

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Mr. Justice Qazi Faez Isa
Mr. Justice Sardar Tariq Masood

CIVIL PETITIONS NO. 154 AND 155 OF 2019

(On appeal against the judgment dated 17.12.2018 passed by Peshawar High Court, Peshawar in W.P. No. 2037-P of 2017)

Fawad Ishaq & others (In CP No. 154 of 2019)
Mst. Khurshida Ishaq (In CP No. 155 of 2019) **Petitioners**

Versus

Mst. Mehreen Mansoor & others (In both petitions) **Respondents**

For the petitioners:
(In CP No. 154 of 2019) Mr. M. Munir Piracha, ASC
Mr. Mehmood A. Sheikh, AOR

(In CP No. 155 of 2019): Sardar Muhammad Aslam, ASC
Ch. Akhtar Ali, AOR

Respondent No. 1:
(In both petitions) Mr. Imtiaz Ali, ASC
Haji M. Zahir Shah, AOR (Absent)

For Mansoor Ishaq:
(R. No. 3 in CP No. 154/19 & R. No. 5 in CP No. 155/2019) Mr. Amir Javed, ASC
Mr. H.M. Zahir Shah, AOR (Absent)

Other respondents: Nemo

Date of Hearing: 07.02.2020

ORDER

Qazi Faez Isa, J. Mehreen and Mansoor married on 15th May 1995 and the *Nikahnama* mentioned the terms of their marriage. Form II of the Muslim Family Laws Ordinance, 1961 prescribes the official form of *nikahnama* and lists 25 questions¹. In this case question numbers 13 to 16 and the answers thereto in the *Nikahnama* are relevant, therefore, the said pre-typed questions and their handwritten answers are reproduced hereunder:

¹ Form II of *nikahnama* as prescribed by Rules 8 and 10 of the West Pakistan Rules under the Muslim Family Laws Ordinance, 1961 (VIII of 1961)

۱۳۔ مہر کی رقم - حق مہر مبلغ-500000/ (پانچ لاکھ روپیہ) ضرب پاکستانی سکہ رائج
الوقت۔

۱۴۔ مہر کی کتنی رقم معجل ہے اور کتنی موبجل۔

۱۵۔ آیا مہر کا کچھ حصہ شادی کے موقع پر

ادا کیا گیا اگر کیا گیا ہے تو کس قدر۔

۱۶۔ آیا پورے مہر یا اس کے کسی حصہ کے عوض میں کوئی جائیداد ایک عدد مکان رقبہ ایک کنال پر واقع 28 آبدارہ روڈ یونیورسٹی ٹاؤن پشاور
دگنی ہے اگر دگنی ہے تو اس جائیداد کی صراحت اور اس میں بنا کر دیا جائے گا۔

کی قیمت فریقین کے مابین طے پائی ہے۔

2. Sixteen years after the marriage, on 30th June 2011, Mehreen filed a suit claiming a house, measuring 1 *kanal* situated on plot No. 28 Abdara Road, University Town, Peshawar ("**the Property**"), or its prevailing market value of thirty-three million rupees, which she said constituted part of her dower (*mehr*) and as mentioned in clause 16 of the *Nikahnama*. The suit was filed in Family Court-II, Peshawar. Mehreen arrayed Haji Muhammad Ishaq Jan and Mst. Khurshida Ishaq, respectively her father-in-law and mother-in-law, as the only defendants in the suit. The suit was decreed by the learned Family Judge on 3rd May 2014. Both the father-in-law and mother-in-law filed separate appeals but both were dismissed, *vide* consolidated judgment dated 15th February 2017 of the learned Additional District Judge-X, Peshawar. Thereafter, they filed two separate writ petitions before the Peshawar High Court, Peshawar but these too were dismissed, *vide* impugned judgment dated 17th December 2018. It is against these three judgments that the two petitions under consideration have been filed; Mst. Khurshida Ishaq has filed Civil Petition for Leave to Appeal No. 155 of 2018 and Civil Petition for Leave to Appeal No. 154 of 2018 is filed by the two sons and one daughter of Haji Muhammad Ishaq Jan who had passed away.

3. The learned Sardar Muhammad Aslam represents Mst. Khurshida Ishaq ("**Mst. Khurshida**") and the learned Mr. Muhammad Munir Piracha represents the two sons and daughter of the late Haji Muhammad Ishaq Jan; they have joined cause before us. The learned counsel state that admittedly Mst. Khurshida owned the Property which was conveyed to her through a registered document (Exhibit DW-2/1) dated 1st June 1964, however, Mst. Khurshida was not a party to the *Nikahnama* and neither gave nor agreed to give the Property to Mehreen. And, Mst. Khursida's husband (Haji

Muhammad Ishaq Jan) was not given a power of attorney or any other authority to make a commitment on her behalf or in respect of the Property; reliance was placed on the case of *Muhammad Siddiq v Shahab-ud-Din*² where a father was held not liable under Muslim law for the dower of his son. They next submitted that the family suit was filed in a family court but the plaintiff (Mehreen) did not array her husband (Mansoor) as a party therein nor demanded her dower from him which defect in the suit was fatal to it. The learned counsel state that in terms of section 2 (d) of the Family Courts Act, 1964³ ("**Act**") the husband was a necessary party because he was primarily liable to pay the dower but he was not arrayed nor did the learned Judge of the Family Court order his joinder as a party. Section 2(d) of the Act stipulates, that, "*party shall include any persons whose presence as such is considered necessary for a proper decision of the dispute.*" By not arraying her husband (Mansoor) it can be assumed, submit learned counsel, that Mehreen and Mansoor had collusively filed the suit to try to get the Property without making Mansoor liable. The suit was filed sixteen years after the marriage and execution of the *Nikahnama*, and the spouses (Mehreen and Mansoor) are still happily married, it is submitted. Concluding their submission the learned counsel state, that Mst. Khurshida and her husband, respectively Mehreen's mother and father in law, took care of their own interests, they filed their separate written statements, they engaged their own counsel who represented them and independently contested the case.

4. Mr. Imtiaz Ali, the learned counsel representing Mehreen, states that the matter has been concurrently decided and the learned Judge of the High Court upheld the decisions of the two Subordinate Courts and there is no legal reason for this Court to substitute its findings with three well-reasoned judgments. The learned counsel refers to a document (Exhibit PW-4/1) executed by Mehreen's father-in-law which confirms what the *Nikahnama* records, that Mehreen's dower comprised of five hundred thousand rupees, seventy-five *tolas* of gold jewelry and the Property, however, the dispute is only about the Property. The learned counsel refers to section 41 of the

² AIR 1927 Allahabad 364

³ Family Courts Act, 1964 (Act No. XXXV of 1964)

Transfer of Property Act, 1882⁴ and the case of *Kanwal Nain v Fateh Khan*⁵ to contend that Mst. Khurshida had permitted her husband, who was the ostensible owner of the Property, to transfer the Property to their daughter-in-law therefore Mst. Khursida is estopped from preventing the completion of the transaction. The learned counsel cites the case of *Muhammad Anwar Khan v Sabia Khanam*⁶ in which the father of the bridegroom had committed to transfer his house to the bride and it was held that the father had to fulfil his commitment, which principle the learned counsel states is equally applicable herein. Referring to the case of *Parveen Umar v Sardar Hussain*⁷ it is submitted that the different properties (money, gold and the land with house) mentioned in the *Nikahnama* were collectively given as dower and were not alternatives. The learned counsel concludes by referring to the case of *Muhammad Arif v District and Session Judge, Sialkot*⁸ as precedent for the proposition that the father and mother of a plaintiff's husband can be arrayed as parties in a family suit.

4. Mr. Amir Javed, the learned counsel representing Mansoor submits that Mansoor got married when he was at University and then settled abroad with his wife Mehreen. He refers to section 2 (d) of the Act and states that Mansoor was not a necessary party because the relief sought in the suit was in respect of the Property and against Mst. Khurshida and her husband; the decree was also passed against them, and not against Mansoor, therefore, it was not necessary to array Mansoor as a defendant, and if the learned Family Judge felt that he was a necessary party the learned Judge could have impleaded him but did not do so. Mansoor's parents should abide by the commitment made with regard to the Property at the time of the marriage, the learned counsel concludes.

5. Reference has been made to a document titled 'Declaration' (Exhibit DW-1/1) made before the Consul General of Pakistan Toronto, Canada by Mansoor wherein he states on oath that, "*According to the local traditions my father, promised my wife Ms. Mehreen Mansoor a dower of 1 kanal land with*

⁴ Transfer of Property Act, 1882 (Act No. IV of 1882)

⁵ PLD 1983 Supreme Court 53

⁶ PLD 2010 Lahore 119

⁷ 2003 YLR 3097

⁸ 2011 SCMR 1591

a fully constructed house on 28 Abdara Road, University Town Peshawar, Pakistan ... and [I have] advised her to claim the same from my father...". Reference was also made to the inscription written by Haji Muhammad Ishaq Jan, on page 2 of the *Nikahnama*, stating that a house would be constructed on the said plot and given to Mehreen (Exhibit Pw-4/3-A). In response to our query we were informed by the learned counsel representing Mansoor and Mehreen that when the suit was filed they were happily living together as husband and wife in Canada and continue to do so.

6. We have heard the learned counsel for the parties and with their able assistance examined the documents on record, the judgments of the Subordinate Courts, the impugned judgment of the High Court, provisions of the laws that have been referred to and the cited precedents.

7. Mst. Khurshida acquired land in the year 1964 on which subsequently a house was constructed. It is also admitted that Mst. Khursida was not a signatory to the *Nikahnama* nor had executed any other document agreeing to transfer the Property, either before or after a house was constructed on it, to her daughter-in-law. Mst. Khurshida also did not grant a power of attorney or otherwise authorize her husband to make any commitment on her behalf with regard to the Property, let alone to transfer it. The 'Declaration' (Exhibit DW-1/1) executed by Mansoor stated that his father had agreed to construct and deliver the possession of the Property, which is of little consequence because, firstly, it is self-serving document and, secondly, the Property was owned by Mst. Khursida, who had not agreed to part with it. Moreover, the referred to "*local traditions*" if they deprive a lady of her property without her consent will not prevail over the law and *shariah* (as discussed hereinbelow). The other document relied in support of Mehreen's case is the *Nikahnama* (Exhibit PW-4/3) and in particular the said note thereon (Exhibit PW-4/3-A) mentioning the Property, however, this document too was not executed by Mst. Khurshida. In the referred to case of *Muhammad Anwar Khan v Sabia Khanam*⁹ the father-in-law, who was the owner of a house, had agreed to transfer it to his son's spouse at the time of marriage, however, in the present case Mst. Khurshida had not agreed to transfer the Property, therefore, it is not applicable to the facts of this case.

⁹ PLD 2010 Lahore 119

8. The argument that Mst. Khurshida had permitted her husband, expressly or impliedly, to transfer the Property in terms of section 41 of the Transfer of Property Act¹⁰ is not borne out by the record. To attract section 41 it had to be established that, Mst. Khurshida had expressly or impliedly held out that her husband was the "*ostensible owner*" of the Property and had authorized him to transfer the Property to Mehreen. The other requirements of section 41 are that the proposed transferee had taken "*reasonable care to ascertain that the transferor had power to make the transfer*" and had "*acted in good faith*". Mst. Khurshida neither held out that her husband was the ostensible owner of the Property nor that she had authorized him to transfer it. Mehreen also lead no evidence to show that she had attempted to ascertain that Haji Muhammad Ishaq Jan had the power to transfer the Property. Therefore, Mehreen could not avail the benefit of section 41 of the Transfer of Property Act.

9. The learned Judge of the High Court was aware that the Property was owned by Mst. Khurshida but had agreed with the decisions of the Subordinate Court because, firstly, the wives of Mst. Khurshida's other sons had been given plots of "*2 kanal each*", secondly, she did "*not question Nikah Nama*" and, thirdly, her husband was "*guarantor*" of the Property. With respect to the learned Judge, none of the three reasons which prevailed with him (and which had persuaded the learned Judges of the Subordinate Courts to respectively decree and uphold the decree) are sustainable in law. If the spouses of the other sons of Mst. Khurshida were given land it was inconsequential since every marriage and its terms are independent from every other and there is no legal concept of parity. The other cited reason, that Mst. Khurshida had not questioned (by which we presume the learned Judge meant challenged in court) the contents of the *Nikahnama*, was irrelevant, since the matter did not concern her; Mehreen and Mansoor were *sui juris* and had agreed to get married on certain terms, which could not unilaterally be imposed on Mst. Khurshida who had not executed or signed the *Nikahnama*, therefore, Mst. Khurshida was not obliged to challenge it. Moreover, it was for Mehreen to establish that Mst. Khurshida had agreed to

¹⁰ Transfer of Property Act, 1882 (Act No. IV of 1882)

give the Property as dower to her, however, there was no evidence that she had agreed to do so. The obligation to pay dower was incurred by Mansoor and remained his to fulfil. As regards the reason that Mst. Khurshida's husband was a *guarantor* of the Property it has no legal basis since a husband has no right to his wife's property nor can he 'guarantee' or encumber it without her permission.

10. We however find that the old European and American concepts at times permeate into the thinking even of judges in Pakistan. The doctrine of 'coverture' subsumed a married woman's identity. Sir William Blackstone¹¹ described the doctrine of coverture: "*By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything; and is therefore called in our law-French a feme-covert...*"¹². In her comprehensively researched book¹³ Amy Louise Erickson writes, "*Under common law a woman's legal identity during marriage was eclipsed - literally covered - by her husband. As a 'feme covert', she could not contract, neither could she sue nor be sued independently of her husband. ... The property a woman brought to marriage - her dowry or portion - all came under the immediate control of her husband*"¹⁴. It was only on the passing of the Married Women's Property Act, 1882 that in England a married woman became, "*capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a feme sole, without the intervention of any trustee*"¹⁵.

11. The situation in the United States of America of married women was no better, they had no legal existence apart from their husbands. The reason for a married woman's servile status was sought to be explained by the

¹¹ William Blackstone, *Commentaries on the Laws of England* (Volume 1, Oxford University Press, 1765)

¹² William Blackstone, *Commentaries on the Laws of England* (Volume 1, Oxford University Press, 1765) pg. 442

¹³ Amy Loise Erickson, *Women and Property in Early Modern England* (London and New York: Routledge, 1993)

¹⁴ Amy Loise Erickson, *Women and Property in Early Modern England* (London and New York: Routledge, 1993) pg. 24

¹⁵ Section 1(1) of the Married Women's Property Act, 1882

Supreme Court of Illinois¹⁶, *"It is simply impossible that a married woman should be able to control and enjoy her property as if she were sole, without practically leaving her at liberty to annul the marriage"*¹⁷. The unjustness of the laws was severely criticized. Elizabeth Cady Stanton listed in the *Declaration of Sentiments*¹⁸ "the injuries and usurpations on the part of man toward woman"¹⁹ – *"He has made her, if married, in the eye of the law, civilly dead. He has taken from her all right in property, even to the wages she earns... the law, in all cases, going upon a false supposition of the supremacy of a man, and giving all power into his hands"*²⁰. Harriet Beecher Stowe was another campaigner for women's rights, observing that, *"[T]he position of a married woman... is, in many respects, precisely similar to that of the negro slave. She can make no contract and hold no property; whatever she inherits or earns becomes at that moment the property of her husband. ... [I]n English common law a married woman is nothing at all. She passes out of legal existence."*²¹

12. Discrimination against women pervaded in other areas too. It was only in 1960 that women in America could open bank accounts without their husband's permission²² and this right was acquired by women in the United Kingdom as late as 1975²³. The professions were also barred to women. Mrs. Myra Colby Bradwell had passed the bar examinations but was not allowed to practice law; she asserted her right to practice but in 1873 the United States Supreme Court²⁴ held, that denying Mrs. Bradwell the right to practice law violated no provision of the federal Constitution and added, *"That God designed the sexes to occupy different spheres of action, and that it*

¹⁶ *Cole v Van Riper*, 44 Ill 58 (1867)

¹⁷ *Cole v Van Riper*, 44 Ill 58 (1867), pg. 63

¹⁸ Elizabeth Cady Stanton, *A History of Woman Suffrage* (Vol. I, Rochester, New York: Fowler and Wells, 1889)

¹⁹ Elizabeth Cady Stanton, *A History of Woman Suffrage* (Vol. I, Rochester, New York: Fowler and Wells, 1889), pg. 70

²⁰ Elizabeth Cady Stanton, *A History of Woman Suffrage* (Vol. I, Rochester, New York: Fowler and Wells, 1889), pg. 70-71

²¹ Melissa Homestead, *American Women Authors and Literary Property, 1822-1869* (1st edn, New York: Cambridge University Press, 2005), pg. 29

²² Stephanie Coontz, *The Way We Never Were: American Families and the Nostalgia Trap* (New York: Basic, 1992)

²³ Equal Credit Opportunity Act, 1974 and Sex Discrimination Act, 1975

²⁴ *Bradwell v. The State*, 83 U.S. 130 (1873)

belonged to men to make, apply, and execute the laws, was regarded as an almost axiomatic truth"²⁵.

13. The position of women in Islam is different. "*Men shall have the benefit of what they earn and women shall have the benefit of what they earn*"²⁶. The Holy Qur'an also prohibits taking another's property – "*Do not eat up (or consume) one another's property*"²⁷. Women's share in inheritance are also precisely ordained²⁸. What a woman inherits is hers and hers alone; neither her husband, father, brother or son has any entitlement to it; a woman also does not need permission to dispose of her property or to acquire property. The bridal gifts given at the time of marriage are also the wife's property, these can be added to but not subtracted by the husband²⁹. It is also recommended that husbands make wills to provide for their wives³⁰.

14. A husband and wife, who were both Government servants, had challenged an office memorandum of the Government which did not treat husband and wife alike. The Federal Shariat Court³¹ comprehensively attended to the question of discrimination and the status of a married woman in Islam and after referring to a number of verses of the Holy Qur'an³² held:

"These Verses clearly confirm the right of earning, owning and possessing by male and female - all in the like manner - and emphasizes again and again that no one can be deprived of his/her due share for any reason. Both are equally entitled to their own individual shares on the basis of their services, duties and functions performed by each one. Each one is at par with the other in this respect, without any discrimination. The rights of each one accrued thus in no manner could be infringed, curtailed or diminished."³³

²⁵ *Bradwell v. The State*, 83 U.S. 130 (1873), pg.132

²⁶ Al-Qur'an, *Surah An-Nisa* (4) verse 32

²⁷ Al-Qur'an, *Surah An-Nisa* (4) verse 29

²⁸ Al-Qur'an, *Surah An-Nisa* (4) verses 7, 11 and 12

²⁹ Al-Qur'an, *Surah An-Nisa* (4) verses 24 and 25; *Surah Maidah* (5) verse 5; *Surah Mum'tahanah* (60) verse 10

³⁰ Al-Qur'an, *Surah Al-Baqarah* (2), verse 240

³¹ *Kazim Hussain v Government of Pakistan*, PLD 2013 Federal Shariat Court 18

³² Al-Qur'an, *Surah Al-Baqarah* (2) verse 143, *Surah Al-Imran* (3) verse 171, *Surah An-Nisa* (4) verse 32, *Surah Al-Kahf* (18) verse 30 and *Surah Az-Zumar* (39) verse 70

³³ *Kazim Hussain v Government of Pakistan*, PLD 2013 Federal Shariat Court 18, pg. 39

The Federal Shariat Court held that, "*one of the principles which is the hallmark of Islamic injunctions is the principle of equality before law and equal protection of law for all people, irrespective of their gender, colour or creed*"³⁴.

Elaborating further the Court observed, that:

"This fraternity and equality is all pervading and is not only a matter of form but is indeed a matter of substance. It emphasizes equality before law and equal protection of law. In this respect, Sharia does not make any distinction between the citizens of an Islamic State. Here we find no concept of discrimination in the administration of justice between one person and another on any basis. In social and legal perspectives, no human being can be denied or deprived of any fundamental right, nor any juridical right can be reserved for any particular group on the external consideration of his wealth, status caste or colour or any other ground. It clearly shows that equality before law and equal protection of law is the cardinal principle which runs like a golden chord in all Injunctions of Islam."³⁵

15. A chasm existed between a woman's position in Islam to that which prevailed till a century ago in Europe and America where upon marriage a wife stood deprived of her property, which became that of her husband to do with it as he pleased. However, in the Muslim world the situation was altogether different and this has been the position since over fourteen hundred years. Muhammad Mustafa (peace be upon him) was employed by lady Khadijah bint Khuwaylid (may Allah be pleased with her), the first convert to Islam, who spent abundantly from her personal wealth in the cause of Islam; she retained her properties and wealth after her marriage to the Prophet (peace be upon him). In Islamic societies Muslim ladies not only retained their properties but also their identities after marriage. The noble lady Ayesha (may Allah be pleased with her) on becoming a widow on the death of the Prophet (peace be upon him) was not cloistered but became one the greatest narrators of *hadith* and between three to four thousand recorded in the six main *hadith* collections³⁶ cite her as their source; she was also a teacher, a great scholar and made her presence felt on the battlefield.

³⁴ *Kazim Hussain v Government of Pakistan*, PLD 2013 Federal Shariat Court 18, pg. 36

³⁵ *Kazim Hussain v Government of Pakistan*, PLD 2013 Federal Shariat Court 18, pg. 39

³⁶ *Sahih al-Bukhari, Sahih Muslim, Sunan Abu Dawud, Sunan al-Tirmidhi, Sunan al-Nasa'i, and Sunan Ibn Majah*

16. British rule and Colonization of the subcontinent disrupted Muslim society's links with the past but without completely severing ties with *shariah*³⁷. To restore the privileges and status of women in Islam a number of laws were enacted, including the Dissolution of Muslim Marriages Act, 1939³⁸. The importance of a Muslim married woman's right to property can be gauged from the fact that, if her husband, "*disposes of her property or prevents her from exercising her legal rights over it*", she could obtain dissolution of her marriage because it constituted "*cruelty*"³⁹. The proposition which has been put forward that Mst. Khurshida's husband could deprive her of the Property is both against *shariah* and the Dissolution of Muslim Marriages Act. *Shariah*, including the rights it grants women, was made unassailable by the Constitution of the Islamic Republic of Pakistan⁴⁰, which specifically stipulates that all existing laws are to conform to the injunctions of *Islam* as laid down in the Holy *Qur'an* and *sunnah*. The Fundamental Rights in the Constitution include the "*right to acquire, hold and dispose of property*"⁴¹ and "*no person shall be compulsorily deprived of his*⁴² *property save in accordance with law*"⁴³; these provisions do not distinguish between men and women. Therefore, unless a married woman elects to gift, sell or otherwise dispose of her property neither her husband nor any male relative has any right over it.

17. Mst. Khurshida was not a signatory to the *Nikahnama* nor had she, at any stage, agreed to transfer the Property to Mehreen. Mst. Khurshida's husband could not have made a commitment on her behalf with regard to the Property. Mehreen also did not array her husband as a party to the suit even though he was a necessary party thereto. Mehreen undoubtedly had a valid claim against her husband with regard to the dower promised by him at the time of marriage, as mentioned in the *Nikahnama*, and could claim the value of the Property from him however she elected not to do so but instead

³⁷ The words of Almighty Allah in the Holy *Qur'an* and *sunnah* - the teachings of Prophet Muhammad (peace be upon him)

³⁸ The Dissolution of Muslim Marriages Act, 1939 (Act VII of 1939)

³⁹ Section 2(viii)(d) of the Dissolution of Muslim Marriages Act, 1939

⁴⁰ Article 227 of the Constitution of the Islamic Republic of Pakistan

⁴¹ Article 23 of the Constitution of the Islamic Republic of Pakistan

⁴² Article 263(a) of the Constitution of the Islamic Republic of Pakistan states, "*words importing the masculine gender shall be taken to include females*"

⁴³ Article 24 of the Constitution of the Islamic Republic of Pakistan

lay claim to the Property. Be that as it may, Mehreen could still claim from her husband any part of her dower which remains unpaid.

18. Therefore, for the reasons mentioned above, these petitions are converted into appeals and allowed by setting aside the judgments of the Courts below and by dismissing the suit filed by Mehreen against Haji Muhammad Ishaq Jan and Mst. Khurshid Ishaq. There shall however be no order as to costs.

Judge

Judge

Bench-IV
Islamabad
7.02.2020
(Atif)

Approved for Reporting