

CASE COMMENT: ABDUL KADIR V. SALIMA

Zeenat Tasnim***INTRODUCTION**

Marriage is not a new concept. It is a custom prevailing in society to maintain natural and systematic progress in human evolution. While dealing with the Muslim Personal Law, marriage can often be called ‘nikah.’ It literally means the union of the sexes. The Privy Council said that nikah under Muslim law is a religious ceremony.¹ An important question arises from the nature of nikah - whether it is a civil contract or a religious sacrament. The essentials of marriage or nikah including the principle of proposal (Ijab) and acceptance (Qubul), attaining adult age, ante or post-nuptial agreement, etc., make it similar to the features of a contract whereas the inapplicability of contingency, time-bounded and lien shows it to be devoid of being a civil contract. The observation of M.C. J. Jung:” Marriage is an institution of Ibadat clothed in the legal form of contract regulating sexual intercourse, but its continuance is dependent upon the maintenance of conjugal affection”. In the ultimate analysis, it can be said that marriage in Islam is neither purely a civil contract nor a sacrament but the blending of both.² Muslim marriage consists of yet another essential named Dower or Mahr. Dower is the sum that becomes payable by the husband to the wife on marriage, either by agreement between the parties or by operation of law.³ Abdur Rahim has observed the dower to be essentially an obligation imposed on the husband as a mark of respect for the wife. The concept of “dowry” is often heard and discussed but Dower is an entirely different provision in the Muslim Personal Law that provides the wife a much secure and dignified married life. The marriage is valid even though no mention of dower has been made by the contracting party.⁴ Generally, dower is divided into prompt and deferred on the basis of the time within which it must be paid though it does not bring much difference to the fact that it has to be paid at the time of marriage or after the marriage. However, dower must not be confused with ‘consideration’.⁵ Consideration is preferably a promise in return for another act or a promise bargained. Dower is a necessary which the law will presume by virtue of the contract itself and it is binding on the husband.

¹ Shoharat Singh v. Jafri Begum

² MOHAMMEDAN LAW By AQIL AHMAD (27th Edition)

³ MOHAMMEDAN LAW By AQIL AHMAD (27th Edition)

⁴ Hassina Bibi v. Zubaida Bibi, ILR (1916) 38 All 581

⁵ Smt. Nasra Begum v. Rizwan Ali AIR (1980) All 118

FACTS OF THE CASE

Abdul Kadir (plaintiff) was married to Salima (defendant). After three months of their marriage, the defendant went to her father's house but was disallowed by her father to return to her nuptial home. Her husband appealed to his father-in-law to allow his wife to return but was turned a deaf ear.

A few days later, the husband brought a suit for recovery of conjugal rights against his father-in-law and wife before the British Empire. The defendant put forth a counter-claim of divorce decree, non-payment of dower, and cruelty upon to wife as a reason for her non-return. The court gave the second counterclaim major attention, namely non-payment of dower, considering it to have some legal merit. According to the court, although it is not compulsory for the husband to pay the dower at the time of marriage or right after the marriage takes place, the husband was required to pay a certain sum of dower as wished by the wife. After hearing such a statement by the court, the husband deposited the entire sum of the dower in the court during the case hearing. The court issued a conditional judgment for reinstatement of conjugal rights on payment of the dower, based on the deposit of the dower.⁶ This decision was challenged by both parties. While dismissing the husband's appeal, the court later found that since the dower was not paid before the suit was filed in the court and the wife had refused consummation, the husband could not seek judicial remedy further. On the issue of maintainability of the claim on non-payment of dower, the court's division bench referred the case to the full bench.

LEGAL ISSUES

- Whether the nature of Muslim marriage and its consequences were reliable.
- Whether the petition for restitution of conjugal rights is filed before the payment of dower.
- Whether non-payment of dower is a complete defence to the suit before cohabitation has taken place.

OBSERVATIONS OF THE COURT

The full bench answered the issue of the maintainability of the suit affirmatively, leaving the division bench to settle the remaining concerns after seeking guidance from the complete

⁶ LAWYERS CLUB INDIA

bench. Justice Syed Mahmood, who was the author of the judgment, said “Marriage among Muhammadans is not a sacrament, but purely a civil contract”. He pointed out the rights and obligations of the spouses towards each other which was a consequence of marriage. Marriage is believed to be a sacred ceremony in human society and although Islam has provided the provision for divorce or talaq, the Prophet has discouraged such a provision in the Hadith. Also, the court generally avoids passing a decree of judicial divorce before giving the couple a certain period of time to try to resolve their issues. Justice Mahmood made it clear that he would overlook the nature of marriage and point towards the after-effects of marriage including the rights and duties of the spouses to maintain a peaceful married life. Muslim Law confers upon a wife the following rights to compel payment of her dower:⁷

- Refusal to cohabit
- Right to dower as debt

DECISION

It was held by the court that the effect of non-payment of prompt dower is that the wife can refuse to cohabit or refuse to live with the husband. If the husband sues her for restitution of conjugal rights before sexual intercourse takes place, non-payment of the dower is a complete defense to the suit, and the suit will be dismissed.⁸ It was also held by the Allahabad High Court that the wife can refuse to live with her husband and refuse to the sexual intercourse so long as the prompt dower is not paid to her.⁹ If suit is brought after sexual intercourse has taken place with her free consent the proper decree to pass is not a decree of dismissal, but a decree for restitution, conditional on payment of prompt dower.¹⁰

Mahmood J., the deciding judge of the case, gave his decision based on the opinion laid by Abu Yusuf which said that according to Imam Muhammed and the Shia law, the wife cannot have the option of denial of conjugal rights in cases of deferred dower. He observed that in present cases, the wisest course of action was to issue a conditional decree for the restitution of conjugal rights on payment of dower, rather than dismissing the claim for non-payment of dower. In the event of a suit by the husband, he decided that the defense of payment of dower

⁷ MOHAMMEDAN LAW By AQIL AHMAD (27TH EDITION)

⁸ MOHAMMEDAN LAW By AQIL AHMAD (27TH EDITION)

⁹ Nasra Begum v. Rizwan Ali AIR (1980) All 118

¹⁰ Rabia Khatoon v. Mukhtar Ahmed AIR 1966 All 548

could, at best, function to modify the decree for restitution of conjugal rights by making its enforcement conditional on payment of so much of the dower as may be regarded as prompt¹¹.

ANALYSIS

We have often heard of the word 'dowry' but dower is a term not known to many who are unaware of the Muslim law. Dower is a unique provision in a Muslim marriage that substantially provides security to the wife. In the above case, the fact that the husband was unable to provide the wife with the dower on her demand, raises a question on the loyalty of the husband towards the wife. So even if she refuses to consummate and cohabit with him, he has to perform his obligation towards his wife to save the marriage. In case she is a minor, her legal guardian has the right to refuse to send her to her husband's house till the payment of the prompt dower. The absolute right of the wife to insist on payment of the prompt dower, before giving him access to her, is lost after the consummation of the marriage¹². But at the same time, if the wife without demanding the dower, deserts her husband and does not give him a valid reason for such desertion, the decree of restitution of conjugal rights must be implemented upon the wife. Thus, the payment of a dower is an essential criterion for the fulfillment of a Muslim marriage.

CONCLUSION

Prompt dower should not be confused with deferred dower. Prompt dower has to be given right on the demand of the wife or as promised at the time of marriage or after the marriage occurs. But in the case of deferred dower, it is generally given after the marriage dissolves or after the death of the husband. So, there are different provisions laid down for both types of dower. Since Muslim law is uncodified, there are no specific sections for such provisions that we have to remember but the importance of dower in marriage cannot be ignored. Thus, we can conclude that the dower is an indispensable ingredient of Muslim marriage.

¹¹ LAWYERSCLUBINDIA

¹² Hamidunissa Bibi v. Zaheer-Sheik, 17 Cal 670.