

RAJASTHAN HIGH COURT

Hasina Bano

Vs.

Alam Noor

Cri. Misc. Petn. No. 608 of 1998

(R.S. Chauhan, J.)

09.10.2006

ORDER

R.S. Chauhan, J.

1. The fight over the payment of "mehar" (dower) has brought the parties before this Court. The appellant-wife has demanded the payment of "mehar" from the non-petitioner-husband; the latter has denied his liability to pay the same on the ground that she has relinquished her right to the "mehar" through an agreement. The trial Court and the Additional Sessions Judge No. 1, Bhilwara have upheld the non-petitioner's contention. The petitioner is, thus, challenging the Order dated 6-6-1997 whereby the Additional Civil Judge (J.D.) and Judicial Magistrate 1st Class, No. 2, Bhilwara has rejected the claim for "mehar" by the petitioner against the non-petitioner. She is also challenging the Order dated 22-6-1998, whereby the learned Additional Sessions Judge, No. 1, Bhilwara has dismissed the revision petition filed by the petitioner against the Order dated 6-6-1997.

2. The brief facts of the case are that, in 1982, the petitioner and non-petitioner were married according to the Muslim rites and customs. At the time of her marriage, the petitioner was given not only jewellery, but also utensils and other household goods. Most importantly, at the time of marriage, it was agreed that the non-petitioner-husband shall pay Rs. 5,000/- and three gold "asharfies" (gold coins) to the petitioner as the "mehar". Out of the wedlock, son, Umar Farooq, was born to the couple. However, subsequently, differences arose between the parties. Therefore, the petitioner was thrown out of her matrimonial home. In 1992, the non-petitioner divorced the petitioner. But despite the said divorce, the non-petitioner neither paid the "mehar", nor returned the dowry amount and items to the petitioner. Thus, the

petitioner filed an application under Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (henceforth to be referred to as 'the Act' for short).

3. The non-petitioner filed the reply to the said application. He claimed that due to the utter poverty of the petitioner's family, but for the jewellery, no other dowry item was given by her family at the time of marriage. According to him the petitioner took the said jewellery when she left the matrimonial home. Moreover, according to him, on 4-8-1992, the petitioner's brother, Saleem, her mother and the petitioner came to his house and entered into an agreement. According to the said agreement, since the petitioner was given the right to keep the son, Umar Farooq, with her, she was relinquishing her right to the "mehar". Thus, according to the non-petitioner, the petitioner has relinquished her right to the "mehar", she is bound by the said agreement. Hence, now she cannot claim the right to the "mehar".

4. In order to substantiate her case, the petitioner produced three witnesses. Likewise, in order to buttress his case, the non-petitioner submitted the copy of the agreement dated 4-8-92, as Ex. D/1. After going through the oral and documentary evidence, vide Order dated 6-6-1997, the learned Magistrate held that since the petitioner had relinquished her right to the "mehar", she could not claim the said "mehar" from the non-petitioner. However, as the dowry articles were not returned to her, the non-petitioner was directed to pay the value of those articles to the petitioner. Lastly, for the period of "iddat", the non-petitioner was directed to pay Rs. 600/- per month to the petitioner.

5. Since the petitioner was aggrieved by the said order, she filed a revision petition before the Additional Sessions Judge, No. 1, Bhilwara. However, vide Order 22-6-1998, the learned Judge held that because of the relinquishment deed entered into by the parties, the petitioner is not entitled to claim the "mehar". He, therefore, dismissed the revision petition. Hence, this miscellaneous petition before this Court.

6. Mr. Usman Gani, the learned counsel for the petitioner, has raised various contentions before this Court: firstly, the relinquishment of the "mehar" has to be unconditional. In case a condition is imposed while relinquishing the "mehar", then the agreement is void *ab initio*. However, in the present case, the "mehar" was relinquished on the condition that the son would continue to remain with the petitioner. Secondly, the alleged agreement entered into by the parties was not voluntarily made,

but was made due to the pressure exerted by the non-petitioner and his relatives. The non-petitioner and his relatives had threatened to take away the child in case the "mehar" were demanded. Therefore, in order to ensure that the child is safely left with her, the petitioner relinquished her right over the "mehar". Thirdly, the agreement has been entered into between the non-petitioner and the petitioner's brother, Saleem. Since the "mehar" can be relinquished only by the wife and not by her relative, the agreement is void *ab initio*. Lastly, considering that a child has to be maintained, the amount paid for the "Iddat" period is too little. In order to substantiate his arguments, the learned counsel has relied on the case of *Nurannessa Khanum v. Khaje Mahomed Sakroo*,¹ and upon *Danial Latifi and another v. Union of India*,²

7. On the other hand, Mr. Ravi Bhansali, the learned counsel for the non-petitioner, has argued that there is no bar in the Muslim Personal Law that the relinquishment of the "mehar" cannot be conditional. According to the counsel, a Muslim marriage is not a sacrament, but a contract between two consenting parties. Therefore, like a contingent contract, the relinquishment of "mehar" can also be covered by an agreement entered by the parties. Such an agreement can be conditional. Secondly, although the agreement dated 4-8-92 was entered into between the non-petitioner and the petitioner's brother, but the same was signed by the petitioner and her mother in front of other members of the community. Hence, there is no evidence that the said agreement was made under duress. Thirdly, the petitioner's mother, Majidan, P.W. 2, has admitted in her testimony that there was an agreement between the non-petitioner and her family, although she denied the existence of such an agreement later on in the testimony. According to the counsel, the petitioner has totally denied the existence of the said agreement. But, she is not a trustworthy witness as her mother had admitted the existence of the said agreement. Fourthly, in case the agreement was entered into under duress, the petitioner could have stated so in her testimony. But, her denial and her silence over the said compulsion belies the argument of her counsel that she had signed the agreement under pressure. Lastly, the petitioner is desperately trying to wriggle out of the agreement dated 4-8-92, but she cannot be permitted to do so.

8. We have heard the learned counsel and have perused the impugned Orders.

9. Unlike a Hindu marriage, which is a sacrament, according to the Islamic Law, a marriage ("Nikah") is a permanent and unconditional civil contract (which comes into immediate effect) made between two persons of opposite sexes with a view to mutual

enjoyment and procreation and legalizing of children. Although the marriage is a religious ceremony, but in essence it is a contract entered between two persons of opposite sex for certain specified purposes. Since it is a contract, it stands terminated on death of one of the parties or on divorce between the parties.

10. One of the essential features of a valid marriage is the payment of "mehar" (dower). "Mehar" has been defined as anything which a wife is entitled to get from her husband by virtue of entering into the marriage contracted. The Arabian Jurists have sometimes drawn an analogy between a contract for dower and one for sale, where the wife is considered the property and the dower is considered the price to be paid. (Ref. to *Abdul Kadir v. Salima*,³ But the modern view is that it is an obligation imposed by law on the husband as a mark of respect for the wife. (Ref. to *Fatima Bibi v. Lal Din*,⁴ *Abidhunnissa v. Mohd. Fathiuddin*, *ILR 41 Mad 1026 : (AIR 1918 Madras 319)*, and *Abdul Kadir* (supra)). Although it is an obligation upon the husband, but the wife is well within her rights to relinquish the said dower. For, the dower is an unsecured debt which is recoverable by the wife or her heirs from the husband or in the event of his death, from his assets. Since it is a debt, she is free to relinquish the same. Such a relinquishment can be made conditionally.

11. Since the concept of contract is the basis of marriage, the principles of a valid contract would be applicable to the relinquishment. Thus, the relinquishment should be made voluntarily. It should not be induced by duress, fraud, misrepresentation, undue influence or mistake. It should be made with free consent. Section 14 of the Indian Contract Act, 1872 (henceforth to be referred to as 'the Contract Act', for short) defines the term "free consent" as consent is said to be free when it is not caused by coercion, undue influence, fraud, misrepresentation or mistake. "Consent is said to be caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake." In case the consent is free and other elements of a valid contract are satisfied, the contract is binding on the parties.

12. Since the right to relinquish the dower exists, the right can be exercised conditionally as well. There is no bar in the Mohammedan Law which forbids a conditional relinquishment of dower. Such a prohibition cannot be read into the law. Thus, the contention of the learned counsel for the petitioner that the relinquishment has to be an unconditional one, is without merit. The learned counsel has not been able to show either a clear prohibition in the law or a case law laying down such an

interpretation. Hence, the counsel's contention is rejected.

13. In order to buttress his contention about the relinquishment being voluntary, the learned counsel for the petitioner has relied on the case of Nurannessa Khanum, (AIR 1920 Calcutta 463) (supra). However, the said case is distinguishable from the present case on the basis of factual matrix. In that case, the appellant, Nurannessa Khanum had relinquished her "mehar" when the body of her dead husband was shown to her. Under great emotional stress, under the unfortunate circumstance of losing her husband at a very early age in her life, shocked by his sudden death, the appellant had relinquished the "mehar". The Hon'ble Calcutta High Court held that considering the tragic circumstance of the sudden death of her husband in that pathos and agony if the appellant had relinquished her right to "mehar", it cannot be deemed to be done voluntarily. Thus, the relinquishment was not believed and the appellant was held entitled to the "mehar". However, in the present case, there is no tragic circumstance, no sudden death, no emotionally stressful situation. The petitioner went to the non-petitioner's house accompanied by her close family members and then signed the agreement. Her family members, her brother and mother, would have been her best advisers. In case there was the slightest possibility of coercion, fraud, mistake, misrepresentation or of undue influence, the family members would have protected her interest from the same. After due deliberation, after some reflection, with a cool mind, the agreement had been signed. Hence, the case of Nurannessa Khanum (supra) does not come to the rescue of the petitioner.

14. According to their Lordships of the Hon'ble Allahabad High Court, as expressed in the case of *Sajjad Husain v. Muhammad Sayid Hasan*,⁵ "it is for the person who sets up a case of relinquishment of dower by the wife to show that the relinquishment was made by her voluntarily and of her own free will and without any pressure of any kind". In the present case, the non-petitioner has clearly stated that "after the divorce, my elder brother-in-law and three to four men had come in order to enter into an agreement with me. Mohammad Saleem, Sadique Mohammad, Abdul Saleem, Hasina Bano, Majeedan had come. They wrote the agreement that in case the son is given to them, the "mehar" is relinquished. The agreement was written on a stamp paper. The stamp agreement is Exhibit D-1. This stamp Mohammad Saleem, Hasina Bano's brother, had bought." In his cross-examination he clearly states that Hasina Bano has put her thumb impression on the agreement. It has not been suggested in the cross-examination that the agreement was signed under coercion, or induced by fraud,

undue influence, misrepresentation or mistake. Hence, there is nothing to prove that the petitioner had not given her free consent to the agreement.

15. Moreover, even in her testimony the petitioner has not said a word about the non-voluntariness of the agreement. On the contrary, she denies the very existence of the agreement. But, she cannot be believed on this point. For, her mother, Majeedan, in her cross-examination initially admitted that an agreement was entered between Alam Noor and her family. Although she denied it later on, but the cat was already out of the bag. According to the non-petitioner, the petitioner and her family members had come along with her for signing of the agreement. The agreement bears the petitioner's thumb impression. Under these circumstances, it cannot be held that the agreement was induced by coercion, fraud, undue influence, misrepresentation, or mistake. Since the petitioner was major, she had the capacity to enter into the agreement. Her free consent is writ large. Thus, she is bound by the agreement. Once she has relinquished her right to receive the "mehar" under a valid agreement, she is prevented from claiming the same.

16. In the result, this petition has no force. It is, hereby, dismissed. There shall be no orders as to cost.

Petition dismissed.

Cases Referred.

1. ILR 47 Cal Series 537: (AIR 1920 Cal 463)
2. AIR 2001 SC 3958
3. ILR 8 All 149)
4. AIR 137 Lah 345
5. AIR 1934 All 71