Stereo. H C J D A 38.

Judgment Sheet

IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

W.P. No.10090 of 2011

Ana Liaqat VERSUS Addl. District Judge etc.

JUDGMENT

Date of Hearing: 14.06.2021

Petitioner by: Mr. Asghar Ali Hashmi, Advocate.

Respondent-3 by: Ex parte vide order dated 22.09.2020.

SAFDAR SALEEM SHAHID, J. – Through this petition the petitioner has assailed the order dated 28.09.2010 passed by the learned Judge Family Court, Gujranwala and the judgment dated 18.02.2011 passed by the learned Additional District Judge, Gujranwala.

2. Brief facts giving rise to this petition are that the petitioner was married with respondent No.3 on 31.12.2005 and 32.25 tola gold ornaments was fixed as dower, which was paid to her but later on was snatched by respondent No.3. The petitioner was given dowry articles amounting to Rs.13,91,000/- by her parents. Out of the wedlock two children were born, but due to clash between the parties the petitioner filed a suit for dissolution of marriage, recovery of dower, dowry articles and recovery maintenance. Respondent No.3 contested the suit. The learned Judge Family Court after recording the statements of the parties, vide order dated 28.09.2010, decreed the suit of the petitioner to the extent of dissolution of marriage on the basis of Khula under Section 10(4) of the Family Courts Act, 1964, in lieu of dower. Feeling aggrieved the petitioner filed appeal but the same was dismissed vide judgment dated 18.02.2011 by the learned Additional District Judge, Gujranwala. The petitioner has assailed the order of the trail Court and that of the appellate Court through this writ petition.

3. The learned counsel for the petitioner argued that the suit was filed on the grounds of failure to pay maintenance and cruel behaviour of respondent No.3, which are covered under Section 2(ii) and (viii)(a) of the Dissolution of Muslim Marriages Act, 1939, which says that a marriage cannot be dissolved on the basis of Khula. However, the learned Judge Family Court, under Section 10(4) of the Family Courts Act, 1964, dissolved the marriage on the basis of Khula in lieu of the dower. Likewise, the learned Additional District Judge held that where the wife is not willing to co-habit with her husband she can ask for Khula on the ground of hatred against husband with all consequences flowing therefrom and in such cases she will have to surrender benefit in the form of dower etc. derived from her husband. Learned counsel argued that neither the intention of the petitioner was to get the decree for dissolution of marriage on the basis of Khula nor it was mentioned anywhere in the plaint. She did not make any statement regarding the same. Learned counsel in this regard relied upon the case of *Sardar Abid Iqbal vs. Tabassam Khursheed* **(2009 YLR 1745)**.

4. Respondent No.3 was proceeded against ex parte vide order dated 22.09.2020.

5. Arguments heard. Record perused.

6. I reproduce the proceedings dated 28.09.2010, as under:-

"28.09.2010- کونسل فریقین حاضر۔ فریقین اصالتاً حاضر۔ بیانات فریقین قلمبند ہووے

بیان ازاں مدعیہ مسماۃ انا لیاقت بر حلف

بیان کیا کہ میرا نکاح ہمراہ مدعاعلیہ مورخہ ۰۵-۱۲-۳۱ کو باشرح محمدی سر انجام پایا۔ حق مہرسوا بتیس تولا طلای زیورات مقرر ہوا جو کہ مدعاعلیہ نے ادا کرنے کے بعد چھین لیا تھا۔ مدعاعلیہ کے ظالمانہ رویہ کی بنا پر مجھے اس سے شدید نفرت ہو چکی ہے۔ میں ہمراہ آباد نہ ہونا چاہتی ہوں۔ مجھے ڈگری تنسیخ نکاح دے دی جاوے۔

سن کر درست تسلیم کیا۔

بیان ازاں مدعاعلیہ محمد اویس بر حلف

بیان کیا کہ میں مدعیہ کو ہر شرط پر آباد کرنے کے لیے تیار ہوں۔

سن کر درست تسلیم کیا۔

Order:

> Pretrial reconciliation proceedings were conducted which ended in smoke. The plaintiff is not willing to reconcile with the defendant at any cost. In such circumstances, this court is of the view, that if she be compelled to join the defendant at his home. It shall proved to be a hateful union, therefore, the matrimonial tie between the parties is dissolved u/s 10(4) W.P. Family Court Act, 1964 in lieu of dower. Certified copy of this order and decree be sent to the concerned union council forthwith. Now to come up for framing of issues on 04.10.10.
>
> Announced."

7. The purpose of the West Pakistan Family Courts Act, 1964, is to expedite the family matters in order to save the families from permanent and lengthy litigation in the Courts. Under the provisions of Section 2(ii) and (viii) of Dissolution of Muslim Marriages Act, 1939, the marriage cannot be dissolved on the basis of pleadings of the parties and on the failure of reconciliation between the parties. The point of hatred and cruelty, if agitated can only be decided by the trial Court after recording the evidence. Under Section 10(4) of the West Pakistan Family Courts Act, 1964, the marriage can be dissolved on the basis of Khula in summary proceedings and the requirement in such proceedings is to provide an opportunity of reconciliation and as a consequence of failure thereof decree for dissolution of marriage can be passed and in this event the wife has to forego her claim of dower. The Court on its own cannot deprive the lady from the dower and cannot order to relinquish the dower because the dower is the right5 of the lady given by the Shariah. This right cannot be discretionarily or arbitrarily exercised by the Court. Reliance in this regard, is placed on the case of *Mst. Saima Irum and 3 others vs. Tariq Javed and another* **(2005 S.L.R. 655)**, wherein it was held that unless the lady herself has not relinquished her right of dower or any other thing and specifically she asked to dissolve the marriage on the basis of Khula, the Court on its own cannot pass such order for dissolving the marriage on the basis of Khula.

8. The concept of Khula has been interpreted by various scholars in a number of books on the subject. In Al-Hudaya it is summed up:-

> *"if the cruelty is from the side of the husband his realizing a compensation from the wife for her relinquishment (Khula) is disapproved. If insubordination is from the wife, in that case, the husband may take back only what property which he had given to her.*
>
> *It was further observed that in case where Khula is decreed on the basis of cruelty the Court may not give any compensation to the husband."*

The meaning of Khula in Shria is that as the husband has the authority to exercise his right of divorce, in the similar way the wife is permitted under Sharia to claim dissolution of marriage, after returning the benefits, she gained out of this relation from the husband. If the husband is not agreed, she may file suit for dissolution of marriage on the basis of Khula before the Court. in this scenario, if Court feels that the relation of husband and wife cannot remain proper, then the Court will ask the lady to relinquish her right of dower, and will ask the husband to divorce her against the relinquishment of dower. But even if the husband is not ready to divorce the lady on the condition; the Court cannot on its own pass decree of Khula in favaour of lady. This is also important, that if the marriage is dissolved on the basis of Khula, it will be Talaq-e-Baain "طلاق بائن". In case if the husband and wife compromise with each other; then only the Nikah will be repeated. In support of this definition and procedure, I will quote the historic background of the Khula and its application in view of Qur'an and Sunnah:-

"(1) ابوداود نے اپنی سنن میں حضرت عائشہ کی روایت سے اس واقع کو بیان کیا ہے۔ کہ حبیبہ بنت سہل، ثابت بن قیس بن شماس کے نکاح میں تھی۔

ثابت نے حبیبہ کو مارا۔ اور اسکا کوئی عضو ٹوٹ گیا۔ حبیبہ رسول ﷺ کے خدمت میں حاضر ہوئی اور ثابت کی اس بارے میں شکایت کی۔

آپ ﷺ نے ثابت کو بلایا اور فرمایا کہ حبیبہ کے مال میں سے کچھ لیکر اس کو چھوڑ دے۔ثابت بن قیس نے دریافت کیا۔ یا رسول ﷺ کیا یہ درست ہو گا؟ آپؐ نے فرمایا۔ہاں۔اس نے کہا یارسول اللہ ﷺ میں نے اسکو دو باغ دیے ہیں۔اور وہ اسکے قبضے میں ہیں۔رسولؐ نے فرمایا۔ان باغوں کو لے لو۔اور حبیبہ کو چھوڑ دو۔چنانچہ ثابت نے ایسا ہی کیا۔

یہ اسلام میں پہلا خلع تھا۔

مقدمہ بلقیس فاطمہ بنام نجم اللہ اکرام میں عدالت نے یہ قرار دیا کہ اگر عدالت اس نتیجے پر پہنچے کہ زوجین حدود اللہ کو قائم نہ رکھ سکیں۔ تو شوہر کی رضامندی کے بغیر عدالت بیوی سے مناسب معاوضہ شوہر کو دلوا کر خلع کرا سکتی ہے۔اُسی نقطہ نظر کو سپریم کورٹ نے PLD 1959 Lahore 566 بمقدمہ خورشید بیگم اختیار کیا۔

(2) فتاویٰ عالمگیری جلد دوم۔

آٹھواں باب۔

فصل اول

بدائع میں ہے۔اور جب شوہر و جورو میں رنجش پیش آئی اور دونوں کو اسکا خوف ہوا کہ ہم سے حدود اللہ کی پاسداری نہیں ہو گی۔تو مضائقہ نہیں ہے۔کہ عورت اتنا مال دیکر کہ شوہر اسپر عورت کو خلع دے دے۔اپنے نفس کو چھڑاوے۔پس جب دونوں نے ایسا کیا تو ایک طلاق بائن واقع ہو گی۔اور عورت پر مال لازم ہو گا۔یہ ھدایہ میں ہے۔اور اگر سرکشی مرد کی جانب سے ہو۔تو خلع پر اُسکو کچھ عوض لینا حلال نہیں۔

(3) نذر رحمٰن میں ڈاکٹر جسٹس (R) تنزیل الرحمٰن نے دفعہ 116 کی ضمن میں وضاحت سے لکھا۔

اگر عدالت کو اس امر کا اطمینان ہو گیا ہو کہ زوجین شدید ناچاقی کے سبب باہمی معاشرت میں احکام خداوندی کی پابندی نہ کر سکیں گے ۔تو شوہر کو خلع کا حکم دے گی۔

مگر شرط یہ ہے کہ اگر مرد قصوروار پایا جائے گا تو عدالت بلا معاوضہ تفریق کرا دے گی۔

مزید شرط یہ ہے کہ اگر قصور عورت کا ہو۔یا دونوں میں سے کسی کا نہ ہو۔مگر حالات خلع کے متقاضی ہوں۔تو شوہر کو عورت سے مناسب معاوضہ دلوایا جائے گا۔"

9. Now if the above said proposition is kept in view, the logical and philosophical dimension of the matter it can be said that a husband if left unchecked shall apprehend no loss if he, for any reason, develops a disposition to break the bondage of marriage and resorts to cruelty with a mind to compel the wife to demand Khula instead of giving benefit of retaining or getting back the dowered property/amount. Such a cruelty would undoubtedly be a purpose oriented one of which the law and Courts must take notice, so as to keep the husband off the oche of cruelty. The jurists have done much work on this proposition that since the lady has filed suit for

dissolution of marriage she had also filed a suit for dower and dowry articles along with maintenance allowance and her specific plea in the suit is that the husband was not paying the maintenance allowance to the children and not to her and furthermore he had expelled her from the house and all the belongings (dowry articles and dower) were lying with the husband. Under this situation the Court cannot assume the power to pass an order which is totally against the spirit of the basic law. The lady has not stated anything regarding Khula rather in her statement dated 28.09.2010 she had mentioned the reason that hatred is the cause of the cruel attitude of the husband, then the Court was under obligation to pass the decree of dissolution of marriage not on the basis of Khula because demanding of such a decree on the basis of Khula is the exclusive right of the lady which cannot be exercised by anybody even by the Court itself. The spirit of Section 10(4) of the West Pakistan Family Courts Act, 1964 is clear, the relevant portion of which is reproduced below:-

> *"(1) When the written statement is filed, the Court shall fix an early date for a pre-trial hearing of the case.*
>
> *(2) On the date so fixed, the Court shall examine the plaint, the written statement (if any) and the precis of evidence and documents filed by the parties and shall also, if it so deems fit, hear the parties and their counsel.*
>
> *(3) The Family Court may, at the pre-trial stage, ascertain the precise points of controversy between the parties and attempt to effect compromise between the parties.*
>
> *(4) Subject to subsection (5), if compromise is not possible between the parties, the Family Court may, if necessary, frame precise points of controversy and record evidence of the parties."*

10. If no compromise or reconciliation is possible the Court shall frame issues in the case and fix a date for recording of 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 shall also restore to the husband the *Haq Mehr* received by the wife in consideration of marriage at the time of marriage. This

option can only be exercised if the lady has opted to relinquish the benefit but Court itself cannot exercise its jurisdiction. Reliance in this regard is placed on the case reported as *Lal Muhammad vs. Mst. Gul Bibi and another* **(PLD 1986 Quetta 185)**, wherein it has been held as under:-

> *"It is quite evident from proceedings in Suit No.8 of 1982, filed by respondent Gul Bibi; that, plea in respect of 'Khula' was not specifically taken. In replication dated 31-5-1982 only a mild reference has been made which too, suggests that in view of strained relations it was not possible for her to reside with petitioner. However learned Civil Judge did frame specific issue regarding entitlement of Mst. Gul Bibi for seeking dissolution of marriage on the ground of 'Khula'. Normally when parties are conscious about point on which they are at variance and specially when issues in that behalf are also framed, in that event mere non-mention of such ground with clarity in the pleadings cannot be made basis for rejecting the claim. But as would be dealt with later, dissolution of a marriage on the plea of 'Khula' is available only if conscious attempt is made by the "woman" to exercise her right in this behalf and not otherwise. Therefore, in this peculiar case unless wife comes forward to specifically claim this right, decree cannot be lawfully allowed on this score merely on Court's motion. Factual position on record is that learned Civil Judge did not accept claim for dissolution of marriage on account of cruelty but surprisingly on the strength of same set of evidence has granted decree by way of 'Khula'. It appears that Family Court has accepted right of 'Khula' merely because wife was adamant and was not inclined to join the petitioner on the behest of her parents. Before adverting to the question as to authority exerciseable by Qazi or Court competent under the law to grant decree on the plea of Khula in this case it would be appropriate to make brief reference to the evidence available before the Family Courts for adjudication of family dispute between the parties."*

It has been further observed as under:-

> *"It is bounded duty of the judicial forum to restrict itself to the evidence on record, and decide the matter on the available fact and circumstances. In deciding the dispute, Courts are not expected to act in an arbitrary capricious or whimsical manner. Most pertinent question for determination therefore, is that, to what extent right to dissolve marriage on the basis of 'Khula' is exerciseable by the wife. Islam undoubtedly has conceded, right to wife to seek dissolution on the ground of Khula in extreme circumstances But right to claim dissolution of marriage on the*

basis of 'Khula' is not absolute; and no blanket authority is given to wife for automatically denouncing marital bonds. In fact this right is reasonable controlled and is dependent upon scrutiny of "Court" competent to decide in the matter after properly satisfying itself about existence of reasonable circumstances whereby separation is being claimed, so as to terminate sacrosanct relationship of the spouse. In Holy Qur'an Verse No.229 of Sura Baqr deals with "Right" to Claim "Khula" wherein procedure for sanctioning the right of wife to claim dissolution of marriage on this ground is mentioned. This right, of wife to claim dissolution of marriage on the ground of 'Khula' has been elaborately and authoritatively considered by superior Courts in following cases:-

(i) *Saeed Khanem v. Muhammad Sami* ***PLD 1952 Lah. 113****,*

(ii) *Fatima Balqis v. Najamul Islam* ***PLD 1959 Lah. 566****,*

(iii) *Mst. Khurshid Bibi v. Baboo Muhammad Amin* ***PLD 1967 SC 97****, and*

(iv) *Abdur Rahim v. Mst. Shahida Khan* ***PLD 1984 SC 329****."*

11. In case when other grounds for dissolution of marriage are agitated and available in the plaint then if the Court decrees the suit on the basis of Khula under Section 10(4) of the Family Courts Act, 1964, then this is necessary for the Court to mention that decree for dissolution of marriage has been passed on the basis of 'Khula', the Court has to adopt the whole procedure for awarding the decree of dissolution of marriage on the basis of Khula, then, the Court will also discuss that why the other grounds taken by the lady have not been taken into consideration. In that case, the lady may be asked to return the benefit she has taken from the husband, dower and any other benefit. Dower will only be returned when the lady herself opts for Khula. However, the other benefit, if had been obtained by the lady can be ordered to be returned.

12. I have drawn this enology from the original text that when after the Nikah if Rukhsati has not taken place and the divorce is effected in between the parties, the lady is entitled for half of the dower fixed at the time of Nikah. In that case, even she has not performed any other rights as wife with the husband, but Shariah has declared that

she is entitled for half of the dower fixed in Nikah, meaning thereby the full dower cannot be asked to return by the Court under any order of the Court. The lady cannot be deprived from the right of dower, which has been given by Sharia, unless the lady herself requests and exercise her right of Khula and there is no other reason for the Court to pass a decree for dissolution of marriage. In that case if the Court passes the decree on the basis of Khula then the Court may direct the lady to relinquish dower amount. But when there is no request from the lady regarding separation on the basis of Khula; and there are other allegations about the conduct of the husband that he was not maintaining the lady and the children, then certainly Court may pass observation regarding those allegations and then can pass the decree for dissolution of marriage but not on the basis of Khula; the Court may discuss the attitude of the husband that lady is living in her parents' house, non-maintaining the children, if any, and the allegation is also evident from the record and the statement of the lady at the time of pre-conciliation efforts. There is another aspect of the proposition that if the Court frames the issue regarding those allegations and those are not proved by the lady; at this stage the Court may pass decree for dissolution of marriage on the basis of some condition. But it will be not dissolution of marriage on the basis of Khula, because there is the wisdom behind, that the parties should not be forced to live in a hateful union. Reliance is placed upon the cases reported as *Abdul Ghaffar vs. Parveen Akhtar* **(1999 YLR 2521)** and *Sajjad Hussain alias Allah Ditta Khan vs. Judge Family Court, Mailsi and another* **(2015 CLC 1347)**.

13. The Court has the power to decide the matter in view of the facts before it even through summary inquiry. A decree of Khula may be passed when even there exists no ground but lady is not willing to settle down with the husband, but the condition has to be fulfilled. Now the lady may be asked to return the benefit, but not the full dower but the half one. In that case certainly the lady will have to forego rights which she has gained from the husband. It has been held

in *Mst. Shazia Haider vs. Gul Islam* **(PLD 2014 Peshawar 194)**, that even, if wife who omits to demand Khula can be granted a decree for Khula if the conditions exist that in case a decree for dissolution of marriage is not granted it will give birth to a hateful union of the spouses which will not bring the spouses within the limits prescribed by God. Reliance in this regard is also placed on the cases of *Shamim Akhtar vs. Arshad Mehmood* **(PLD 2017 S.C. (AJ&K) 40)** and *Chanzeb and another vs. Mst. Yasmeen Bibi and others* **(2015 MLD 1140)**.

14. Another importasnt factor is that there is difference in Talaq and Khula. The dissolution of marriage on the basis of Khula, is on the demand of the lady. If offer is accepted by the husband, then Talaq will be effected otherewise, in case of refusal by the huisband, the conditions of Khula; then the Talaq will not be effected.

15. Second important thing is that if the lady offers Khula; her demand of dower will be finished. But in case of Talaq by the husband dower is payable by the husband. In case if the husband asks the lady; that he will divorce, if the wife relinquishes her right of dower and lady accepts the same then, Talaq will be effected, without payment of dower and it is the same as the Khula. In Khula, it is not necessary for the husband to use the word 'Talaq'. In case if the lady demands separation on the basis of Khula, and the husband accepts this offer and says that I have accepted the offer of Khula and Khula is awarded it will effect as "طلاق بائن". Now the husband has no right to 'رجوع' the lady or to take back Khula; but if the spouses are agreed, they may repeat Nikah. There are some procedural mistakes which have been noted with deep concern.

1. The decree of dissolution of marriage on the basis of Khula cannot be passed Ex-parte. The Court has to put the offer of the lady to the husband and on the reply of husband in positive, the decree of Khula can be passed.

2. If on the conditions the husband is not ready, or he puts some more conditions, then, the same will be put to the lady. Unless on the conditions spouses are ready, the decree cannot be passed on the basis of Khula. Now the Court will frame the issues, regarding the other grounds agitated by the lady for dissolution of marriage and will decide the same on the basis of available record.

16. The separation between spouses on the basis of Talaq or Khula, when happens, it has a social impact not only to the extent of the life of the effected families, but also on the society as whole. One of the concepts of marriage is to organize the family system. So, even at the time of Talaq by the husband; the order of Allah is:-

"جب انہیں طلاق دو۔ تو احسن طریقے سے رخصت کرو، اور کچھ دے کر رخصت کرو۔"

(سورۃ البقرۃ)

If there are children from the wedlock, certain responsibilities are imposed on the husband. In some cases, the lady has the right even to stay in her ex-husband's house; under the limits described by Sharia. The feeding of baby expenses are also to be borne by the husband. So, in all respect Sharia has given protection to both husband and wife and the purpose behind is to form a peaceful, beautiful social system. So, when there are other reasons available, the lady cannot be forced to get separation on the basis of Khula, by relinquishing her right of dower, which the Sharia has given to her.

17. Result of the above discussion is that although the Court was empowered to pass a decree on the basis of Khula, but under the circumstances, when neither the lady agitated the same nor it was her request while making statement before the Court and certain other grounds existed, on the basis of which decree could have been passed for dissolution of marriage, the order dated 28.09.2010 and the judgment dated 18.02.2011 passed by the learned Judge Family Court and the learned Additional District Judge, Gujranwala, are without jurisdiction. Respondent No.3 already had been proceeded ex-parte

through order dated 22.09.2020. The case of the petitioner for dower will be deemed to be pending before the learned Family Court. She may file the application there, if so advised and can claim her right of dower, and the learned Court will proceed with the matter according to law, while awarding opportunity to respondent No.3 to place his view before the Court and the learned Judge without being influenced by this judgment, will decide the case on merits strictly in accordance with law. Consequently, the instant petition is allowed, both the impugned orders are set aside and decree for dissolution of marriage is granted in favour of the petitioner and against the respondent No.3, as the other grounds exist to pass the decree for dissolution of marriage in favour of petitioner. No order as to costs.

(Safdar Saleem Shahid)
Judge

Approved for reporting

JUDGE

Saleh