

**JUDGMENT SHEET.**

**ISLAMABAD HIGH COURT, ISLAMABAD,**  
**JUDICIAL DEPARTMENT.**

**W.P No.470/2017.**

**Muhammad Afzal Khan      VS      Chairman Arbitration Council, etc.**

**Petitioner by:                      Mr. Rashid Hanif, Advocate.**

**Syed Shafaqat Hussain Shah/Respondent  
No.1 in person.**

**Respondent No.2 Ex-Parte.**

**Date of Hearing:                      06.12.2017.**

**MOHSIN AKHTAR KAYANI, J:-** Through the instant constitutional petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner, who is real father of Mst. Shayan Afzal, has assailed the order dated 20.10.2016, passed by Chairman Arbitration Council, F-8, Markaz, Islamabad/respondent No.1, whereby application of Mst. Shayan Afzal for issuance of certificate of effectiveness of Talaq filed on 21.10.2013 was dismissed.

2.      The facts, in brief, as referred in the instant writ petition are that Mst. Shayan Afzal had entered into marriage with Syed Farrukh Abbas/respondent No.2 on 20.03.1989 and she had been delegated unconditional right of Talaq under column 18 of the contract of marriage/Nikahnama. On 21.10.2013, Mst. Shayan Afzal had made an application to the Chairman Arbitration Council/respondent No.1 that pursuant to column 18 of the Nikahnama and vide Talaq Notices, she has exercised her right of divorce to husband. All the three notices were attached with the said application. Chairman Arbitration Council/Respondent No.1 issued notices to Syed Farrukh Abbas/respondent No.2 for appearance on 13.11.2013, 11.12.2013, 01.01.2014 and 15.01.2014 but none appeared on behalf of respondent No.2. On 15.01.2014, respondent No.1 directed Mst. Shayan Afzal got recorded her statement and adjourned the proceedings to 29.01.2014. That the proceedings were initiated on 21.10.2013 and after expiry of 90 days, it was incumbent upon respondent No.1 to issue certificate of effectiveness of divorce but instead of issuing the certificate, respondent No.1 adjourned the proceedings till

appearance of respondent No.2. Mst. Shayan Afzal, who died due to terminal disease in UK on 22.02.2015. On 30.09.2016, the petitioner filed an application before respondent No.1 for issuance of divorce certificate in the name of his daughter Mst. Shayan, which was dismissed vide impugned order dated 20.10.2016 with the observation that Mst. Shayan Afzal has died and father had no legal right to pursue the same.

3. Notices to respondent No.2 were issued by this Court through registered post AD and TCS on 08.02.2017 but his service could not be effected. In compliance of order dated 28.02.2017, phone calls were also made on the telephone number of respondent No.2 provide by the petitioner, which was not attended. On 15.05.2017 again notice was issued to respondent No.2 through registered post AD and TCS but his service could not be effected. Resultantly, on 03.07.2017, substituted mode of service was adopted through publication in "The News International" for 24.10.2017. Despite publication none appeared on behalf of respondent No.2 on 24.10.2017, whereupon respondent No.2 was proceeded against ex-parte.

4. Learned counsel for the petitioner contended that Chairman Arbitration Council/respondent No.1 has no authority to withhold the issuance of certificate of effectiveness of Talaq, especially when the executor of divorce Mst. Shayan Afzal had not withdrawn her application for issuance of certificate of effectiveness of Talaq. It was further contended that the divorce *ipso-facto* has become effective after expiry of 90 days from the date, when application/notice of Mst. Shayan Afzal was received by respondent No.1.

5. Syed Shafaqat Hussain Shah, Chairman Arbitration Council/respondent No.1 has appeared before the Court today and confirmed from his record that the application for issuance of certificate of effectiveness of Talaq alongwith notices of Talaq on the basis of delegated right of divorce in terms of column No.18 of the Nikahnama was filed by Mst. Shayan Afzal Khan and notices were issued to respondent No.2 on 03.11.2013, 11.12.2013, 01.01.2014 & 15.01.2014 but none appeared on behalf of respondent No.2 and finally Muhammad Afzal Khan/father of Mst. Shayan Afzal Khan requested the Arbitration Council for issuance of certificate of effectiveness of Talaq on 17.10.2016 in the name of Mst. Shayan Afzal but the certificate was not issued due to death of Mst. Shayan Afzal. He has been confronted as to whether late Mst. Shayan Afzal ever

submitted request for withdrawal of application for issuance of certificate of effectiveness of Talaq, in response to the query, he has replied that no such request was ever submitted by Mst. Shayan Afzal. He has further stated that Mst. Shayan Afzal nominated her father/present petitioner as her Arbitrator, who put appearance on different occasions but neither any intention was shown nor any request was made by him for the withdrawal of application for issuance of certificate of effectiveness of Talaq submitted by Mst. Shayan Afzal. He has not denied that respondent No.2 never filed any application challenging the delegated right of divorce.

6. I have heard learned counsel for the petitioner as well as Chairman Arbitration Council/respondent No.1 and gone through the record.

7. From the perusal of record it has been observed that Mst. Shayan Afzal and respondent No.2/Syed Farrukh Abbas got married to each other on 20.03.1989 at Rawalpindi against the dower of Rs.50,000/- and in column No.18 of the Nikahnama respondent No.2 had delegated right of Talaq to his wife Mst. Shayan Afzal with the following words:-

شوہر نے غیر مشروط طور پر طلاق کا حق بیوی کو تفویض کر دیا ہے۔

The above referred Urdu wording contained in column 18 of the Nikahnama is very clear and unambiguous and it can safely be presumed that husband/respondent No.2 had extended his powers of divorce to his wife Mst. Shayan Afzal without any condition and Mst. Shayan Afzal could exercise the delegated right of divorce without any objection or permission.

8. In order to understand the concept of divorce/Talaq under Muslim Family Laws Ordinance, 1961, section 7 of the ordinance is relevant, which reads as under:-

*“7. Talaq.—(1)Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of talaq in any form whatsoever, give the Chairman a notice, in writing of his having done so, and shall supply a copy thereof to the wife.*

*(2)Whoever, contravenes the provisions of sub-section (1) shall be punishable with simple imprisonment for a term which may extend to one year, or with fine which may extend to five thousand rupees, or with both.*

*(3)Save as provided in sub-section (5) a talaq, unless revoked earlier expressly or otherwise shall not be effective until the expiration of ninety days from the day on which notice under sub-section (1) is delivered to the Chairman.*

*(4)Within thirty days of the receipt of notice under sub-section (1), the Chairman shall constitute any*

*Arbitration Council for the purpose of bringing about a reconciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation.*

(5).....

(6).....”

9. It is also settled proposition of law that divorce pronounced by a party having not been revoked would be effected after expiry of ninety (90) days from the date of receiving of the notice by the Chairman Arbitration Council under sub-section 3 of section 7 of the Muslim Family Laws Ordinance, 1961. Even failure to send notice of Talaq to the Chairman Arbitration Council does not render Talaq ineffective in Shariah. Reliance is placed upon Mst. Zahida Shaheen, etc vs. State, etc (NLR 1995 SD 37). There is no specific word for pronouncement of Talaq under any Code of law, however, it is settled proposition of law that a person exercising the right of Talaq has to state his intention in unequivocal terms, through which it could be considered that he or she has intention for termination of the marriage.

10. I have gone through the first notice of Talaq issued by Mst. Shayan Afzal on 30.08.2013, wherein she categorically mentioned that she has been given right as per column 18 of the Nikahnama and that she declares that she is desirous of dissolving the Nikah and the marriage with Syed Farrukh Abbas, as it was not possible in the circumstances for the parties to live together as husband and wife within the limits prescribed by Islam and she separated herself from Syed Farrukh Abbas/respondent No.2 since one and half year i.e. from February, 2012. The notice of Talaq was issued on 30.08.2013 to respondent No.2 on the addresses in Doha, Qatar and Pakistan. Similarly on the same date second and third notices of Talaq were issued to respondent No.2 on the addresses in Doha, Qatar and Pakistan, which clearly give impression that late Mst. Shayan Afzal was not interested to reconcile the matter and she issued the same without any consultation or other factors.

11. Literal meaning of Talaq "تَرْك" and "مُتَارَكَة", which means to release from a relation or a contract as per different schools of thoughts. Every Muslim husband can pronounce three Talaqs to his wife, where-after relationship of husband and wife ceases to exist and the other conditions for the executor of Talaq is to be sane and major while

pronouncement of Talaq. In case when any party pronounces and executes three Talaqs, the same is called as "طلاق بائن" or irrevocable Talaq under Shariah and the intention of the parties has to be considered for final termination of the marriage. It has also been settled by the Jurists that once husband has delegated his right of divorce to his wife, he cannot revoke the same. The same has also been referred in section 101 Part-II Chapter 12 of (مجموعہ قوانین اسلام) (جلد دوم), which is as under:-

"تفویض طلاق (delegation of the power of divorce) کے معنی ہیں "طلاق دینے کا اختیار اپنی زوجہ کے سپرد کرنا" چنانچہ عورت کا مرد سے نکاح کے وقت یہ شرط کرنا کہ وہ طلاق کی مختار ہے شرعاً صحیح ہے۔ اسی طرح شوہر کا اپنی زوجہ کو قیام نکاح کے دوران حق طلاق تفویض کرنا بھی جائز ہے۔ ملک شام کے عائلی قانون کے تحت بھی شوہر کا یہ اختیار تسلیم کیا گیا ہے۔"

اگر زوجہ نے بوقت نکاح شوہر سے حق طلاق حاصل کر لیا ہو یا وہ نکاح کے بعد اس حق کی مالک بن گئی ہو تو وہ اس حق کو استعمال کر کے خود کو طلاق دے کر رشتہ زوجیت قطع کر سکتی ہے اور اس طلاق کا اسی طرح اعتبار کیا جائے گا جیسے کہ شوہر نے زوجہ کو وہ طلاق خود دی ہو۔

تفویض یا تملیک طلاق کے بعد شوہر زوجہ کے اس حق کو فسخ نہیں کر سکتا۔ کیوں کہ تفویض کے بعد زوجہ اس اختیار کی بنفسہ مالک ہو جاتی ہے خواہ اس حق کو استعمال کرے یا نہ کرے اور جب چاہے کرے۔ البتہ اگر تفویض طلاق معین مدت کے لیے ہو اور وہ مدت گزر جائے تو عورت کا حق باطل اور بے اثر ہو جائے گا۔

لیکن شوہر کے اپنی زوجہ کو حق طلاق تفویض کرنے کی صورت میں خود اس کا حق طلاق ساقط نہیں ہوتا چنانچہ اگر شوہر نے اپنی زوجہ کو حق طلاق تفویض کر دیا اور پھر خود اس کو طلاق بائن دے دی تو عورت کا اختیار باطل اور غیر نافذ ہو جائے گا۔

یہاں ایک سوال یہ پیدا ہوتا ہے کہ تفویض سے ملکیت کیونکر پیدا ہوئی اور اگر ملکیت عورت کو حاصل ہو گئی تو پھر مرد کا حق طلاق کیونکر باقی رہا؟ اس کا مختصر جواب یہ ہے کہ تفویض طلاق دراصل خیار طلاق ہے اور خیار دینا ایک فعل کے کرنے یا نہ کرنے کا مالک کرتا ہوتا ہے کیونکہ مخیر (جسکو اختیار دیا گیا) اس فعل میں اپنی رائے سے تصرف کرتا ہے لہذا اگر شوہر اپنی زوجہ کو خیار طلاق تفویض کرتا ہے تو گویا وہ اپنی زوجہ کو یہ اختیار دیتا ہے کہ خود کو طلاق دے کر اس مرد کے رشتہ زوجیت سے علیحدہ کر سکتی ہے اور ایسی صورت میں ظاہر ہے کہ، عورت مالک ہو کر تصرف ہے جس کا منشاء یہ ہے کہ مرد کی اس ملکیت میں عورت بھی تصرف کر سکتی ہے جو اس مرد کے علاوہ ہے نہ کہ بجائے۔"

12. The concept of delegated right of divorce can also be given effect in three different formations and it has been derived by Muslim jurists and commentators on the

followings of the Verses [28 & 29] of Surah Al-Azhab as a main source. The entire concept has been defined in the authoritative judgment of the Federal Shariat Court referred as **Khawar Iqbal vs. FOP (2013 MLD 1711)**, wherein it has been held that:

#### تفویض طلاق:

فقہائے نے "تفویض طلاق" پر مفصل بحث کی ہے اور تفویض کے لئے عربی زبان میں جو مختلف تعبیرات اختیار کی جاتی ہیں، جیسے افر بالید، اختیار، مشیت، ان کے اثرات انتاج پر روشنی ڈالی ہے، یہاں ان کا ذکر کرنا موجب طوالت ہو،۔۔۔ البتہ چونکہ تفویض طلاق نکاح کے مستقبل میں پیش آنے والی دشواریوں کے حل میں ایک مناسب تدبیر ہے اور خصوصیت سے ہندوستان کے موجودہ حالات میں مسلمان عورتوں کے مصائب کو دور کرنے میں اس سے نفع اٹھایا جاسکتا ہے، اس لیے کچھ ضروری باتیں اس بابت عرض کی جاتی ہیں۔

(۱) بیوی کو کہے کہ "اگر تم چاہو تو اپنے آپ پر طلاق واقع کر لو" تو جس مجلس میں بیوی سے بات کہی ہے، یا شوہر کے قاصد نے جس مجلس میں اس کی اطلاع دی ہے، اس مجلس میں طلاق واقع کرنے کا حق حاصل ہوگا، اسی طرح اگر کسی تیسرے شخص سے کہا کہ تم چاہو تو میری بیوی کو طلاق دیدو، تو یہ توکیل نہیں، تفویض ہوگی، اور وہ شخص اس کے اند ہی طلاق واقع کرنے کا مجاز ہوگا، مجلس کے بعد نہیں۔ (ہندیہ 402/1)

(۲) بیوی سے کہا: "تم اپنے آپ پر طلاق واقع کر لو"، اور اس کی چاہت کا ذکر نہیں کیا یعنی یہ نہیں کہا کہ اگر تم چاہو تو طلاق واقع کر لو، تب بھی تفویض ہے، مجلس تک بیوی اپنے آپ پر طلاق واقع کر سکتی ہے اور شوہر اس درمیان اپنی بات سے رجوع نہیں کر سکتا، اسی عبارت سے اگر کسی اور شخص کو حق دیا کہ اس کی بیوی پر طلاق واقع کر دے تو یہ توکیل ہوگی، طلاق دینے کا اختیار مجلس کے بعد بھی باقی رہے گا، لیکن شوہر چاہے تو اختیار واپس لے سکتا ہے۔ (حوالہ سابق)

(۳) بیوی کو یا کسی تیسرے شخص کو تفویض طلاق کرتے ہوئے اس طرح کہے کہ "تو جب بھی چاہے، اپنے آپ پر طلاق واقع کر لے، تو اب یہ تفویض مجلس تک محدود نہیں رہے گی، بلکہ وہ عورت جب بھی چاہے اپنے آپ پر طلاق واقع کر سکتی ہے، یا وہ شخص اس کی بیوی کو طلاق دے سکتا ہے۔ (الدر المختار علی ہامش الرد 476/2)

(۴) اس بات کی گنجائش ہے کہ تفویض مشروط ہو، مثلاً یہ کہ "اگر میں تم کو چھوڑ کر اسٹے دنوں غائب ہو جاؤں تو تم اپنے اوپر طلاق واقع کرنے کا حق ہوگا" یا "اگر میں تمہاری موجودگی میں دوسری شادی کی یا تم کے بے جا مار پیٹ کی، یا اتنی مدت تک نفقہ نہیں دیا، تو اپنے اوپر طلاق واقع کر لو" ان صورتوں میں مذکورہ شرائط پائے جانے کی صورت ہی میں طلاق واقع کرنے کا اختیار ہوگا۔

(ہندیہ 396-98/1)

دارالقضاء کو تفویض طلاق:

موجودہ حالات میں سماجی مشکلات کو حل کرنے کے لئے "تفویض طلاق" ایک بہتر شکل ہے، البتہ عورتوں کو حق طلاق تفویض کرنا نقصان سے خالی نہیں، اگر خواتین اس حق کا صحیح استعمال کرنے کی صلاحیت رکھتیں تو شریعت نے مردوں کی طرح عورتوں کو بھی حق طلاق دیا ہوتا، اس لئے خیال ہوتا ہے کہ تفویض طلاق کی ایسی صورت اختیار کرنی بہتر ہے جس میں طلاق دارالقضاء یا محکمہ شرعیہ کو دیا گیا ہو، بیوی کے علاوہ دوسروں کو طلاق کا اختیار دینا بنیادی طور پر تو "توکیل" ہے اور وکالت کبھی بھی واپس لی جاسکتی ہے، لیکن اگر کسی تیسرے شخص کی چاہت و مشیت پر طلاق کے استعمال کو موقوف کر دیا جائے تو "توکیل" کے بجائے "تفویض" ہے، (الحانیہ 524/1) اب شوہر اختیار کو واپس نہیں لے سکتا، فتاویٰ بزازیہ میں ہے:

"لو قال لا جنبی طلاقھا بیدک او طلقھا ان شئت کفولہ امرک بیدک یقتصر ولا تملك الرجعة" (ہدایہ 224/3) (اگر اجنبی شخص سے کہا کہ عورت کا حق طلاق تمہارے ہاتھ میں ہے، یا یہ کہے کہ "اگر تم چاہو تو طلاق دیدو" تو یہ تمہارا معاملہ تمہارے ہاتھ میں ہے "کہنے کی طرح ہے کہ اس میں اختیار مجلس میں محدود رہے گا اور شوہر کو اس سے رجوع کرنے کا حق حاصل نہیں ہوگا۔)

اور سراجیہ میں ہے۔

"لو قال لا جنبی طلقھا ان شئت ثم عدلہ لا یصح" (السراجیہ 24)

(اجنبی شخص سے اپنی بیوی کی بابت کہے کہ اگر چاہو تو اسے طلاق دیدو، پھر اس کو اختیار سے معزول کر دے تو درست نہیں۔"

فتاویٰ بزازیہ میں ہے کہ اختیار طلاق کو اسی مجلس تک محدود مانا گیا ہے، کیوں کہ شرط کے لیے جو لفظ استعمال کیا گیا ہے وہ عموم کو نہیں بتاتا ہے، اگر "ان شئت" (اگر تو چاہے) کی بجائے (جب بھی تو چاہے) کہا جائے تو پھر بعد از مجلس بھی اختیار باقی رہے گا۔

پس اگرچہ شرطوں کے ساتھ دارالقضاء کو حق طلاق تفویض کیا جائے اور یہ وسعت برقی جائے کہ عورت قاضی سریت کے پاس ثبوت شرعی کے ذریعہ ان شرائط میں کوتاہی ثابت کر دے، یا دوسرے قرائن کی بنا پر قاضی کو عورت کے بیان کی صداقت پر اطمینان ہو جائے تو وہ عورت کو طلاق بآن دے سکتا ہے تو شاید یہ زیادہ بہتر صورت ہو۔ (قاموس الفقہ، صفحہ 339 تا 340)

*A prominent religious scholar, Maulana Ashraf Ali Thanwai has also discussed talaq Tafweez in his book, Hila Najiza. He writes that:*

اس قسم کا کابین نامہ لکھوانا (جس میں طلاق کا اختیار عورت کے ہاتھ میں دیدیا گیا ہو اور بوقت ضرورت اس سے کام لینا شرعاً جائز ہے) اور اس اختیار دیدینے کو تفویض طلاق کہتے ہیں) اور شرطوں کا بیان نمبر (۳) میں آتا ہے۔

(۲) اس کی تینوں صورتیں جائز ہیں چاہے نکاح سے پیشتر لکھوایا جاوے چاہے عین وقت عقد میں زبان سے کہلوایا جائے چاہے بعد میں لکھوایا جائے مگر پہلی اور دوسری صورت کے صحیح و معتبر ہونے کی ایک ایک شرط ہے۔

پہلی صورت کہ یہ کاہن نامہ نکاح سے پہلے لکھا جاوے اس کے معتبر و مفید ہونے کے لیے یہ شرط ہے کہ اس میں نکاح کی طرف اضافت و نسبت موجود ہو مثلاً یہ لکھا جائے کہ اگر میں فلاں بنت فلاں کے ساتھ نکاح کروں اور پھر شرائط مندرجہ اقرار نامہ ہذا میں سے کسی شرط کے خلاف کروں تو مسامتہ مذکورہ کو اختیار ہوگا کہ اسی وقت یا پھر کسی وقت چاہو تو اپنے اوپر ایک طلاق بائن واقع کر کے اس نکاح سے الگ ہو جائے اگر اس میں اضافت الی نکاح نہ لکھی گئی تو یہ اقرار نامہ محض بیکار ہوگا اس کی رو سے عورت کو کسی قسم کا اختیار حاصل نہ ہوگا۔

اور دوسری صورت کو عین ایجاب و قبول ہی میں زبانی شرائط مذکور ہوں اس کے صحیح و معتبر ہونے کی شرط یہ ہے کہ ایجاب عورت کی جانب سے ہو یعنی اولاً خود عورت (یا اس کا ولی یا وکیل یعنی قاضی نکاح خواں) عقد نکاح کے وقت یوں کہے کہ میں نے اپنے آپ کو (یا مسامتہ فلاں بنت فلاں کو) تیرے نکاح میں اس شرط پر دیدیا کہ اگر تم نے یہ کام کیا یا وہ کام کیا (یعنی شرطیں لگانا مقصود ہوں سب کو ذکر دیا جاوے) تو اپنے معاملہ کا اختیار میرے (یا مسامتہ موصوفہ کے) ہاتھ میں ہوگا یعنی شرائط مذکورہ میں سے کسی ایک شرط کی خلاف ورزی پر بھی اختیار ہوگا کہ اسی وقت یا پھر کسی وقت چاہوں (یا چاہے) تو اپنے آپ کو ایک طلاق بائن دیکر اس نکاح سے الگ کر سکوں گی (یا کر سکے گی) اس کے جواب میں مرد نکاح یوں کہے کہ میں نے قبول کر لیا اس پر عورت کو اختیار ہوگا کہ وہ جب اپنے اوپر شرائط کے خلاف ظلم و مصیبت دیکھے اپنے آپ کو ایک طلاق بائن دیکر اس شوہر کے نکاح سے نکل جائے یعنی اس طرح کہدے کہ میں اپنے آپ کو ایک طلاق بائن واقع کرتی ہوں۔

اور اگر ایسا نہ کیا گیا بلکہ ابتدائے کلام (یعنی ایجاب) مرد کی جانب سے ہو اور لڑکی والے قبول کے ساتھ تفویض طلاق کی شرط لگا دیں تو نکاح بلا کسی شرط کے صحیح ہو جاویگا اور شرط بالکل بے کار جائے گی۔

اور تیسری صورت کہ نکاح کے بعد کوئی اقرار نامہ اس قسم کا شوہر سے لکھوایا جاوے یہ صورت بھی صحیح اور بالکل درست ہے۔

لیکن عورت کو اس کے بعد بھی چاہئے کہ طلاق واقع کرنے میں جلدی نہ کرے بلکہ اطمینان کے ساتھ سوچ سمجھ کر کام کرے اور تین باتوں کا ضرورت التزام کرے۔

اول یہ کہ فوراً غصہ کے وقت اپنے اس اختیار سے کام نہ لے بلکہ ایک معتد بہ مدت تک غور و خوض کرے جس کی میعاد ایک ہفتہ سے کم نہ ہو۔

دوسرے یہ کہ اپنے خیر خواہوں سے مشورہ کرے۔



تیسرے یہ کہ سنت کے موافق استخارہ کرے اور ویسے بھی دعا کرے کہ اللہ تعالیٰ میرا دل ایسے کام کی طرف پھیر دے جو میرے لئے دین و دنیا میں بہتر ہو اس تمام کوشش کے بعد جو کچھ دل میں آئے اس پر عمل کرے اور اللہ تعالیٰ پر بھروسہ رکھے۔ اس طرح پھر وہ خطرہ نہ ہو گا جو تفویض مطلق کی صورت میں ہوتا ہے۔ فقط اللہ اعلم (حیلہ ناجزہ، صفحہ 19-24)

13. The above view has also been reiterated by the Division Bench of the Hon'ble Peshawar High Court in Sajid Hussain Tanoli vs. Nadia Khattak and three others (2013 CLC 1625), wherein it is held that:

"9. Although the power to give divorce belongs to the husband, yet he may delegate the power to the wife or to a third person, either absolutely or conditionally, and either for a particular period or permanently. The person to whom the power is thus delegated may then pronounce the divorce accordingly. Such a divorce is known as "Talaq by Tafweez". The delegation of option called "Tafweez" by the husband to his wife, confers on her the power to divorce herself. Tafweez is of three kinds:

- (a) Ikhtiar, giving her the authority to divorce herself.
- (b) Amr-ba-yed, leaving the matter in her own hand.
- (c) Mashiat, giving her the option to do what she likes.

All these when analyzed, resolve themselves into one, viz, leaving it in her or somebody else to option to do what she or he likes. The wife cannot sue to enforce the authority alleged to have been given to her, but she sues after she has given effect to it, to make the husband liable for her dower or to restrain him from seeking conjugal relations.

10. The Holy Quran being a Code itself provides that it is a simple Deen and anybody, who makes it complicated will stand ostracized. The provisions of Islam in respect of divorce are very simple and balanced. The God has fixed the limits and no one can transgress over it. Here, guidance is sought from Ayat No.28, 29. Sura Al-Ahzab 33 of Holy Quran wherein it is mentioned as;---

يَا أَيُّهَا النَّبِيُّ قُلْ لِأَزْوَاجِكَ إِن كُنْتُنَّ تُرِدْنَ الْحَيَاةَ الدُّنْيَا  
وَزِينَتَهَا فَتَعَالَيْنَ أُمَتِّعْكُنَّ وَأَسَرِّخْكُنَّ سَرَاحًا جَمِيلًا. وَإِن  
كُنْتُنَّ تُرِدْنَ اللَّهَ وَرَسُولَهُ وَالدَّارَ الْآخِرَةَ فَإِنَّ اللَّهَ أَعَدَّ  
لِلْمُحْسِنَاتِ مِنْكُنَّ أَجْرًا عَظِيمًا.

اے نبی اپنی بیویوں سے کہو اگر تم دنیا اور اسکی زینت چاہتی ہو تو آؤ، میں تمہیں  
کچھ دے دلا کر رخصت کر دوں۔ اور اگر تم اللہ اور اس کے رسول ﷺ اور  
دار اخوات کی طالب ہو تا جان لو کہ تم میں سے جو نیکو کار ہیں اللہ نے ان کے  
لئے بڑا اجر مہیا کر رکھا ہے۔

11. *The matter has been interpreted by Maulana Modudi in Tafseer-ul-Quran in the following words:---*

"تفویض طلاق" یہ اختیار ایک دفعہ عورت کو دے دینے کے بعد شوہر نہ تو اسے واپس لے سکتا ہے۔ اور نہ عورت کو اس کے استعمال سے روک سکتا ہے۔ البتہ عورت کے لئے یہ لازم نہیں ہے کہ وہ اس اختیار کو استعمال ہی کر لے۔ وہ چاہے تو شوہر کے ساتھ رہنے پر رضامندی ظاہر کر دے چاہے علیحدگی کا اعلان کر دے اور چاہے تو کسی چیز کا اظہار نہ کرے اور اس اختیار کو یونہی ضائع ہو جانے دے۔ اس اختیار کے عورت کی طرف منتقل ہونے کی دو شرطیں ہیں۔ اول یہ کہ شوہر نے یا تو اسے صریح الفاظ میں طلاق کا اختیار دیا ہو یا اگر طلاق کی تفویض نہ کی ہو تو پھر اسکی یہ نیت اختیار دینے کی ہو۔"

14. Besides the above referred conditions, section 8 of the Muslim Family Laws Ordinance, 1961 recognizes the concept of delegated right of divorce, which is as under:-

**"8. Dissolution of marriage otherwise than by Talaq.—**  
*Where the right to divorce has been duly delegated to the wife and she wishes to exercise that right, or where any of the parties to a marriage wishes to dissolve the marriage otherwise than by talaq the provisions of section 7 shall, mutatis mutandis and so far as applicable, apply."*

This section specifically provides another form of Talaq known as تفویض طلاق i.e delegated right of divorce to wife absolutely or conditionally and either for temporary period or permanent and lays down the procedure provided in section 7 of the ordinance shall be followed. It has also been settled that the Chairman Arbitration Council has no authority to refuse the acceptance of notice of Talaq and notice sent by the wife to husband would be considered as formal pronouncement of Talaq by wife and such pronouncement would become irrevocable (if all three Talaqs have been pronounced) and would operate Talaq by wife.

15. The Arbitration Council is bound to proceed with the process provided in Muslim Family Laws Ordinance, 1961 after receiving notice of Talaq from either party, whereby notice to other party has to be issued and after completion of reconciliation proceedings, if it is found out that reconciliation proceedings have been failed, the Arbitration Council shall issue certificate of effectiveness of Talaq on expiry of 90 days. Reliance is placed *Mst. Gul Zameeran and 3 others vs. Mst. Aasia (2017 CLC 1431 /Sindh (Sukkur Bench).*

16. The purpose of Arbitration Council is to hold reconciliation proceedings between the spouses and if the matter is not reconciled, the Chairman Arbitration Council has to

issue certificate of effectiveness of Talaq after expiry of 90 days, whereas it is prerogative and authority of the person, who files the application alongwith notices of Talaq for issuance of certificate of effectiveness of Talaq to withdraw the same before expiry of the 90 days and if the said application is not withdrawn by the applicant (whether the applicant is husband or wife), the Chairman Arbitration Council cannot refuse to issue certificate of effectiveness of Talaq, especially in those cases, when the other side does not appear for reconciliation proceedings. Similarly, if wife (in case of delegated right of divorce) has approached the Chairman Arbitration Council for issuance of certificate of effectiveness of Talaq and notices have been issued to other side, whereas the other side fails to appear before the Chairman Arbitration Council and in the meanwhile the applicant (wife) or the person, who applied, dies then it can only be presumed that the executor of the notices of Talaq had intention to pronounce Talaq as the same can be gathered from the documents of Talaq. Reliance is placed upon *Malik Khalid Riaz vs. The Administrator, Arbitration Council, Hafizabad and another (2016 CLC 1522)*.

17. It is apparent from record that request for issuance of certificate of effectiveness of Talaq is still in field and no request for withdrawal of the said application was ever been made by Mst. Shayan Afzal Khan (late) during her lifetime. With reference to such admitted facts on record, no other intention can be gathered except that right of divorce was delegated to Mst. Shayan Afzal Khan, which was in field at the time of pronouncement of divorce and the same was exercised with due diligence. Hence, the Chairman Arbitration Council was bound to give effect to the said request. Despite issuance of notices by respondent No.1, none appeared on behalf of respondent No.2 before the Chairman Arbitration Council, Islamabad, therefore, it was not possible to adopt the reconciliatory mechanism as such the request made by Mst. Shayan Afzal for issuance of certificate of effectiveness of Talaq became absolute.

18. In present case the deceased Mst. Shayan Afzal, who had issued three notices of Talaq on the same day to respondent No.2 on the basis of delegated right of divorce (Talaq Tafweez) as per column 18 of Nikahnama by exercising her right of divorce and requested in writing to Chairman Arbitration Council/respondent No.1 for issuance of certificate of effectiveness of Talaq and notices were issued to respondent No.2

(husband) by respondent No.1 but no one appeared on behalf of respondent No.2. Even otherwise from the perusal of record, it has been observed that the parties had already been separated prior to the filing of the application for issuance of certificate of Talaq but the Chairman Arbitration Council kept the matter pending after 90 days, even after one year, the certificate was not issued and in the meanwhile Mst. Shayan Afzal died on 22.02.2015 in UK. The death certificate has also been placed on record. It can safely be presumed that the deceased had no intention to revoke the notice of Talaq. Reliance is placed upon **Malik Khalid Riaz vs. The Administrator, Arbitration Council, Hafizabad and another (2016 CLC 1522).**

19. Even otherwise, it is not case of respondent No.2 that he had not extended the delegated right of Talaq to Mst. Shayan Afzal and it is settled proposition that Talaq once pronounced would be effective after expiry of 90 days. Reliance is placed upon **Sajid Hussain Tanoli vs. Nadia Khattak and 3 others (2013 CLC 1625).** It is also settled proposition that under Islamic Law powers to give divorce belong to husband but he can delegate such powers to his wife or third party either absolutely or for particular period or permanently, whereas such kind of divorce has been recognized in section 8 of Muslim Family Laws Ordinance, 1961. Reliance is placed upon **Khawar Iqbal through Attorney vs. Federation of Pakistan through Secretary M/o Law and Justice, Islamabad (2013 MLD 1711 FSC).** The said procedure is also applicable in the present case and Chairman Arbitration Council has to issue certificate of effectiveness of Talaq after expiry of 90 days from the date of application, whereas record reveals that unnecessary adjournments were granted to respondent No.2 by Chairman Arbitration Council but the proceedings were not concluded. Even otherwise, it is not the mandate of law to wait for other person to join reconciliation proceedings even after expiry of 90 days. The very mandate of law is to provide a mechanism under which the parties have to go through the opportunity of reconciliation to settle their differences by way of arbitration mechanism, however when such efforts fail, despite elapse of three months, law presumes that reconciliation is not possible and there is irretrievable breakdown, thereupon the parties are allowed to undo the marriage life and both parties can walk away, if they so wish with dignity and grace, which is the real mandate of law. Reliance is placed upon **M. Parnian Arooj vs. Mahmood Sadiq and another (2010 CLC 258 Lahore).** In the same judgment, it has

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further been held by the Hon'ble Lahore High Court that non-service of notice of Talaq has to be considered as a mere irregularity which would not affect the validity of Talaq validly pronounced and communicated as it is the duty of parties to approach Union Council of the area where wife resides, to facilitate her participation in the proceedings, if she so desires and such purpose could adequately be served by service of notice and same is the case with husband who can approach the Union Council of the area where wife permanently resides and the proceedings of the Arbitration Council is to declare the matter under the law or settlement of the marriage dispute in a manner provided under the law. However, all service modes have been applied by the Arbitration Council as well as by this Court in the instant writ petition but respondent No.2 never turned up, who has been proceeded ex-parte, therefore, the very intent gathered from the conduct of respondent No.2, who decided himself neither to appear before the Arbitration Council nor before this Court with view that he is not interested for any kind of reconciliation, hence, there is no other possible way to call respondent No.2 except to decide the matter in accordance with the legislative intent, i.e. to issue certificate of effectiveness of divorce after expiry of 90 days.

20. The conduct of Chairman Arbitration Council regarding non-issuance of certificate even after expiry of 90 days is contrary to law and the same is in violation of Articles 4 & 10(A) of the Constitution of the Islamic Republic of Pakistan, 1973, whereby all persons have been given due protection of law with assurance that an opportunity of fair trial shall be given to him or her, whereas the concept of fairness demands that when time has been referred in any law, the legislative intent is to be followed in same spirit and no other interpretation is permissible as it would mean to reading down the legislative intent and the same is also not permissible under the rules of interpretation. It has been observed from the record that the Nikhnama was duly registered and words "*Talaq Tafweez*" have duly been incorporated in column 18 of Nikahnama and notices were issued to respondent No.2 by respondent No.1 but he did not turn up. In such like situation, intention of Mst. Shayan Afzal has to be given effect as she never withdrew her request of issuance of certificate of effectiveness of Talaq before her death, therefore, any other interpretation would be against the very foundation of concept of Talaq-e-Tafweez.

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21. It is settled proposition of law that if Talaq has been pronounced by the party and process of Arbitration Council has been adopted under the law and during pendency of proceedings the executor of the Talaq dies before expiry of 90 days, Talaq will not take its effect as held in 1994 SCMR 1720 (Mushtaq Ahmed and another vs. Sat Bharai and 5 others), whereas in other cases, if the executor of Talaq dies after completion of 90 days process time before Arbitration Council, Chairman Arbitration Council would be under legal obligation to issue certificate of effectiveness of divorce (Talaq) in favour of deceased, as applicant has not withdrawn his/her Talaq before 90 days.

22. In view of above discussion, instant writ petition is allowed. Respondent No.1 is directed to issue certificate of effectiveness of Talaq in the name of Mst. Shayan Afzal, when 90 days were completed from 21.10.2013. (The date of application of Mst. Shayan Afzal for issuance of certificate of effectiveness of Talaq). The said certificate shall be issued to petitioner/father of Mst. Shayan Afzal.

\_\_\_\_\_  
(MOHSIN AKHTAR KAYANI)  
JUDGE

Announced in open Court on: 29<sup>th</sup> December, 2017.

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JUDGE

Approved for reporting.

R.Anjam