JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.662 of 2016
Khurram Nasser
Versus
The Judge Family Court (West) & others

Date of Hearing: 29.02.2016
Petitioner by: Sayyid Murtaza Ali Pirzada, Advocate

MIANGUL HASSAN AURANGZEB, J:- Through the instant writ petition, the petitioner (Khurram Naseer) has impugned the Order dated 17.11.2015, passed by the learned Judge Family Court (West), Islamabad, whereby the marriage between the petitioner and respondent No.2 (Uzma Khurram) was dissolved on the basis of *khula* under Section 10(4) of the West Pakistan Family Courts Act, 1964 (hereinafter referred to as "WP-FCA, 1964"). Furthermore, respondent No.2 was directed to return the dower amount of Rs.25,000/- to the petitioner. As far as the rest of the claims made by respondent No.2 in her suit for dissolution of marriage on the basis of cruelty and assault, recovery of maintenance and dower amount, and the claims made by the petitioner in his written statement, they were to be decided after the recording of evidence.

2. The record shows that the petitioner and respondent No.2 got married on 18.03.2001. During the wedlock, four children were born, namely, Abdul Nafeh (aged 13), Ummama (aged 10), Ramla (aged 08) and Hamna (aged 06). These children are in the custody of respondent No.2. On 03.10.2014, the petitioner contracted a second marriage. The strained relations between the petitioner and respondent No.1 caused her to leave her matrimonial abode along with her children. On 08.04.2015, respondent No.2 instituted the

suit for dissolution of marriage etc., before the Court of learned Judge Family Court (West), Islamabad. This suit was contested by the petitioner by filing a detailed written statement wherein the petitioner prayed that a decree for the dissolution of marriage may be granted to respondent No.2 *"subject to the payment of advance taken at Rs.10,00,000/- or any other sum, collected from Mr. Chaudhry Sagheer, in connection with Agreement to Sell dated 23.12.2014, entered in to unlawfully by committing criminal breach of trust being a Muslim wife."* Additionally, it was prayed that the suit for the dissolution of the marriage on the basis of cruelty, physical assault and non-payment of maintenance, be rejected.

3. A copy of the order sheet of the learned Trial Court appended to this petition reveals that vide order dated 07.10.2015, the learned Trial Court adjourned the matter for pre-trial reconciliation proceedings between the parties to 20.10.2015. As the learned Presiding Officer was on leave on 20.10.2015, the matter was adjourned to 05.11.2015. On 05.11.2015, both the petitioner and respondent No.2 were present before the learned Trial Court, and they were given time in the Court to reconcile their differences, but to no avail. During these proceedings, respondent No.2 asked for the dissolution of the marriage on the basis of khula and expressed her readiness to forego her right to the dower amount. The learned Trial Court duly recorded the statements of the contesting parties.

4. The learned counsel for the petitioner, in the proceedings before the learned Trial Court, had taken the position that the marriage could not be dissolved as the matter involved monetary claims of the petitioner, which he was entitled to get prior to the dissolution of the marriage. The learned Trial Court, vide order dated

05.11.2015, fixed an amount of Rs.5,000/- per month for each minor child as interim maintenance, which was payable on or before the 14th of each calendar month with effect from November, 2015. The matter was then adjourned to 17.11.2015. After hearing the parties, the learned Trial Court, vide order dated 17.11.2015, dissolved the marriage between the petitioner and respondent No.2 on the basis of khula under Section 10(4) of the WP-FCA, 1964.

5. Learned counsel for the petitioner submitted that the learned Trial Court erred by dissolving the marriage between the contesting parties as it was obligatory upon the learned Trial Court to wait until evidence was led establishing cruelty at the hands of the petitioner and until the amount due from respondent No.2 was recovered by the petitioner. He further submitted that the learned Trial Court had violated the procedure prescribed in Section 10 of the WP-FCA, 1964, by not affording a meaningful opportunity to the contesting parties to reconcile their differences. He also submitted that the learned Trial Court could not dissolve the marriage on the basis of *khula* when the suit instituted by respondent No.2 was for the dissolution of marriage on the basis of cruelty etc. He also submitted that the learned Trial Court erred by dissolving the marriage at the stage of pre-trial reconciliation proceedings without requiring respondent No.2 to either amend the existing plaint or to file a fresh plaint seeking the dissolution of marriage on the basis of *khula*. In making his submissions, the learned counsel for the petitioner relied on the cases of Fakkhar ud Din Vs. Kousar Taqreem reported as PLD 2009 Peshawar 92, Muhammad Faisal Khan Vs. Sadia reported as PLD 2013 Peshawar 12, Sajid Abbas Rizvi Vs. Noureen reported as PLD 2013 Sindh 348,

Muhammad Ashraf Butt Vs. Muhammad Asif Bhatti reported as PLD 2011 SC 905, and Muhammad Anwar Vs. Illyas Begum reported as PLD 2013 SC 255.

6. I have heard the arguments advanced by learned counsel for the petitioner and perused the record with his able assistance.

7. I cannot bring myself to agree with the contention made by the learned counsel for the petitioner that in dissolving the marriage on the basis of khula, the learned Trial Court violated the mandatory provisions of Section 10 of the WP-FCA, 1964, which is reproduced herein below:-

> "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.]
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> (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.
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> (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 [the recording of the] evidence.
>
> [Provided that notwithstanding any decision or judgment of any Court or tribunal, the Family Court in a suit for dissolution of marriage, if reconciliation fails, shall pass decree for dissolution of marriage forthwith and also restore the husband the Haq Mehr received by the wife in consideration of marriage at the time of marriage.]"

8. Now the record reveals that on 05.11.2015, the learned Trial Court, in accordance with Section 10 (3) of the WP-FCA, 1964, gave an adequate opportunity to the contesting parties to reconcile their differences. These pre-trial reconciliation proceedings could not result in curing the differences between the contesting parties, who also happened to be cousins. Therefore,

after recording the statements of the contesting parties, the learned Trial Court proceeded further and dissolved the marriage in accordance with Section 10(4) of the WP-FCA, 1964, and the proviso thereto.

9. It is settled law that for a dissolution of marriage on the basis of *khula* the statement of the wife alone is a determinative factor. Sections 10(3) & (4) of the WP-FCA, 1964, place an obligation on the Family Court to effect a compromise or reconciliation between the parties. It is only after the Family Court considers that no compromise or reconciliation is possible that it can proceed to dissolve the marriage and pass a decree for the dissolution of marriage. As mentioned above, the learned Trial Court in the instant case has satisfied these prerequisites.

10. It is by now well settled that the proviso to Sub-Section 4 of Section 10 (requiring the wife to restore to the husband the Haq Mehr received by her in consideration of marriage at the time of marriage) shall be applicable only to those cases in which a Family Court grants a decree on the ground of *khula*. The learned Trial Court was correct in dissolving the marriage between the petitioner and respondent No.2 on the basis of *khula* because respondent No.2, had on 05.11.2015 claimed dissolution of marriage on the basis of khula and had expressed her readiness to forego her right to the dower amount. Consequently, vide the impugned order dated 17.11.2015, the learned Judge Family Court not just dissolved the marriage on the basis of *khula,* but also directed respondent No.2 to return the dower amount of Rs.25,000/- to the petitioner.

11. The contention of the learned counsel for the petitioner that learned Trial Court could not have dissolved the marriage on the basis of *khula* without

requiring respondent No.2 either to amend her suit or file a fresh one, is hyper technical in nature and goes against the essential requirement of expeditious disposal of such cases. True, respondent No.2 had filed a suit for dissolution of marriage on the basis of cruelty, etc., but the record reveals that on 05.11.2015 she asked for the dissolution of the marriage on the basis of *khula* and expressed her readiness to forgo her right to the dower amount. This is duly recorded in the order dated 05.11.2015, passed by the learned Trial Court. Hence, it was not incumbent for the learned Trial Court to establish cruelty or non-payment of maintenance before dissolving a marriage on the basis of *khula*.

12. The case law relied upon by the learned counsel for the petitioner does not come to his aid. There is no cavil with the law laid down in the case of Muhammad Anwar Vs. Illyas Begum reported as PLD 2013 SC 255 that individuals have a right to be treated in accordance with the law. The case of Muhammad Ashraf Butt Vs. Muhammad Asif Bhatti reported as PLD 2011 SC 905 relates to the doctrine of *lis pendens* as enshrined in Section 52 of the Transfer of Property Act, 1882. In this case, it was held that if a revisional court passes an order which does not qualify the test of Article 4 of the Constitution and suffers from a patent error such as non-reading and misreading of the facts on the record, it can be corrected and rectified by the High Court in exercise of its constitutional jurisdiction under Article 199 of the Constitution. In the case of Fakkhar ud Din Vs. Kousar Taqreem reported as PLD 2009 Peshawar 92, the Hon'ble Peshawar High Court dilated upon the amendments made in *inter alia* the West Pakistan Family Courts Act, 1964, through the Family Courts (Amendment) Ordinance, 2002. In paragraph 30 of the said Judgment, guidelines have

been provided by the Hon'ble High Court, which can be taken into consideration by the Family Courts while deciding a petition for dissolution of marriage on the ground of *khula*. Some of these guidelines come to the aid of respondent No.2, viz the husband having contracted a second marriage. In the cases of Sajid Abbas Rizvi Vs. Noureen reported as PLD 2013 Sindh 348 and Muhammad Faisal Khan Vs. Sadia reported as PLD 2013 Peshawar 12, Section 10 of the WP-FCA, 1964, has been interpreted and emphasis has been laid on the requirement to conduct the pre-trial reconciliation process. As mentioned above, the case law relied upon by the learned counsel for the petitioner does not come to his aid. The learned Trial Court has strictly adhered to the procedure set out in Section 10 of the WP-FCA, 1964, by conducting pre-trial reconciliation proceedings after the petitioner filed the written statement and before the marriage was dissolved on the basis of *khula*.

13. The powers that this Court is to exercise in its constitutional jurisdiction enshrined in Article 199 of the Constitution in a challenge to an order passed by a Family Court dissolving a marriage on the ground of *khula* have been elaborately set out by the Division Bench of the Hon'ble Peshawar High Court in the case of Hadyat Ullah Vs. Amna Bibi reported as 2005 CLC 54 Peshawar, in the following terms:-

> "Powers of High Court in constitutional jurisdiction are not analogous to those of an Appellate Court. Constitutional jurisdiction can only be exercised, if the lower Court has exceeded its jurisdiction or acted without jurisdiction. Finding of fact recorded by a Court possessing jurisdiction cannot be disturbed merely on the ground that another view is possible on the same evidence, unless that finding is based on no evidence, is fanciful or arbitrary. The object of taking away right of appeal in the family matters is meaningful. If the constitutional jurisdiction takes the place of appeal, then the intent and purpose of

> Legislature would be frustrated. Impugned judgment, if passed with competence and jurisdiction conferred on the Court of law, then it cannot be adjudged in Constitutional jurisdiction of High Court."

14. In view of the above, I find the order dated 17.11.2015 passed by the learned Judge Family Court to be strictly in accordance with the law and not suffering from any jurisdictional infirmity. The instant writ petition having been bereft of substance is dismissed in limine.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2016

(JUDGE)

APPROVED FOR REPORTING

(JUDGE)

Qamar Khan*