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Judgment Sheet

LAHORE HIGH COURT
RAWALPINDI BENCH RAWALPINDI
JUDICIAL DEPARTMENT

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WRIT PETITION NO.167 OF 2024

SYED ASIF HUSSAIN SHAH

Versus

FEDERATION OF PAKISTAN and others

JUDGMENT

Date of hearing:	**29.04.2024**
Petitioner by:	Ms. Afshan Ghazanfar, Advocate.
Respondents No.1&2by:	Mr. Muhammad Sajid Ilyas Bhatti, Additional Attorney General for Pakistan.
Respondent No.3 by:	Mr. Khalid Ishaq, Advocate General, Punjab.
	M/s Imran Shaukat Rao and Muhammad Shahid Munir, Assistant Advocate Generals, Punjab.
Respondent No.4	Mirza Zulfiqar Ahmad, father of respondent No.4 in person.

MIRZA VIQAS RAUF, J. This petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter referred to as "Constitution") primarily challenges the *vires* of order dated 19th December, 2023, whereby learned Judge Family Court, Rawalpindi, on failure of reconciliation proceedings, proceeded to decree the suit for dissolution of marriage on the basis of *khula,* instituted by respondent No.4 (hereinafter referred to as "respondent"). The petitioner also calls in question the *vires* of proviso to Sub-Sections 4 & 5 of Section 10 of the Family Courts Act, 1964 (hereinafter referred to as "Act, 1964"), being contrary to

Articles 4, 8, 9 and 10-A of the "Constitution". In view of questions raised in this petition, it was admitted for regular hearing by way of order dated 23rd January, 2024 and notice under Order XXVII-A of the Civil Procedure Code (V of 1908) was also issued to the learned Advocate General, Punjab. For the purpose of ease of reference, order is reproduced below:-

> *"The petitioner was married with respondent No.4. On account of some differences, respondent No.4 instituted a suit for dissolution of marriage on the basis of Khula, which was decreed by way of order dated 19th December, 2023 on failure of reconciliation proceedings.*
>
> *2. Learned counsel for the petitioner inter-alia contends that section 10 of the Family Courts Act, 1964 provides detailed procedure for the purpose of reconciliation between the spouses. She adds that the marriage was dissolved on the basis of Khula in a mechanical manner through impugned order. Submits that before passing a decree for dissolution of marriage on the basis of Khula, it was obligatory for the Family Court to hold reconciliation proceedings in an effective manner and also seek the consent and willingness of husband before passing the decree for Khula. Learned counsel emphasizes that the Family Courts are dissolving the marriages on the basis of Khula in haphazard manner, which is against the Islamic injunctions. Contends that the proviso to sub-section 4 and subsection 5 of section 10 of the Family Courts Act, 1964 are contrary to Articles 4, 8, 9 and 10-A of the Constitution of the Islamic Republic of Pakistan, 1973. In order to supplement her contentions, learned counsel places reliance on SALEEM AHMAD and others v. GOVERNMENT OF PAKISTAN through Attorney General of Pakistan and 2 others **(PLD 2014 Federal Shariat Court 43)** and FEDERATION OF PAKISTAN v. AITZAZ AHSAN and another **(PLD 1989 Supreme Court 61)**.*
>
> *3. Points raised need consideration. Admit. Notice. Since vires of sub-Sections 4 and 5 of section 10 of the Family Courts Act, 1964 are in question, so notice under section XXVIIA of the Code of Civil Procedure (V of 1908) be also issued to the learned Advocate General, Punjab."*

2. Before moving further, it would be apposite to have a preview of necessary facts giving rise to this petition. The petitioner was married to the "respondent" on 14th February, 2002 according to Shariat Muhammadi and dower was fixed as Rs.50,000/- in the shape of gold ornaments. The spouses were blessed with three children, however, on account of some differences, "respondent" instituted a suit for dissolution of marriage on the basis of *khula*. On failure of

reconciliation proceedings, suit was decreed by way of order dated 19th December, 2023, hence this petition.

3. Learned counsel for the petitioner submitted that marriage is sacred relationship and every possible effort should be made to keep it intact. She also made reference to Ayat No.229 of Surah Al-Baqarah. Learned counsel emphasized that reconciliation in terms of Section 10 of the "Act, 1964" should be meaningful and marriage cannot be dissolved in a mechanical manner. It is contended with vehemence that before passing a decree for dissolution of marriage on the basis of *khula*, it is obligatory for the Family Court to hold reconciliation proceedings in an effective manner and also seek consent and willingness of the husband. Learned counsel emphasized that impugned order in the circumstances is not tenable under the law. Learned counsel, in the last, submitted that she would not challenge the *vires* of the law and to that extent does not press this petition. Placed reliance on *SALEEM AHMAD and others v. GOVERNMENT OF PAKISTAN through Attorney General of Pakistan and 2 others* ***(PLD 2014 Federal Shariat Court 43)*** *and* FEDERATION OF PAKISTAN v. AITZAZ AHSAN and another ***(PLD 1989 Supreme Court 61)***.

4. Mr. Khalid Ishaq, learned Advocate General, Punjab on the other hand submitted that marriage between Muslims can be dissolved by three modes *i.e.* Talaq, Mubarat and *khula*. Added that Talaq is an arbitrary and unilateral act of the husband, whereby he may divorce his wife whereas through Mubarat, spouses may agree to dissolution of marriage by their mutual consent. Learned Advocate General maintained that as to the right of divorce accorded to a man, a Muslim woman is granted the right to obtain divorce through *khula* by filing a suit in the court of law. Learned Advocate General also made reference to Section 2 of The Dissolution of Muslim Marriages Act, 1939, with the contention that it outlines the grounds on which a Muslim woman can seek a decree for dissolution of her marriage. In the last, learned Advocate General submitted that

no yardstick can be laid to regulate the reconciliation proceedings before the Family Court. In support of his contentions, learned Advocate General, made reference to *Syed AMIR RAZA versus Mst. ROHI MUMTAZ and others* **(2023 SCMR 1394)**, *Mst. KHURSHID BIBI versus Baboo MUHAMMAD AMIN* **(PLD 1967 Supreme Court 97)**, *Mst. BALQIS FATIMA versus NAJM-UL-IKRAM QURESHI* **(PLD 1959 (W.P.) Lahore 566)**, *Dr. MAHMOOD-UR-RAHMAN FAISAL versus GOVERNMENT OF PAKISTAN through Secretary, Ministry of Justice, Law and Parliamentary Affairs, Islamabad* **(PLD 1994 Supreme Court 607)**, *LIAQAT ALI versus DISTRICT COLLECTOR, GUJRAT and 4 others* **(2022 MLD 1195)**, *SALEEM AHMAD and others versus GOVERNMENT OF PAKISTAN through Attorney General of Pakistan and 2 others* **(PLD 2014 Federal Shariat Court 43)**, *ABDUL RAHIM versus Mst. SHAHIDA KHAN* **(PLD 1984 Supreme Court 329)**, *IMRAN ANWAR KHAN and others versus PROVINCE OF THE PUNJAB through Secretary Ministry of Law, Lahore and others* **(PLD 2022 Federal Shariat Court 25)** and *Mst. FAZEELAT JAN and others versus SIKANDAR through his Legal Heirs and others* **(PLD 2003 Supreme Court 475)**.

5. It would not be out of place to mention here that “respondent” though arranged her representation through Mr. Muhammad Naseer Awan, Advocate but he did not turn up without any justifiable reason so I have no other option except to proceed in his absence.

6. Heard. Record perused.

7. In the light of respective contentions, noted hereinabove, the matter in issue is now only confined and restricted to the scope and import of reconciliation proceedings as embodied in Section 10 of the “Act, 1964” as the petitioner is challenging the *vires* of impugned order on the ground that the Family Court has failed to conduct reconciliation proceedings in a concrete and effective manner before dissolving the marriage.

8. The spouses are admittedly Muslims hence they are to be governed by the Quranic injunctions. To this effect *Surah 2 Al-Baqarah, Ayat 229* is very pertinent for the resolution of matter in issue, which commends as under:-

ٱلطَّلَٰقُ مَرَّتَانِۖ فَإِمۡسَاكُۢ بِمَعۡرُوفٍ أَوۡ تَسۡرِيحُۢ بِإِحۡسَٰنٖۗ وَلَا يَحِلُّ لَكُمۡ أَن تَأۡخُذُواْ مِمَّآ ءَاتَيۡتُمُوهُنَّ شَيۡـٔٗا إِلَّآ أَن يَخَافَآ أَلَّا يُقِيمَا حُدُودَ ٱللَّهِۖ فَإِنۡ خِفۡتُمۡ أَلَّا يُقِيمَا حُدُودَ ٱللَّهِ فَلَا جُنَاحَ عَلَيۡهِمَا فِيمَا ٱفۡتَدَتۡ بِهِۦۗ تِلۡكَ حُدُودُ ٱللَّهِ فَلَا تَعۡتَدُوهَاۚ 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].

9. After going through the Islamic injunctions it can be observed with all clarity that Islam permits dissolution of marriage between Muslim spouses in three ways *i.e.* Talaq, Mubarat and *khula*. Needless to reiterate that Talaq is an arbitrary and unilateral act of the husband, whereby, he may divorce his wife. Mubarat on the other hand is one of the forms of dissolution of marriage whereunder spouses may agree to part their ways through mutual consent. Contrary to both, a Muslim woman is also vested a right to obtain divorce through the court of law by instituting a suit, which is termed as *"khula"*.

10. *"Khula"* denotes the right of a Muslim woman to seek dissolution of her marriage in which she gives or consents to give a consideration to the husband for her release from marriage as determined by the court. In addition, Section 2 of The Dissolution of Muslim Marriages Act, 1939 (hereinafter referred to as "Act, 1939) lays down the grounds on which a Muslim woman can seek a decree for dissolution of marriage. For ready reference and convenience, same is reproduced below:-

"**2. Grounds for decree for dissolution of marriage**.- A woman married under Muslim Law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely:-

(i) that the whereabouts of the husband have not been known for a period of four years;

(ii) that the husband has neglected or has failed to provide for her maintenance for a period of two years;

[(iia) that the husband has taken an additional wife in contravention of the provisions of the Muslim Family Laws Ordinance, 1961]

(iii) that the husband has been sentenced to imprisonment for a period of seven years or upwards;

(iv) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;

(v) that the husband was impotent at the time of the marriage and continues to be so;

(vi) that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease;

(vii) that she, having been given in marriage by her father or other guardian before she attained the age of [sixteen] years, repudiated the marriage before attaining the age of eighteen years:

Provided that the marriage has not been consummated;

[(viia) lian,

Explanation.- Lian means where the husband has accused his wife of zina and the wife does not accept the accusation as true.]

(viii) that the husband treats her with cruelty, that is to say,

(a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or

(b) associate with women of evil repute or leads an infamous life, or

(c) attempts to force her to lead an immoral life, or

(d) disposes of her property or prevents her exercising her legal rights over it, or

(e) obstructs her in the observance of her religious profession or practice, or

(f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran,

(ix) on any other ground which is recognized as valid for the dissolution of marriages under Muslim Law:

Provided that –

(a) no decree shall be passed on ground (iii) until the sentence has become final;

(b) a decree passed on ground (i) shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorised agent within that period and satisfies the Court that he is prepared to perform his conjugal duties, the Court shall set aside the said decree; and

(c) before passing a decree on ground (v) the Court shall, on application by the husband, make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfied the Court within such period, no decree shall be passed on the said ground."

11. There is, however, a mark distinction between dissolution of marriage through *"khula"* under the "Act, 1964" and "Act, 1939". To understand such distinction in better terms one cannot lost sight of recent judgment of the Supreme Court of Pakistan in the case of *Ibrahim Khan versus Mst. Saima Khan and others* **(Civil Petitions No.4657 to 4659 of 2022)**. Relevant extract from the same is reproduced below:-

> "11. Where a woman files suit for dissolution of marriage under the grounds of DMMA or through *khula*, there are procedural distinctions. Firstly, under Section 2 of the DMMA, various grounds (cruelty, assault, ill-treatment, etc.) are provided for judicial pronouncement of dissolving the marital relationship, which is also called *fuskh*. Hence, there must be some cause as per the DMMA to get a decree of dissolution of marriage under the DMMA. However, *khula* can be granted to a woman without establishing any ground or proving the cause to the court. Secondly, if the grounds under the DMMA are established by a woman, then Section 5 of the said law protects her right of dower as the same shall not be affected. Whereas in *khula*, she has to waive or forgo her right of dower. Lastly, in terms of procedure in the case of *khula*, once the pre-trial reconciliation fails under Section 10 of the Family Courts Act, 1964 (**FCA**), the court is bound to immediately pass a decree for the dissolution of marriage. Whereas the decree for dissolution of marriage under the DMMA can only be passed after the recording of evidence under Section 11 of the FCA. Therefore, termination of marriage under the DMMA

> or by way of *khula* exists in, distinct and different legal domains with separate consequences."

After having an overview of above principles, no cavil left to hold that *"khula"* and dissolution of marriage under the "Act, 1939" operate under entirely different legal systems, leading to distinct outcomes as well.

12. Since the petition at hand stems from an order of the Family Court awarding a decree for dissolution of marriage on the basis of *"khula"* in lieu of return of dower of Rs.50,000/- so it would be apt to restrict ourselves to the core issue relating to the true import of Section 10 of the "Act, 1964". For the purpose of ease of reference, it is reproduced hereinbelow:-

> "**S.10. Pre-trial proceeding**.-(1) When the written statement is filed, the Court shall fix an early date for a pre-trial hearing of the case.
>
> (2) On the date so fixed, the Court shall examine the plaint, the written statement (if any) and the precise of evidence and documents filed by the parties and shall also, if it so deems fit, hear the parties, and their counsel.
>
> (3) The Family Court may, at the pre-trial stage, ascertain the precise points of controversy between the parties and attempt to effect compromise between the parties.
>
> (4) Subject to subsection (5), if compromise is not possible between the parties, the Family Court may, if necessary, frame precise points of controversy and record evidence of the parties.
>
> (5) In a suit for dissolution of marriage, if reconciliation fails, 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 up to fifty percent of her deferred dower or up to twenty-five percent of her admitted prompt dower to the husband.
>
> (6) Subject to subsection (5), in the decree for dissolution of marriage, the Family Court shall direct the husband to pay whole or part of the outstanding deferred dower to the wife."
>
> (Underlining is supplied for emphasis)

From the bare glimpse of above referred provision of law, it clearly manifests that Subsection (3) makes it imperative for the Family Court to ascertain the precise points of controversy between the parties and attempt to effect compromise between them at the

pre-trial stage. Subsection (5), however, postulates that in a suit for dissolution of marriage, if reconciliation fails, the Family Court shall immediately pass a decree for dissolution of marriage and in case of dissolution of marriage through "*khula*", it may direct the wife to surrender upto fifty percent of her deferred dower or upto twenty five percent of her admitted prompt dower to the husband.

13. The survey of law and the precedents referred by the learned Advocate General, Punjab paves a path to discover the legislative history of right of *"khula"*. Right of "*khula*" of wife was identified for the first time in the jurisprudence of Pakistan in the case of *Mst. BALQIS FATIMA versus NAJM-UL-IKRAM QURESHI* **(PLD 1959 (W.P.) Lahore 566)**. The relevant extract from the judgment is reproduced below:-

> "3. In the appeal in the suit for dissolution of marriage, we find no reason to differ with the finding of the learned District Judge that the husband was in no way to blame for the *rukhsati* not taking place, and, therefore, the wife was not entitled to maintenance. This finding would have finished the appeal, but learned counsel for the appellant wife raised a new point that a khula is the right of wife, that is, the wife can at any time come to Court and demand a divorce on abandonment and restitution of any benefit which she may have received from her husband. As the point was one of pure law, we allowed it to be argued. In support of his argument, learned counsel for the wife placed reliance on what is contained in a book entitled " *Haquq-uz-Zaujain* " written by Maulana Abul Ala Maudoodi. In this book, Maulana Maudoodi has dealt exhaustively with the nature and incidents of *khula* and has recorded an emphatic opinion that *khula* is the right of the wife. He reproduces first the verse of the Holy Quran which says: " And if you fear that they (spouses) cannot be kept within the limits of Allah there is no blame on them or what she may give up to become free thereby." Maulana Maudoodi interprets these words as meaning that the wife will be entitled on payment to secure her release. He then supports his inference by reference to how the Holy Prophet acted in the well known cases of Sabit Bin Kais wherein the Holy Prophet had ordered Kais to divorce his wives on their restoration of what they had received from him. The commentator also quotes an instance from Hazrat Umar wherein he had allowed divorce to a woman on payment of some small amount because the woman had absolutely refused to live with her husband.
>
> 4. Maulana Maudoodi is not only a great religious scholar but comes from the orthodox school, and his opinion, by itself, could be the basis of a further investigation with respect to the rights of a woman for divorce. But there is some other authority too which supports

him. According to the opinion of Maulana Muhammad Ali expressed in "The Religion of Islam " at page 673, there is an equality between the spouses with respect to divorce. After quoting the following verse of Holy Quran, " And if you fear a breach (*shiqaq*) between the two, then appoint a judge from his people and a judge from her people ; if they both desire agreement, Allah will effect harmony between them, surely Allah is Knowing, Aware", and then referring to the following words, "And if they separate, Allah will render them both free from want out of His ampleness, and Allah is Ample-giving, Wise ", the learned commentator says:

> " This verse gives us not only the principle of divorce, which is *shiqaq* or a disagreement to live together as husband and wife, but also the process to be adopted when a rupture of marital relations is feared. The two sexes are here placed on a level of perfect equality. A breach between the two ' would imply that either the husband or the wife' wants to break off the marriage agreement and hence either may claim a divorce when the parties can no longer pull on in agreement. In the process to be adopted, both husband and wife are to be represented on a status of equality ; a judge has to be appointed from his people and another from her people. The two are told to try to remove the differences and reconcile the parties to each other. If agreement cannot be brought about, a divorce will follow."

In the beginning of the Chapter of *Khula* and *Mubarat*, Mr. Amir Ali says:

> " Previous to the Islamic legislation, the wives had no right to claim a dissolution of the marriage on any ground whatsoever. In special cases only the power of divorce was expressly reserved in their favour by contract. As a general rule, neither the Hebrews nor the pre-Islamic Arabs recognised the right of divorce for women. The Koran allowed them this privilege which had been denied to them by the primitive institutions of their country."

This paragraph would seem to lay down that the wife has a right of divorce, though it is true that it is not explained further in this chapter as to how this right is to be exercised. At page 519 of the same book, it is stated that so far as Shias are concerned, in case of *shiqaq*, arbitrator may be appointed to settle their disputes and if no settlement can be effected, the marriage ought to be dissolved. In Islamic Law by Aziz Ahmad, the Malki Law relating to *khula* is thus explained:

In *Bibi Sogra* v. *Muhammad Sayeed* (40 I C 672), Roe, J. had expressed the opinion, after reference to Muhammadan Law by Mr. Amir Ali, that if the wife wants to obtain a divorce without any justifiable cause, she has simply to abandon her claim to the settlement in order to secure a dissolution of her marriage."

4. The question is obviously an important one. We accordingly refer the following question to a Full Bench :-

Whether under the Muslim Law the wife is entitled to khula as of right ?

As we are making a reference in the appeal arising out of the dissolution of marriage, the Letters Patent Appeal in the suit for restitution of conjugal rights will have to remain pending till this appeal is decided.

OPINION OF FULL BENCH

KAIKAUS, J.---Briefly the facts leading to this reference are that the simple nikah ceremony of the appellant, Mst. Balqis Fatima, and the respondent, Mr. Najm-ul-Ikram, took place in Lahore on the 7th of October 1949. Before rukhsati could take place, disputes arose between the families of the parties so that the spouses never lived together. On the 2nd of January 1952 i.e., about two, years and three months after the nikah ceremony, the appellant filed the suit, out of which Regular Second Appeal No. 39 of 1957 arises, claiming dissolution of marriage, on the two following grounds :-

(1) That the husband had failed to provide maintenance for a period of more than two years ;

(2) that the husband was associating with women of evil repute.

While this suit was pending, the husband too filed a suit for restitution of conjugal rights. The two suits were consolidated. The trial Court found that the husband had failed to provide maintenance to the wife for a period of more than two years, and decreed the suit for dissolution of marriage. The suit for restitution of conjugal rights was dismissed because of the decree for dissolution. On appeal by the present respondent, the learned District Judge found that the wife was not entitled to maintenance because it was she and not the husband who was responsible for rukhsati not taking place. As this was the only ground on which the suit for dissolution had been decreed, the learned District Judge accepted the appeal and dismissed that suit. However, he was of the opinion that the relations between the parties had become so strained that it would not be proper to pass a decree in favour of the husband for restitution of conjugal rights. He, therefore, dismissed the other suit also.

2. The wife filed an appeal against the dismissal of her suit for dissolution of marriage, while the husband preferred an appeal in the suit for restitution of conjugal rights. The appeal of the husband was dismissed *in limine* by Yaqub Ali, J. and the husband has filed L. P. A. No. 26 of 1957 against that judgment. The second appeal of the wife (Regular Second Appeal No. 39 of 1957) and the Letters Patent Appeal of the husband both came up for hearing before me and Shabir Ahmad, J. In the Regular Second Appeal we found no reason to disagree with the learned District Judge on the question as to who was to blame for the *rukhsti* not having taken place and we were of the opinion that the wife was not, under the circumstances, entitled to maintenance. This finding would have been sufficient for the disposal of the, appeal, but a new point was raised before us. It was contended that *khula* is the right of the wife, i.e., the wife can at any time come to Court and demand the grant of divorce on restitution of any benefit which she may have received from the husband. This was a pure question of law which, if

conceded, would entitle the wife to a decree though the decree could be made only after she returned the benefit that she had received. Keeping particularly in view the fact that the learned District Judge had found the relations of the parties to be so strained as to stand in the way of a decree in the suit for restitution of conjugal rights, we allowed the point to be argued. Finding that there was some force in the contention-of learned counsel for the appellant, we decided to make a reference of the point raised to a Full Bench, in view of its great general importance. Following is the question which has been referred :-

> "Whether under Muslim Law the wife is entitled to *khula* as of right ?"

We find that in some authorities the word `khula' has been defined as an agreement between the husband and wife, and we want to make it clear that the question referred means no more than the following question :-

> "Is the wife entitled to dissolution of marriage on restoration of what she has received from the husband in consideration of marriage ?"

The two questions have for us an identical import for we are not using the word `khula' in the sense of an agreement but in the sense of a dissolution on restoration of benefit received.

> 3. The verse of the Qur'an which is the basis of the right of *khula* is Verse No. 229 of Sura Baqr, which runs-Divorce may be (pronounced) twice ; then keep (them) in good fellowship or let (them) go with kindness, and it is not lawful for you to take any part or 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 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, these it is that are the unjust."

4. This verse admittedly permits the termination of a marriage by the wife passing consideration to the husband. The question for consideration is whether this termination can be effected only by agreement between the husband and the wife or F whether the wife can claim such termination even if the husband be not agreeable. The first point that deserves attention is that the words "if you fear" are addressed to the *"ulil amr"* that is, the State, or the Judge. On this point there is no difference at all between the commentators and there could be no difference for the spouses are being referred to as `they' in this part of the verse. The words `if you fear' show that the judge is to determine if the circumstances are such that there is apprehension of the spouses not observing the limits of God. Now, what for is he to determine this question if after he has determined it, his finding is to have no effect on the matter ? It is not the view of any of the schools of Muslim Law that if the spouses agree to a separation still a finding by the Judge that there is apprehension of transgression of limits of God is essential. All jurists accept that if parties agree, no such finding is needed. If without

agreement there could be no termination of marriage and if in case of agreement nothing further was needed, the determination by the Judge would become meaningless. The reference to the Judge can only mean that he is entitled to pass an order even though the husband does not agree. The interpretation is supported by the two oft-quoted instances of *khula* ordered by the Holy Prophet. Both relate to Sabit Ibn-i-Qais. In the first incident, his wife Jamila came to the Prophet and stated her complaint in the following words :-

> "Oh Prophet of God. Nothing can bring me and him together. When I raised my veil, he was coming from the front with some men. I saw that he was out of them the shortest and the ugliest. I swear by God I do not hate him because of any defect in him, religious or moral, but I hate his ugliness. I swear by God that if it was not for fear of God I would have spit at his face when he came to me. Oh Prophet of God, you see how handsome I am, and Sabit is an ugly person. I don't blame his religion or his morals but I fear heresy in Islam."
>
> On hearing this the Prophet of God said to Jamila :-
>
> "Are you prepared to return the garden that he gave you". She said : "Yes, Oh Prophet of God, and even more". The Holy Prophet said : "No more, but you return the garden that he gave you", and then the Holy Prophet said to Sabit : "Take the garden and divorce her".

5. The second incident is of Habiba, the other wife of Sabit, and it is thus stated by Imam Malik and Abu Daud. "One day early in the morning when the Holy Prophet came out of his house, he found Habiba standing there. He inquired from her what the matter was and she said. "I and Sabit can never pull on together", When Sabit appeared, the Prophet of God said : `This is Habiba, daughter of Sehl. She has stated what God wished she should state'. Habiba said, "O, Prophet of God, let Sabit take from me whatever he has given me for that is all with me". The Holy Prophet told Sabit to take back what he had given her and to release her". In some versions the words used are "khale sabilaha" and in others "fariqha". Both of them mean "divorce her".

6. I may state here that there is a version of this tradition reported by Abu Daood and Ibn Garir as coming from Hazrat Aisha wherein it is stated that Sabit had beaten Habiba so as to break her bone, but as pointed out by Maulana Maudoodi (page 68 of Haquq-uz-Zaujain) it appears from the words imputed to Habiba by Ibn Maja that the complaint of Habiba was not of beating but of ugliness. She had used the same words as Jamila, that is, "if I did not fear God, I would spit at his face". It should also be noted that the Holy Prophet had ordered restitution of property by Habiba which indicates that the dissolution was not for fault of the husband. If the divorce was due to cruelty, there is no reason why the dower should have been returned.

7. This is how the Holy Prophet enforced the right of *khula*. In both these cases there was an order by him to Sabit to take back what he had given to the wife and to divorce her. In neither case was Sabit in any way to blame, and so far as Jamila is concerned, she

had expressly said that she found no fault with him and that the sole reason why she wanted a release was that he was ugly and she could not bear him, she being herself a handsome woman. In neither case did the Holy Prophet make any pronouncement as to the reasonableness of the attitude of the wife. He was just satisfied that the husband and wife could not amicably live together. He never asked for the consent of the husband.

8. The same appears to be the practice of the Khulafa-I-Rashidin. Before Hazrat Umar appeared a woman and her husband. The woman wanted a divorce. Hazrat Umar advised her to live with her husband, but she refused. At this Hazrat Umar shut her up in a dungeon which was full of refuse. After keeping her there for three days, he asked her how she had fared. She replied: "I swear by God, I have never passed more peaceful nights". At this Hazrat Umar said to the husband.

> "Give her khula even if it be in lieu of her earrings". (Kushf-ul-Ghumma). It will be observed that there was no inquiry into the grounds of the wife's refusal to live with the husband. Only Hazrat Umar was convinced that the wife was serious in her demand and was really unhappy with her husband what-ever the reason. No fault had been found with the husband.

9. Rabi, daughter of Maooz, approached Hazrat Usman for a *khula* in lieu of all that she owned. Hazrat Usman ordered her husband to take all that she had and to grant her a divorce.

10. Maulana Abul-ala-Maudoodi, whose position as a distinguished religious scholar is not open to any doubt, has in his book entitled "Haqooq-uz-Zaujain" dealt exhaustively with the question of the right of the wife to a *khula* and has recorded an emphatic and fully reasoned opinion that the wife can claim *khula* as of right, subject only to the existence of an apprehension that the spouses will transgress the limits of God. He says (page 61) "Muslim Law just as it has given to the husband the right to divorce the wife with whom he cannot pull on has also given to the wife the right to get a *khula* from her husband whom she hates and with whom she cannot live". After explaining that there is a moral and legal side to the exercise of the right of *khula* and that morally it is wrong for the husband as well as the wife to exercise the right of divorce or *khula* just in order to satisfy their animal passions elsewhere, he continues: "But law which fixes the rights of persons ignores this aspect. Just as it gives the right of divorce to the husband, it gives the wife the right of *khula* so that in case of need there may be a liberty to each to get a release from the bondage of marriage and neither party be forced to continue in marriage where there is hatred in the heart, objects of marriage are being frustrated and married life has become a torture." As regards the abuse of power thus granted to the spouses, the law places all reasonable restrictions on the exercise of their power, but then to a great extent leaves the matter to the good sense of the party, and really none but the party or the Almighty can determine whether the need of the party is real or whether he or she is only a seeker after sexual enjoyment."

11. The importance of the opinion of Maulana Maudoodi is enhanced by the fact that he belongs to the orthodox school. He is not a person against whom a charge of heresy or schism can be brought.

12. Maulvi Muhammad Ali, another great religious scholar, the author of commentary on the Qur'an and of numerous religious books has in his "Religion of Islam" expressed a similar opinion. He says (page 676)-

> " The right of the wife to claim a divorce is, not only recognized by the Holy Qur'an and Hadith but also in Fiqh. The technical term for the wife's right to divorce by returning her dowry is called khul, and it is based on the Hadith already quoted, and ti-a following verse of the Holy Qur'an. `Divorce may be pronounced twice ; then keep them in good fellowship 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' (2 : 229). By keeping `within the limits of Allah' here is clearly meant the fulfilment of the object of marriage or performance of the duties imposed by conjugal relationship. The dowry is thus a check on the party who wants the divorce ; if the husband wants to divorce the wife, the wife shall have the dowry ; if the wife wants the divorce, the husband is entitled to the dowry. But it is the judges spoken of in v. 4 : 35, and referred to here in the words `if you fear that they cannot keep within the limits of Allah,' that shall decide whether the husband or the wife is responsible for the breach and which of them is entitled to the dowry."

The word "dowry" is being used here in the same sense as the dower.

13. In 1956 a Commission was appointed by the Government of Pakistan to report on marriage laws. The Chairman of the Commission was Mian Sir Abdul Rashid, a retired Chief Justice of Pakistan. The report of the Commission is printed at page 1215 of the Central Gazette. With respect to the right of *khula* the report said:

> "The Commission is of the opinion that the provisions of the Dissolution of Muslim Marriages Act, 1939, do not require any modification. It. was also agreed that supplementary legislation may be undertaken to make the khula form of talaq more certain and precise. About khula, that is divorce sought by wife, there is a consensus of opinion that Islam has granted this right to the woman if she foregoes the mehr or a part of it, if it is so demanded by the husband. There is a universally accepted Hadith about a khula case which arose between a woman of the name of Jamila and her husband Sabit-ibn-Qais. The Holy Prophet granted the divorce on the basis of extreme incompatibility of temperament only ; no other accusation was made by the wife as a ground for the demand of divorce. We are recommending that incompatibility of temperament should not give the wife a right to demand a divorce except in the khula form."

14. In Aziz Ahmad's Muslim Law (page 235) the view of the Ahmadi (Qadiani) sect of Muslims is thus stated :-

> "*Ahmadiyya View*.-The Court has the power and must grant *khula* if it is so moved by the wife. It is maintained that incompatibility of temperament or hatred is a good ground for *khula* and the assertion of the wife that she hates her husband or that their temperaments differ must be accepted, provided that the Court may delay the decision for a reasonable time to assure itself that the wife is not acting under a temporary passion or under the influence of a third person. To be sure on the point, the Court may order her to give her husband an opportunity to see her and plead with her. If the wife refuses to obey the order of the Court, the decision may be postponed till she obeys it."

15. Amir Ali, the author of a well-known commentary on Muslim Law begins his chapter of *khula* and *mubarat* with the following words :-

> "Previous to the Islamic legislation, the wives had no right to claim a dissolution of the marriage on any ground whatsoever. In special cases only the power of divorce was expressly reserved in their favour by contract. As a general rule, neither the Hebrews nor the pre-Islamic Arabs recognised the right of divorce for women. The Koran allowed them this privilege which had been denied to them by the primitive institutions of their country.
>
> `When married parties disagree', says the Fatawai Alamgiri following the Hedaya and the Badaya, `and are apprehensive that they 'cannot observe the bounds prescribed by the divine laws, that is, cannot perform the duties imposed on them by the conjugal relationship, the woman can release herself from the tie by giving up some property in return in consideration of which the husband is to give her a khula and when they have done this a talak-ul-gain would take place.

This quotation gives the impression that the learned commentator regarded the passage in Fatawa-i-Alamgiri and the verse of the Qur'an on which the passage is based as recognising the right of the wife to secure a release, otherwise the words "Qur'an allowed them this privilege" would be inappropriate. Sir Rowland Wilson does not regard-this interpretation of the passage in Fatawa as impossible. He says (page 154 of Anglo-Muhammadan Law)-

> "As to judicial divorce for the husband's cruelty or adultery, the Hedaya and Fatawa-i-Alamgiri are silent, unless, indeed, we are to understand in a compulsory sense an isolated expression in an extract from the latter work, which is thus rendered by Baillie, page 304 : `When married parties disagree, and are apprehensive that they cannot observe the bounds prescribed by Almighty God (or, in other words, perform the duties incumbent on them by the marriage relation), there is no objection to the woman's ransoming herself from her husband, with property, in consideration of which he is to give her a *khoola*". If this means that the *kazi* must, or may, on the wife's demand, compel the husband to give her a *khula*, we must further suppose (1) that he can pass such a decree on mere

> proof of incurable disagreement, or incompatibility, irrespective of actual cruelty or other breach of conjugal duty ; and (2) that he can fix at his discretion the price at which the woman is to purchase her freedom. These propositions, if accepted; would to a certain degree assimilate the woman's position as regards divorce to that of the man, but the point has never come up for judicial decision in that form in British India. In Khalilal Rehman, (Burma, 1820), 49 I C 804, the grounds for a judicial divorce are stated in wide terms, including habitual cruelty, and perhaps even desertion and neglect."

And he adds his own opinion:

> "The Hadith in Tirmizi (1,368) that a woman who demands *khula* without necessity will loss heaven, implies that legally she can make good her demand, possibly without other reason than alleged `aversion' or in modern equivalent `incompatibility', but at least when she can satisfactorily show to impartial parties the impossibility of a happy married state."

16. Before proceeding further it will be proper also to reproduce the allied verse of the Qur'an which relates not to *khula* but to disagreement between the spouses and provides for the action that should be taken in cases of such disagreement. The two matters are connected for if the Qur'an does not envisage the continuance of a married life in case of a breach and provides for dissolution in such a case even without restoration of benefit, the claim of the wife to a *khula* as of right becomes stronger. That verse is No. 35, part 4, Chapter IV, and runs as follows :-

> "And if you fear a breach between the two, then appoint a judge (arbiter) from his people and a judge from her people; if they both desire agreement, Allah will effect harmony between them; surely Allah is Knowing, Aware."

This provision enables the judge to appoint arbiters in a case when there is a breach between the parties, one from the family of the wife and the other from the family of the husband, and the arbiters are first to make an effort at reconciliation. If they are unable to effect a reconciliation but are of the opinion that the parties should be separated, they are to be separated, although there is a difference of opinion as to whether the arbiters themselves have the right to order separation or whether that is only the jurisdiction of the judge. In Umedatul Qari, the legal position is thus stated-

> "One of the arbiters should be from the side of the man and the other from the side of the woman, but if such people who will bring about settlement cannot be got from the friends of the parties, then it is permissible to appoint strangers. Verily if they (arbiters). differ, their order will not be promulgated but if they agree, it (their order) will be enforced in its entirety without any delegation.
>
> "But there is a difference of opinion as to what is to happen if the judges (arbiters) agree on separating the parties. It is the opinion of (Imam) Malik, (Imam) Auzai and (Imam) Ishaq that it will be enforced independently of any authority and without the permission of the spouses. But the Kufies and (Imam) Shafei

> and (Imam Ahmad Ibne-i-Hanif are of opinion that they (arbiters) need permission because the right to divorce is with the husband ; if he agrees in this (divorce) well and good but if he does not (agree to divorce) then the judge will effect a divorce. Ibne-i-Abi Sheba narrates of Hazrat Ali that he (Ali) said that Allah has permitted the arbiters to join the spouses and to separate them. Shabi is of opinion that whatever the arbiters decide will be enforced. Abu Salma is of opinion that if the arbiters wish they may bring the spouses together and if they wish they may separate. Mujahid is of the same opinion."

17. It will be observed that although there is difference of opinion as to whether the arbiters themselves are capable of effecting a separation, there is no difference of opinion as to whether the Court can do so. The jurisdiction of the Qazi to effect a separation depends only on whether there is "*shiqaq*" between the parties, which means a breach. If the breach is established, he has authority to effect a separation though he will first appoint arbiters who will make an effort at reconciliation and if they come to the conclusion that the parties are not capable of living together as husband and wife in a manner that is in accord with the Muslim conception of married life, they would order a separation.

18. That in the case of "*shiqaq*" there is jurisdiction in the Qazi to order a separation does not appear to be a matter of contest and is supported even by a careful study of the judgments which are cited against the right of the wife to a divorce, that is, *Umar Bibi v. Mohammad Din* and *Saeeda Khanam v. Muhammad Sami*. Later in this judgment, there is a full discussion of both these cases, but I may refer even at this stage to an objection raised by one of the Judges in the second-mentioned case. It will be observed that the word used in this verse is "hakam" which is translated in some commentaries as "judge" and in others as "arbiter". One of the learned Judges had interpreted this as referring only to a conciliator. Whichever of these two meanings is adopted any contention that this verse only provides for reconciliation has, with all respect, to be rejected. A person called judge or arbiter cannot be only a conciliator. He must have a power of decision. The only reasonable inference from the use of this word is that the hakam has power to separate the spouses. Whether the order is by itself capable of enforcement as is stated by some jurists or whether there is to be superadded to it the order of the judge as is stated by others, is really a matter of procedure. The question is whether it is the husband or the authority appointed by the State that is to determine whether the relationship is to continue, and the answer must be that it is the authority appointed by the State and the matter does not depend on the will of the husband. The answer must further be that the discretion of that authority is not hedged in by any rules. If it considers further continuance of marriage not proper, it puts an end to the marriage. As will appear from the quotation from Umdetul Qari, the view that hakam is to decide whether the relationship should continue has the support of as great a person as Hazrat Ali.

19. Amir Ali (Muhammadan Law, volume II, page 519, 1929 edition) says that the jurisdiction of the Qazi to grant a divorce is "founded on the express words of the Prophet : `If a woman be prejudiced by

a marriage, let it be broken off.' The Shiah Bihar-Anwar also lays down that in case of *nushuz* or *sheqaq* arbitrators may be appointed to settle the disputes, or the Judge may intervene ; and "if no settlement can be effected, the marriage ought to be dissolved".

20. The question which we have to decide in this reference is really a part of the broader question as to the attitude of Islam towards a discord between the husband and the wife. If a husband and the wife cannot live together in peace and harmony, does Islam allow them to separate or does it force them to continue? In this connection let us first refer to those verses of the Qur'an which give the Qur'anic concept of married life. "It is one of His signs that He created from -amongst yon your mates that you may find solace in their company and created between you love and kindness". (Arroom 3.1) "It is He who created you from a single person and made your mate of like nature that you find solace in her." (Araf 24) "You are apparel for them and they are apparel for you." (Baqar 23). Little doubt is left in one's mind as to the answer to the broader question on a consideration of the verses relating to Shiqaq and Khula along with these verses. Maulana Abul Kalam Azad while dealing with the interpretation of the verse relating to *shiqaq* thus answers this question. (Tarjman-ul-Qur'an, page 284) :-

> "It is not contemplated by a marriage that the parties should be tied together in all circumstances, nor that the wife should be just a means of satisfaction of the passions of the husband.
>
> The object of the marriage is the creation of a perfect and happy life by the conduct of the spouses and such a life can only be created if there be mutual love and affection and if the limits imposed by God be observed. If for some reason this is not possible, the object of the marriage has been defeated and it is necessary that the door be opened to the parties for a change. If on the object of the marriage being defeated, separation has not been allowed to the parties, this would have been a cruel limitation of the right of free choice and society would have been deprived of a happy married state of life."

21. Law in the Middle East is a treatise on Muslim Law as administered in the Middle East, and is a collection of contribution made by a number of scholars of Muslim Law. It thus answers the question (pages 146/147) :-

> "It is decreed that the fundamental principle of the marriage contract is that it is permanent and is to endure as long as the spouses live. But in order for it to continue it is not alone sufficient for the *shari'a* to lay down the law that it is permanent; the love which binds the two spouses together must continue also, for it is the tie on which the continuation of true married life depends. But the spouses might develop a strong aversion to each other, thus making love difficult. In such a case one of three choices must be made : (1) To continue the marriage despite this strong aversion, thus giving rise to ill-will and rancour. The continuation of this situation would not be to the interest of the family ; (2) Physical separation while preserving the married state. This would be an offence against morality and might drive the two parties to vice. (3) Divorce, which breaks the

> marriage-bond and makes an act of ill-will out of what had originally been an act of blessing. This is the soundest way, even though it means the destruction of the family.
>
> "If, then there must be divorce when aversion is strong, in whose hands shall the decision regarding divorce lie ? Shall both parties decide it jointly, shall the law decide it, or shall one of the two parties decide it ?
>
> "There is no doubt but that if the tw9 parties agree on divorce it must be carried out. It is only necessary to see that this agreement has not taken place in a momentary fit of anger which might quickly pass away ; Islam has made provision for such an eventuality as we shall make clear.
>
> "There remain the other two cases, namely whether the Judge (cadi) is to determine when divorce can take place or whether this can be done by one of the two parties.
>
> "If the woman wants a divorce it can take place only by decision of the cadi because the husband has undertaken financial responsibilities with regard to this marriage ; he has made an advance payment on the bride-price and is to pay the balance upon divorce ; he has furnished the house and has incurred many expenses. If the wife could divorce him on her own responsibility he would lose all that he had spent on her. It is therefore necessary for the cadi to intervene in order to ascertain that she has requested a divorce because she has been wronged. If such is the case, then the husband bears the B consequences and loses the money which he has spent on her. If it is established that the aversion is on her part and that it is the cause of her seeking a divorce, then the cadi divorces them on condition that she reimburse the husband for all that he has spent on his marriage. This is the procedure of the school of Malik which was the practice also of some of the Companions of the Prophet and their successors. The intervention of the cadi was for the purpose of preventing the husband from being wronged if it were she who bore the aversion to him, so that the husband would not lose the money which he had spent on her."

22. I may also refer here to the question as to whether there are any limitations on the power of the Qazi to dissolve a marriage. That the Qazi has authority to dissolve a marriage is universally accepted. But is this power of his subject to any limitations ? The Qazi dissolves a marriage if the husband is impotent or suffers from leprosy or insanity or if he has been absent for a long time or if he is unable to maintain the wife or to perform the marital obligations. Are these grounds enumerated in the Qur'an or the Hadith ? Let me state that neither the Qur'an nor the Hadith enumerates the ground on which dissolution can be brought. The Qazi has been dissolving marriages on the grounds aforesaid because he found that continuance of the marriage in the circumstances was not just and proper. The only limitation on the power of the Qazi to dissolve the marriage is his own conscience-his judgment that the marriage should not under the circumstances be continued. If the parties cannot live together as Islam intends they should live, they are to be separated. If the authority of the Qazi to dissolve a marriage were based on the verse relating to *shiqaq*, even in that case the only

limitation on his part would be that a breach should exist between the parties. However, his jurisdiction goes beyond that for he can dissolve a marriage on the ground of impotency, insanity or absence of husband, or option of puberty, none of which is a case of *shiqaq*. His jurisdiction is based on the simple fact that Islam regards the marriage contract as being capable of termination. It has to be terminable because it is not a reasonably possible view that a marriage must continue even though the husband misbehaves or is unable to perform his obligations or for no fault of the wife it would be cruel to continue it.

23. To the husband the law grants full power of divorce. He can put an end to the marital tie at will whether he has a ground or not. It would be reprehensible that he should divorce one wife and take another just for sexual enjoyment, yet the law places no restrictions on his power of divorce and leaves the matter to his good sense. If such power be granted to the husband, why should there be a great disparity between the rights of the wife and the husband? One can understand that the husband having paid or taken on himself the responsibility of payment of dower, the wife should not be allowed to put an end to the contract so as to appropriate that which is paid or promised by the husband and she should be forced to restore the benefit she has taken. It is also argued sometimes that the female is fickle-minded and may on a passing fancy or a sudden impuse effect a separation. But assuming without conceding that in this respect the male is better than the female, the objection can be met with by giving the right to pronounce a divorce in a case where the wife wants it to the Qazi and not to the wife herself. The Qazi will in that case be able to see whether there is really any dispute between the parties and whether the wife is serious in her demand for dissolution. But it does not seem reasonable that while to one of the two contracting parties has been granted a plenary power to put an end to the contract, there should be no power given to the other party and the wife must in order to get a release prove some such misconduct on the part of the husband as will disentitle him to the continuance of the marriage. The wife ought, in reason, to have a right similar to that of the husband subject only to the order of the Court. She- should approach the Qazi who may advise her and make an effort to effect a reconciliation, but if she be adamant and the Qazi apprehends that the limits imposed by God will not be observed, she can only be ordered to restore all the benefits she has received. The rights of the contracting parties should as far as the circumstances permit beat a par.

24. Let me review the argument in brief and state my conclusions. The only proper interpretation of the verse relating to *khula* is that *khula* depends on the order of the judge and not on the will of the husband. That is the implication of the words "if you fear" being, addressed to a judge, or the head of the State. The judge ought to grant *khula* if he finds that "they will not observe the limits of God". Contemporary opinion is unanimous on this interpretation. As regards the verse relating to *shiqaq* the clear implication of "arbiter" is that there is power to order separation and the verse does not contemplate an attempt at reconciliation alone. So far as the power of the Qazi is concerned, there does not appear-to be any dispute

that he will be able to separate the parties in case of *shiqaq*. This would appear from the quotation from the Umdatul Qari. Islam does not force on the spouses a life devoid of harmony and happiness and if the parties cannot live together as they should, it permits a separation. If the dissolution is due to some default on the part of the husband, there is no need of any restitution. If the husband is not in any way at fault, there has to be restoration of property received by the wife and ordinarily it will be of the whole of the property but the judge may take into consideration reciprocal benefits received by the husband and continuous living together also may be a benefit received. The jurisdiction of the Qazi to dissolve a marriage in cases of *shiqaq* is limited only by what is stated in the t Qur'an, i.e., "if you fear a breach" which means that there is real discord between the parties, and in the case of *khula* by the words "If you fear that they will not observe the limits of God". While effecting separation, the Qazi adjusts the financial matters so as to direct a partial or total restoration of the benefits received by the wife.

25. It may be objected that we would be, granting to the wife for the first time a right of release from the marital tie and it may be asked whether it is open to us to adopt a course different from that laid down by the old jurists. There area number of replies to this objection. The first is that no Hanafi authority has been cited before us which may deal with the question as to whether the wife is entitled to a divorce on restoration of benefit, and it cannot be said that we are in direct conflict with any Hanafi authority. Parties are admittedly Hanafis. In fact before us no ancient jurist has been cited at all who may have discussed the question. The second reply is that there is admittedly jurisdiction in the Qazi in accordance with the verse relating to *shiqaq* to separate the spouses. As the quotation from Umedatul Qari shows there is no dispute as to the power of the Qazi to order a separation though there is dispute as to the power of the arbiters without the order of the Qazi. The only condition of this jurisdiction is the existence of discord. The difference between the jurisdiction granted by the verse relating to *shiqaq* and the jurisdiction granted by the verse relating to *khula* is that between circumstances that constitute *shiqaq* and circumstances that will raise an apprehension that the limits of God will not be observed. I do not think there is much difference between the two jurisdictions. If there is shiqaq, the parties will not be observing the limits of God and vice versa. The two verses should be read together and once we accept the jurisdiction of Qazi to order dissolution in case of *shiqaq*, there would be little difficulty in holding that the Qazi can order a *khula*.

26. Even if it- were to be held that the passage reproduced from Umedatul Qari does not establish that all schools accept the jurisdiction of the. Qazi to dissolve marriage in case of *shiqaq*, it cannot be denied that Imam Malik does hold this opinion and according to a well-recognized rule as between the different Sunni Schools the difference of opinion is not such as is regarded a matter of conscience and absolute compliance, and it is open to a Qazi of one school to decide according to the doctrine of another school. I reproduce below two passages from Abdur Rahim's jurisprudence

which will clear the misapprehension that appears to exist on this question :-

> "No doubt the four teachers had each his own followers and these men, as time progressed, devoted themselves more and more to the task of developing the particular doctrines of their respective masters until we arrive at the age of the writers on Usul, when the labours of these jurists who devoted themselves to the separate systematization of the principles laid down by the early teachers must have accelerated the tendency to form into distinct Schools. But even in their time the question of a difference of opinion among the masters was regarded as a matter for discussion and controversy, and it was not supposed that, because a certain view had found vogue among the principal exponents of a particular School, it was on that account binding on the conscience of a Sunni Muhammadan or on the Courts of justice in preference to any other view which had the support of some other Sunni School. It was not until very modern times that attempt was made by means of the doctrine of Taqlid to confine the Court and the jurists to one of the four Schools of law as distinguished from the others" (page 178).

> "When a question depends upon juristic deduction a Qadi belonging to one School of Sunni law such as the Hanafi may decide it according to the Shafi'i law, if he prefers that view, or he may make over the case, to a Shafi'i Qadi for decision, if there is one available. In support of this a number of cases are mentioned. For instance, a Hanafi Qadi following the views of other Sunni Schools, in preference to those of his own School to the contrary, may declare that divorce by a drunken person is not valid, uphold a marriage contracted without two witnesses being present as valid, set aside the marriage of a minor contracted by his father in the presence of profligate witnesses, uphold the sale of a *muddabar* and perhaps of an *ummi walad* and so on. That this is the correct view of the law on the subject cannot be doubted not only upon principle but having in regard the array of authorities cited in its support, such as As-Siyaru'-I-Kabir, Jami'tul Futawa, Khazanutu'1-Muftiin, Majma'u'n-Nawazil, Al-Zakhira, Futawa Rashidu'd-din, Shaikhu'l-Islam,Abdu'1-Wahabu'ush-Shaibani, Shaikhu'1-Islam, Ata-ibn Hamza, and others. (Pages 180 and 181 of Abdur Rahim's Muslim Jurisprudence).

27. The third reply is that we are really dealing with the interpretation of the Holy Qur'an and on a question of interpretation we are not bound by the opinions of jurists. If we be clear as to what the meaning of a verse in the Qur'an is, it will be our duty to give effect to that interpretation irrespective of what has been stated by jurists. *"Atiullah-ha-wa Ati-ur-Rasul"* is the duty cast on the Muslim and it will not be obedience to God or to the Prophet if in a cafe where our mind is clear as to the order of the Almighty or the Prophet we fail to decide in accordance with it. We are concerned here with the interpretation of the verse relating to *khula* and as. I have already stated its interpretation must be that the Court or the State has authority to direct a *khula*. Similar considerations apply to the interpretation of the traditions of the Prophet.

28. I will now deal with the cases that are cited against the right of the wife. The first case is Mst. Umar Bibi v. Mohammad Din. The allegations in that case were that the wife hated the husband and that it was not possible for her to live with her husband in peace and comfort. On these allegations two pleas were based : (1) The wife was entitled to a *khula* even though the husband be not willing, and (2) incompatibility of temperament, dislike or even hatred which arises justifiably or without justification can be a good ground for divorce. Abdur Rahman, J. (with whom Sir Traver Harries, C. J. agreed) recorded, in the first place, two preliminary findings, one relating to the jurisdiction of the Qazi and the other as to the meaning of the word "recognized" in section 2 (ix) of the Dissolution of Muslim Marriages Act. He was of the opinion that the jurisdiction which the Qazi exercised under the Muslim Law vested in the Civil Courts and he was of opinion too that although the word used in section 2 (ix) of the Dissolution of Muslim Marriages Act is "recognised", it only means a ground on which a marriage could be dissolved if Muslim Law was applicable and did not imply that it was a ground which was already recognised by Muslim jurists. With both these conclusions I am in entire agreement.

29. On the first question that was raised before him, i.e., one relating to the right of the wife to a *khula*, the learned Judge simply referred to the definition of *khula* in Hedaya, Durrul Mukhtar and Baillie where the word `*khula'* was stated to be either an agreement or an act of the husband, and after quoting the definition the learned Judge said that the definitions left "no room for doubt that in cases of *khula*, *mubaraat* or ordinary *talaq* it is a husband or a person (including the wife herself) who has been authorised by the husband who can effect a khula divorce and that it is not possible for a Qazi or a Court to do so (*khula*) in view of the powers vested in either of them." Beyond a reference to the definition there is no discussion of the subject at all and there is no reference to the verse of the Qur'an dealing with *khula*.

30. On the second question the learned Judge began by saying :-

> "It will then become possible for any woman to get rid of the marriage tie-fickle minded and impressionable as she temperamentally is-on account of a passing fancy and besides being open to the objection that she would be taking advantage in that case of her own wrongful act and conduct, it will make the marriages more or less a farce."

When the verse relating to *shiqaq* was relied upon before the learned Judge for the proposition that if breach is apprehended, the marriage can be dissolved, the learned Judge said-

> "But I do not read any such indication in the verse. It only provides for a procedure, as I read it, to bring about a reconciliation, and contains a direction to (Ul-il-Amr) or a Qazi to appoint an arbiter from the husband's relations and another from the wife's relations whenever a breach is apprehended between the spouses. There is nothing, however, in this verse which could be read as authorising the arbiters to dissolve the marriage bond if they are unable to bring about a settlement or reconciliation."

The learned Judge then quoted the passage from the Umedatul Qari which I have already reproduced and said-

> "It will be noticed that out of the four Imams, so well recognized in India, there is first of all a difference according to this commentary between three Imams in regard to the question whether the decision of arbiters, if they were unanimous, would be enforced with or without the permission of the husband as it was he alone who held the power to give a divorce-Imam Shafei and Imam Ahmad Ibn-i-Hambal being of the view that it could be enforced only with the husband's authority."

31. This is, with all respect, not a correct interpretation of that passage. The authority of the Qazi has not in that passage been doubted. The only question was whether the arbiters could themselves effect a separation or whether the Judge's order was necessary. The learned Judge then quoted from Tafseer-i-Kabeer where there is cited an instance of Hazrat Ali that he directed the arbiters to separate the spouses if they came to the conclusion that they should be separated and ended by saying---

> "I am thus of opinion that if an (Hakam) is not satisfied about (Shiqaq) (breach) or if he does not appoint arbiters from amongst the relations of either spouse or even when so appointed they do not agree as to separation, a divorce cannot be given. Moreover, according to the authorities to which I have referred I consider it doubtful whether a divorce could be given without the husband's consent even if the arbiters were agreed as to the separation. As to the tradition about Jameelah, wife of Sabit-bin-Qais reported, as above indicated, in Sahi-ul-Bokhari, it does not take us very much further. It is true that a divorce had been effected in that case but it must not be overlooked that the Prophet of Islam had ordered Sabit in that case to divorce his wife Jameelah in the words "Talaqaba Tatliqa" (give her an irrevocable divorce) according to the tradition reported at page 794 and "Amreho Jafarqaha" (the Prophet ordered him and brought about separation) according to what is reported at page 795. In either case the divorce is reported to have been granted by Qais and not pronounced by the Prophet although it may be admitted that out of reverence that Muslims had for the Prophet of Islam, it would have been impossible for Qais to disobey his order. The point, however, remains that the divorce was granted by Qais and not by the Prophet."

32. So the learned Judge did accept at least in the beginning that if the Qazi finds *shiqaq* he can order a separation. I have already stated my interpretation of this verse. In all translations of the Holy Qur'an the word "Hakam" is translated only as judge or arbiter and `arbiter' cannot mean one who is merely a conciliator. There is also the incident of Hazrat Ali. In any case, the learned Judge too does not reject the proposition that the Qazi can dissolve the marriage if there is *shiqaq* and that is all that I say. I have already stated that between the circumstances that constitute *shiqaq* and those that lead to an apprehension that limits of God would not be observed there is little difference.

33. As regards the argument with respect to the Hadith relating to Sabit-bin-Qais that Sabit granted a divorce out of reverence for the Prophet, let me say, with all respect, that this is a misunderstanding of the attitude of the Holy Prophet towards his followers. The Holy Prophet never imposed his will on anybody where he was not entitled to force it as the Law-giver and the head of the State. He was very scrupulous of the rights of others. If in a matter where he was not entitled to pass an order it was his desire that a person should act in a particular manner, he would advise that person but at the same time would take care to point out to him that he was not bound to act in accordance with the advice and there are cases where the advice given was not accepted. The Holy Prophet would only order a person to do a thing if he as the head of the State was entitled to do so.

34. The second and the more important case against the right of the wife is *Sayeeda Khanam v. Muhammad Sami.* In that case the wife had claimed a dissolution of marriage on grounds of cruelty, failure to maintain, failure to perform marital obligations, accusation of adultery, incompatibility of temperament and aversion. The trial Court held that incompatibility of temperament was proved but it found itself unable to give relief on that ground because of Mst. Umar Bibi v. Muhammad Din (A I R 1945 Lah. 51). It decreed the suit, however, on grounds of cruelty and accusation of adultery. Its findings as to cruelty in the words of Cornelius, A. C. J., were the following:-

> "The plaintiff had undergone many privations and sufferings. Owing to a mishap to a member of the husband's family shortly after she entered it by marriage, she was described as *manhoos*. Her visits to her own relations were disapproved, and she was beaten whenever she stayed with her relations too long. Visits by her relations to her were also disapproved, and these led to the husband suspecting her of immorality. He carried his suspicion so far that he would not let her go to the kitchen, in case she might meet the cook there. When she protested against his accusations of immorality, he beat her. He did not care for her to look well, and, therefore, refused to allow her to wash and dress her hair. Once in the presence of one of her friends he beat her with a broom."

On appeal the learned District Judge disagreed with the trial Court on the question of cruelty. He was of opinion that the wife was self-willed and self-opinionated. He accepted that the wife disliked the husband but was of the opinion that she had to suffer this marriage till the husband gave her an excuse for getting the marriage dissolved. He said-

> "Among other things she seems to dislike her husband because she believes that he suffers from gout and also from some disease of the chest. I can understand the plaintiff's desire to get rid of a man whom she did not select and who is not up to her mark now, but so long as he chooses to retain her and so long as he does not give her an excuse for seeking the cancellation of her marriage with him, the ill-fated union must continue".

In the High Court, Kayani, J. (as he then was) was of the opinion that the above-quoted finding of the learned District Judge was sufficient to establish incompatibility of temperament. He was not inclined to agree with *Mst. Umar Bibi v. Mohammad Din* that incompatibility of temperament was not a good ground for dissolution and he referred the matter to a Full Bench.

35. In the Full Bench, Cornelius, A. C. J., (with whom the other learned Judges of the Full Bench concurred) though he agreed that there was improper conduct by the husband did not accept that the circumstances of the case fell within "incompatibility" of temperament". I reproduce below his finding on this question verbatim:-

> "There are a number of acts of alleged cruelty adduced by the plaintiff, in regard to which she has led evidence, and for the purpose of determining whether there is indeed incompatibility of temperament, it is open to us to take these various acts into account. They have already been mentioned above, and having regarded them both individually and collectively with care. I fail to see in them proof of such a degree of difference of dispositions or of reactions to particular incidents and influences, or even of lack of sympathy as would qualify for the description, `incompatibility of temperament'. The instances are more readily traceable to bad manners, tendency to suspect the plaintiff's character, tendency, to give expression to such suspicion, and tendency to use violence towards the wife, on the part of the husband. For the display of bad manners, the plaintiff was not at all responsible ; she did not time her arrival in the family herself and, therefore, it cannot be said that her husband's description of *manhoos* applied to her was his reaction to anything said or done by her. As regards the imputations of immorality, they arise out of visits by the plaintiff to her kitchen and to her relations, and here again, there is no question of reaction on the part of the husband to anything in the nature of a characteristic act by the plaintiff and, therefore, it is impossible to infer any clash of disposition here ; at the most, a defect of mentality in the husband may be deduced. To the same category belongs his refusal to allow her to dress and look well. There remain the allegations of beating, and this is also of unilateral effect indicating a fault in the nature of the husband. Therefore, I would be inclined to say that in the present case, the evidence is hardly adequate to draw a conclusion of incompatibility of temperament between the spouses. For that, it would be necessary, by means of inferences drawn from instances of behaviour as between the spouses, to gain an impression concerning the mental characteristics and the general disposition and frame of mind of each of the spouses and thereafter to draw the conclusion that, having the minds that they possessed, it was impossible for them to adapt themselves to each other, and, therefore, they were incapable of living together in harmonious association. As I have remarked, the evidence on the record is insufficient for making such a survey and examination of the mentalities of the spouses in this case."

This finding would have disposed of the case but the learned Judge found that in the order of reference aversion towards the husband

which would constitute *shiqaq* was also mentioned as a ground for dissolution of marriage and as the factum of aversion was admitted, the learned Judge proceeded to consider whether *shiqaq* could furnish a ground for dissolution. HP dealt first with the tradition of the Holy Prophet relating to Jameela wife of 8abit. He was of the opinion that the version in the Hadith in Bokhari was a condensed one and did not state all the facts and be quoted the following extract from the Tafsir-ul-Kabir of Imam Razi :-

> "It has been reported that this verse (i.e. Verse 35 of Chapter IV) was revealed respecting the case of Jamila daughter of Abdullah son of Ubayy and her husband Sabet son of Qais son of Shenlas. The facts were that she hated him with intense hatred and he loved her with intense love. She came to the Holy Prophet and said : Effect separation between me and him and I hate him. I saw him, from the side of my veil, coming amongst people. He was of the shortest stature, the ugliest in face and blackest in complexion. I do not prefer infidetily (Kufr) after having accepted Islam. Sabet addressed the Prophet as follows `O Prophet of Allah, order her that she should return the garden I gave her'. The Holy Prophet said to her : `What have you to say'? She replied : 'I agree and I will give more'. Then the Holy Prophet said : `No, only the garden'. Then the Holy Prophet said to Sabet : Take from her what you gave and clear her way Sabet did this and it was the first khula in Islam."

The learned Judge was of opinion that this was a case where the husband had himself made an offer to grant a divorce if the wife returned his orchard to him. He went on to say that if there was any doubt in his mind as to the correctness of interpretation that doubt was dispelled on a reference to the following two traditions of the Prophet :-

> "1. Saoban reported that the Messenger of Allah said: Whichever woman asks her husband for divorce without fault, the fragrance of paradise is unlawful for her.
>
> "2. Ibn Omar reported that the Apostle of Allah said: The most detestable of lawful things near Allah is divorce."

It was quite natural for Cornelius, A. C. J., to accept the version given by so learned a person as Imam Razi and no further effort seems to have been made by learned counsel appearing in that case to find out the exact words used by the Holy Prophet or the manner in which the incident took place, i.e., whether it was just an offer by the husband or whether he granted a release in obedience to the order of the Holy Prophet. It was a matter to be decided with reference to the various versions given in the compilations of traditions, but even the version in the Tafsir-ul-Kabir is that when Jameela told the Holy Prophet that she found no fault with her husband but wanted a divorce as she hated him and said : "Effect a separation between me and him as I hate him". The Holy Prophet never said : "You have no ground for dissolution and I cannot dissolve the marriage. It is only if your husband agrees that you can get a release". If he was powerless to interfere (in fact, according to tradition No. 1 he should have told her that the fragrance of heaven would be unlawful to her if she asked for a divorce), that is what he

would have told her, but the Holy Prophet obviously sent for Sabit. He never told Sabit that it was up to him to agree or not. I have already stated and I repeat that the Holy Prophet was scrupulous about the rights of other persons and never assumed authority where he had none. He would always explain when he was giving advice that it was open to the person to whom he was tendering advice to accept his advice or not. One point to remember is that according to Tafsir-ul-Kabir, Sabit had intense love for Jameela. Does it seem reasonable to infer that he will agree of his own accord to give her a divorce. He would know well that the Prophet would not take it ill. That was the way of the Holy Prophet. He was never offended if his advice was not taken, for he recognized the rights of all to act as they like if they are not prohibited from so acting by law. Does the whole incident that is related in this Hadith create an impression that the Holy Prophet did not consider Jameela entitled to a dissolution. Even according to the Tafsir-ul-Kabir Sabit had said : "O Prophet of Allah, `order' her that she should return the garden I gave her." Was not the Holy Prophet passing orders? Sabit did not say "I am not prepared to grant a divorce till she returns my garden." He understood that the Holy Prophet was giving orders. And the Holy Prophet had said to Sabit : Take from her what you gave her and clear her way". Was this not an order ? When Jameela said she was prepared to give more, he said : "No, only the garden". This too was an order. The Holy Prophet was obviously deciding a case. 1t may also be stated here that although Imam Razi is entitled to great respect he is only a commentator and he has to take the tradition from some traditionist. His source is not stated and it is not clear wherefrom he got his version. If there was any real difference between his version and that in Bokhari, we would be entitled to accept the version in Bokhari. Cornelius, A. C. J., says this was according to Imam Razi, the first *khula* in Islam. Of course, it was, but it does not mean that it was just a matter of agreement.

36. It is unfortunate that before the learned Judge only this tradition was quoted. If to this tradition had been added the other tradition relating to the other wife of Sabit Bin Qais and the orders passed by Hazrat Umar and Hazrat Usman in cases already referred to where they ordered the husband to grant *khula*, I wonder if the learned Judge's interpretation would not have been affected. It will be observed that Hazrat Umar and Hazrat Usman had used the word `*khula'* when passing orders so that it will be impossible to argue that *khula* can be the result only of an agreement and not of an order passed by the Qazi. It is noteworthy too that there is no reference in the judgment to the verse of the Qur'an which deals with *khula* although the discussion is as to the right of the wife to *khula*. The words *'in khiftum'* in the verse which are according to unanimous opinion addressed to, the person in authority, the Judge or the `*ulil amr'* become wholly inappropriate if there is no authority which such person is to exercise.

37. The learned Judge has regarded the two traditions quoted above as supporting the interpretation he has put on the tradition relating to Jameela. I say with great respect that they support the opposite interpretation. If a woman had not the right to get a khula without fault of the husband, what is the significance of saying that

if she asks for a divorce without fault of the husband, the fragrance of heaven will be denied to her ? It is only if she has option of asking for a divorce that this tradition will have a meaning. Sir Rowland Wilson (page 154 of the Anglo Muhammadan Law) has in a passage which I have already quoted anti which I will repeat, made the same inference from this Hadith. He says:

> "The Hadith in Tirmizi (1,368) that a woman who demands khula without necessity will lose heaven, implies that legally she Fan make good her demand, possibly without other reason than alleged `aversion' or in modern equivalent `incompatibility', but at least when she can satisfactorily show to impartial parties the impossibility of a happy married state."

It is pertinent also to observe that the Holy Prophet was a party to the dissolution of the marriage of Jameela who was asking for a divorce without any fault of the husband, and if this tradition be accepted as authentic, he was a party to her deprivation of the fragrance of heaven. If the Hadith be authentic, it can only mean that religion grants rights to do acts which it disapproves and in fact the second tradition quoted is the strongest proof of this proposition. Divorce is regarded as detestable, yet divorce is allowed. No one would argue on the basis of the Hadith which says divorce is detestable that there is no power of divorce and similarly it cannot be argued that because fragrance of heaven will be denied to a woman who asks for a divorce without fault of the husband, she does not possess the option to have a *khula*.

38. The learned A. C. J., then entered upon a discussion of the verse relating to *shiqaq* and held that the word `Hakam' did not mean either judge or arbiter as it appeared in the various translations of the Qur'an. He said :-

> "I am of the opinion that the meaning of the word `Hakama', which should be accepted for the purposes of placing a correct interpretation upon Verse 35, is that which is in contradistinction with the judicial function. Having regard again to the Organisation of society, among the peoples to whom this Scripture was revealed, viz., on a tribal and family basis, it becomes reasonably possible that by hakama is meant persons from the tribes of the respective spouses who exercise authority over the members of their tribes to such a way that they are capable of restraining such person from acting in any particular way, or from acting wrongly, and such persons could only be those who were acknowledged heads of the tribe, i.e., the legitimate chiefs or otherwise the elders of the tribes."

No authority has been quoted for this interpretation and it is not suggested that the word `Hakam' has ever been used in the Arabic language in the sense of a tribal elder. This interpretation assumes (1) that some authority existed in the elders of the tribes even after the establishment of the Muslim State at Madina, and (2) that in all cases a person with tribal authority did exist and if in any case he did not exist, this verse could not be availed of. After the Muslim State had come into existence no authority was being exercised by the tribal elders over the members of the tribe. At the same time there is good orthodox opinion in favour of the proposition that

Hakam could be even from non-relatives if no relatives were available, the stipulation about relatives being only directory in nature. Let me here refer to page 209, Volume III of Tafsir-i-Haqani, a well-known and exhaustive commentary on the Qur'an where it is stated in the course of a comment on this verse that if people of the family be not available, any right-minded person can be appointed.

39. The learned A. C. J., then considered various authorities and concluded by saying that even if the Hakam had the power of separation that would be no warrant for the conclusion that the Qazi had that power. The simple reply to this argument is that the right of the wife to obtain a dissolution cannot be affected by the fact that the procedure needed for the enforcement of that right appears to be such as cannot be adopted by these Courts. The law provides that in matters of marriage and divorce Muslim Law shall apply to the Muslims. If the Muslim Law provides; a particular procedure for the enforcement of a right of dissolution, either we regard that as a substantive provision and apply it as such or we regard that as a mere matter of procedure and having regard only to the substance of the right enforce it by whatever; procedure is available. But the right of the wife cannot be defeated. Either we should appoint Hakams or we should ourselves assume the jurisdiction of the Hakam in so far as It. relates to dissolution for that is a judicial function.

40. The view taken by the learned A. C. J., assumes that the whole procedure prescribed in this verse is for reconciliation and the moment the Qazi appoints the arbiters he exhausts his jurisdiction. The case decided by Hazrat Ali was referred to by the learned Judge but he was of the opinion that Hazrat Ali only disapproved of the conduct of the husband who was not accepting the order of the Hakam. Following is the report of the incident as it appears in the Tafseer-i-Kabir (page 129):

> "Imam Shafei has reported a tradition from Hazrat Ali and that has been reported by lbn Sirin from Ubaida. It is to the effect that a man and a woman came to Hazrat Ali and each one of them was accompanied by a number of persons. Hazrat Ali ordered that one hakam should be appointed from the man's family and one from the family of the wife, and addressing the *hukma*, he said : Do you know what your duties are ? Your duty is to unite the couple if they can be united, and if you decide to separate, separate them.' The woman said she accepted what Allah had ordained whether the verdict be for or against her. But the husband said that he did not want separation. Hazrat Ali then said to the husband : `You have uttered a lie. You should also have given the same undertaking as your wife'."

41. I would regard the word `Hakam' in its ordinary sense of judge or arbiter. One who is only a conciliator is neither a judge nor an arbiter and I am unable to accept that the jurisdiction of the Qazi is exhausted by the appointment of the, arbiter, that if the effort at reconciliation fails, there is nothing further to be done and that the wife must be forced to live with the husband even though she be unhappy and may be in no way to blame and though the result would be that the spouses "do not observe the limits of God". Take

> the very case with which the Full Bench was dealing. I have already quoted the findings of fact of the learned A. C. J. The wife was regarded by the husband as `*manhoos'*. She was suspected by him of immorality and was not allowed to go even in the kitchen because there she would meet the cook. Yet she was forced to remain attached to the husband. Is this what Islam contemplates? Is it possible that the husband and the wife can under the circumstances live happily ? If the husband did not like the wife, he could divorce her at his will even though there was no blame on her. Yet the wife though she could not pull on with the husband without any fault in her, must be forced to live with him. Why should there be such a disparity between the rights of the spouses ?
>
> 42. Let it not be understood that our answer to the question referred grants a right to wife to come to the Court at any time and obtain *khula* if she i9 prepared to restore the benefit she has received. There is an important limitation on her right of *khula*. It is only if the judge apprehends that the limits of God will not be observed, that is, in their relation towards one another, the spouses will not obey God, that a harmonious married state, as envisaged by Islam, will not be possible that he will grant a dissolution. The wife cannot have a divorce for every passing impulse. The judge will consider whether the rift between .the parties is a serious one though he may not consider the reasons for the rift.
>
> 43. That the wife may go wrong if dissolution is not ordered is rather a reason for grant of dissolution for Islam prefers divorce to adultery.
>
> 44. The rights of the spouses as regards dissolution may be summed up by saying that the husband can effect a dissolution himself by pronouncing a divorce, while the wife has to approach the Court and she is to get a dissolution only if the Court regards further continuance of the marriage as not proper. But if it does regard continuance of marriage as improper, there is no further limitation on its jurisdiction to dissolve the marriage.
>
> 45. The answer to the question referred is that the wife is entitled to a dissolution of marriage on restoration of what She received in consideration of marriage if tie judge apprehends that parties will not observe the limits of God."

14. The above view of Full Bench of this Court was approved by the Supreme Court of Pakistan in *Mst. KHURSHID BIBI versus Baboo MUHAMMAD AMIN* **(PLD 1967 Supreme Court 97)** in the following words:-

> "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 الى الله 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) ايها المراة زوجها طلاقاً من غير 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. (باس محرام عليها رائحة الجنة

The Qur'an also declares: "Women have rights against men, similar to those that the men haye against them, according to the well-known rules of equity" (و لهن مثل الذى عليهن 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 circumtances. The Qur'an expressly says that the husband should either retain the wife, according to well-recognised custom امساك بالمعروف " *(Imsak-un-bil-ma'roof)* or release her with grace- تسريح 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 تمسكو هن ضراراً لتعتدو" . Another hadith declares-- " لا ضرر ولا ضرار في الاسلام (*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) اولى لا مر منكم (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 الاحكام 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 وحقایق التاویل (*Madarak-ul-tanzil-wa-Haqaiq-ul- Ta'veel*), by Baizavi (بیضاوی)in his *Tafsir* انوار التنزیل و اسرار التاویل *Anwar-ul-Tanail-wa Israr-ul-Ta'veel*, by القسطلانی(*Al-Qastallani*) in his ارشاد السازی(*Irshad-us-Sazi*), by جصاصJassas in his احکام القران(*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 snore recent times, Mufti Muhammad Abduh of Egypt, in his Tafsir Al Manay تفسیر المناhas endorsed this view. For analogy, the cases of لعان (li'an) and ایلا (‘Ila)عنین (Inin) and *Mafqoodel Khabar* (مفقود الخیر)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 همامin his فتح القدیر(*Fateh-ul-Qadir*), Vol. III, p. 199 and جصاصJassas 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 (المسوی من احادیث الموطا)*Al-Musawwa-min-H Ahadith-al-Muatta* Vol. I1, 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 band, Imam Shafe'i, Imam Ahmad, Imam Daood and out of .the Companions, Ibn-eAbbas were of the view that *khula* amounts to *fisk-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 (الدرایة فی تخرجة احادیث الهدایه 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 (تلخيص الهبير)(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 كتاب الخلع (Kitab-ul-Khul Vol. 111, p. 260) of his celebrated work (نيل ا الاوطار) (Nail-al-Autar) and he reaches the conclusion that *khula* is not a type of *talaq*, but is a category apart t 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.

It must be admitted that this is also a controversial question. Dr. Sabum has summarized various opinions, bearing on this point, at page 621 of his bookمدى حرية الزوجين فى الطلاق . In particular he refers to what is related from Umar-ibn-Al-Khattab, through the authority of Behaqi, that he said that "when women desire *khul'* do not deny it". Sha'rani in his book الميذان الكبرى(Al-Mizan-ul-Kimiia, Vol. II, page 117) says: "Imams agree in that the woman, if she dislikes her husband because of his ugliness or misconduct she has a right to seek khul' by payment of compensation Even if there is nothing to cause her dislike and the husband and wife both agree upon khul; without any reason, it is lawful and is not condemned.

On the contrary, Zuhri, Ata and Daud refute this stand by saying that "*khul*" in this case is futile and what is futile is unlawful and that which is unlawful is condemned". Dr. Sabuni in his book "Mada Hurriyat-al-Zaujain" at page 572, says "A large section of Muslim jurists believe that khula is lawful only with the existence of dislike on the part of the wife, so that the husbands may not start oppressing their wives to make them seek khul' so as to get back the property they gave to them." Badaruddin Ayni in his Umda-tul-Qari (عمده القارى) Vol. IX, p. 573 says: "There is difference of opinion in the case when both spouses agree; on separation, Malik, Auza'i and Ishaq are of the opinion that no *Hakams* are required and nor (further) permission of spouses. Kufis, Shaf'i and Ahmad have said that their permission is necessary, as the right to divorce is in the hands of the husband. If he permits, well 'and good; otherwise the Court *will divorce on his behalf*".

This has reference to the well-known verse of the Qur'an, which requires *Hakams* to represent spouses to be appointed in case of *shiqaq* which means breach or schism between them, for the purpose of effecting reconciliation if possible and for ordering separation if that be necessary. Some of the legists have described

Hakams as merely Attorneys or arbitrators and not Judges, but others have said that they have full powers to decide as they think fit Some have held that the arbitrators' opinion is to be submitted to the Qazi,. who will .decide, in accordance with that opinion There is also difference of opinion among the legists as to whether reference on the Sultan (Sovereign) or Qazi is necessary, at all, or not. This will be found discussed by Ibn-e-Hazm in (المحلى) (Almohalla).,

This difference, arises owing to the fact that two situations are contemplated by the writers. One is where *khula* takes place as a result of the mutual consent of the spouses, which is technically called *mubara't*. In such a case it appears that no reference to the Qazi is necessary. But where the husband disputes the right of the wife to obtain separation by *khula*, it is obvious that, some third party has to decide the matter and, consequently, the dispute will have to be adjudicated upon by the Qazi, with or without assistance of the *Hakams*: Any other interpretation of the Qur'anic verse regarding *khula* would deprive it of all efficacy as a charter granted to the wife. It is significant that according to the Qur'an, she can "ransom herself" or "get her release" and it is plain that these words connote an independent right in her.

The Qur'anic injunctions must be interpreted in the light of well-known *ahadith*. The classical instance of *khula* is that of the wife of Sabet-bin-Qais-bin-Shamas. That tradition is to be found in various collections of *ahadith*, including Bokhari, Abu Daood, Nasai, Ibn-e-Maja and Tirmizi. But there are two versions, one referring to Jamila, daughter of a sister of Abdullah bin Abi Salool (in some versions, daughter of Abdullah and the other to Habiba, daughter of Sahl. It is said by some commentators that the two cases relate to two different wives of the same person. Jamila came to the Prophet, according to this tradition, and said that she had no reason to reproach Sabetbin-Qais, in respect of his morals or his faith, but she disliked him and after going into the fold of Islam, she did not want to commit infidelity. The Prophet asked her whether she was prepared to return the garden given by her husband to her, in dower. She answered in the affirmative. The Prophet then directed the husband to accept the garden and to give her a divorce according to one version. Another version given by Bokhari, has it that when she agreed to return the garden to her husband, the Prophet ordered "Qats and he" separated her (امره ففارقها). From still another version given by Hazrat Aisha Siddiqa, (related by Abu Daud) it. seems that Habiba was also subjected by her husband to physical violence during the previous night but this fact was not put forward .by the woman, apparently, as ground for her release. Abu Daood also talks of two gardens being returned, which had been originally gifted by the husband. The two different versions may be reconciled by the suggestion that, due to her aversion, Habiba was not willing to perform her marital obligations and was beaten by her husband in consequence. The generally accepted account of Jamila's case as well as that of Habiba makes it clear that the only ground on which the Prophet ordered the woman to be released from the marriage bond, was her intense dislike of her husband. According to one text, she clarified that she found him to be ugly and repulsive, and in another that she felt like spitting at him. The Prophet being

convinced that the spouses could not live together in conformity with their conjugal obligations, ordered the husband to separate her. Hakim in Almustadrak (المستدرک) Ibne-Abdul Barr in (الاستعیاب)(*Al-Istiab*), Sbaukani in Nail-ul-Autar (نیل الا وطار)the last-named (relying on Dar Qatani's version), are categorical in saying that it was the Prophet who ordered. the separation. As has been observed above, Ibne Hajr Asqlan'. shares this opinion and doubts the authenticity of the haditl, which specifies that this was a case of talaq. Ibne Hazm in AlMohalla upholds the Qazi's right to effect separation by khula, after efforts at conciliation through Hakams have failed. It is not possible to consider this act of the Prophet, except as one conceding the right of the wife, in circumstances of extreme discard.

The opinion of Allama Ibne Rushud on this point has already been quoted in support of the thesis that khula is a right of the wife. Amir Ali in his Muhammadan Law, Vol. II, p. 466 and M. Muhammad Ali in his Religion of Islam p. 676, express themselves in similar terms. Some other modern opinions will be found collected in Kaikaus, J's judgment in Balqis Fatima's case including one by Wilson in his Anglo-Muhammadan Law. Kaikaus, J., has also cited the case of a woman who sought divorce from her husband in Hazrat Umar's time and after testing the seriousness of her demand by confining her in a dirty prison, he ordered her to be separated from her spouse. A modern priest of Egypt, Ali Khafif in his book Furaq-al-Zauj-fi-al Mazahib al Islamia (فرق الزوج فی المذاهب اسلامیہ)strongly supports the wife's right to khul' when discord is established. I may add, however, that opinions of living authors are not entitled to as much weight as those who have joined the majority, since the possibility of their changing their views before death cannot be excluded.

The present trend of legislation in Muslim countries which may provide indication of Ijma's in modern times, may also be examined. The right of the wife to obtain separation from her husband on any ground of (ضرار) (injury), is recognised in Iraq by section 40 of Qanun-ul-Ahwal-al-Shakhsiya of 1959, in Egypt by section 6 of Law No. 25 of 1929, in Tunis by section 25 of Mujalla-tul-Ahwal-ul-Shakhsiya in Morroco by section 56 of Mudawwana-tul-Ahwal-ul-Shakhsiya-al-Maghrib, in Jordan by section 96 of Qanun-o-Huquq-al-Alla-tul-Urdani and in Syria by section 112 of Qanun-ul-Ahwal-ul-Shakhsiya-Assuri. In some of these Codes it is provided that the matter will first be referred to Hakams and the final decision will rest with the Court.

The argument was raised on behalf of the respondent, that the case should be decided only in accordance with the opinions of Hanafi doctors, who contemplate the grant of a divorce on the part of the husband even in the case of khula and not separation such as could be ordered by a Qazi. The authorities referred to, however, do not discuss what would happen in case the husband is reluctant to divorce the wife but the relations between the spouses have deteriorated so considerably that they could not be expected to live together within the limits of Allah. Such a position is expressly dealt with in books of other Sunni sects-the Malikis, the Shafe'is and the

Hambalis. It is permissible to refer to those opinions which are consistent with the Qur'anic injunctions. A certain amount of fluidity exists, even among orthodox Hanafis in certain matters. In the case of a husband who has become mafqudulkhabar (absent without news) for instance, Malikis opinion can be resorted to by a Hanafi Qazi, as is mentioned in Radd-ul-Muhtar.

There is a hadith of the Prophet, concerning Barairah who was married to a slave, named Mughis. She did not live with her husband who followed her disconsolate and weeping, in public. The Prophet advised her to go back to her husband. She asked: "Is this an order?" The Prophet said that it was merely a recommendation. She then declined to go back to her husband, saying: "I 'have no need of him." This shows that a woman cannot be compelled, if she has a fixed aversion to 'her husband, to live with him.

The reasoning that found favour in the cases of Umar Bibi and *Sayeeda Khanam* may also be briefly noticed. Those reasons were analysed by Kaikus, J. in *Balqis Fatima's case* and with respect, it seems to me, justification was shown to exist for departing from the earlier view. a Sir Abdur Rahman, J. in Umar Bibi's case relied on Baillie's Digest of Muhammadan Law, First Part, p. 305, the Hedaya, Book. 1, Vol. IV, Chapter on khula and the corresponding Chapter in Durr-ul-Mukhtar and held that even in khula cases; it is the right of the husband to effect separation, by granting a divorce. These authorities, however, do not consider contentious cases, where the husband refuses to release the wife, out of pure obstinacy. The learned Judge also expressed the opinion that even where there was mutual dislike or extreme incompatibility of temperament between husband -and wife there can be *muaddat* (مودت), *sukoon* سکون and *rehmat* رحمتin the married life (declared to be objectives of marriage by the Qur'an), with the procreation of children. With respect, it seems to me, that this view is difficult to sustain. In such cases, if there is fixed aversion on the part of the wife or the husband, life becomes a torture for both. The learned Judge also thought that the first condition for. separation between the spouses is that Hakams should have been appointed, in accordance with the injunctions of the Qur'an, and it would be for them to consider whether the couple should be parted or not. But if the Hakams can so decide under authority of an order by the Qazi, I confess, it is difficult to see why a Qazi does not possess a similar capacity in suitable cases. It is said in the Mabsoot of Al-Sarakhsi, Vol. 11 that the Qazi has the power to remove cause's of tyranny by means of talaq. It is also in the Radd-ul-Muhtar that, for this purpose, the Qazi becomes the agent of the husband, if he refuses to give divorce.

In *Sayeeda Khanam's case*, the verse bearing on the right of *khula*, was not noticed, though the *hadith* in respect of Jamila, . wife of Sabet-bin-Qais-was discussed. The opinion was expressed in that judgment that the decision of the Prophet in that case was not to be regarded as a decree, awarded by him in the capacity of a Judge or as the Head of the State of, Islam. It was thought that, as the husband was agreeable to the separation, on the delivery back to him, of his garden, this was a separation by mutual consent, and it was in consequence of this that the Prophet gave his direction. It

would be more consistent, in by humble opinion, with the letter and spirit of the Qur'an which places the husband and the wife on an equal footing, in. respect of rights of one against the other, to construe this incidents a meaning that the person in authority, including the Qazi, can order separation by *khula* even if ,the husband is not agreeable to that course. Of course the Qur'anic condition must be satisfied that it is no longer possible for the husband and the wife to live together in harmony and in conformity with their obligations.

After a discussion of the original sources, I have, therefore, reached the conclusion that the view, taken by Kaikaus, J. in *Balqis Fatima's case*, that the relevant verse of the Qur'an gives the right of khula to the wife subject to the limitation mentioned therein is correct.

In the present case, on the facts, it has been found that there is no possibility left, of the parties residing together in amity and goodwill. There has been litigation between them. The wife had to be brought away from the husband's house, on a warrant, issued under section 100, Criminal Procedure Code. She may have taken an intense dislike to her husband, after he contracted his second marriage, but ever since that time, she has consistently declined to share the connubial bed with him. In the circumstances, it would be idle to have recourse to the formality of appointing Hakams to attempt a reconciliation between them, considering that a Panchayat, convened by the defendant's father, also failed, in this respect. I would9 therefore, hold that the plaintiff is entitled to separation from her husband, by *khula*, in the circumstances of the instant case.

The next question is on what terms, such a decree should be granted to her. Unfortunately, in the trial Court, the question of terms was not gone into, on either side, and the trial Judge also failed to advert to this aspect of the matter. There is no material on the file, from which it can be ascertained how much money, if at all, the husband had given to the wife, on the occasion of the marriage, and on receipt of what compensation he would be willing to grant her *khula*. The pleadings of the parties show that the dower, whatever its amount was, had not yet been paid to the wife. She merely express her willingness to relinquish her dower, but the husband said, he was not agreeable even, on this condition, to grant her *khula*. He did not plead that he had actually paid her the dower. Though, according to the *Hedaya*, it is abominable on the part of the husband to have more than the dower itself, in a case of separation by *khula*, yet if he insists, it is legally permissible for him to demand something more than the dower, and to the extent that he might have been out of pocket, in respect of gifts, given to the wife on marriage, he may, in law, demand restitution. This would necessitate an enquiry into the facts -and the final decision as to what compensation must be paid by the wife for he relief, must rest with the Court. I would, therefore, allow the appeal and send back the case to the trial Judge, with the direction the parties may be permitted to lead evidence to what gifts, if any, and of what value, were given by the husband to the wife, on the occasion of the marriage, so that if the husband wants to take more than the dower,

> the condition may be imposed on the wife, to pay the additional sum, expended by the husband on her, to the grant of *khula*. The parties may be left to bear their own costs throughout in the circumstances of the case. (Some of the original authorities referred to in this judgment have been collected together by me in the form of an appendix to this judgment."

After having an overview of well settled principle of law, there remains no cavil that a woman can seek "*khula*" from the court as of right if she has fixed aversions to her husband.

15. Now adverting to the scope and import of word "reconciliation" used in Section 10(5) of the "Act, 1964", it is observed that since it is nowhere defined in the "Act,1964" itself, so in order to properly comprehend its meaning, we have to seek guidance from dictionary meaning from various law dictionaries, which are as under:-

The **Black's Law Dictionary** describes the meaning of "Reconciliation" as under:-

> Restoration of harmony between persons or things that had been in conflict <a reconciliation between the plaintiff and the defendant is unlikely even if the lawsuit settles before trial> *Family law*. Voluntary resumption, after a separation, of full marital relations between spouses <the court dismissed the divorce petition after parties' reconciliation>. *Accounting*. An adjustment of accounts so that they agree, esp. by allowing for outstanding items <reconciliation of the checking account and the bank statement>"

Oxford, Advanced Learner's Dictionary portrays the meaning of "Reconciliation" as under:-

> an end to a disagreement and the start of a good relationship again: *Their change of policy brought about a reconciliation with Britain*. the process of making it possible for two different ideas, facts, etc. to exist together without being opposed to each other;

Cambridge Dictionary articulates the meaning of "Reconciliation" as under:-

> A situation in which two people or group of people become friendly again after they have argued; *It took hours of negotiations to being about a reconciliation between the two sides.* 2. The process of making two opposite beliefs, ideas, or situations agree.

Whereas, **Webster's Dictionary** explains the meaning as under:-

An act of reconciling for the state of being reconciled **2.** The process of making consistent or compatible.

16. From the collective analysis of dictionary meaning of "Reconciliation" as noted hereinabove, we can infer that its true import is to bring an end to the differences through meaningful and concrete effort. In other words, word "reconciliation" postulates adoption of such measures as can be proved as a factor for harmonious union between the spouses after redress of grievances which had led them to have recourse to litigation.

17. Reconciliation and harmony amongst the spouses are one of the main themes of the injunction of Islam. In *Surah Al-Nisa*, *Ayat* 35, Allah Almighty obligates the elders and close relatives of the spouses to put all possible efforts for bringing an end to the unpleasant rift between them. For ready reference, same is reproduced:-

وَإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَٱبْعَثُواْ حَكَمًا مِّنْ أَهْلِهِ وَحَكَمًا مِّنْ أَهْلِهَآ ۚ إِن يُرِيدَآ إِصْلَـٰحًا يُوَفِّقِ ٱللَّهُ بَيْنَهُمَآ ۗ إِنَّ ٱللَّهَ كَانَ عَلِيمًا خَبِيرًا ٣٥

اور اگر تم کو معلوم ہو کہ میاں بیوی میں ان بن ہے تو ایک منصف مرد کے خاندان میں سے اور ایک منصف عورت کے خاندان میں سے مقرر کرو وہ اگر صلح کرا دینی چاہیں گے تو خدا ان میں موافقت پیدا کر دے گا کچھ شک نہیں کہ خدا سب کچھ جانتا اور سب باتوں سے خبردار ہے۔(35)

18. Pakistan is a Federal republic and in terms of Article 2 of the Constitution of the Islamic Republic of Pakistan, 1973, Islam is the State religion of Pakistan. Chapter 2 of the Constitution deals with Principles of Policy and one of the principles highlighted therein is embodied in Article 31, which states that steps shall be taken to enable the Muslims of Pakistan, individually and collectively, to order their lives in accordance with the fundamental principles and basic concept of Islam and to provide facilities, whereby they may be enabled to understand the meaning of life according to the Holy Qur'an and Sunnah. Article 35 of the Constitution, being part of the Chapter 2, ordains that the State shall protect the marriage, the family and mother and the child. Reference to this effect can also be made to *HAMMAD HUSSAIN versus FEDERATION OF PAKISTAN*

through Secretary, Ministry of Law and Justice, Islamabad and another **(PLD 2022 Federal Shariat Court 21),** wherein the Federal Shariat Court, while dealing with Section 10(3) of the "Act, 1964", held as under:-

> "2. We have heard the arguments and reached at the following conclusions:
>
> i) it is correct understanding of the petitioners that in Islamic society, the protection of family unit or family system has core-importance, which is rightly reflected in Article 35 of the Constitution of Pakistan, 1973 stating one of the principles of policies in the Constitution. Article 35 states that "the State shall protect the marriage, the family, the mother and the child";
>
> ii) in the light of Quran and Sunnah, divorce is legally permissible but it is considered as the most abhorrent and unpleasant act; therefore, Quran and Sunnah stress upon reconciliation and compromise to be made between the spouses in case of any unpleasant rift occurs between them to avoid divorce. The Quran puts a moral and religious duty upon the elders and family members of the parties to put efforts for making a compromise between the spouses in case any unpleasant rift occurs between them. The referred Ayat of Sura Al-Nisa explains the manner in which such reconciliation efforts may be made between the parties within the family. The Ayat 35 of Sura Al-Nisa is directed for the family members and elders of the conflicting spouses for making compromise or doing efforts for reconciliation between them. For ready-reference, the Ayat 35 of Sura Nisa is reproduced below:
>
> وَإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَٱبْعَثُواْ حَكَمًا مِّنْ أَهْلِهِ وَحَكَمًا مِّنْ أَهْلِهَآ ۚ إِن يُرِيدَآ إِصْلَٰحًا يُوَفِّقِ ٱللَّهُ بَيْنَهُمَآ ۗ إِنَّ ٱللَّهَ كَانَ عَلِيمًا خَبِيرًا ٣٥
>
> اور اگر تم کو معلوم ہو کہ میاں بیوی میں ان بن ہے تو ایک منصف مرد کے خاندان میں سے اور ایک منصف عورت کے خاندان میں سے مقرر کرو وہ اگر صلح کرا دینی چاہیں گے تو خدا ان میں موافقت پیدا کر دے گا کچھ شک نہیں کہ خدا سب کچھ جانتا اور سب باتوں سے خبردار ہے۔(35)
>
> 3. This matter was very clearly decided by this Hon'ble Court in Para-8 of its earlier judgment dated 04.07.2013, whereby Sh. Petition No. 20-I of 1999 titled *"Muhammad Zoonnoon Khan v. Federal Government of Pakistan and another"* and Sh. Petition No.06-I of 2010 titled "Muhammad Shah, etc. v. The State" in which it was pointed out that the authority given to Family Court for reconciliation or compromise at pre-trial proceedings under section 10 of the

> Family Courts Act, 1964 or after conclusion of trial under section 12 of the said Act, is adopted on the basis of Verse 35 of Sura Al-Nisa of Holy Quran.
>
> The reference made by the petitioners to the Holy Quran and Sunnah while challenging Section 10(3) of the West Pakistan Family Courts Act (Act XXXV of 1964) and section 10(3) of the Family Courts Act, 1964 (As amended for Punjab) is completely misconceived. Hence, the Shariat petition is dismissed accordingly and the Shariat Miscellaneous Application No.4-I of 2021 being infructuous is disposed of."

19. Subsection (3) of Section 10 of the "Act, 1964" though postulates that the Family Court may, at the pre-trial stage, ascertain the points of controversy between the parties and attempt to effect compromise between them but neither the "Act, 1964" nor the rules framed thereunder provides any procedure for the said purpose. It has been thus left to the discretion of the Family Court to do so, keeping in view the peculiar facts and circumstances of each case. Even otherwise, no hard and fast rules can be laid to bound down the Family Court to strictly follow the same for the purpose of effecting compromise or bringing reconciliation between the parties. A Family Court cannot compel a party for reconciliation against his/her will. It may not be difficult for someone to take the horse to the water but at the same time he cannot make him drink. Law only requires from a Family Court to make a genuine and concrete attempt for reconciliation between the parties. Guidance in this respect can be sought from *SOHAIL AHMED versus Mst. SAMREENA RASHEED MEMON and another* **(2024 SCMR 634)**, wherein Supreme Court of Pakistan has held as under:-

> "14. The proviso to section 10 empowers the Family Courts to pass a preliminary decree for the dissolution of Marriage forthwith upon the failure of reconciliation and further provides that wife shall be ordered toreturn the Haq Mehr received by her.
>
> 15. Section 10(3) imposes a legal obligation on the Family Courts to make a genuine attempt for reconciliation between the parties. Trial Court shall remain instrumental and make genuine efforts in resolving the dispute between the parties. In case if despite of genuine efforts, reconciliation fails, the Trial Court under proviso of section 10(4), without recording evidence is empowered to pass a decree of dissolution of

> marriage forthwith. At this juncture if the court observes that the wife without any reason is not willing to live with her husband, then under proviso (ibid) the Court is left with no option, but to dissolve the marriage."

20. In the case of ***AMANAT ALI versus Mst. NADIA SHAUKAT*** **(PLD 2019 Lahore 160)**, learned Single Bench of this Court, while outlining the scope of Section 10(3) as amended by The Punjab Family Courts (Amendment) Act, 2015 observed as under:-

> "6. …From the reproduction of Section 10(3) as above, it depicts that before amendment the legislature used the word "shall" in order to determine the points at issue between the parties and try to effect a compromise of reconciliation between the parties, however„ after amendment in the Section 10(3), the word "may" has been used in place of "shall", which means that it is not mandatory for the Court seized with the matter to effect compromise of reconciliation between the parties, rather, it is subject to the facts of the case or if the Court deems necessary for the same. In the present case, on 15.12.2018, when the case was fixed for reconciliation, respondent No.1 recorded her categorical statement before the learned Judge Family Court, Lahore which is reproduced herein below:
>
> 15-12-2018بیان ازاں نادیہ شوکت دختر
>
> برحلف:
>
> میری شادی 7اپریل 2018کو امانت کے ساتھ ہوئی تھی۔ میرا خاوند مجھے خرچہ نہ دیتا ہے۔ مجھے کہتا ہے کہ گھر والوں سے خرچہ لا کر مجھے دو مجھے مارتا ہے نشہ اور گالی گلوچ کرتا رہتا ہے۔ میں مصالحت نہ کرنا چاہتی ہوں۔ عدالت سے خلع لینا چاہتی ہوں۔ ہمارے درمیان مصالحت کی گنجا ش نہ ہے۔
>
> Aforementioned, statement of respondent No.1 clearly shows that she has refused to join the petitioner due to his alleged cruel attitude and she categorically denied the possibility of reconciliation with the petitioner. So, in the light of relevant law as stated above, it was not mandatory for the Family Court to effect compromise between the parties when the lady was not ready to do so. Even, on the same the stance of the petitioner was also recorded by the learned Judge Family Court which the respondent No.1 not accepted.
>
> Moreover, the above quoted section and particularly the proviso to its subsection (4) is fully in consonance with Muslim Law. The Legislature while introducing amendment in the Family Courts Act, 1964 has derived wisdom from Quran and Sunnah…."

21. Sub-Sections (3) and (5) are interlinked and none can be read in isolation to the other. Section (5) of Section 10 of the "Act, 1964" commands the Family Court to immediately pass a decree for

dissolution of marriage on failure of reconciliation proceedings. No shatters thus can be placed upon the power of the Family Court to dissolve the marriage on the basis of "*khula*", when reconciliation is not possible. Reference to this effect can be made to *KHURRAM SHEHZAD versus FEDERATION OF PAKISTAN through Ministry of Law and Justice Commission of Pakistan, Islamabad and another* **(PLD 2023 Federal Shariat Court 286)**.

22. In the wake of above-noted threadbare discussion, now adverting to the merits of the case, it is noticed that on institution of suit for dissolution of marriage on the basis of "*khula*" by the "respondent", the petitioner appeared before the Family Court, Rawalpindi, who in terms of Section 10(3) of the "Act, 1964" fixed the date for pre-trial reconciliation proceedings but it evinces from the record that despite efforts, parties did not arrive at reconciliation, as the "respondent" was not willing to reconcile with the petitioner at any cost. As already observed, court cannot compel any party to effect compromise against his/her wishes instead can make a genuine effort to bring reconciliation between the parties amicably.

23. The nutshell of above discussion is that the petitioner has failed to point out any illegality or perversity in the impugned order passed by the learned Family Court, resultantly, this petition fails and is **dismissed** with no order as to costs.

(MIRZA VIQAS RAUF)
JUDGE

SAJJAD

Dictated:

Signed:

Announced in open Court on **12.06.2024**

JUDGE

Approved for reporting

JUDGE

Form No.HCJD/C-121

ORDER SHEET

LAHORE HIGH COURT
RAWALPINDI BENCH RAWALPINDI
JUDICIAL DEPARTMENT

Review Application No.04 of 2024

Rizwan Ahmed **VS** Federation of Pakistan etc.

S.No. of order/ proceeding	Date of order/ proceeding	Order with signature of Judge and that of parties or counsel, where necessary
	20.06.2024	M/s Raja Imran Khalil, Taimur Waheed Malik and Hafiz Liaqat Manzoor Kamboh, Advocates for the applicant.

This application is in terms of Section 114 read with Order XLVII of the Code of Civil Procedure (V of 1908) seeking review of the judgment dated 12th June, 2024 passed in Writ Petition No.167 of 2024.

2. The grievance agitated by the applicant in this application is restricted to Paras No.4, 12 & 14 of the reproduced portion of judgment reported as *Mst. BALQIS FATIMA versus NAJM-UL-IKRAM QURESHI* **(PLD 1959 (W.P.) Lahore 566)** more specifically highlighting the view of Quadiani Group, which was further affirmed by the Supreme Court of Pakistan in the case of *Mst. KHURSHID BIBI versus Baboo MUHAMMAD AMIN* **(PLD 1967 Supreme Court 97)** find mentioned as Para No.2 at page No.37 of the judgment under review.

3. The review is sought on the ground that after the promulgation of the Constitution of the Islamic Republic of Pakistan, 1973 in terms of Article 260 a person of the Quadiani Group or the Lahori Group who call themselves 'Ahmadis' or by any other name have been declared as non-Muslim.

4. In view of averments in the application notice is issued to the learned Advocate General, Punjab. At this stage, Mr. Muhammad Shahid Munir, Assistant Advocate

General Punjab accepts notice, so there is no need to issue any formal notice to this effect.

5. As already observed that the applicant is only aggrieved of certain portion of reproduced extract from the judgment in the cases of ***Mst. Balqis Fatima*** *supra* and ***Mst. Khurshid Bibi*** *supra* more specifically Paras No.4, 12 & 14 of the judgment of the former case and Para No.2 reproduced at page No.37 of the judgment under review from the latter case.

6. Needless to observe that the above-mentioned Paras were only reproduced as extracts from the above referred judgments and with the promulgation of the Constitution of the Islamic Republic of Pakistan, 1973 and more specifically by inserting definitions of "Muslim" and "non-Muslim" in Article 260(3)(a) & 260(3)(b), the observations recorded in the above referred judgments automatically loses their efficacy as well as status and there remains no cavil to observe that a person of the Quadiani Group or the Lahori Group who call themselves "Ahmadis' or by any other name or a Bahai, and a person belonging to any of the Scheduled Castes cannot be termed as "Muslim" or class/sect of "Muslim".

7. With these observations this review application with consent of all in attendance is accordingly **disposed of**. The observations recorded hereinabove shall be treated as part of judgment dated 12th June, 2024 passed in Writ Petition No.167 of 2024.

(MIRZA VIQAS RAUF)
JUDGE

Shahbaz Ali*