Form No.HCJD/C-121

ORDER SHEET

IN THE LAHORE HIGH COURT, LAHORE

(JUDICIAL DEPARTMENT)

Case No. Writ Petition No.31627 of 2021

Shahbaz *Versus* Fakhira Bibi

Sr. No. of order/ Proceeding	*Date of order/ Proceeding*	*Order with signature of Judge, and that of parties or counsel, where necessary.*

21.05.2021 Mr.Muhammad Javaid Chaudhry, Advocate.

Through this petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 the petitioner has challenged judgment and decree dated 7.4.2021 delivered by learned Judge, Family Court, Lahore (*the learned trial court*) whereby suit for dissolution of marriage filed by Mst.Fakhira Bibi (*respondent No.1*) was decreed on the basis of '*Khula*' in terms of section 10(5) of the Family Courts Act, 1964.

2. Learned counsel for the petitioner submits that the impugned judgment and decree has been passed without consent of respondent No.1; that the petitioner was not given sufficient time to reconcile with respondent No.1; that the impugned judgment and decree is result of mis-reading and non-reading of record; that petitioner is ready to apologize from respondent No.1 just to save his matrimonial life and also for the welfare of children who want to see their parents under one roof and that decree for dissolution of marriage on the basis of *khula* has been awarded in favour of respondent No.1 without any valid ground.

3. I have heard the learned counsel for the petitioner and have also gone through the file.

4. Firstly, taking up the plea of the petitioner that impugned judgment and decree has been passed without consent of respondent No.1 and without providing sufficient opportunity to the petitioner for reconciliation, I have noted that on 16.12.2020 petitioner entered

appearance and got copy of plaint and case was adjourned for 24.12.2020 for submission of his written statement. On 24.12.2020 instead of filing the written statement only memo of appearance was filed on behalf of the petitioner and the court adjourned the case for filing of '*Wakalat Nama*' and written statement but on 12.1.2021 only Power of Attorney on behalf of the petitioner was submitted before the trial court and the case was again adjourned for 26.1.2021. On 4.2.2021 petitioner filed his written statement, thereafter, learned trial court fixed the case on 22.2.2021 for re-conciliation proceedings by directing the parties to appear in person. On 22.2.2021 respondent No.1/plaintiff appeared before the court and got recorded her statement in presence of the petitioner/defendant by stating therein that she did not want to reconcile with the petitioner and prayed for issuance of decree on the ground of *Khula*. When the petitioner/defendant was asked to get recorded his statement he refused to do so on the pretext of non-availability of his counsel by clarifying that he would make statement in the presence of his counsel, as a result the trial court adjourned the proceedings for 2.3.2021 when an application for exemption from appearance was moved on behalf of the petitioner. Further, the hearing of the suit was postponed on 8.3.2021, 22.3.2021, 24.3.2021 due to non-availability of the Presiding Officer. On 29.3.2021 fresh power of attorney on behalf of the petitioner/defendant was filed and an application for requisition of '*Nikah Nama*' was moved which was dismissed by the trial court on the same date and case was adjourned for 1.4.2021. On 1.4.2021 at 9.00 a.m. when the case was called respondent No.1/plaintiff was present but petitioner/defendant was absent, as a result, the court kept the file in wait. At 11.30 a.m. case was again called for and at this time petitioner/defendant entered appearance alongwith his counsel and refused to record his statement on the ground that he challenged order, dated 29.3.2021, passed by the trial court through writ petition before this Court and produced the copy of writ petition without any order of the Court. The proceedings were adjourned for production of the attested copy of the writ petition alongwith stay order with the clear cut note that in case of absence of the stay order reconciliation proceedings would be conducted and bound down the petitioner/defendant for recording of his reconciliation statement. On

7.4.2021 case was called on at 10.00 a.m. and at that time respondent No.1/plaintiff was present but petitioner/defendant was absent. Consequently, the court kept the file in wait. Again at 12.00 p.m. case was called but the position was same and lastly at 3.00 p.m. case was called but at that time petitioner/defendant was again absent and his counsel moved an application for recalling order, dated 1.4.2021, which was was dismissed *in limine.* As a last resort the learned trial court, while observing in unequivocal words that the petitioner/defendant was avoiding to make statement in the reconciliation proceedings on one pretext or the other, decreed the suit of respondent No.1/plaintiff for dissolution of marriage on the basis of Khula under section Section 10(5) of the Family Court Act, 1964. If the contention of the petitioner, under discussion, is considered while putting in juxtaposition to his conduct portrayed in this para, there leaves no ambiguity that the learned trial court showed maximum leniency to enable the petitioner to make statement in reconciliation proceedings but when he failed to do so despite availing number of opportunities, the learned trial court was left with no option but to pass the impugned judgment and decree.

5. Now coming to plea of the petitioner that no valid ground existed for dissolution of marriage between the parties on the basis of *Khula* I am of the view that respondent No1 *inter alia* averred in the plaint that petitioner/defendant had been raising undue demands from her family and used to give mental and physical torture to her and in support of allegation of torture she referred to the application submitted by her at Police Station Harbanspura, Lahore alleging mal-treatment at the hands of the petitioner. The marriage under Islamic law is a civil contract and not a sacrament. It is ordained by Almighty Allah in Holy Quran and it is for the comfort, love and compassion. Islam has laid down paramters for spouses to live within those bounds and if the parties transgress those paramters, they should relieve each other i.e. they may break matrimonial tie with kindness. Moreover, cruelty on the part of the husband is a valid ground for *khula.*

6. Now the question arises as to whether wife is entitled as of right to claim Khula, despite the unwillingness of the husband to

release her from the matrimonial tie. In this regard, I am of the humble opinion not only according to the Injunctions of Islam but also according to Family Court Act, 1964, the wife cannot be compelled to live with her husband against her wishes. Further, the said question had elaborately been dilated upon by the Full Bench of the Hon'ble Supreme Court of Pakistan in case titled *Khurshid Bibi Vs Muhammad Amin* (**PLD 1967 SC 97**) *inter alia* with the following conclusions:-

> *"The fundamental laws of Islam are contained in the Qur'an and this is, by common consent, the primary source of law for Muslims. Hanafi Muslim jurisprudence also recognizes hadith, ijtehad and ijma as the three other secondary sources of law. The last-two really fall under a single category of subsidiary reasoning, ijtehad being by individual scholars and ijma being the concensus of scholars who have resorted to ijtehad in any one age. That this is the order of priority, in their importance, is clear from the well known hadith, relating to Maudh-ibn-e-Jabal who was sent by the Prophet as Governor and Qazi of Yemen. The Prophet asked him, how he would adjudicate cases. "By the Book of God", he replied. "But if you find nothing in the Book of God how?" Then by the precedent of the Prophet". But if there be no precedent? "Then I will diligently try to form my own judgment." On this, the Prophet is reported to have said, "Praise be to God who hath fulfilled in the meesenger sent forth by his apostle that which is well pleasing to the apostle of Allah."*
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> *The four orthodox schools of Sunni fiqh were headed by Imam Abu Hanifa, Imam Malik, Imam Shafei and Imam Ahmad-bin-Hanbil. The learned Imams never claimed finality for their opinions, buit due to various historical causes, their followers in subsequent ages, invented the doctrine of taqlid, under which a Sunni Muslim must follow the opinion of only one of their Imams, exclusively, irrespective of whether reason be in favour of another opinion. There is no warrant for this doctrinaire fossilization, in the Qur'an or authentic Adith. In the Almital-wan-Nihal (page 39) it is stated that the great Abu Hanifa used to say "This is my opinion and I consider it to be the best. If someone regards another person's opinion to be better, he is welcome to it ("for him is his opinion and for us ours").*
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> *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 dead lock."*
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> *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" (*ابغض 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 his privileges, one of which says that women asking for khula will be deprived of the fragrance of paradise (Trimizi) (*ايها المراة زوجها طلاقاً من غير باس محرام عليها رائحة الجنة*) 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.*
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> *The Qur'an also declares; "Women have rights against men, similar to those that the men have against them, according to the well-known rules of equity" (*ولهن 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 circumstances. The Qur'an expressly says that the husband should either retain the wife, according to well-recognized custom ''امساک بالمعروف'' *(Imsak-un-bil-ma'roof) or release her with grace* ''تسریح باحسان'' *(Tasree-hun-bi-ihsan). The word of God enjoined the husband not to cling to the woman, in order to cause her injury Another hadith declares—*''لا ضرر ولا ضرار فی 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 dirovce 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 your 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 whoso 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 (those in authority from community or*''اولی الامر منکم'' *(those in authority from among you), and includes 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 الاحکام 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* ''مکارک التنزیل و حقایق التاویل''*"Madarak-ul-tanzil-wa-Haqaiq-ul-Ta'veel" by Baizavi* ''بیضاوی''*in his Tafsir* ''انوار التنزیل و اسرار التاویل''*Anwar-ul-Tanzil-wa Israr-ul-Ta'veel, by* ''القسطلانی''*Al-Qastallani in his Irshad-us-Sazi by Jassas in his* ''احکام القرآن''*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 position to give orders when disputes are presented before them. In more recent times, Mufti Muhammad Abduh of Egypt, in his Tafsir Al Manay* ''تفسیر المنا''*has endorsed this view. For analogy the cases of* ''لعان''*and* ''ایلا''*lla* ''عنین''*Inin and Mafqoodel Khabar* ''مفقود الخبر''*may be cited 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 Hedays the* ''ردالمختار''*Radd-ul-Mukhtar and the* ''احکام القرآن''*Ahkam-ul-Qur'an of* ''الجصاص''*Alijasas 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 obligation while living together. Ibne-Hamman (ابن همام) *in his* (فتح القدیر) *Fateh ul Qadir Vol.III, p.199 and* (جصاص) *Jassas in his* (احکام القرآن) *Ahkamul Qur'an Vol.I, 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 Ullah of Delhi in* (المسوی امن احادیث المؤطا) *Al-Musawwa-min-Ahadith-al-Muatta Vol.II, p.160 goes to the length of saying that "even if she obtains khul' withouyt 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 hand, Imam Shafe'I, Imam Ahmad, Imam Daood and out of the Companions, Ibn-e-Abbas were of the view that khula amounts to fiskh-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. Ibne-e-Hajar Asqlani in his books (الدرایہ فی تخرجۃ احادیث الہدایہ و فتح الباری) *(Alderaya-fi-Takhrija-Ahadith-ul-Hidaya and Fat-hul-Bari) prefers the opinion of Ibne-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* (تلخیص الہبیر) *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 diffrerence 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't and the period of Iddat is different in the two cases. The relevant Ahadith are discussed by Shaukani in* (کتاب الخلع) *Kitab-ul-Khul Vol.III, p.260 of his celeberated work* (نیل الاوطار) *Nail-al-Autar and he reaches the conclusion that khula is not a type of talaq, but is a category apart 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. Sabuni has summarized various opinions, bearing on this point, at page 621 of his book, مدی حریۃ الزوجین فی 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* المیزان الکبریٰ *Al Mizan-ul-Kubra, Vol.II page. 117says; "Imams agree in that the woman if she dilikes 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 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 dilike 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 (عمدۃ القاری) *Umda-tul-Qari Vol.IX, p.573 says: "There is difference of opinion in the case when both spouses agree on separation,. Malik, Auza'I and Ishaqare 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 Qura'n, 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 to the Sultan (Sovereign) or Qazi is necessary, at all, or not. This will be found discussed by Ibn-e-Hazm in (المحلیٰ) *Almohallah.*

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 Sabet-bin-Qais, in respect of his morals or his faith, but she disliked him and after going into 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 given by Bokhari, has it that when she agreed to return the garden to her husband, the Prophet ordered "Qais and he" separated her (امرہ ففارقھا). *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 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, Shaukani in* (نیل الاوطار) *Nail-ul-Autar 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 Asqalani shares this opinion and doubts the authenticity of the hadith which specifies that this was a case of talaq. Ibne Hazim in Al-Mohalla 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 اسلامیه) *strongly supports the wife's right to khul when discord is established. I may add, however, that opinion 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 moden times, may also be examined. The right of the wife to obtain separation from her husband on any ground of (ضرار) *injury, is recognized 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 Mujallah-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 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 sect.—the Malikis, the Shafe'is and the Hambalis. It is permissible to refer to those opinion 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 case 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. Sir Abdul Rehman, J. in Umar Bibi's case relied on Baillie's Digest of Muhammadan Law, First Part, p.305, the Hedaya,

Book I, 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 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, (مؤدت) *sukoon* (سکون) *and rehmat* (رحمت) *in 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.II that the Qazi has the power to remove causes of tyranny by means of talaq. It is also in the Radd-ul-Mukhtar 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 though 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 my 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 Kaikhaus, 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."

7. Admittedly, the decree passed on the basis of *Khula* has been declared as non-appealable in terms of section 14(2) of the Family Court Act, 1964 seemingly for the reasons that wife cannot be compelled to live with the husband against her wishes and secondly to protect *wife* from costly and prolonged litigation. While dealing with somewhat similar question, the apex court of the country in the case law *Abid Hussain Vs AdditionalDistrict Judge, Alipur, District Muzaffargarh and another* (**2006 SCMR 100**) has *inter alia* held as under:-

> *"The argument ignores the provision contained in subsection (1) which open with the non obstante clause and states "the decision given or decree passed by the Family Court shall be appealable" Subsection (2) is in the nature of a proviso to subsection (1) and prohibits filing of appeal in case of dissolution of marriage on any ground except the one mentioned therein. The object behind non-provision of appeal in case of dissolution of marriage is to be protect women, an under privileged and generally oppressed section of our society from prolonged and costly litigation. It aims to put a clog on the right of husband. It is well established that the provision of proviso is to be restrictively construed. It would be improper to construe subsection (2) (a) in a way so as to deprive a wife from appealing from the decree refusing her relief on the grounds which according to the Family Court have not been proved but nevertheless granting the decree of dissolution on some other ground. Such an interpretation would be in violation of the wholesome provision of appeal contained in subsection 14(1) and the very object of introducing the Family Court Act."*

If the fate of the impugned judgment and decree is adjudged on the touchstone of the afore-referred judgment of the Hon'ble Supreme Court, this court is of the considered opinion that the same does not suffer from any legal infirmity.

8. There is no cavil to the proposition that exercise of power in writ jurisdiction is discretionary which is to be used in good faith keeping in view all attending circumstances and relevant facts of the case and at the same time it would be used in just, fair and reasonable way. Reliance is placed on the case titled *Nawab Syed Raunaq Ali, etc. Vs Chief Settlement Commissioner and others* (**PLD 1973 SC 236**) wherein the Hon'ble Supreme Court of Pakistan has laid law to the following effect:-

> *"An order in the nature of a writ of certiorari or mandamus is a discretionary order. Its object is to foster justice and right a wrong. Therefore, before a person can be permitted to invoke this discretionary power of a Court, it must be shown that the order sought to be set aside had occasioned some injustice to the parties. If it does not work any injustice to any party, rather it cure a manifest illegality, then the extraordinary jurisdiction ought not to be allowed to be invoked.*"

Further, while exercising its discretionary powers, this court has to see as to whether the Tribunal or Court acted without jurisdiction or in violation of any relevant statute or law and this Court by no stretch of imagination can embark upon re-appraisal of evidence and proceed as if it was hearing an appeal against an order of a subordinate court.

9. It is trite law that where a Statute does not provide appeal against decision of a Court or Tribunal, constitutional petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 is not maintainable only on the ground to re-assess the evidence on record. Insofar as the instant case is concerned, the learned trial court dissolved marriage of respondent No.1 on the ground of Khula as relation between the spouses were severely strained and it had become impossible for them to live as husband and wife. Further, learned trial court, while passing the impugned judgment and decree, has given sound reasons and no material irregularity or jurisdictional defect has been pointed out by learned counsel for the petitioner, warranting interference by this Court in its constitutional jurisdiction. Consequently, I see no force in this petition which is accordingly ***dismissed in limine***.

(AHMAD NADEEM ARSHAD)
JUDGE

APPROVED FOR REPORTING.

JUDGE

*Saeed**