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Judgment Sheet

LAHORE HIGH COURT
RAWALPINDI BENCH RAWALPINDI
JUDICIAL DEPARTMENT

….

WRIT PETITION NO.2521 of 2022

SYED SHOUZAB IMRAN KAZMI

Versus

SYEDA IFFAT BUKHARI and 2 others

JUDGMENT

Dates of hearing:	01.11.2022, 03.11.2022, 27.05.2024, 23.10.2024 & 31.10.2024
Petitioner by:	Syed Muddasir Abbas Kazmi, Advocate.
Respondent No.1 by:	Syeda Nida Zahra, Advocate.
Respondents No.5 & 7 by:	Mr. Khalid Ishaque, Advocate General for Punjab.
Amicus Curiae:	Ch. Imran Hassan Ali, Advocate.

MIRZA VIQAS RAUF, J. The petitioner was married to respondent No.1 (hereinafter referred to as "**respondent**") on 19th June, 2003 in lieu of dower amounting to Rs.50,000/-. From the wedlock four sons namely Abdul Mutlib Kazmi, Abu Talib Kazmi, Hassan Raza and Ibn-e-Hussain were born. On account of some differences, the **respondent** instituted a suit for dissolution of marriage, recovery of dower, maintenance, gold and dowry articles before the Family Court, Attock. Suit was resisted by the petitioner, while submitting his written statement, controverting the assertions contained in the plaint. On 28th May, 2022 on failure of reconciliation proceedings suit for dissolution of marriage was decreed in favour of the **respondent** on the basis of khula in terms of

Section 10(5) of the Family Courts Act, 1964 (hereinafter referred to as "**Act, 1964**") subject to relinquishing of dower by the **respondent** as per law and with regard to the remaining controversy issues were framed. Feeling dissatisfied the petitioner filed this petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter referred to as "**Constitution**") on multiple grounds.

2. The petition was admitted for regular hearing by way of order dated 21st September, 2022 and in view of the matter in controversy involved in this petition, Ch. Imran Hassan Ali, Advocate was appointed as *amicus curiae* to assist the Court. It took numerous dates to conclude the hearing and finally hearing is completed on 31st October, 2024.

3. Syed Muddasir Abbas Kazmi, Advocate for the petitioner submitted that parties to the lis by faith are observing *"Fiqah-e-Jafria"* and there are specific bindings in event of dissolution of marriage between them on the basis of *Talaq* or *Talaq-e-Khul*. He added that marriage between the spouses relating to *"Fiqah-e-Jafria"* can only be dissolved after recitation of "Seeghas" by the husband without any influence or coercion. Learned counsel emphasized that in view of amendment in Section 7 of the Muslim Family Laws Ordinance, 1961 when the spouses belong to *"Fiqah-e-Jafria"*, marriage can only be dissolved in the manner prescribed therein. It is also one of the contentions of learned counsel for the petitioner that in view of law laid down in the case عمران انور خان و دیگر بنام حکومت پنجاب بذریعہ سیکرٹری وزارتِ قانون، لاہور و دیگر **(PLD 2022 Federal Shariat Court 25)** the impugned order is not tenable. He further contended that according to Para No.310 of Muhammadan Law by D.F. Mullah a divorce must be pronounced only in Arabic and that too in a specific form. In order to supplement his contentions, learned counsel also placed reliance on *Syed ALI NAWAZ GARDEZI versus LT.-COL. MUHAMMAD YUSUF* **(PLD 1963 Supreme Court 51)**, *Mst. MARYAM BANO versus HUSSAIN ALI AND ANOTHER* **(1984 CLC 1961)**, *Syed AZHARUL HASSAN NAQVI versus HAMIDA BIBI alias ESHRAT*

JAHAN and 3 others **(1987 CLC 1041),** *THE STATE versus SYEDDA SALMA BEGUM AND ANOTHER* **(PLD 1965 (W.P.) Karachi 185)** and *Syed ASAD RAZA NAQVI versus Mst. SAIMA FATIMA and another* **(2014 MLD 254).**

4. Mr. Khalid Ishaque, learned Advocate General Punjab contended that even if parties belong to *"Fiqah-e-Jafria"* marriage can be dissolved on the basis of khula. He added that amendment in Section 7 of the Muslim Family Laws Ordinance, 1961 is only to the extent of Federal Capital Territory and does not apply to marriages solemnized in Punjab. Learned Advocate General Punjab emphasized that khula is not against any injunction of Islam and no exception can be taken to the decree of dissolution of marriage passed in favour of **respondent** (wife). In the last, learned Advocate General Punjab argued that Section 10(4) of the **Act, 1964** provides summary procedure in case of dissolution of marriage on the basis of khula, which has been declared by the Federal Shariat Court as valid legislation. Placed reliance on *Mst. KHURSHID BIBI versus Baboo MUHAMMAD AMIN* **(PLD 1967 Supreme Court 97)**, *SALEEM AHMAD and others versus GOVERNMENT OF PAKISTAN through Attorney General of Pakistan and 2 others* **(PLD 2014 Federal Shariat Court 43)** and *Mst. BALQIS FATIMA versus NAJM-UL-IKRAM QURESHI* **(PLD 1959 (W.P.) Lahore 566)**.

5. Ch. Imran Hassan Ali, Advocate/*amicus curiae* at the very outset raised question regarding maintainability of this petition on the parameters of writ of certiorari. He submitted that dissolution of marriage between the spouses relating to *"Fiqah-e-Jafria"* is not prohibited in **Act, 1964**, which can be dissolved in a summary manner. It is emphatically argued that court can grant decree of khula without consent of the husband. It is also one of the arguments of learned *amicus curiae* that in view of doctrine of severability when some particular provision of a statute offends or is against a constitutional provision that provision is severable from the rest of the statute, only that offending provision will be declared void by the Court and not the entire statute. Placed reliance on *BAZ MUHAMMAD KAKAR and others versus FEDERATION OF PAKISTAN through Ministry of Law and Justice and others* **(PLD 2012 Supreme Court 923)**, *Haji SAIF-UR-*

RAHMAN SHAHEEN versus ISLAMIC REPUBLIC OF PAKISTAN through Attorney General of Pakistan, Islamabad and 4 others **(PLD 2024 Federal Shariat Court 9)** and *KHURRAM SHEHZAD versus FEDERATION OF PAKISTAN through Ministry of Law and Justice Commission of Pakistan Islamabad and another* **(PLD 2023 Federal Shariat Court 286)**.

6. Learned counsel for the **respondent,** while defending the impugned order submitted that self-contradictory stance was taken by the petitioner in his application for dismissal of suit as is evident from Para Nos.9 & 10 of the said application and the impugned order resulting into dissolution of marriage by way of Khula is unexceptionable.

7. Heard. Record perused.

8. The petitioner is aggrieved of order of dissolution of marriage on the basis of khula passed by the Family Court, while invoking Section 10(5) of the **Act, 1964**. The petitioner has though initially challenged the *vires* of the order on two-fold grounds; firstly, that the Family Court established under the **Act, 1964** is not vested with the authority to dissolve the marriage by way of khula as spouses are observing *Shia* sect and secondly that the decree of khula cannot be awarded to the **respondent** summarily and without consent of the petitioner (husband) and performance of necessary *"Seeghas"* on his part. During the hearing learned counsel, however, opted not to press the objection with regard to jurisdiction of Family Court. The moot point thus emerges for determination is as under :-

> ***"Whether a marriage interse spouses observing "Shia" sect can be dissolved by the Family Court through khula without consent of husband and performance of "Seeghas"?"***

9. Before pondering upon the core issue, it would be apposite to observe that all Muslims are to be governed by the Quranic injunctions. Allah almighty in *"Surah-Al-Baqarah"* verse 229 commands in the following words :-

ٱلطَّلَٰقُ مَرَّتَانِۖ فَإِمۡسَاكُۢ بِمَعۡرُوفٍ أَوۡ تَسۡرِيحُۢ بِإِحۡسَٰنٖۗ وَلَا يَحِلُّ لَكُمۡ أَن
تَأۡخُذُواْ مِمَّآ ءَاتَيۡتُمُوهُنَّ شَيۡـًٔا إِلَّآ أَن يَخَافَآ أَلَّا يُقِيمَا حُدُودَ ٱللَّهِۖ فَإِنۡ

خِفْتُمْ أَلَّا يُقِيمَا حُدُودَ ٱللَّهِ فَلَا جُنَاحَ عَلَيْهِمَا فِيمَا ٱفْتَدَتْ بِهِۦ تِلْكَ حُدُودُ ٱللَّهِ فَلَا تَعْتَدُوهَا ۚ وَمَن يَتَعَدَّ حُدُودَ ٱللَّهِ فَأُوْلَٰٓئِكَ هُمُ ٱلظَّٰلِمُونَ ٢٢٩

> Divorce is twice. Then [after that], either keep [her] in an acceptable manner or release [her] with good treatment. And it is not lawful for you to take anything of what you have given them unless both fear that they will not be able to keep [within] the limits of Allāh.[1] But if you fear that they will not keep [within] the limits of Allāh, then there is no blame upon either of them concerning that by which she ransoms herself. These are the limits of Allāh, so do not transgress them. And whoever transgresses the limits of Allāh - it is those who are the wrongdoers [i.e., the unjust].

To understand the theme and spirit of the above stated verse in better terms, we may have a recourse to the *"Tafsirs"* by some of renowned jurists and scholars on the subject. As per Abul Ala Maududi, *Tafhim-al-Qur'an* :-

> **"**Divorce may be pronounced twice; then either the wife be kept honourably or parted with gracefully. And it is not lawful for you to take back anything out of what you have given them. There is, however, an exception to this; if you fear that they might not be able to keep within the limits imposed by Allah, there is no harm if both agree mutually that the wife should obtain divorce by giving something as compensation to the husband. These are the bounds set by Allah; therefore do not violate them, for those who violate the bounds of Allah are the transgressors.**"**

Muhammad Asad, *The Message of The Qur'an* :-

> **"**A divorce may be revoked twice, whereupon the marriage must either be resumed in fairness or dissolved in a goodly manner. And it is not lawful for you to take back anything of what you have ever given to your wives unless both partners have cause to fear that they may not be able to keep within the bounds set by God; Hence, if you have cause to fear that the two may not be able to keep within the bounds set by God, there shall be no sin upon either of them for what the wife may given up to her husband in order to free herself. These are the bounds set by God; do not, then, transgress them: for they who transgress the bounds set by God – it is they, they who are evildoers!**"**

Muhammad Taqi Usmani, *The Noble Quran* :-

> **"**Divorce is twice; then either to retain in all fairness, or to release nicely. It is not lawful for you to take back anything from what you have given them, unless both the apprehend that they would not be able to maintain the limits set by Allah. Now, if you apprehend that they would

> not maintain the limits set by Allah, then, there is no sin on them in what she gives up to secure her release. These are the limits set by Allah. Therefore, do not exceed them. Whosoever exceeds the limits set by Allah, then, those are the transgressors**"**

Sayyid Mohammad Hossein Tabataba'i, *Tafsir-al-Mizan* :-

> **"**Divorce is twice; then keep (them) in fairness or let (them) go with kindness; and it is not lawful for you to take any part of what you have given them, unless both fear that they cannot keep within the limits of Allah; then if you fear that they cannot keep within the limits of Allah, there is no blame on them for what she gives up (to become free thereby). These are the limits of Allah, so do not exceed them, and whoever exceeds the limits of Allah then these it is that are the unjust**"**

10. Islam permits dissolution of marriage between Muslim spouses in three ways i.e. Talaq, Mubarat and Khula. As the proposition in hand is related to last one, so it would be apt to restrict myself to this extent. The literal meaning of term "khula" is to extract oneself. According to Ibn Manzur Muhammad bin Mukarram (*Lisan al-'Arab*), the root of "*khul*" is "*khal*" and the verbal noun "*khal*" refers to the act of extraction, removal, detaching or tearing out. In its real sense, "*khal*" is generally associated with things or object, such as garments. According to Alauddin Masu'd al-Kasani (*Badda 'i'al-sana'i' fi tarib al-shara 'i'*) the redemption (*khul*) is lexically, "*al-naz*" which means to pull out/extract something from something. Thus, "*khala'ha*" means that he has removed her from his marriage. According to Badruddin Mahmud al-'Ayni (*al-Binayah*), the term "*khul*" is used technically for marital "extraction", in that it is an act of receiving compensation from the wife in exchange of her being relieved from the marital tie. Thus, in simple terms, "*khul*" denotes a woman securing the annulment of her marriage in lieu of payment of some compensation to her husband.

11. Above all "*Surah Al-Baqarah*" verse 229 is complimented by ahadith of the Holy Prophet (Peace Be Upon Him) from the events of sunnah one of which recounts (in Sahih al-Bukhari) that when Habibah bint Sahl complained to the Prophet Muhammad (Peace Be Upon Him) about wanting to separate from her husband purely on account of his physical attributes, she was allowed to do so subject to

return of the garden given to her as dower. The Prophet Muhammad (Peace Be Upon Him) then ordered her husband, Thabit bin Qays, to accept the garden and separate from her.

12. "Khula" denotes the right of a Muslim woman to seek dissolution of her marriage in which she gives or consent to give a consideration to the husband for her release from marriage as determined by the court. In Subcontinent origin of khula was surfaced in the case of *Mt. Umar Bibi versus Mohammad Din* **(A.I.R. (32) 1945 Lahore 51)** and it was pronounced that khula cannot be directed by Qazi or court which view was then adopted in *Mst. SAYEEDA KHANAM versus MUHAMMAD SAMI* **(PLD 1952 Lahore 113)** while holding that khula, whilst initiated from the woman's desire from separation, is dissolution of marriage by agreement between the parties, against consideration to be paid by the woman to the husband. It was thus held that a woman's hatred for her husband, howsoever, intense is not a valid ground for dissolution of marriage under Section 2(ix) of the Dissolution of Muslim Marriages Act, 1939, unless she can persuade him to release her from the marital bond.

13. The above principle of law, however, then went under a radical change as in the case of *Mst. BALQIS FATIMA versus NAJAM-UL-IKRAM QURESHI* **(PLD 1959 (W.P.) Lahore 566)** Full Bench of this Court carved out "Khula" as a right of wife to seek from the court albeit the husband does not agree upon dissolution of marital tie. The Full Bench, while heavily relying upon and interpreting verse 2:229 noted hereinabove coupled with ahadith including ***Habibah's*** case as well as practices of the Khulafa-e-Rashideen and opinion of Maulana Maududi (in Huqooq-ul-Zaujain) as well as other interpretations by renowned Muslim Scholars held that the commandment to refer the matter to the Qazi would be pointless, if he could not make a determination that the parties cannot live within the bounds set by Allah almighty without the husband's consent to the dissolution of marriage. It would not be out of context to mention here that in arriving at its conclusion, the court observed that though all schools

of thought do not accept the jurisdiction of the Qazi to dissolve a marriage on basis of khula without the husband's consent, however, in rendering judgment on a question of interpretation of the Quran, the High Court is not bound by the opinions of jurists, especially where the plain meaning of the verse is clear. Thus, the objection that most interpretations by Muslim exegetes of verse 2:229 envisage consent of the husband was authoritatively dispelled. This view of the court was affirmed by the Supreme Court of Pakistan in *Mst. KHURSHID BIBI versus Baboo MUHAMMAD AMIN* **(PLD 1967 Supreme Court 97).** The relevant extract from the same is reproduced below :-

> **"**A few words may now be said about the concept of marriage in Islam. As is well-settled, marriage among Muslims is not a sacrament, but in the nature of a civil contract. Such a contract undoubtedly has spiritual and moral overtones and undertones, but legally, in essence, it remains a contract between the parties which can be the subject of dissolution for good cause. In this respect, Islam, the *Din-al-Fitrat*, conforms to the dictates of human nature and does not prescribe the binding together of a man and woman to what has been described as "holy deadlock."
>
> The husband is given the right to divorce his wife, though, of course, arbitrary divorces are discountenanced. There is a saying of the Prophet to the effect that "the most detestable of lawful things in Allah's view is divorce" (البغض الحال الی اللہ طلاق Abou Daood). Similarly, the wife is given the right to ask for *khula* in cases of extreme incompatibility though the warning is conveyed by *ahadith* against too free exercise of this privilege, one of which says that women asking for *khula* will be deprived of the fragrance of paradise (Trimizi) (باس محرام علیہا رائحة الجنة ایها المراة زوجها طلاقاً من غیر). The warning both to man and woman in this regard, is obviously placed on the moral rather than the legal plane and is not destructive of their legal rights.
>
> The Qur'an also declares: "Women have rights against men, similar to those that, the men have against them, according to the well-known rules of equity" (ولهن مثل الذی علیہن بالمعروف). It would, therefore, be surprising if the Qur'an did not provide for the separation of the spouses, at the instance of the wife, in any circumstances. The Qur'an expressly says that the husband should either retain the wife, according to well-recognised custom— "امساک بالمعروف" (*Imsak-un-bil-ma'roof*) or release her with grace— "تسریح باحسان" (*Tasree-hun-bi-ihsan*). The word of God enjoined the husband not to cling to the woman, in order to cause her injury "ولا تمسکوهن ضراراً لتعتدو". Another

hadith declares— "لا ضرر ولا ضرار فی السلام"*Lazarar-un-wa-la-zarar-fil-Islam*) "Let no harm be done, nor harm be suffered in Islam". In certain circumstances, therefore, if the husband proves recalcitrant and does not agree to release the woman from the marital bond, the Qazi may well intervene to give redress and enforce the Qur'anic injunctions.

As was pointed out by Kaikaus, J. in *Mst. Balqis Fatima's case* the foundation of the law relevant to *khula* is contained in the Qur'anic verses, which may be translated as follows:

> "Such divorce may be pronounced twice; then, either retain them in a becoming manner or send them away with kindness. And it is not lawful for you that you take anything of what you have given them, unless both fear that they cannot observe the limits prescribed by Allah. But, if *you* fear that *they* cannot observe the limits prescribed by Allah, then it shall be no sin for either of them in what she gives to get her freedom. These are the limits prescribed by Allah, so transgress them not; and whose transgresses the limits prescribed by Allah, it is they that are the wrong-doers."

We may first consider the opinions of the commentators of the Qur'an as to the meaning of these verses, bearing on *khula*. The words— "فان خفتم" (if you fear) are addressed to the community or "اولیٰ لا مرمنکم" (those in authority from among you), and include the *Qazi*, who represents the community, for adjudication of disputes. This is borne out from the commentary of the Qur'an by Qurtabi, known as (الجامع الحکام القرآن) "*Al Ja'me-le-Ahkaam al-Qur'an*". The learned author says that this is the opinion of Ibn-e-Abbas and Malik-bin-Anas as well as the majority of the legists. Similar opinion is expressed by زمخشری *Zamakhshri* in his well-known commentary الکشاف (*Alkashshaf*), by نسفی (*Nasafi*) in his Tafseer, called مدارک التنزیل و حقایق التاویل (*Madarak-ul-tanzil-wa-Haqaiq-ul-Ta'veel*), by Baizavi (بیضاوی) in his *Tafsir* انوار التاویل اسرار) (التنزیل و *Anwar-ul-Tanzil-wa Israr-ul-Ta'veel*, by القسطلانی (Al-Qastallani) in his ارشاد السآزی (*Irshad-us-Sazi*), by جصاص Jassas in his احکام القرآن (*Ahkamul Qur'an*) and by the authors of تفسیر ابن کثیر (Tafsir Ibne Kasir) and تفسیر خازن (Tafsir Khazin). Baizavi distinctly says that this is so because the rulers are in a position to give orders when disputes are presented before them. In more recent times, Mufti Muhammad Abduh of Egypt, in his Tafsir Al Manay تفسیر المنأ has endorsed this view. For analogy, the cases of لعان (li'an) and ایلا (’Ila) عنین (*Inin*) and *Mafqoodel Khabar* (مفقود الخبر) may be cited a in which cases the Qazi, it is settled, has the authority to separate the spouses, even if the husband is refusing to grant a divorce or is not available. The Hedaya, the ردالمحتار

(*Radd-ul-Muhtar*) and the احکام القران (*Ahkam-ul-Qur'an*) of الجصاص (*Aljasas*) agree in this respect.

By the phrase "Limits of Allah", according to the above-cited commentators, reference is intended to the injunctions regarding the performance of conjugal obligations while living together. Ibne-Hammam (ابن همام) in his (فتح القدیر) (*Fateh-ul-Qadir*), Vol. III, p. 199 and (جصاص) Jassas in his (احکام القران) (*Ahkamul Qur'an*), Vol. 1, p. 391 have adopted this view which also finds mention in Sahih Bokhari (Arabic Text), published by Karkhana Tijarat-i-Kutub, Karachi (Vol. II, p. 794). It is explained that incurable aversion to the husband, on the part of the wife would be sufficient justification for *khula*. Shah Wali Amin Ullah of Delhi in (المسوىٰ من احادیث المؤطا) *Al-Musawwa-min-Ahadith-al-Muatta* Vol. II, p. 160) goes to the length of saying that "even if she obtains *khul*' without any reason (apart from personal dislike) it is lawful but not approved. The reason is that the Prophet and the Companions never inquired from her the reason for her (seeking) *khul*'."

The question whether *khula* is to be equated with *talaq*, or it is a form of, dissolution of marriage in a category of its own, has been the subject of controversy amongst the jurists. Ibn-i-Rushud, in his Badaya-tul-Mujtahid, says that most of the *ulema* and Imam Malik and Imam Abu Hanifa are of the opinion that *Khula* is equivalent to *talaq*. On the other hand, Imam Shafe'i, Imam Ahmad, Imam Daood and out of the Companions, Ibn-e-Abbas were of the view that *khula* amounts to *fiskh-i-nikah* (cancellation or dissolution of marriage) and not *talaq*. Imam Shafe'i had also stated on another occasion that if the husband intended *talaq*, even in a contract of *khula*, it would operate as *talaq* and if he had the intention of *fiskh-i-nikah*, it will have effect as such. Ibn-e-Hajar Asqlani in his books (الدرایه فی تخرجة احادیث الہدایه وفتح الباری) (Alderaya-fi-Takhrija-Ahadith-ul-Hidaya and Fat-hul-Bari) prefers the opinion of Ibn-e-Abbas on this point and casts doubt on the authenticity of the *hadith* which equates it with (طلاق بائن) (irreversible divorce). He relies in this connection on a Tradition of the Prophet, which specified that Sabet-bin-Qais's wife, after the grant of *khula*, was ordered to pass one period of menstruation as her *iddat* and this would not be so if *khula* were *talaq*. He reiterates this position in (تلخیص الہبیر) (Talkhisul Habir Vol. III, p. 205). On the other hand, the authorities quoted, on behalf of the respondent, including the Hedaya, take the view that there is no difference between *khula* and *talaq*. This question need not detain us further. There are good reasons for the view that *khula* is separation and not *talaq*, as the right of the husband to take back the wife after *khula*, does not exist, as it does in the case of *talaq-i-raja'i* and the period of Iddat is different is the two cases. The relevant *Ahadith* are discussed by Shaukani in کتاب

> الخلع (Kitab-ul-Khul Vol. 111, p. 260) of his celebrated work (نیل الاوطار) (Nail-al-Autar) and he reaches the conclusion that *khula* is not a type of *talaq*, but is a category apart from it. If this opinion is accepted, then it is clear that *khula* is not dependent on the will of the husband alone. But even if *khula* be regarded as *talaq* as seems to be the view of some of the orthodox Hanafi Jurists, the question arises whether the wife is not entitled, in appropriate cases, to demand a *khula* divorce from the husband, in the face of the latter's opposition. This problem finds no express treatment in the treatises of these Hanafi Jurists who content themselves by saying that divorce is the right of the husband.**"**

14. In the case of *SALEEM AHMAD and others versus GOVERNMENT OF PAKISTAN through Attorney General of Pakistan and 2 others* **(PLD 2014 Federal Shariat Court 43)** in somewhat similar facts and circumstances the Federal Shariat Court held as under :-

> **"**18. The word "Khula" literally means "to put off". In the context of verse which states that "They are garment for you and you are garments for them. It denotes laying down by the husband of rights and authority over his wife, at her instance, on acceptance of consideration by means of the word "Khula". It signifies as conditional situation on the part of wife, entered into for the purpose of dissolving the marital tie at her instance, in lieu of a compensation paid or agreed to be paid by her to the husband out of her property. In case of mutual agreement on such an arrangement, the wife needs not go to court and ask for dissolution of her marriage as in such a situation the husband would release her from the marital bond and the wife would be free to marry any other person after the 'iddat' period, as would be required in her case, if she is or is not pregnant. The relevant verse in this connection is 229 of Sura Al-Baqara (Reproduced herein above). As is evident, that mutual arrangement and agreement for putting an end to the marriage tie is not sinful in any way and appear commendable in case no reconciliation is possible. But a question arises if the husband does not agree to this arrangement and refuses to release her from his marital tie by not accepting any compensation even and also declines to divorce her, what should be the course of action for the wife? What would she do if reconciliation fails and the husband proves adamant to dissolve the marriage? Will it be justified to leave the wife who cannot live happily or perform her marital obligations grope in the darkness? Should she be pushed back to her husband to remain tongue tied, tight lipped, depressed, dejected, having a miserable survival

throughout her whole life? Should she be kept, at the mercy of her in laws, vulnerable to indecent immoral life? Can anyone call this sort of situation morally justified on any standard? Will this position assigned to her not defeat the very object of marital peace and tranquility? Who will be considered responsible if she cannot bear the Mental agony in state of affair and put an end to her life by setting herself on fire or adopt any other method for committing suicide, which is our normal observation off and on, in different parts of the country? who will stop or what will prevent her to administer poison to her husband if she finds herself entangled in a "holy dead lock"?

We put these questions to almost all the advocates and scholars but no satisfactory solution was suggested even. As mentioned above "Justice for all" is the essence social teachings of Islam. No one is to be harmed.

It has been declared that "Let no harm be inflicted nor suffered in Islam". The Holy Qur'an has repeatedly stressed the husband's duty to keep the wife with kindness. It has been directed to keep them in good fellowship or let them go with grace (2:229). At another place it has asked the husband to "retain them in kindness or set them free with kindness" (2:231). The husbands have been ordered not to retain them (unjustly) for injury and not to exceed the limits (2.231). "Treat them with grace and kindness" (4:19) is a command and it has been to be obeyed in letter and spirit. These pieces of command are not mere instructions or admonitions to be left to the sweet will of the husband only. An Islamic State is bound to implement them through suitable legislation so that it is ensured that none of the spouses is harmed or treated unjustly. It is duty-bound to constitute proper judicial forums where every one gets justice and where grievances are properly redressed. Obviously Islam does not intend to force a wife live a miserable life, in a hateful unhappy union, for ever. If she is unhappy and reconciliation fails, she should be entitled to get relief whatsoever. This is what justice demands. This is referred to in the Verse: "Women shall have rights similar to the right against them, according to what is equitable" (2:228).

19. Here it is pertinent to point out that "Khula" and 'Mubarat' operate as a single, irrevocable divorce. Even thereafter both the spouses can contract fresh marriage with mutual consent of course if they want to, without any intermediary marriage of the wife with another person as is required in the case when a husband pronounces divorce for the third time. However, Iddat shall be incumbent on the wife if she wants to contract marriage with some one else.

20. Now first of all we refer to the following Verses/Ahadith repeatedly quoted in support of the petition.

(a) "And if you divorce them before consummation, which you have already fixed for them an amount (of dower) then there is one half of what you have fixed, unless they (the women) forgive or forgives the one in whose hand lies the marriage tie" (2: 237)

(b) "Divorced women shall keep themselves waiting for three menstrual courses, and it is not permissible for them to conceal what Allah has created in their if they believe in Allah and in the Last Day. Their husbands are best entitled to take them back in the meantime, if they really want reconciliation; and women have the same rights against their men as men have against them though for men there is a degree above them. Allah is All Powerful, All Wise (2: 228).

(c) Men are the protectors (i.e. care takers and maintainers) of women because Allah has made some of them excel the other (in strength), and because they spend out of their wealth (to support them)....." (4:34)

Now let us consider the meaning of the verse at S.No.(a). As is evident the subject matter herein is the payment of dower in case the divorce takes place before consummation of marriage when the husband has not touched his wife while the amount of dower has already been fixed. The verse referring to this says that the wife will be entitled to half of the stipulated dower and the husband will be required to pay her the same amount unless the wife forgoes her claim. If in the second alternative, the husband has already paid full dower to her, he is entitled to take back half of the same. However he may show grace and forgive his claim. This is what is referred to in the verse: "or forgives the" one in whose hand lies the marriage tie and the remission (of the man's half) is closer to Taqwa, and do not forget to be graceful to one another. Indeed Allah is Watchful of all what you do"

Obviously this verse is not all related to the issue of Khula. Payment of dower is the obligation of husband and since he is the one in whose hand lies the marriage tie, he alone can forgo his right by not claiming half of the amount of dower, if already paid by him to his wife in full. Thus the question here pertains only to the payment or claiming of dower and not, in any way, to the issue of 'Khula'.

The second verse at S.No.(b) is also in the context of divorced women who have to wait for three menstrual courses before entering into another marital contract, provided they have not conceived and are not pregnant.

Since determination of parentage is highly pertinent, they are directed not to conceal what Allah has created in their wombs. So in case of divorce they have to observe the "Iddat" period which is either three menstrual periods, if they are not pregnant, or delivery of the child if they are pregnant, and still in another case when they are too young or too old and have no menstrual course, three months. However, men have an edge over them in this respect in the sense that they do not have to wait but can marry immediately any time without any waiting period. Men have a degree in another sense also. They can directly exercise their right of divorce without any recourse to a court of law whereas in case of 'Khula' the wife has to seek indulgence of the court, if her husband does not agree to her demand of 'Khula'. The course of judicial process provides an opportunity to the wife to thoroughly consider pros and cons of her demand for 'Khula". It is similar to the period of Iddat in case of revocable divorce given by the husband who can, on reconsideration, recall it if better sense prevails. Both wife and husband are provided opportunity to consider and reconsider their course of action and both have to bear financial liability if they insist on separation. No one has any superiority over the other in respect of their rights and responsibilities. It is pertinent to note that this very verse declares unequivocally that women have rights similar to what they owe to their husbands in graceful manner. Thus their rights and responsibilities are similar and there is no discrimination whatsoever. Men can arbitrarily divorce to dissolve the marital tie and women can ask for her release from the same bond through "Khula", if the parties feel that they cannot live together within the limits prescribed by Allah Almighty. The third Verse at S.No.(c) above is self evident and specifies the responsible position of the husband being accountable for the maintenance of his wife and children. The word used here is **(قَوَّامُونَ)** plural of **(قَوَّام)**, which means a person responsible for administering managing and protecting the interests of a person or an organization and looks after its affairs. In the context, this verse 'refers to the responsibilities of the man who is required to protect, safeguard and provide for the needs of those under his supervision. Obviously, there are psychological and physiological differences between the sexes and they have to perform different roles but, admittedly, no one is superior to the other except by Taqwa (i.e. faith and good deeds). In fact they are complementary to each other. No one can ever exist without the other. Both have similar rights/ responsibilities with different roles to play in life. Nevertheless Islam affirms their equality as human beings and advocates and duly protects their fundamental rights. All these three verses referred to

again and again by the petitioner/counsel/Jurist Consult, thus do not specifically create a bar for court of competent jurisdiction to decree the case of "Khula" when reconciliation fails. After all what are the Courts of law established for? The courts are there to dissolve the disputes that arise between the parties. They can decide all type of matters including, admittedly, dissolution of marriage on certain grounds. One wonders why they are not authorized to decide the case of Khula, if a husband does not at all agree to the divorce of his wife and all the reconciliatory efforts fail. In this view of the matter we find that this verse has nothing to do with the subject of "Khula", in the context as has been agitated and argued.

21. The famous Ahadith pertaining to the incidents of 'Khula' demanded by Jamila and Habiba, as relied upon by the petitioners are also not very explicit in this connection. Both the traditions relied upon by the petitioners are narrated as follows:--

> "It is stated that one day Jamila wife of Sabit Ibn Qays appeared before the Prophet (صلی اللہ علیہ والہ وسلم) and said. "0 Messenger of Allah! I and Sabit can never live together. I saw him coming from the other side with some men. I found that he had the smallest stature, was the blackest and ugliest amongst them: I swear by God that I do not dislike him on account of religious or moral turpitude, but I dislike him on account of his ugliness. I swear by God that if I did not fear God I would spit on his face when he comes to me (meaning that she hated his very sight). 0 Messenger of Allah! You can see how beautiful I am while Sabit is an ugly person. I do not blame him for any depravity in his religious practices or morality, but I fear that I may be guilty of transgression of the injunctions of Islam." The Prophet (صلی اللہ علیہ والہ وسلم) asked he if she would return the orchard given by Sabit to her as dower. She replied, "Yes: and if he demands more, then I am ready to give him more than that". The Messenger of Allah (صلی اللہ علیہ والہ وسلم) said, "No: Not more than what he had given to you". He then asked Sabit to take back the orchard and to release her from the marriage-tie by divorcing her which he did.
>
> The other occurrence is related to another wife of Sabit named Habibah, daughter of Suhaye which is stated as follows: One day early morning, when the Prophet (صلی اللہ علیہ والہ وسلم) came out of his house, he saw Habibah waiting outside. He asked her what the matter was and why she was standing there. She said that she could not pull on with Sabit. When Sabit came there, the Prophet (صلی اللہ علیہ والہ وسلم) said to him, "Here is Habibah daughter of Suhayl. She has complained against you." Habibah said, "0 Messenger of Allah ! I have still got all that Sabit had given me for dower." The Prophet (صلی اللہ علیہ والہ وسلم) then ordered Sabit to take it and to release her, that

> is, to divorce her".
>
> We may mention that in both the cases the words used by the Holy Prophet (صلی اللہ علیہ والہ وسلم) are (طَلِّقُهاَ تَطلِيقة) (Divorce her) فَارِقُهاَ (separate here), خَلِّ سبيلَهاَ (leave her), اَمَرَالطَّلاقَ (he ordered him to divorce her) and (فَفَرِّقَ بينَهُماَ) (He separate them). (For further detailed discussion see Huququz Zawjain by Syed Mawdudi Pages 58-80 and Fiqhul Quran by Maulana Umar Ahmad Usmani Vol III, Pages 398-417.)
>
> 22. The upshot of the above discussion is that there is no specific verse or authentic Ahadith that provides a bar to the exercise of jurisdiction by a competent Qazi to decree the case of Khula' agitated before him by a wife, after reconciliation fails. As discussed above in detail, the Ayaat and Ahadith relied upon by the petitioners neither specifically relate to the issue of Khula' nor to the lack of authority of a Qazi duly authorized by an Islamic State to resolve the disputes between husband and wife. The interpretation of the said Verses and Ahadith is also not unanimous.**"**

15. So far contention of learned counsel for the petitioner that in view of amendment in Section 7 of the Muslim Family Laws Ordinance, 1961 (hereinafter referred to as "**Ordinance, 1961**") when the spouses belong to *Fiqah-e-Jafria*, marriage can only be dissolved in the manner prescribed therein; suffice to observe that amendment in Section 7 was introduced through the Muslim Family Laws (Second Amendment) Act, 2021, which admittedly is restricted to Federally administered areas and it is not extended to the Province of Punjab.

16. Adverting to the contention of learned counsel for the petitioner that in view of law laid down in عمران انور خان و دیگر بنام حکومت پنجاب بذریعہ سیکرٹری وزارتِ قانون، لاہور و دیگر **(PLD 2022 Federal Shariat Court 25)** the impugned order is not tenable, it is noticed that the said judgment was rendered by the Federal Shariat Court on 17th February, 2022 and it was held that in terms thereof subsections (5) and (6) of section 10 of the **Act, 1964** shall be deemed to be annulled and ineffective with effect from 1st May, 2022. Article 203D of the **Constitution** deals with the powers, jurisdiction and functions of the Federal Shariat Court and in terms of proviso to sub-article (2) of Article 203D, no decision of the Federal Shariat Court shall be deemed to take effect before the expiration of the period within which an appeal therefrom may be

preferred to the Supreme Court or where an appeal has been so preferred, before the disposal of such appeal. Article 203F of the **Constitution** provides a time period for filing an appeal against the decision of the Federal Shariat Court before the Supreme Court of Pakistan. In terms whereof, if the appeal is to be preferred by any party to the proceedings such appeal is to be presented within sixty days of the decision whereas if the appeal is to be preferred on behalf of the Federation or of a Province it prescribes six months time limit for such appeal. It is an admitted position on the record that against the decision of the Federal Shariat Court in عمران انور خان *supra* case an appeal in terms of Article 203F of the **Constitution** has been preferred by the Province of Punjab. From the joint reading of both the provisions i.e. Articles 203D and 203F of the **Constitution** an inference can safely be drawn that at the time of passing of impugned order, Section 10(5) of the **Act, 1964** was intact and as such it cannot be said that the impugned order suffers with any perversity. Even otherwise in the case عمران انور خان *supra*, the question before the Federal Shariat Court was not related to "Khula" as is evident from the bare perusal of the same.

17. So far judgments in the cases of ***Syed Ali Nawaz Gardezi's, Mst. MARYAM BANO's, Syed AZHARUL HASSAN NAQVI's, THE STATE's*** and ***Syed Asad Raza Naqvi's*** *supra* heavily relied upon by the learned counsel for the petitioner are concerned, those are related to issue of *Talaq* pronounced in terms of Section 7 of the **Ordinance, 1961** and as such clearly rested on entirely different facts are thus not applicable at all to the present case.

18. The nutshell of above noted threadbare discussion is that a wife can seek dissolution of marriage by way of khula from the court even if his husband does not give consent for the same, nevertheless spouses are observing "*Shia*" sect.

19. Subsection (5) of Section 10 of the **Act, 1964** ordains that in a suit for dissolution of marriage on failure of reconciliation proceedings, the Family Court shall immediately pass a decree for

dissolution of marriage and in case of dissolution of marriage through khula, may direct the wife to surrender upto fifty percent of her deferred dower or upto twenty five percent of her admitted prompt dower to husband. No shatters thus can be imposed upon the power of Family Court to dissolve the marriage on the basis of khula, when reconciliation is not possible. Reliance to this effect can be placed on *KHURRAM SHEHZAD versus FEDERATION OF PAKISTAN through Ministry of Law and Justice Commission of Pakistan, Islamabad and another* **(PLD 2023 FSC 286).**

20. Adverting to the contention of learned counsel for the petitioner that without pronouncement of *"Seegahjaat"* no divorce interse *"Shia"* spouses would become effective, it is observed that a similar proposition came under consideration in the case of *Syed SAJID HUSSAIN ABIDI versus IRAM SHEHZADI ABIDI and others* **(PLD 2023 Lahore 38)** and this Court ruled as under :-

> **"**6. Notably, both the parties have got their statements recorded in the presence of the Family Judge. The petitioner has not denied the presence of respondent No.1 in the court. His only argument is that Talaq will become effective only after *Seeghajaat* read by him. In this context, it will be important to mention that under the personal law of *Fiqa Jafria* the divorce takes effect when the Arabic sentences (*Seeghajaat*) are read in presence of two witnesses. To trace out the relevant judicial precedents, the first famous authority is in case titled *Syed Ali Nawaz Shah Gardezi v. Lt.-Col. Muhammad Yusuf Khan, Commissioner, Quetta Division* reported as (PLD 1962 (W.P.) Lahore 558) in which Single Judge of this Court had dealt with the proposition in detail and held in para 74 that two witnesses are not only required as a proof of divorce under Shia law but essential to the very act of divorce as it is related to substantive law. Relevant extract at page 626 is reproduced as under:-
>
> > "…..It will be noticed that it is not with regard to proof of divorce that the Shia law insists on two witnesses but to the very act of divorce and it cannot, therefore, be held that the matter related to proof and not to substantive law….."
>
> In *Syed Ali Nawaz Shah Gardezi v. Lt.-CoL. Muhammad Yousaf Khan, Commissioner, Quetta Division* (PLD 1962 (W.P.) Lahore 558), same view (supra) was followed with a further reference to Mulla's Principles of Mohammadan Law that under Shia law a Talaq must be pronounced orally in the presence of two competent witnesses and Talaq communicated in writing will not be valid unless the husband is physically

incapable of pronouncing it orally. Extract from para 5 is reproduced as under:-

> "Mr. S. Anwarali has also invited my attention to Mulla's Principles of Mahommedan Law where it is again stated that a Talaq under Shia Law must be pronounced orally in the presence of two competent witnesses, and a talaq communicated in writing, is not valid unless the husband is physically incapable of pronouncing it orally."

Likewise, in *The State v. Syedda Salma Begum and another* reported as (PLD 1965 (W.P.) Karachi 185) same view was followed with a reliance upon Muslim Law as administered in British India by Saksena according to which

> "Under Shia Law, a Talaq is of no effect unless it is pronounced:
> (1) Strictly in accordance with Sunna
> (2) in Arabic terms.
> (3) in the presence of at least two adult male witnesses."
>
> This follows that Talaq pronounced by respondent No.1 was not valid as it did not comply with the legal requirements prescribed by Sia Law. If a Shia is unable to pronounce Talaq in presence of wife in the prescribed manner then it cannot be pronounced in presence of two male witnesses and communicated to her in writing. There is nothing on record to show that the respondent No.1 was incapable of pronouncement in the prescribed form and manner before the witnesses."

In *Syed Azharul Hassan Naqvi v. Hamida Bibi alias Eshrat Jahan and 3 others* reported as (1987 CLC 1041) it was held that Talaq pronounced by a Shia male had to be heard by two "Adil" males if it has to result in breaking of ties. Relevant extract from para 3 is reproduced as under:-

> "3. The precise question which came up for decision before the learned trial and appellate Courts as well as before this Court was whether or not the Talaq pronounced by the petitioner was valid. Whereas the petitioner insisted that Talaq pronounced by him was in consonance with the Muslim law as followed by Shias yet respondent No.1 asserted that no valid Talaq had been given by the petitioner and that the marriage continued to subsist. Admittedly, under Shia law pronouncement of Talaq by the petitioner was required to be heard by two adil males if it were to result in the breaking of marriage tie. The learned trial court, on the basis of the evidence led by the parties, reached the conclusion that the pronouncement of Talaq made by the petitioner did not conform to the requirement of Shia law inasmuch as it was not heard by two adil males and, therefore, respondent No.1 could not be said to have ceased to be his wife. This finding of the learned trial Court having been endorsed by the learned Additional District Judge the petitioner has invoked the extraordinary jurisdiction of this Court."

In *Mst. Asmat Nigar v. Sayed Ibrar Hussain Shah and 2 others* reported as (2004 YLR 111), Division Bench of Peshawar High Court has given reference to the

famous book; Muhammadan Law by Syed Amir Ali the Shia doctrine of Talaq was discussed. Relevant extract is reproduced as under:-

> "The requirement of valid Talaq under Shia Law is that it shall have no effect unless it is pronounced strictly in accordance with Shia Law, in Arabic words in presence of two adult male witnesses and the wife but when the presence/attendance of the wife cannot be procured, then the husband can pronounce the Talaq in specific Arabic words which is known as "Khutba Talaq", but in presence of two male witnesses and the same can be reduced into writing and forwarded to wife or it may be intimated to her otherwise.
>
> 3. Amir Ali in his book Muhammadan Law, Vol. II, Seventh Edition has stated Shia Doctrine of Talaq as follows:-
>
> "They do not allow a Talaq to be given in writing nor in any language other than Arabic when there is ability to pronounce the words necessary for a valid repudiation….Even an absent husband cannot effect a valid Talaq in writing. He must pronounce the words in the presence of witnesses, and the fact of his doing so may be recording in writing, which may be forwarded to the wife or it may be intimated to her otherwise."

In *Syed Asad Raza Naqvi v. Mst. Saima Fatima and another* (2014 MLD 254), a reference was given to *Mst. Kaneez Fatima v. Wali Muhammad and another* (PLD 1993 Supreme Court 901), while holding that Section 7 of the Ordinance, 1961 is to be applied and interpreted to the facts of the case. However, it was held that such Shia male can pronounce the divorce afresh. Para 14 is relevant and is reproduced as under:-

> "…..Since, the valid Talaq is a precondition for exercise of jurisdiction under section 7(1) of the Muslim Family Laws Ordinance, 1961, or initiating proceedings under it and since the Talaq in question is invalid from the very face of it, therefore, the respondent No.2 was not liable to act upon such invalid Talaq and as such any proceedings, it initiated, on the basis of invalid talaq, would be illegal and without lawful authority and of no binding effect. So far as the case-law cited by learned counsel for petitioner in connection with the provisions of section 7 of Muslim Family Laws Ordinance, 1961, is concerned, a larger Bench of Hon'ble Supreme Court of Pakistan, examined such question in the case of Mst. Kaneez Fatima v. Wali Muhammad (PLD 1993 SC 901) and observed in its judgment at page 910 as follows:--
>
> "The provisions of section 7 of the Ordinance have remained controversial from the very beginning and there are conflicting views in general about it. In view of the Constitutional restraints the Courts cannot give any verdict on the conflicting claims challenging or justifying the provisions of section 7 of the Ordinance. However, keeping in view the facts of each case the applicability and interpretation of section 7 has to be construed in that light."

> 15. In view of above, this petition is hereby disposed of accordingly. with the observation that the petitioner will be at liberty to pronounce fresh Talaq to his wife the respondent No.1, keeping in view the C requirements prescribed under the Shia law and thereafter, respondent No 2 shall act in accordance with law without any delay. The listed/pending application (C.M.A. No.4609) filed by petitioner with a prayer to restrain respondent party and police concerned, from causing him any harassment etc., and from interfering in the matter of his second marriage, is also disposed of with direction to the police concerned to ensure that the harassment, if any, is not caused to the petitioner in violation of law."

A reference may also be given to *Mst. Zeba v. Abdul Ali* (2002 SCMR 1315) a leave granting order. Paras Nos. 3 and 4 are relevant and, therefore, reproduced as under for ready reference:-

> "3. Learned counsel appearing for petitioner, inter alia, contended that according to Shia School of thought, respondent Abdul Ali did not pronounce Talaq in Arabic (صیغه) in presence of two witnesses. To substantiate his contention, he referred to para.2517 (page 377) of the book "(توضیح المسائل)". He also relied upon the cases of Syed Ali Nawaz Gardezi v. Lt. Col. Muhammad Yousaf (PLD 1963 SC 51) and Mirza Qamar Raza v. Mst. Tahira Begum and 14 others (PLD 1988 Kar. 169).
>
> 4. It was argued by the learned counsel that the Family Court decided the issue "whether defendant has divorced plaintiff on 26-8-1996?" against the respondent, after having appreciated the available evidence on record, according to the principle of Qanun-e-Shahadat Order, 1984, but learned High Court in its Constitutional jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan disturbed the findings of the fact contrary to the settled law that the findings of facts are intervened very rarely unless it is established that the trial Court has recorded the perverse findings and had drawn conclusion which is contrary to law.
>
> We have heard the learned counsel appearing for petitioner and have also gone through the judgment cited by him as well as the book "(توضیح المسائل)". In our opinion, the contention raised by the learned counsel needs examination in depth. As question of public importance is involved in instant petition as such leave to appeal is granted."

Notably, the amendment recently introduced is exactly in accordance with the precedents of the superior Courts of this country and the law discussed hereinabove.**"**

21. The nutshell of above discussion is that Family Court, while dissolving the marriage through khula in exercise of powers conferred under Section 10(5) of the **Act, 1964** has committed no

illegality and in view thereof, this petition is devoid of any merits. Resultantly it is **dismissed** with no order as to costs.

22. Before parting, I deem it apposite to appreciate the able assistance rendered by learned counsel for the petitioner as well as learned *amicus curiae* and learned Advocate General Punjab which enabled me to arrive at the above conclusion.

23. The above are the detailed reasons of my short order dated 31st October, 2024, which reads as under :-

> **"**For the reasons to be recorded later, this petition is **dismissed** with no order as to costs.**"**

(MIRZA VIQAS RAUF)
JUDGE

APPROVED FOR REPORTING

JUDGE

Shahbaz Ali*