrowed some money for the marriage of his daughter, which was liable to be returned, hence, remaining dower was also paid to the father of the appellant in her presence, therefore, the entire dower had been paid, however, the learned Family Judge as well as the learned High Court did not consider this aspect of the case. He added that the cost of the dowry articles might be Rs. 25000/-, but the Family Judge erroneously passed decree for recovery of dowry articles, available at the residence of the

respondent which has rightly been rectified by the learned High Court. He further added that the suit for restitution of the conjugal rights was wrongly dismissed by the Family Judge which could have been decreed by the learned High Court, but the learned High Court has also failed to appreciate the evidence to this extent. He finally prayed that the rest of the impugned judgment of the learned High Court is well-reasoned, speaking one and unexceptional calling for no interference and this appeal is not maintainable which is liable to be dismissed.

4. After hearing the learned counsel for the parties at length, as well as on thorough scrutiny of factual situation emerged from the arguments advanced on behalf of the parties; it divulges that, four suits were filed by the plaintiff-appellant, herein;

one for payment of dower of Rs. 4,25,525/-, second for past and future maintenance allowance at the rate of Rs. 12000/- per month, third for dissolution of marriage on the ground of cruelty, non-performance of marital obligations, non-payment of dower and maintenance allowance etc. and fourth for recovery of dowry articles or its price of Rs. 1,53,300/-, against the defendants-respondents, herein, before the Judge Family Court, Muzaffarabad, on 25.03.2017 and 19.05.2018, respectively. A cross suit was also filed by respondent No.1, herein, before the same Court for restitution of conjugal rights. The suits were contested by the other side before the trial Court while submitting the written statement. Out of the pleading, the learned Family Judge framed following issues:-

"1۔ کیا مدعیہ ڈگری کففاف ماہانہ دلا پانے کی حقدارہ ہے؟ اگر ہاں تو کس قدر اور کس عرصہ کا؟ (بذمہ مدعیہ)

2۔ کیا مدعیہ ڈگری حق مہر دلا پانے کی حقدارہ ہے؟ (بذمہ مدعیہ)

3۔ کیا ڈگری تنسیخ نکاح بر بنائے تشدد ،عدم ادئیگی حقوق زوجیت، وعدفراہمی تحفظ،عدم ادائیگی حق مہر، عدم ادئیگی نان ونفقہ کفاف ماہانہ دلا پانے کی حقدارہ ہے؟ (بذمہ مدعیہ)

4۔ کیا مدعیہ ڈگری سامان جہیز دلا پانے کی حقدارہ ہے؟ (بذمہ مدعیہ)

5۔ کیا مدعی بالمقابل ڈگری اعادہ حقوق زن آشوئی دلا پانے کا حقدارہ ہے؟ (بذمہ مدعاعلیہیم)"

The learned Family Judge at the conclusion of the proceedings decreed all the suits filed by the plaintiff-appellant, herein, and dismissed the suit filed by the defendant-respondent, vide consolidated judgment and decrees dated 29.12.2018. The suit for recovery of deferred dower was decreed at the rate of Rs. 3,25,525, second suit for recovery of maintenance allowance was decreed at the rate of Rs. 2000/- per

month from the date of institution of suit till the date of decision alongwith the period of Iddat. The suit for dissolution of marriage was decreed on the basis of cruelty and recovery of dowry articles was also decreed. Whereas, the cross suit filed by Pervaiz Hussain, for restitution of conjugal rights was dismissed on the basis of decree of dissolution of marriage. Feeling aggrieved, the respondents, herein, filed appeals before the High Court. The learned High Court after necessary proceedings while partly accepting the judgment and decrees of the Family Court, modified the same while observing that:-

> *"The crux of above discussion is that by partly accepting appeals Nos. 20, 21, 22 & 23 the impugned judgment and decrees dated 29.12.2018, passed by the learned Judge Family Court, Muzaffarabad, are modified to the extent that respondent-plaintiff*

shall be entitled to receive maintenance allowance for the period of 'Iddat' only. Her marriage is dissolved in lieu of consideration of 'khula' amount Rs. 100,000/- which shall be returned to appellant No.1, and respondent-plaintiff shall be entitled to take items of dowry articles mentioned in paragraph No. 12, supra. Consequently, finding no substance in Appeal No. 24, filed against dismissal of suit for restitution of conjugal rights, it is hereby, dismissed, with no order as to the costs."

5. The perusal of the impugned judgment reveals that the decree to the extent of restitution of conjugal rights has been upheld by the learned High Court which has not been challenged by the respondent, hence, the same has attained finality. The learned High Court has modified rest of the decrees of the family Judge through the impugned judgment, dated 15.10.2019. Firstly, we would like to deal with

the point that the whether the learned High Court has rightly dissolved the marriage on the basis of 'Khula', in lieu of dower Rs. 100,000/- (prompt dower). The cumulative appreciation of the evidence reveals that the plaintiff claimed dissolution of marriage on the basis of cruelty, non-payment of dower and maintenance allowance and non-performance of the marital obligation. She produced five witnesses, namely Syed Ali Hussain Shah, Syed Zameer Hussain Shah, Syed Nadeem Hussain Shah, Syed Mazhar Hussian Shah and Syed Shabir Hussain Shah, in support of her claim and also got her own statement recorded before the Family Judge. In rebuttal, the defendant also produced witnesses namely Syed Iqtadar Hussain Shah and Mir Hussain Shah and recorded his own statement. The learned Family Judge

after formal proceedings dissolved the marriage on the basis of cruelty but on appeal before the learned High Court, the same has been modified and converted into the dissolution of marriage on the basis of 'Khula' against the adjustment of 100,000/-. The learned Judge of the High Court passed the reversed findings therefore, for our own satisfaction, we have examined the whole evidence minutely. The plaintiff's witness namely Syed Ali Hussain Shah, stated in his statement, that:-

"مظہر مدعیہ سے اس کی شادی کے بعد اس وقت ملا تھا جس وقت مدعیہ واپس اپنے والدین کے گھر چلی گئی تھی۔ نومبر کے آخر میں مدعیہ ملی تھی۔ یہ غلط ہے کہ مظہر نومبر میں ملنے کی نسبت غلط بیانی کر رہا ہے۔ یہ غلط ہے کہ مدعاعلیہ کے تھانہ میں زیورات کی نسبت اور مار پیٹ کی نسبت اپنی بات تسلیم کرنا مظہر نے غلط بیانی سے کہا ہے۔ یہ غلط ہے کہ مدعاعلیہ نے کبھی بھی کسی سے گالم گلوچ نہ کی ہے۔ یہ غلط ہے کہ مدعیہ اپنی مرضی اور خوشی سے اپنے والدین کے ساتھ مدعاعلیہ کے گھر

آئی۔ مدعاعلیہ نے اسے گھر سے نہ نکالا از خود کہا کہ مار پیٹ کے
گھر سے نکالا۔"

The plaintiff's witness, Syed Shabir Hussain Shah, in his statement, stated that:-

"دوران آبادی پرویز کا ایک بہنوئی اقتدار شاہ کی بد کرداریوں
اور اس کے مدعیہ کے اوپر حملہ کرنا اور اس کی عزت سے کھیلنے
کی کوشش کی۔ مدعیہ کے گھر اجاڑنے کی بنیادی وجہ اقتدار شاہ
مذکور بنا ہے اور اقتدار شاہ مذکور کی مدعیہ سے بد کرداری کی
کوشش کی بناء پر مدعیہ کا گھر اجڑا اس کی بد کرداری کو چھپانے
کی کوشش کی وجہ سے انہوں نے بچی کا زیور چھین لیا۔ اس
کے بعد انہوں نے ہر روز بچی کو مار پیٹ شروع کر دی۔ مظہر
نے ابتدائی بیان میں جو کہ کہا کہ اقتدار شاہ نے مدعیہ کی عزت
پر حملہ کیا وہ مظہر نے اپنی آنکھوں سے دیکھا ہے۔"

The plaintiff, in her cross-examination, deposed that:-

"یہ غلط ہے کہ مظہرہ نے بیان ابتدائی میں یہ غلط کہا کہ مظہرہ کو
مار پیٹ اور تشدد کر کے گھر سے نکالا گیا۔ یہ بات غلط ہے کہ
مظہرہ اپنی مرضی سے اپنے والدین کے ساتھ مدعلیہ کے گھر
والدین کے ہمراہ آئی تھی۔ یہ غلط ہے کہ غیر آبادی کے دوران
بھی مدعاعلیہ مظہرہ کو کفاف ماہانہ کی ادائیگی کرتا رہا۔ یہ غلط ہے
کہ مظہرہ نے اپنے بیان ابتدائی میں یہ غلط کہا ہے کہ نومبر سے

آج تک مظہرہ کو کوئی خرچہ نہ دیا ہے اور دوران آبادی بھی خرچ
نہ دیا جاتا تھا۔"

On the other hand, in rebuttal, the witness of defendant, Iqtadar Hussain Shah, stated in his statement that:-

"یہ غلط ہے کہ مدعیہ 12 ستمبر 2017 کو از خود ناراض ہو کر اپنے والد کے ہمراہ چلی گئی تھی۔"

The defendant himself deposed during cross examination that:-

"یہ غلط ہے کہ جب سے مدعیہ غیر آباد ہوئی ہے مظہر نے خرچہ
ادا نہ کیا ہے۔ یہ درست ہے کہ خرچہ کی ادائیگی کی نسبت مظہر
نے امروز عدالت میں کوئی ثبوت پیش نہ کیا ہے۔"

From the bare perusal of above reproduced statements of witnesses, it is clear that the respondent by his conduct and behavior created such circumstances which compelled the appellant to leave the house. The statement of defendant's witness, Iqtadar Hussain Shah reproduced hereinabove, that *"it*

is not correct that plaintiff herself left the house of the respondent on 12 September, 2017" is very much clear to prove the fact that she did not leave the house with her own will. Even otherwise, the conduct of Syed Iqtadar Hussain Shah, brother-in-law of her husband, also amounts to mental cruelty as she herself deposed in her statement that Syed Iqtadar Shah attacked her honor and sexually harassed her. She has also levelled some allegations in her statement against brother-in-law of the respondent, herein, for making attempts to have illicit relations with her and in this regard, the appellant has also lodged the private complaint before the Judicial Magistrate, Muzaffarabad, which is at page No. 199 to 201 of paper book. In the compliant, she alleged that she attacked upon her honor and when she informed her husband, he, instead of

protecting her, favoured his brother-in-law. It is useful to reproduce the same here below:-

"یہ کہ سائل و مسئول نمبر 2 کے مابین اختلافات کی بنیادی وجہ یہ تھی کہ مسئول نمبر 1 جو کہ مسئول نمبر 2 کا بھائی ہے اور طبع ایک اوباش آدمی ہے نے متعدد مرتبہ سائلہ کے ساتھ دست درازی کی کوشش کی جس وقت سائلہ نے اپنا رد عمل ظاہر کیا اور اس نسبت مسئول نمبر 2 کو مطلع کیا لیکن مذکور نے بحیثیت شوہر سائلہ کی عزت کا تحفظ کرنے کے بجائے بے جا اپنے بہنوئی کی حمایت میں سائلہ کا گھر تباہ کر دیا۔"

The learned High Court in the impugned judgment has observed that the prudent mind does not accept that any person can dare to develop illicit relations with a woman specially in presence of her husband. We are not agreed with this observation of the learned High Court. As the plaintiff has categorically mentioned in her statement that brother-in-law of her husband Syed Iqtadar Hussain Shah, tried to develop illicit relations with her. Had the

stance of the plaintiff been incorrect, why would have she lodged the private complaint against him and other accused. Even otherwise, the defendant-respondent, herein, has also ledged an FIR against the appellant, herein, on charges of theft of the gold ornaments given to her as prompt dower. It is very astonishing that the ornaments which were given to her in lieu of dower, how the same can be stolen by herself. In our view, all these tactics appears to have been adopted just to mentally torture the appellant, herein and deprived her of her legal rights. She has also alleged that said Iqtadar Hussain Shah has played a basic role to spoil relationship of the spouses, due to which she faced mental stress and agony. As matrimonial matters are matters of great delicacy which involves intricate and emotional bonding, and

requires trust, regard, respect and affection for reasonable adjustment with the partner and this relationship has to conform to social norms religious and social values, as well. The problematic conduct of one partner may cause smaller to greater inconvenience for other one. Cruelty in matrimonial life is considered to be of founded variety, which may be an act violent or non-violent, gestures or mere silence. The term ‘cruelty’ with reference to matrimonial matter is to be judged within the parameters of statutory provision of section 2 of the Dissolution of Muslim Marriages Act, 1939, which speaks of different kinds and natures of cruelty. The term ‘cruelty’ is not only confined to physical assault or inflection of physical injuries rather it, being a comprehensive term as elaborated in the statutory

provision which includes all types of cruelty which may be classified as legal, mental and physical. The word 'cruelty' in Black's Law Dictionary (Eighth Edition) is defined as under:-

> *"**Cruelty**. The intentional and malicious infliction of mental or physical suffering on a living creature, esp. a human; abusive treatment; outrage.*
> *'legal cruelty', cruelty that will justify granting a divorce to the injured party; specif., conduct by one spouse that endangers the life, person, or health of the other spouse, or creates a reasonable apprehension of bodily or mental harm.*
> *'mental cruelty'. As a ground for divorce, one spouse' course of conduct (not involving actual violence) that creates such anguish that it endangers the life, physical health, or mental health of the other spouse.*
> *'physical cruelty'. As a ground for divorce, actual personal violence committed by one spouse against the other.*

(Underlining is ours)

The dictionary meaning of word 'cruelty' clearly shows that cruelty may be mental or physical. It is a celebrated principle of law that to prove cruelty, it is not necessary to manifest physical assault or injury, rather sometimes, the conduct and behavior amounting to mental assault, has also been treated by the Courts as cruelty. For considering dissolution of marriage at the instance of a spouse who alleges mental cruelty, the result of such mental cruelty must be such that it becomes impossible to continue with the matrimonial relationship. In other words, the wronged party cannot be expected to condone such conduct and continue to live together. The degree of tolerance will vary from one couple to another and the Court while considering the background, level of

education and the status of parties in order to justify whether cruelty alleged is sufficient to dissolve the marriage or not.

Our this view is fortified from the reported judgment of this Court titled *Muhammad Zaheer-ud-Din Babar vs. Mst. Shazia Kausar & others [2015 SCR 621],* wherein, it was held that:-

> *"The cruelty is not confined only to physical torture. Even the cruel attitude is not confined only to the extent of physical violence, it includes the mental torture, hateful attitude of the husband or other inmates of the house also include other circumstances, in presence of which the wife is forced to abandon the house of her husband.*

The same view has been taken by this Court in the case reported as *Mst. Amreen vs. M. Kabir & others [2014 SCR 504],* wherein, it has been held that:-

> *"The cruel attitude is not confined only to the extent of physical violence, it includes the mental torture, hateful attitude of husband or other inmates of the house and also includes other circumstances, in presence of which the wife is forced to abandon the house of her husband".*

6. It also appears from the above referred statements of witnesses that the respondent failed to maintain the appellant. Moreover, the appellant in her suit for dissolution of marriage has also taken the ground of non-maintenance. It is spelt out from the record that the respondent failed to provide maintenance allowance to her wife which was one of the grounds taken by the appellant for dissolution of marriage. According to section 2, of Dissolution of Muslim Marriage Act, 1939, the decree for dissolution of marriage can be passed on the following grounds:-

"2. Grounds for decree for dissolution of marriage.

A woman married under Muslim Law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely:-

(i) That the whereabouts of the husband have not been known for a period of four years;

(ii) That the husband has neglected or has failed to provide for her maintenance for a period of two years [(ii-A) that the husband has taken an additional wife in contravention of the provisions of the Muslim Family Laws Ordinance, 1961;]

(iii) That the husband has been sentenced to imprisonment for a period of seven years or upwards;

(iv) That the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;

(v) *That the husband was impotent at the time of the marriage and continues to be so;*

(vi) *That the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease;*

(vii) *That she having been given in marriage by her father or other guardian before she attained the age of sixteen years; repudiated the marriage before attaining the age of eighteen years;*

After going through the above stated provision, it is clear that non-providing of maintenance is itself a form of cruelty which serves as one of the grounds on which the decree for dissolution of marriage can be passed. As it is proved from the evidence that she has not been paid maintenance from the last two years, therefore, in our estimation, the learned Family Judge has not committed any illegality while handing the judgment and decrees.

Moreover, the element of cruelty cannot be ruled out, if any of the grounds mentioned in section 2 of Dissolution of Muslim Marriage Act, 1939, is proved, the decree for dissolution of marriage can be passed. Once it is found that wife is entitled to get the decree on the ground of non-maintenance, the marriage can be dissolved on that ground. The contesting respondent failed to substantiate in the trial Court that his attitude towards the appellant, herein, was not cruel in nature and he performed his legal duty to maintain his wife. The respondent has also failed to bring anything on record that the conduct of the appellant disentitled her for claiming the maintenance. Therefore, in our considered view, the learned Family Judge has rightly dissolved the

marriage on the basis of cruelty which has been wrongfully modified by the learned High Court.

7. The next point which needs resolution is maintenance allowance of the appellant. As it has been discussed before in detail that the appellant has proved through reliable evidence that she was ousted from her husband's house and did not leave the house with her own free will as evident from the statement of Syed Iqtadar Hussain Shah. Thus, she was held entitled to the maintenance allowance by the Family Judge. She claimed Rs. 12000/- as past and future maintenance in the suit. The statements of the witnesses do not support the version of the respondent through which it could be ascertained that the appellant was provided with maintenance allowance. It is the duty of the husband to maintain

her wife. Section 277 of Muhammadan Law clearly speaks that it is the obligation of husband to provide maintenance to her wife till she is faithful and obeying to her husband. For better appreciation, the same is reproduce here below:-

> *"277. Husband's duty to maintain his wife.—The husband is bound to maintain his wife (unless she is too young for matrimonial intercourse) so long as she is faithful to him and obeys his reasonable orders. But he is not bound to maintain a wife who refuses herself to his or is otherwise disobedient, unless the refusal of disobedience is justified by non-payment of prompt dower or she leaves the husband's house on account of his cruelty."*

In the case reported as *Mst. Iqra vs. Abuzar [2012 SCR 284],* it has been observed by this Court that:-

> *"The definition of word 'maintenance' is Islam is 'Nafqa'.*

In the language to the support of life, such a food, clothes and lodging. The subsistence of the wife is incumbent upon her husband. When a women surrenders herself into the custody of her husband, it is incumbent upon him thenceforth to support her with food, clothing and lodging, whether she be a Mussalman or an infidel, because such is the precept in Holy Qur'an. Such a obligation arises from the moment the wife is subject to the moral control of her husband and in certain cases for a time even after it is dissolved. Similar view prevailed in a case titled Ghulam Nabi vs. Mst. Zubaida Khatoon (1992 CLC 1926), in which it has been held as under:-

(4) Be that as it may, in Muhammad Nawaz vs. Mst. Khurshid Begum and 3 others (PLD 1972 SC 302), it was held that Article 120 of the Limitation Act applies in respect of claim for past maintenance. The limitation provided in the Article is for a period of six years when the right to sue accrues. In the instant case, the impugned decree for

maintenance was passed by the Chairman Arbitration Council for a period of ten years and six months prior to the institution of the application, which was not warranted by law".

7. According to the Islamic injunctions, it is the obligation of the husband to maintain his wife till she disobeys him without any good cause and that being so a husband is obliged to pay even the arrears of maintenance if not paid during the subsistence of the marriage if the wife has not given any cause for their non-payment. The subsistence is incumbent upon her husband. The maintenance, in all circumstances, is to be considered a debt upon the husband in conformity with his tenet. It is really remarkable in Islam that as soon as tow sui juris persons enter into contract of marriage so many rights are created but as soon as the marriage is dissolved, those rights will continue according to the Injunctions of Holy Qur'an. Wife can justly claim maintenance from the date of accrual of cause of action and not necessarily from

the date of first seeking redress as has been laid down in case titled Muhammad Asad vs. Ms.t Humera Naz and other (2000 CLC 1725), in which it has been observed as under:-

"it is really remarkable in Islam that as soon as two sui juris persons enter into contract of marriage so many rights are created but as soon as the marriage is dissolved, those rights will continue according to the injunctions of Holy Qur'an. It is also held in Sardar Muhammad vs. Naseema Bibi and others (PLD 1996 (W.P), Lah. 703) that wife can justly claim maintenance from the date of accrual of cause of action and no necessarily from the date of first seeking redress."

It is also laid down in the supra titled judgment that marriage in Islam has a contractual nature and dower is the consideration agreed between the parties which the husband has to pay to the wife either promptly or subsequently, in

accordance with the terms of the agreement. On the contrary, maintenance is an obligation, which is one of the essential ingredients of marriage, liable to suspension or forfeiture under certain circumstances. The learned Family Judge has rightly passed the decree of maintenance allowance at the rate of Rs. 2000/- per month, from the date of institution of the suit till the date of decision. The learned High Court has fell in grave error of law while modifying the same, therefore, judgment of the learned High Court to this extent is set-aside.

9. Besides that, the learned Advocate for the appellant has also contended that the learned High Court has illegally dissolved the marriage on the basis of 'Khula' and the prompt dower has been declared to be returned in lieu of Khula. As it is evident from the

record that Nikah between the spouses was solemnized against the dower of Rs. 425,525/-, out of which, 100,000/- was paid at the time of Nikah in shape of gold ornaments and Rs. 325,525/- was fixed as deferred dower. As the impugned judgment of the learned High Court to the extent of dissolution of marriage on basis of Khula has been set-aside, therefore, in the light of decision of the Family Judge, the appellant, herein, is entitled to the dower of Rs. 325,525, deferred dower.

10. So far as the decree of dowry articles is concerned. The learned Family Judge has rightly granted the decree in the terms that the appellant, herein, is entitled to the recovery of dowry articles available at the residence of the respondents. The learned High Court has wrongly observed in the

impugned judgment that the learned Family Judge has not appreciated the record in its true perspective. Therefore, the impugned judgment of the learned High Court is set-aside.

In view of what has been discussed above, we do not feel any hesitation to hold that the learned High Court has failed to determine the real controversy involved in the case. The judgment and decrees passed by the Family Judge are well reasoned and have been passed quite in accordance with law. We are unable to find out any misreading or non-reading of evidence or any other legal infirmity in the judgment passed by the Judge Family Court.

Resultantly, the judgment and decrees passed by the High Court are not maintainable which are se-aside while accepting this appeal and the

judgment and decrees passed by the Family Judge are hereby, restored with no order as to cost.

JUDGE (J-II) JUDGE (J-I)

Muzaffarabad,