Form No: HCJD/C-121.
JUDGEMENT SHEET
IN THE ISLAMABADHIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

WRIT PETITION NO. 4332 OF 2021

Shaza Tehseen

Vs

Tehseen Butt, etc.

PETITIONER BY: Ms. Jamila J. Aslam, Advocate.

RESPONDENTS BY: Mr. Abid Hussain Chaudhry, Advocate, for respondent No. 1.
Syed Asad Ali Saeed, Advocate for respondent No.3.

DATE OF HEARING: 21.02.2022.

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BABAR SATTAR, J.- The petitioner is aggrieved by judgment and decree passed by the learned Additional District Judge dated 20.09.2021 through which the judgment and decree for dissolution of marriage passed by the learned Judge Family Court dated 21.06.2021 was set-aside.

2. Learned counsel for the petitioner contended that pursuant to the proviso of section 10(4) of West Pakistan Family Courts Act, 1964 **("Family Courts Act")**, the learned Family Court is under an obligation to pass a decree for dissolution of marriage forthwith upon failure of reconciliation proceedings. That after the failure of reconciliation proceedings in the instant case the learned Family Court rightly passed the judgment and decree to the extent of dissolution of marriage while the question of quantum of maintenance and the custody of minor remained pending before the

learned Family Court. That the question raised before the learned Additional District Judge in appeal regarding the quantum of dower to be returned by the petitioner to respondent No.1 on dissolution of marriage which the petitioner was ready to repay. And thus the only dispute between the parties related to the exact dower and the manner in which it was to be returned for purposes of which the matter could be remanded back to the learned trial court. However, what the learned Additional District Judge could not do was to set-aside the decree for dissolution of marriage as once such a decree had been passed the marriage had been dissolved and could not be resurrected by the learned appellate Court while setting aside such decree. She further submitted that under section 14(2)(a) of the Family Courts Act no appeal could be filed against the decree of a Family Court for dissolution of marriage except when the dissolution of marriage was pursuant to section 2(viii)(d) of the Dissolution of Muslim Marriages Act, 1939 (i.e. where dissolution is due to the husband treating the wife with cruelty and disposing of her property or preventing her from exercising her legal rights over it). She submitted that as the dissolution of marriage had not been ordered pursuant to such provision of the Dissolution of Muslim Marriages Act, 1939, the appeal against the decree for dissolution of marriage was not maintainable in terms of section 4(2)(a) of the Family Courts Act. She relied on ***Sadia Arif Vs. Adnan Shahid and 2 others (2021 YLR 1753)*** wherein this Court had held that dissolution of marriage through Khula was neither revocable nor appealable.

3. Learned counsel for respondent No.1 submitted that there was no infirmity in the judgment rendered by the learned appellate court. That the proviso to section 10(4) of the Family Courts Act itself provided that husband was entitled to restoration of *Haq Mehr* received by wife in consideration of marriage. In the event of dissolution of marriage on the basis of Khula, such repayment of *Haq Mehr* was condition precedent for issuing a decree for dissolution of marriage. That in the instant case as the learned Family Court had not passed any order with regard to repayment of *Haq Mehr* received by the petitioner, the learned appellate court had set-aside the decree for dissolution of marriage in accordance with the requirement of section 10(4) of the Family Courts Act. He relied on ***Malik Khawaja Muhammad Vs. Marduman Babar Kahol (1987 SCMR 1543), Muzaffer Ali Vs. Mst. Mehrun Nisa (1989 CLC 1805), Naila Azmat Vs. Judge, Family Court and others (1999 MLD 3090), Ahmed Khan Vs. Mst. Sarwar Khatoon (2004 MLD 555), Shagufta Bibi Vs. Judge Family Court, Mailsi (2013 MLD 487) and Mst. Shahida Vs. Sardar Shah (2018 MLD 146)*** for the proposition that grant of decree for dissolution of marriage was contingent on repayment of *Haq Mehr* paid by the husband to the wife at the time of marriage and such decree could not be passed without repayment of *Haq Mehr*.

4. Let us reproduce provisions of the Family Courts Act which are relevant for our present purposes:

> ***10. Pre-trial proceedings.—*** *(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) *At the pre-trial, the Court shall ascertain the points at issue between the parties and attempt to effect a compromise or reconciliation between the parties, if this be possible.*

(4) *If no compromise or reconciliation is possible the Court shall frame the issues in the case and fix a date for recording of evidence.*

14. Appeals.— *(1) Notwithstanding anything provided in any other law for the time being in force, a decision given or a decree passed by a Family Court shall be appealable—*

(a) to the High Court, where the Family Court is presided over by a District Judge, an Additional District Judge or a person notified by Government to be of the rank and status of a District Judge or an Additional District Judge; and

(b) to the District Court, in any other case.

(2) *No appeal shall lie from a decree passed by Family Court—*

(a) for dissolution of marriage, except in the case of dissolution for reasons specified in clause (a) of item (viii) of section 2 of the Dissolution of Muslim Marriages Act, 1939;

(b) for dower not exceeding rupees fifteen thousand;

(c) for maintenance of rupees five hundred or less per month.

5. The two questions that arise before the Court are whether repayment of *Haq Mehr* received by the wife in consideration of marriage at the time of marriage is a condition precedent for issuance of a decree in suit for dissolution of marriage on the basis of Khula and whether an appeal against a judgment and decree for dissolution of marriage is maintainable in view of section 14(2)(a) of

the Family Courts Act. In view of the provisions of the Family Courts Act together with the provisions of the Dissolution of Muslim Marriages Act, 1939, it becomes apparent that dissolution of marriage can be sought by a wife either on the basis of any fault of the husband or on a no-fault basis. Where the wife is seeking dissolution of marriage due to cruelty on part of the husband and the Family Court comes to the conclusion on the basis of evidence adduced before it that the wife is entitled to the dissolution of marriage due to cruelty the wife in such case cannot be burdened with the liabilities returning dower received at the time of marriage. This was held by the august Supreme Court in ***Abid Hussain Vs. Additional District Judge, Alipur, District Muzaffargarh (2006 SCMR 100)***. It was further held in the said judgment that *"non-provision of appeal in case of dissolution of marriage was to protect women … from prolonged and costly litigation"*.

6. The question of repayment of *Haq Mehr* does however arise in case wife seeks dissolution of marriage on no-fault basis i.e. on the basis of her own considered judgment that she can no longer live with her husband within the bond of marriage. No-fault dissolution of marriage does not contradict Islamic jurisprudence. A woman cannot be forced to continue to suffer within the bond of marriage that she does not wish to remain tied up in and she need not prove and justify the cause of her decision before a court to seek dissolution of marriage. Dissolution of marriage is not a welcome outcome and thus there is emphasis on making efforts to facilitate reconciliation between spouses to ensure that the union preserves. But where it becomes obvious that the wife is unwilling to stay in the

bond of marriage during pretrial reconciliation proceedings, the Family Court is under an obligation to pronounce dissolution of marriage forthwith. The question whether dissolution of marriage was sought due to the husband's fault or not and whether return of *Haq Mehr* is due from the wife are additional questions for which issues can be framed and evidence recorded. But the question of determination of liabilities while contingent on whether the wife is seeking dissolution due to husband's fault, is not a precondition for dissolution of marriage. The question of such determination arises post-dissolution and thus dissolution of marriage is not contingent on repayment of *Haq Mehr* by the wife. There is no concept of personal servitude within the concept of marriage in Islam and none can be imported in section 10(4) of the Family Courts Act. A woman cannot be forced to live with her husband when she wants the marriage dissolved merely because the matter of calculation or settlement of civil liabilities is outstanding between them.

7. The aforementioned scheme of the law is also evident from section 14(2)(a) of the Family Courts Act which prohibits filing an appeal against a decree for dissolution of marriage except when such dissolution is on the basis of finding of the court that a husband has indulged in cruelty and the marriage is liable to be dissolved pursuant to section 2(viii)(d) of the Dissolution of Muslim Marriages Act, 1939. In this context it was held by the learned Sindh High Court in ***Aurangzeb Vs. Mst. Gulnaz and another*** ***(PLD 2006 Karachi 563)*** that the decision with regard to determination and restoration of benefits at the time of dissolution of marriage is appealable and such appeal is not barred by section 14 of the Family

Courts Act. The learned Lahore High Court came to a similar conclusion in ***Khawaja Jameel Ahmed Vs. Judge Family Court, Multan and another (PLJ 2013 Lahore 185)***. Likewise, the august Supreme Court held in ***Abid Hussain Vs. Additional District Judge, Alipur, District Muzaffargarh (2006 SCMR 100)*** that where the family court dismissed a suit seeking dissolution of marriage on ground of cruelty and non-maintenance, the wife aggrieved by such decision could file an appeal under section 14 of the Family Courts Act. What emerges from the law laid down by superior courts is that the question of determination of civil liabilities between spouses upon dissolution of marriage was appealable under section 14 of the Family Courts Act. In the event that a decree has been passed by holding that the husband was liable for cruelty and not entitled to the return of *Haq Mehr*, the husband can appeal the said part of the judgment which held him for liable for cruelty and disentitled him from return of *Haq Mehr*. He can however not seek to have the decree of dissolution of marriage itself set-aside. In other words, the only appealable part under section 14(2) is a finding of the Family Court which determines his civil liabilities for lack of grant of *Haq Mehr* upon dissolution of marriage. Likewise, a wife who seeks dissolution of marriage on the basis of cruelty and the dissolution is not granted on such basis, can appeal such order in the event that she is aggrieved of the determination by the Family Court for civil liability to repay *Haq Mehr* she received from the husband. In such case as well it is the only part of the judgment determining the civil liabilities of the parties that is appealable and not the decree of dissolution of marriage as it cannot be countenanced that marriage having been dissolved by a decree

passed by the Family Court can subsequently be resurrected by the appellate court on the basis that a dispute continues with regard to their civil liabilities as determined by the Family Court in the aftermath of the dissolution of marriage.

8. In forming such opinion this Court relies on the judgment of the august Supreme Court in ***Dr. Akhlaq Ahmed Vs. Mst. Kishwar Sultana (PLD 1983 SC 169)***, wherein the following was held:

> *As regards the third submission of the learned counsel for the petitioner that dissolution of marriage by Khula' cannot stand whilst an inquiry on fact with regard to the terms on which it is to be granted is yet to take place, it appears plausible but is not quite sound. It was held in the case of Moonshee Buzul-ul-Raheem v. Luteefutoon Nisa (8 Moore's Ind. App. 379) that non-payment of stipulated consideration for Khula' does not invalidate the dissolution of marriage by Khula'. Once the Family Court came to the conclusion that the parties cannot remain within the limits of God and the dissolution of marriage by Khula' must take place, the inquiry into the terms on which such dissolution shall take place does not affect the conclusion but only creates civil liabilities with regard to the benefits to be returned by the wife to the husband and does not affect the dissolution itself.*

Likewise, the learned Sindh High Court in ***Aurangzeb Vs. Mst. Gulnaz (PLD 2006 Karachi 563)*** held the following:

> *Thus, the consensus of judicial opinion is that restitution of dower is not an indispensable condition for the grant of Khula' and non-restoration of dower and other benefits will not have any effect upon the validity of the decree. Once the Family Court comes to conclusion that a wife was entitled for Khula' it must pass such decree in her favour. The decision regarding the restoration of mutual benefits will have to be taken in the light of facts of each case and it will have the effect of only creating a civil liability. If the contention of the petitioner that*

> *Khula' cannot be granted without restitution of dower and other benefits is accepted, then a destitute wife, who is found otherwise entitled to Khula', will stand deprived of the right simply because of her incapacity to return the benefits, which will be highly unfair and against the spirit of law and justice.*
>
> *10. …Though a decree for the dissolution of marriage on the ground of Khula' is not appealable in view of the proviso to section 14 of the Family Courts Act, 1964, a decision with regard to determination and restoration of mutual benefits is always appealable and for this view reference may be made to the cases of Muhammad Shafi v. District Judge Gujrat and another 1982 CLC 2057 Lahore, Muhammad Sanaullah v. Muhammad Ilyas, Senior Civil Judge/Judge Family Court Toba Tek Singh and 2 others PLD 1987 Lahore 70, and Muhammad Shaban v. Judge Family Court and others 2003 YLR 2708 Lahore.*

9. Learned counsel for the respondent relied on ***Naila Azmat Vs. Judge Family Court (1999 MLD 3090 Lahore)*** for the proposition that dissolution of marriage is not absolute and is subject to fulfillment of certain conditions by the wife i.e. repayment of *Haq Mehr*. He further relied on ***Shagufta Bibi Vs. Judge Family Court, Mailsi (2013 MLD 487 Lahore)*** wherein the learned Lahore High Court held that decree on the basis of khula granted under section 10(4) of Family Courts Act was conditional upon repayment of *Haq Mehr*. Likewise, the learned counsel for the respondent while relying on ***Mst. Shahida Vs. Sardar Shah (2018 MLD 146 Peshawar)*** submitted that the learned Peshawar High Court in the said judgment held that unless the amount of khula was not paid to the husband the dissolution would not attain finality. With due respect this Court is not in agreement with the view that dissolution of marriage is contingent on prior discharge of civil liabilities by a wife i.e. through return of *Haq Mehr*. It also appears

that the judgment of the learned Peshawar High Court in ***Mst. Shahida Vs. Sardar Shah (2018 MLD 146 Peshawar)*** has been misconstrued by not just the learned counsel for the respondent but also by the law journal that published it due to the construction of the head note. In the said judgment it has not been held that dissolution of marriage on the basis of khula does not attain finality till such time that the amount of khula is repaid by the wife to the husband. The question in this case related to the maintainability of appeal. As has been discussed above an appeal against a part of the judgment determining liability of the wife to repay *Haq Mehr* or disentitlement of the husband to receive repayment of *Haq Mehr* on dissolution of marriage is appealable. The reopening of such matter in appeal does not undo the decree for dissolution of marriage as the question dissolution of marriage itself is not appealable. It was held by learned Lahore High Court in ***Muhammad Shaban Vs. Judge Family Court*** **(2003 YLR 2708)** that "*a decree for dissolution of marriage on the ground of Khula' is not appealable but decision as to fixing of the amount of consideration payable to the husband for wife's release from marriage bond is appealable under section 14 of the Family Courts Act, 1964.*"

10. In view of the law laid down by the august Supreme Court in ***Dr. Akhlaq Ahmed Vs. Mst. Kishwar Sultana (PLD 1983 SC 169)*** and the clear language used in the proviso of section 10(4) read together with section 14(2)(a) of the Family Courts Act it is evident that the matter of dissolution of marriage itself is not appealable. In the instant case the learned Family Court had correctly issued a decree to the extent of dissolution of marriage upon failure of reconciliation proceedings between the petitioner and

respondent No.1. Such dissolution could not be reopened or a decree to such effect could not be set-aside by the learned appellant court. To such extent the judgment of the learned appellate court suffers from infirmity and is liable to be set aside. The question of determination of civil liabilities of the wife i.e. quantum of *Haq Mehr* payable by the wife to the husband upon dissolution of marriage on the basis of khula was a question to be determined by the learned Family Court and to the extent that it was not determined, the matter was rightly remanded back by the learned appellate court to the learned Family Court to frame an issue and allow the parties to adduce evidence in relation thereto.

11. The instant petition is **allowed** and the impugned judgment of the learned appellate court dated 20.09.2021, to the extent of setting aside the judgment and decree passed by the learned Family Court dated 21.06.2021 for dissolution of marriage in favour of the petitioner, is set-aside. However, the question of determination of *Haq Mehr* payable by the petitioner to respondent No.1 will be deemed pending before the learned Family Court which will frame an issue for such purpose and pass judgment after allowing the parties to adduce evidence.

(BABAR SATTAR)
JUDGE

Announced in open Court on **29.04.2022**.

JUDGE

Approved for reporting.

Saeed.