

**JUDGMENT SHEET**  
**IN THE ISLAMABAD HIGH COURT,**  
**ISLAMABAD**

**WRIT PETITION NO.438 OF 2020**

**Malik Musawar Khan**  
**Vs.**  
**Mst. Nadia Yaseen Malik and others**

**Petitioner by : Mr. Ghulam Muhammad Khan, Advocate.**

**Respondents by : Raja Ahmed Abdul Rafay, Advocate.**  
(For Respondent Nos. 1 to 3)

**Date of hearing : 05.01.2022.**

**SAMAN RAFAT IMTIAZ, J.** Through the instant writ petition, the Petitioner (Malik Musawar Khan) assailed Judgment and Decree dated 21.12.2019, passed by the learned Additional District Judge (West), Islamabad, whereby the appeal filed by Respondents No. 1 to 3 was partially allowed and consequently the Judgment and Decree dated 26.06.2019, passed by learned Senior Civil Judge/Judge Family Court (West), Islamabad, was modified.

2. The record shows that marriage between the Petitioner and Respondent No.1 was solemnized on 09.02.2013. The dowry amount was fixed at 04 tola gold and Rs.100,000/- out of which 02 tola gold was given at the time of marriage whereas 02 tola gold and Rs.100,000/- was deferred. The couple was blessed with a son, i.e. Respondent No.2 and a daughter, i.e. Respondent No.3.

3. On 24.01.2019, Respondents No.1 to 3 instituted a suit for dissolution of marriage, recovery of dower and maintenance against the Petitioner. It was, *inter-alia*, contended in the said suit that the Petitioner treated the Respondent No. 1 with cruelty and ultimately on 08-09-2015,

the Petitioner ousted the Respondents No. 1 to 3 from his house, where after she has been bearing all expenditure herself with the help of her brother and no maintenance has been paid by the Petitioner. The Petitioner filed contesting Written Statement in which he prayed for restitution of conjugal rights.

4. The suit was partially decreed by the learned Judge Family Court, vide Judgment and Decree dated 26.06.2019, in the following terms:

*“I. The plaintiff No.1 shall be entitled to maintenance allowance of Rs.5,000/- per month from date of institution of suit till subsistence of marriage.*

*II. The plaintiffs No. 2 & 3 shall be entitled to maintenance allowance of Rs.5,000/- per month for each from date of institution of suit till age of majority of plaintiff No.2 and marriage of plaintiff No.3. The maintenance allowance of minors shall be subject to 10% annual increase.*

*III. The plaintiff No.1 is entitled for recovery of two tolas gold and Rs.1,00,000/- as dower. So far, her claim regarding snatching of two tolas gold given at the time of marriage is concerned the same could not be proved, hence declined to that extent.*

*The decree for restitution of conjugal rights is passed in favor of defendant. The suit of the Plaintiff No. 1 for dissolution of marriage on the basis of cruelty and non-maintenance is dismissed. No order as to cost.”*

5. Feeling aggrieved by the said Judgment and Decree, the Respondents No. 1 to 3 preferred an appeal before the learned Additional District Judge (West), Islamabad. The learned Appellate Court, vide Judgment and Decree dated 21.12.2019 (“**Impugned Judgment**”) partially accepted the appeal and modified the learned Family Court’s Judgment and Decree dated 26.06.2019, in the following terms:

- 1. The plaintiff No.1 shall be entitled to maintenance allowance of Rs.5000/- per month from the date of institution of suit till the period of Idat.*
- 2. The plaintiff No.2 and 3 shall be entitled to maintenance allowance @ Rs.8000/- each per month with 10% per anum increase till the majority of appellant No.2 and till the marriage of appellant No.3.*
- 3. Judgment and decree in favour of respondent to the extent of restitution of conjugal rights is hereby set aside and suit of the*

*appellant No.1 is hereby decreed for dissolution of marriage on the basis of Khulaa instead of on the basis of cruelty etc.*

4. *The appellant No.1 is also entitled to recovery of 2 tolas gold and Rs.100,000/- as dower.*

6. The Petitioner aggrieved of the Judgment and Decree dated 21.12.2019 filed instant Writ Petition. Arguments advanced on behalf of learned counsel for the parties have been heard and the documents placed on record have been examined with their able assistance.

7. The learned counsel for the Petitioner submitted that there are no irreconcilable differences or dispute between the Petitioner and the Respondent No.1 *inter se* and that it was the brother of Respondent No.1 namely Imran, who was also Respondent No. 1's attorney who did not want the parties to reconcile due to *mala fide* intentions and ulterior motives. In view of the foregoing, the legal counsel for the Petitioner requested that the Respondent No. 1 may be directed to appear in person before this Court. The learned counsel for the Petitioner has cited ***Gulzar Hussain Vs. Mst. Mariyam Naz, 2000 MLD 447; Muhammad Ayub Khan Vs. Mst. Shehla Rasheed and another, PLD 2010 Karachi 131; Atiq Ahmed Khan Vs. Noor Ul Saba and another, 2011 CLC 1211; and Major Qamar Zaman Qadir Vs. Judge Family Court, Jehlum and others, PLD 2013 Lahore 88***, whereby it was held that pronouncement of khula by the Court would constitute a single divorce and the husband and wife would be at liberty to remarry each other after solemnization of Nikah without intervening marriage.

8. On the other hand, the learned counsel for the Respondents No. 1 to 3 argued that Khula is neither revocable nor appealable in reliance upon the cases of ***Shahbaz Vs. Fakhira Bibi, 2021 MLD 1506; Shah Hussain Vs. Mst. Nadia Khan, 2018 YLR 2663; Allahuddin Khan Vs. Zamarud***

*Jehan, PLD 2004 Karachi 573; Ghulam Sarwar Vs. Mst. Muniran and others, 1984 CLC 1688; Muhammad Hanif Vs. Mst. Naseem Bibi, 1988 CLC 2308; Fazal Hussain Vs. Mst. Husna Bano, 1995 MLD 170; Amjad Hussain Vs. Zafar Iqbal Khan, etc., K.L.R. 1987 Civil Cases 129; Bibi Feroza Vs. Abdul Hadi, 2014 CLC 60; Sadia Arif Vs. Adnan Shahid, 2021 YLR 1753; Mst. Nabila Safdar Vs. Muneer Anwar, 2000 SD 560; Jaffar Ali Vs. Deputy Commissioner, etc., 2002 SD 819; Ana Liaquat Vs. Additional District Judge, Gujranwala, PLD 2021 Lahore 757; and Fazli-e-Subhan Vs. Mst. Sabereen, PLD 2003 Peshawar 169.*

9. Insofar as the Petitioner's request is concerned that the Respondent No.1 may be directed to appear in person before this Court, it is observed that the same will not serve any fruitful purpose as it is settled law that a decree of dissolution of marriage by way of Khula is neither revocable nor appealable. Having said that there is no cavil to the contention that a decree of Khula constitutes one divorce and as such the Petitioner and the Respondent No.1 are at liberty to remarry each other by performing Nikah if they wish to reunite. However, the parties do not require any pronouncement from this Court for the said purpose nor can this Court direct the parties to do so.

10. This brings us to the Petitioner's contention that the Impugned Judgment & Decree is liable to be set aside regarding payment of dower to the Respondent No.1 because when suit for Khula is decreed, the amount already paid by the husband to the wife is to be returned to the husband and anything outstanding is to be forfeited. In making his submissions, learned counsel for the Petitioner placed reliance on the judgments reported as *Mt. Saima Irum and 3 others Vs. Tariq Javaid and another, 2006 MLD 83;*

*Muhammad Khalil Vs. Shazia Iqbal and 2 others, 2006 CLC 1033; Muhammad Hassan Vs. Federation of Pakistan and 2 others, PLD 2018 Federal Shariat Court 1; and Sadia Arif Vs. Adnan Shahid and 2 others, 2021 YLR 1753.*

11. The learned counsel for the Respondents No.1 to 3 on the other hand, contended that Respondent No.1 did not file suit for dissolution of marriage by way of Khula. Instead she had sought dissolution of marriage on the grounds of cruelty, non-payment of maintenance, and non-performance of matrimonial obligations. In this regard, the learned counsel for the Respondents No.1 to 3 relied upon the cases of *Mst. Sabia Naz Vs. Mir Rustam, 1999 SD 107; Mst. Saffiya Bibi Vs. Fazal Din, 2000 SD 684; Mst. Zatoon Vs. Sabir Hussain, 2002 SD 745; Syed Muhammad Ali Vs. Mussarat Jabeen, 2003 MLD 1077; and Mst. Khurshid Bibi Vs. Baboo Muhammad Amin, PLD 1967 Supreme Court 97.*

12. The principle that emerges from the citations relied upon by the learned counsel for the Respondents No. 1 to 3 and also the ones relied upon by the learned counsel for the Petitioner as enumerated in the preceding two paragraphs is that a decree for Khula may be granted even where no ground for dissolution of marriage as alleged by the wife exists and the wife has omitted to demand Khula if the Court is of the opinion that in the event that decree for dissolution of marriage is not granted, it will give birth to a hateful union and the spouses may not be able to live with each other within the limits prescribed by God.

13. In the instant case, the Respondent No.1 had stated in her Complaint that she had faced such agony at the hands of the Petitioner that it was not

possible for her to live with him while abiding by the limits of Allah. It is also an admitted fact that the parties have been living separately since September, 2015. The pre-trial reconciliation proceedings could not succeed in the learned Family Judge's own opinion. The foregoing factors were sufficient grounds for the grant of a decree for dissolution of marriage by way of Khula in order to avoid a hateful union even if the grounds alleged by the Respondent No.1 for dissolution of marriage were not proved through evidence in the opinion of the Family Court. Instead the learned Family Court concluded that it had not observed any material issue between the parties on the basis of which it could be adjudged that the parties cannot live within the limits prescribed by Allah. Such a conclusion is beyond the jurisdiction of the learned Family Court. The learned Family Court, therefore, erred by dismissing the Respondent No.1's suit for dissolution of marriage and by allowing the Petitioner's prayer for restitution of conjugal rights as no woman can be forced to live with a man without her consent or liking.

14. Be that as it may, it appears from the Impugned Judgment that the learned Appellate Court summoned both the parties once again and heard them both at length but the Respondent No.1 stated that she was not ready to live with the Petitioner. In such circumstances, the learned Appellate Court rightly modified the Judgment and Decree dated 26.06.2019, passed by learned Senior Civil Judge/Judge Family Court to the extent that marriage was dissolved on the basis of Khula rather than cruelty and the judgment and decree in favor of the Petitioner to the extent of restitution of conjugal rights was set aside, which is in consonance with past precedent.

15. But the question that arises is whether in such circumstances the learned Appellate Court was justified in allowing the Respondent No. 1 recovery of dower. Khula is a right given to a woman as the right to divorce is vested in a man with the difference that Khula can be obtained only through a decree of Court and on payment of such consideration as may be fixed by Court.

16. The Court in the case of *Attiq Ahmed Khan (Supra)* explained that the principle of Khula as laid down in various eminent commentaries on Muslim Law in light of the Holy Quran and Sunnah is that a woman can release herself from the tie of marriage by giving up some property in return in consideration of which the husband is to give her Khula. Hence, Khula is repudiation with the consent and at the instance of the wife in which she agrees to give consideration to the husband for her release from the marital tie. However, the Court cannot on its own deprive a lady of her dower and cannot order her to relinquish the same because the dower is the right of the woman given by Shariah as laid down by the Court in the case of *Ana Liaquat (supra)*.

17. Moreover, the learned counsel for the Respondent No.1 has argued that payment of consideration is not necessary in all cases of Khula. The Court can dissolve a marriage on the basis of Khula even without any compensation when it finds that Khula is being claimed due to fault on the part of the husband. He has relied upon the case of *Aurangzeb Vs. Mst. Gulnaz PLD 2006 Karachi 563; Khalid Mahmood Vs. Anees Bibi, PLD 2007 Lahore 626; Fozia Begum Vs. Tariq Hussain, 2004 SD 721; Tuharat Firdos Vs. Imtiaz Khan and others, 2019 CLC 1562; and Asif*

*Jahangir Vs. Mst. Zaheen Kausar and others, 2015 YLR 1547* in this regard.

18. The logic offered by the cases of *Saima Irum (Supra)* and *Ana Liaquat (Supra)* is that otherwise a husband could refuse to give ‘Talaq’ but at the same time create an environment causing the wife to seek Khula, which would entitle him to the benefit of retaining [deferred dower] and /or getting back [prompt] dower property/amount. Thus it was held that where the Court through legal, cogent and convincing evidence comes to the conclusion that the husband has compelled the wife to ask for dissolution of marriage on the ground of Khula then the Court shall have the power to refuse the return of the [prompt] dowered property/amount to husband or to release him from the liability of payment of [deferred] dower.

19. Apart from the judgments cited by the learned counsel of the parties as mentioned herein above, we have also taken guidance from the case of *Razia Begum Vs. Saghir Al-Imad, 1982 CLC 1586*, wherein it was held that it was not correct that in case of Khula, the wife *ipso facto* should return the benefits. The Court held that if a wife seeks Khula without pointing any fault of the husband and the Court finds it proper to grant Khula then the wife should be ordered to return all the benefits received by her and also forego such rights under which she can claim any benefit. However, on the facts of the case, the Court upheld the decision of the trial court whereby the wife was allowed recovery of deferred dower. The Court very clearly stated that the fact that dower was deferred does not mean that it cannot be considered while granting Khula and that it is obligatory on Courts granting Khula to take into consideration dower regardless of whether it is prompt or deferred.



20. It is reiterated that in the case at hand, the Respondent No.1 did not pray for Khula nor did she make any statement regarding relinquishment of dower. The Respondent No.1 prayed for dissolution of marriage on three grounds including the ground of non-maintenance for a period of more than two years. The Respondent No.1 alleged that she was ousted by the Petitioner from his house on 08-09-2015 and that the Petitioner has not paid any maintenance at all to the Respondents since September, 2015. On a factual appraisal, the learned Family Court decided that the Respondent No.1 could not prove desertion by the Petitioner on 08-09-2015. Regarding non-maintenance, the learned Family Court took note of the fact that while the Petitioner claimed that he had been supporting the Respondents till January, 2019, he could not bring on record any proof regarding provision of maintenance since the date of institution of the suit i.e., January, 2019 and further admitted that he was unaware of which school his children were studying in. However, the learned Family Court decided that the Respondent No. 1 was not entitled to decree of dissolution of marriage on account of non-maintenance as such remedy is available only where non-maintenance is for two years.

21. This appears to be a serious case of non-reading and misreading of evidence, which has resulted in miscarriage of justice as the Petitioner failed to produce any evidence of payment of maintenance since 2015 and not just since date of institution of suit. In fact, no proof of maintenance was produced by the Petitioner in evidence at all. Had the learned Family Court appraised the evidence correctly, the Respondent No.1 would perhaps be found entitled to a decree for dissolution of marriage on account of non-maintenance for more than two years.

22. Having said that it is not necessary to consider the validity of the Family Court's decision in this regard given that the learned Appellate Court has already dissolved the marriage by way of Khula and that the Respondent No.1 has not challenged the same before this Court. The above discussion is nevertheless relevant as failure to maintain the Respondents even if for less than the statutory period which entitles a wife to a decree for dissolution of marriage under Section 2(ii) of the Dissolution of Muslim Marriages Act, 1939 would at the very least show that the Respondent No. 1 approached the Court for dissolution of marriage on account of fault of the Petitioner, in which case, the wife is entitled to recovery of outstanding dower. Therefore, I find no reason for interference in the Impugned Judgment & Decree as far as the grant of dower is concerned.

23. Lastly, the learned counsel for the Petitioner submitted that the Petitioner's monthly salary is Rs. 15,000/- and as such the enhancement in the amount of maintenance allowance made by the learned Appellate Court in absence of any proof of Petitioner's income submitted by the Respondent No. 1 is against the settled principles of justice as laid down by superior courts, reliance was placed on case titled ***Khalid Mahmood Vs. Naseem Akhtar reported as 2019 MLD 820***. The learned counsel for the Respondent No. 1 has drawn our attention to the Petitioner's cross-examination in which he has admitted purchase of property in consideration of Rs. 2,700,000/- out of which Rs. 2,200,000/- have admittedly been paid by the Petitioner already.

24. It is also noted that according to the learned counsel for the Respondents No. 1 to 3, the Petitioner has not paid any amount toward maintenance despite orders of the lower courts, which has not been

controverted by the learned counsel for the Petitioner. In such circumstances where the Petitioner has been unable to provide any proof of paying maintenance allowance to Respondents No. 2 & 3 since September, 2015 and has also failed to pay any maintenance amount, whatsoever, to the minor Respondents despite court orders, I am not inclined to set aside the Impugned Judgment & Decree in respect of the enhancement of maintenance allowance of Respondents No. 2 & 3.

25. For all the foregoing reasons, I uphold the Judgment and Decree dated 21.12.2019, passed by the learned Additional District Judge (West), Islamabad. This Petition, having no force, is hereby dismissed.

**(SAMAN RAFAT IMTIAZ)**  
**JUDGE**

Announced in the open Court on \_\_\_\_\_.

**JUDGE**

*Approved for Reporting*  
*Blue Slip added.*