

IMPORTANT JUDGMENT

Constitution Petition No. 3209 of 2019

Presented before:

- Mr. Justice Sardar Tariq Masood
- Mr. Justice Amin-ud-Din Khan
- Mr. Justice Muhammad Ali Mazhar

Authored by:

Mr. Justice Muhammad Ali Mahar

Judge Supreme Court of Pakistan

Mst. Tayyeba Ambareen filled a Constitution Petition before the Hon'ble Supreme Court of Pakistan as she was aggrieved by the judgment of Hon'ble Peshawar High Court, Peshawar.

Brief facts of the case are that Mst. Tayyeba Ambareen is the petitioner filed a suit against her husband for dissolution of marriage on the ground of cruelty, as well as for recovery of dower amount, dowry articles, medical expenses and maintenance for herself and her minor daughter. In the written statement filed by the husband, he also claimed a decree for restitution of conjugal rights. After recording of evidence, the learned Family Court-II decreed the suit of the petitioners vide judgment dated 23.07.2014 which was challenged by the husband in the Appellate Court. The Appellate Court, vide judgment dated 10.11.2015, partially allowed the appeal and dissolved the marriage by way of Khula rather than cruelty. As a consequence thereof, Mst. Tayyeba Ambareen was *directed to refund 05 tolas gold or, alternatively, its market value to the husband*. The findings recorded in the appellate judgment were thereafter affirmed by the learned High Court.

Advocate of Mst. Tayyeba Ambareen argued that the attitude and behavior of her husband had developed hatred and resentment in her mind. He further argued that the evidence produced by Mst. Tayyeba Ambareen fully supported the stances and series of cruel acts pleaded in the suit and, after going through the evidence, the Family Court rightly passed the judgment and decree which was partially upset by the Appellate Court without any lawful justification more.

Hon'ble Supreme Court observed that the *cruelty alleged may be mental or physical*, premeditated or unpremeditated, but lack of intent does not make any distinction. Obviously, if it is a *physical act then it would be a question of fact*, and in the event of *mental cruelty, an enquiry is required* to be made as to the nature of the cruel treatment to find out the impact or repercussions thereof on the mind of the spouse.

Hon'ble Supreme Court relied on definition of cruelty as cited in *Halsbury's Laws of England* (Fourth Edition), Volume 13, Para 1269, Page 602, *American Jurisprudence (Second Edition)*, Volume 24, Chapter: Divorce and Separation, Para 35, Page 217-218, *Corpus Juris Secundum*, Volume XXV, at page 16 and *Black's Law Dictionary* (Ninth Edition), at page 434.

In addition to rely on modern English concepts Hon'ble Apex Court also referred to verses of Holy Quran, in particular, *Surah e Al Nisa*. The Court also relied on Principles of Muhammadan Law and relied on *sub-paragraph (2) of Paragraph 281 of Chapter XIV of "Principles of Muhammadan Law"* (Ninth Edition), by *D.F.Mulla* under the nomenclature "Marriage" (M.Mahmood), which reads as under:

"Cruelty, when it is of such a character as to render it unsafe for the wife to return to her husband's dominion, is a valid defence to such a suit. It may be, too, that gross failure by the husband of the performance of the obligation, which the marriage contract imposes on him (s. 265) for the benefit of the wife, might, if properly proved, afford good grounds for refusing to him the assistance of the Court".

Hon'ble Apex Court while concluding the petition observed that:

The Appellate Court seriously erred in reversing the judgment of the learned Family Court which was founded on the careful exploration and analysis of the concept with regard to mental cruelty, which had resulted in an irretrievable breakdown of the marriage which could not be preserved due to various instances of *cruel behavior of the respondent No.1 that developed severe hatred and aversion in the mind of petitioner No.1* and she totally refused to continue this reluctant relationship any more. *The lodging of this claim should not be used as weapon to defend or obstruct the claim of dower or maintenance allowance, but must be lodged in good faith* and with a bona fide intention to reconcile and rectify the issues between the spouses in order to save the matrimonial tie with magnanimity, kindness and through the fulfillment of the

husband's obligations and not as a tool to fight out or frustrate the claim of maintenance allowance or dower amount. It is quite a strange situation that the petitioner No.1 approached the Family Court for dissolution of marriage on the ground of cruelty but the respondent No.1, quite the reverse, claimed conjugal rights despite all his ruthless, tyrannical and oppressive conduct or behavior, which claim on the face C.P. No. 3209/19 12 of it seems to be motivated with the sole intention to avoid paying the maintenance allowance and the dower amount and he ultimately succeeded in his effort in the Appellate Court whereby the dissolution of the marriage on account of cruelty was converted into a dissolution of the marriage by way of Khula with directions to the petitioner No.1 to refund the dower amount to the respondent No.1.

In the wake of the above discussion, we convert this civil petition into an appeal and allow the same. As a consequence thereof, the *impugned judgment of the Peshawar High Court dated 10.06.2019, as well as the judgment of the learned Additional District Judge-V, Peshawar dated 10.11.2015 are set aside* and the judgment and decree passed by the learned Family Court-II, Peshawar dated 23.07.2014 are restored.