JUDGMENT SHEET

IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(*Judicial Department*)

W.P No. 93-M/2018

Mst. Nizakat Bibi.....(Petitioner)

vs

Muabad Khan & others.....(Respondents)

Present: Mr. Said Karim Shalman, Advocate for the petitioner.

Muhammad Javaid Khan, Advocate for the respondent No. 1.

Date of hearing: 26.09.2022

JUDGMENT

Dr. Khurshid Iqbal, J.-

1. Mst. Nizakat Bibi, the petitioner, brought a family suit against Muabad Khan, her husband, before the Court of learned Senior Civil Judge/Judge Family Court, Timergara, Dir Lower, for dissolution of marriage, recovery of her dower, maintenance and dowry articles. The respondent No. 1/defendant submitted his written statement. After failure of the pre-trial reconciliation proceedings, the learned trial Judge framed as many as 07 issues. Thereafter, both the parties recorded their respective evidence. Post-trial reconciliation proceedings also failed.

2. After hearing arguments of learned counsel for the parties, the learned trial Judge vide his judgment and decree dated 11.04.2017, passed the following decree:

"**دادرسی:**

مفصل بحث و قرارداد ہائے مقدمہ کی روشنی میں مدعیہ نمبر 1 ڈگری برائے تنسیخ نکاح بصیغہ خلع، نان نفقہ برائے طفل آصف برائے عرصہ تین ماہ قبل ازاں رجاع دعویٰ بحساب -/5000روپیہ ماہانہ تا مورخہ 12.04.2017 اور مبلغ -/8000روپیہ ماہانہ برائے عرصہ عدت کی وصولی کا حقدارہ ہے چونکہ نکاح بصیغہ خلع فسخ کی گئی ہے اسلئے مدعیہ حق مہر چار تولے سونا مدعاعلیہ کو واپس کرنے کا پابند ہوگی۔ لہٰذا دعویٰ ہٰذا جزوی طور پر بدیں قرارداد تا حد تنسیخ نکاح ونان نفقہ متذکرہ بحق مدعیہ بر خلاف مدعاعلیہ ڈگری کی جاتی ہے۔"

3. The appeal preferred by the petitioner was partially accepted to the extent of issue No. 6, whereas rest of the judgment/decree was kept maintained vide the impugned judgment/decree dated 10.10.2017.

4. The petitioner has filed the instant writ petition before this Court. Respondent No. 1 was put on notice and the case was fixed for hearing in pre-admission.

5. I have heard arguments of Mr. Said Karim Shalman, learned counsel for the petitioner and Muhammad Javaid Khan, learned counsel for the respondent No. 1 and perused the record.

6. It is admitted that: firstly, the petitioner was the second wife of the respondent No. 1. Secondly, the petitioner entered the *Nikah* with the respondent No. 1 in consideration of 04 tolas gold ornaments as her dower. Thirdly, the petitioner has spent as many as 11 years with respondent No. 1, as his wife. Fourthly, during their spousal relationship, Allah (SWT) bestowed on them three children. In her suit, she contended that her spousal relation got strained after 1-1/2 year of the marriage. She came to know that the respondent No. 1 was already married which fact he did not disclose at the time of her marriage. She complained about cruelty, notably physical beating. The worst that happened was that a criminal case was registered against her. In such circumstance, she filed the family suit, claiming non-payment of her dower and maintenance allowance for herself and her children and her implication in a criminal case at the behest of the respondent No. 1 and, dissolution of her marriage on the basis of cruelty and return of her dowry articles.

7. The respondent denied her entire suit, questioning her moral integrity on the basis of a

criminal case pertaining to her elopement with another man, and a disobedient wife.

8. Key issues framed in the light of divergent pleadings were: cruelty of the respondent as a ground for dissolution of marriage; payment of dower, maintenance, dowry articles the involvement of the petitioner in a criminal case of moral turpitude.

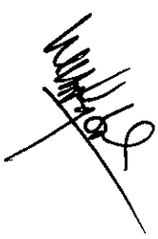
9. The petitioner could not produce any evidence in her support. She recorded her sole statement. In her statement she could not prove cruelty on the part of the respondent No. 1. Though she stated in her deposition that the respondent No. 1 would beat her, she failed to show the reason and to prove her assertion. She admitted having made no report to the police. The evidence also reveals that she went to jail in a criminal case FIR # 145 under sections 361/365-B/496-A, PPC, registered against her on 09.06.2015 in the Police Station of Haya Serai, a town in District Dir Lower. Thus, she could not prove cruelty as she averred in her plaint. The most pathetic aspect emerged from her deposition is that she gave birth to a child while she was detained in jail in the aforementioned case. She also contended that the respondent No. 1 has

divorced her and the worst was that the respondent No. 1 would still share his bed with her.

10. She admitted that the respondent No. 1 has paid her the dower of 04 tola gold ornaments. She contended that that the respondent No. 1 has robbed her of that dower in front of his first wife and her son. She, however, could not prove that the dower was snatched from her. She reiterated that the respondent No. 1 has not paid her maintenance as well as of her kids and that her dowry articles are still lying in his house. The respondent No. 1 furnished evidence of the fact that amongst the kids, one Asif is with the petitioner and others with him. He has, however, admitted that he has never taken care of his little son Asif while in jail with the petitioner. He has not conclusively proved payment of maintenance to his minor son Asif in custody of the petitioner. However, the learned trial Court held that the minor has been given to the respondent, therefore, the respondent is responsible to pay maintenance for the period during which he remained with the petitioner.

11. Surprisingly, the petitioner's two brothers, namely, Sher Mehmood and Wakil Zada gave evidence in favour of the respondent No. 1.

The petitioner's claim of return of dowry articles could not be rebutted though with no specific amount of money. Even her brother could not deny that at the time of her marriage, some dowry articles were purchased for her. The respondent No. 1 himself has stated nothing in his deposition. There could be no denying the fact in our country the dowry articles are arranged whatever the financial position of the parents of woman is. The non-proof of specific amount in respect of dowry articles emerged as unresolved issue. For the reasons discussed above, the learned appellate Court resolved it by determining it Rs. 25,000/-.



12. After a thorough scanning of evidence of the parties, I could not find any scope of interference with the impugned judgment and decree of the learned appellate Court, under article 199 of the Constitution. However, the learned counsel for the petitioner prayed at the bar that the petitioner is unable to return 04 tolas gold ornaments to the respondent No. 1 because of her financial incapability.

13. As regards to the financial incapability of the petitioner to return the dower amount, I have

heard both the counsels at length and perused the evidence. The petitioner has stated that her sister provide to her financial support and buy for her clothes, shoes, and other things of personal needs. She has also stated that she used to borrow zakat and other charities from people. There is nothing in her testimony showing that she has any source of income of her own. Her involvement in a criminal case need not be discussed as her counsel informed that she has been acquitted in that case. Without going into any discussion about her moral integrity, it is apparent that she has suffered before and is still in a sorrowful state. Her parents have passed away. Her brothers have been inimical towards her. She does not appear to have a proper shelter, and even access to worthwhile food and clothing. Her husband has divorced her. In such a dismal situation, she does not seem to be in a position to return 04 tolas gold ornaments. Evidence shows that she was young at the time of her marriage, whereas her husband was much older than her. She has remained for quite good time with her husband having three children from him. Her husband has enjoyed the full bloom of her youth which is now dwindling with no possibility of her marrying

again. Indeed, in such a financially weak situation, compelling her for return of her entire dower of 04 tolas gold ornaments is likely to push her to search for improper sources to satisfy the decree passed against her.

14. In these peculiar circumstances of the case in hand, while the marriage has been dissolved on the basis of *Khula*, it is important to observe that let the parties part their ways without putting each other in agonies. In this respect, verses Nos. 229 and 231 of **Surah Al-Baqarah** of the Holy Qur'an are beacons of light for us. The urdu translation alongwith commentary of these verses by Syed Abul A'la Maududi in *Tafheem-ul-Quran*, is reproduced below, (Volume-I, 15th edition, 2016, pages 174 to 176):

"ترجمہ آیات نمبر229: طلاق دو بار ہے۔ پھر یا تو سیدھی طرح عورت کو روک لیا جائے یا بھلے طریقے سے اس کو رخصت کر دیا جائے۔ اور رخصت کرتے ہوئے ایسا کرنا تمھارے لئے جائز نہیں ہے کہ جو کچھ تم انھیں دے چکے ہو اس میں سے کچھ واپس لے لو۔ البتہ یہ صورت مستثنیٰ ہے کہ زوجین کو اللہ کے حدود پر قائم نہ رہ سکنے کا اندیشہ ہو۔ ایسی صورت میں اگر تمھیں یہ خوف ہو کہ وہ دونوں حدود الٰہی پر قائم نہ رہیں گے، تو ان دونوں کے درمیان یہ معاملہ ہو جانے میں کوئی مضایقہ نہیں کہ عورت اپنے شوہر کو کچھ معاوضہ دے کر علیٰحدگی حاصل کر لے۔ یہ اللہ کے مقرر کردہ حدود ہیں، ان سے تجاوز نہ کرو۔ اور جو لوگ حدود الٰہی سے تجاوز کریں، وہ ظالم ہیں۔

تشریح: .....یعنی مہر اور وہ زیور اور کپڑے وغیرہ، جو شوہر اپنی بیوی کو دے چکا ہو، ان میں سے کوئی چیز بھی واپس مانگنے کا اسے حق نہیں ہے۔ یہ بات

ویسے بھی اسلام کے اخلاقی اصولوں کی ضد ہے کہ کوئی شخص کسی ایسی چیز کو، جسے وہ دوسرے شخص کو ہبہ یا ہدیہ و تحفہ کے طور پر دے چکا ہو، واپس مانگے۔ اس ذلیل حرکت کو حدیث میں اس کتے کے فعل سے تشبیہ دی گئی ہے، جو اپنی ہی قے کو خود چاٹ لے۔ مگر خصوصیت کے ساتھ ایک شوہر کے لیے تو یہ بہت ہی شرم ناک ہے کہ وہ طلاق دے کر رخصت کرتے وقت اپنی بیوی سے وہ سب کچھ رکھوالینا چاہے جو اس نے کبھی اسے خود دیا تھا۔ اس کے برعکس اسلام نے یہ اخلاق سکھائے ہیں کہ آدمی جس عورت کو طلاق دے، اسے رخصت کرتے وقت کچھ نہ کچھ دے کر رخصت کرے۔ جیسا کہ آگے آیت 241 میں ارشاد فرمایا گیا ہے۔

شریعت کی اصطلاح میں اسے "خلع" کہتے ہیں، یعنی ایک عورت کا اپنے شوہر کو کچھ دے دلا کر اس سے طلاق حاصل کرنا۔ اس معاملے میں اگر عورت اور مرد کے درمیان گھر کے گھر ہی میں کوئی معاملہ طے ہو جائے، تو جو کچھ طے ہوا ہو، وہی نافذ ہو گا۔ لیکن اگر دعدالت میں معاملہ جائے، تو عدالت صرف اس امر کی تحقیق کرے گی کہ آیا فی الواقع یہ عورت اس مرد سے اس حد تک متنفر ہو چکی ہے کہ اس کے ساتھ اس کا نباہ نہیں ہو سکتا۔ اس کی تحقیق ہو جانے پر عدالت کو اختیار ہے کہ حالات کے لحاظ سے جو فدیہ چاہے، تجویز کرے، اور اس فدیے کو قبول کر کے شوہر کو اسے طلاق دینا ہو گا۔ بالعموم فقہا نے اس بات کو پسند نہیں کیا ہے کہ جو مال شوہر نے اس عورت کو دیا ہو، اس کی واپسی سے بڑھ کر کوئی فدیہ اس دلوایا جائے۔

ترجمہ آیات نمبر 231: اور جب تم عورتوں کو طلاق دے دو اور ان کی عدت پوری ہونے کو آجائے، تو یا بھلے طریقے سے انھیں روک لو یا بھلے طریقے سے رخصت کر دو۔ محض ستانے کی خاطر انھیں نہ روکے رکھنا کہ یہ زیادتی ہو گی اور جو ایسا کرے گا، وہ درحقیقت آپ اپنے ہی اوپر ظلم کرے گا۔ اللہ کی آیات کا کھیل نہ بناؤ۔ بھول نہ جاؤ کہ اللہ نے کس نعمت عظمیٰ سے تمھیں سرفراز کیا ہے۔ وہ تمھیں نصیحت کرتا ہے کہ جو کتاب اور حکمت اس نے تم پر نازل کی ہے، اس کا احترام ملحوظ رکھو۔ اللہ سے ڈرو اور خوب جان لو کہ اللہ کو ہر بات کی خبر ہے۔"

(Emphasis supplied)

15. Now two questions arise. First, whether non-return of the dower would invalidate dissolution of marriage on *khula*, and second, whether the dower is returnable fully or partially. Both the questions have been answered in the case

of **Dr. Fakhr-ud-din v. Mst. Kausar Takreem and another (PLD 2009 Peshawar 92)**. The reply to first question reads as under:

> **"Under the provision of section 319 of Mohammadan Law by D.F. Mulla, fifteenth edition, the marriage on the basis of "Khula" can be dissolved and the wife has to return such benefits/consideration agreed upon. While interpreting this provision in the case of Monshee Buzul-ul-Rehman v. Luteesutoon-Nisa (1861)8 M.I.A 379, 395; Saddan v. Faiz Bakhsh (1920) I Lah. 402, 55 I.C. 184; Umar Bibi v. Mohammad Din (1944) Lah. 542, 220 I.C. 9, (45) AL. 51. (1861) 8 M.I.A. 379,397-398 (supra); (1861) 8 M.I.A. 379, 396 (supra), it was held that failure on the part of the wife to pay the consideration for the divorce does not invalidate the divorce though the husband may sue the wife for its recovery and that it cannot be postponed until the execution of the `Khulanama' (deed of `Khula').**
>
> **On the basis of the above principles, therefore, it has become imperative, to give the proviso in question that meaning, the legislature wanted to give i.e. timely dissolution of marriage. Accordingly, it is held that the family Court may grant decree for dissolution of marriage on the basis of 'Khula' 'when pre-trial reconciliation efforts fail. However, the Court while granting decree for dissolution of marriage on the basis of `Khula' shall record sound and cogent reasons in support thereof and shall also state that after holding trial if the wife is found liable to pay back the considerations determined by the Court which she had received, the same are to be returned to the husband. However, the Family Court cannot defer the grant of decree on the basis of `Khula' for disruption of marriage because the parties are not in agreement on the payment or non-payment of dower and the decree of `Khula' shall remain effective from the date on which it is pronounced."**

The second question the most relevant in the case in hand, is answered in the following words:

> **"The question poses great deal of intricacy, however, guidance may be sought from the injunctions of Islam. The peculiar social circumstances of the society would also be the determining factors.**
>
> **In the case of Karimullah v. Shabana and 2 others (PLD 2003 Peshawar 146), view was held that Court has the powers to refuse the return of the dower to the husband or to release him from the liability of its payment to the wife where cruel treatment given to the wife by the husband is established and decree for dissolution on basis of `Khula' is to be allowed. We have no reason to take a different view.**
>
> **Keeping in view the command of Almighty Allah given in Verse No.229, "Surah Aal-Baqarah" the divine ordainment is in the following terms:--**
>
> **One cannot dare to deviate from the command of Allah given in the Holy Qur'an. However, the translation of Verse 229 of Surah Aal-Baqarah made by Hazrat Maulana Mahmood-ul-Hassan is to the following effect:--**
>
> **Hazrat Maulana Abul Aala Maudodi in "Tafheem-ul-Quran" has translated the above verse in the following words:**
>
> **Hazrat Maulana Mahmood-ul-Hasan and Hazrat Maulana Abut Aala Maudodi both have given the same translation to the above Verse. However, while interpreting 'and construing the true import of the Verse somewhat liberal approach has been adopted in the matter of determining the consideration to be returned by the wife.**
>
> **The words used "some consideration" is of paramount importance because if the Commandment of the Allah Almighty was to the effect that the wife has to return all that which she had received from the husband, then of course, no room was left to deviate therefrom but the verse of the Holy**

Quran has reduced the burden on the wife by commanding to return some consideration to the husband, therefore, the same in no manner places the wife under obligation to return each and every thing whether in cash or kind she has received from her husband at the time of her release from the wedlock on the basis of "Khula". Even the word ".Haq Mahr" has not been used in this verse nor all benefits received by the wife have been referred to. In this view of the matter, some discretion is left to the Judge to determine the consideration which is to be returned by the wife to the husband."

16. After thorough discussion on the relevant Qur'anic verse No. 229 of Surah Al-Baqarah and its commentary by Maulana Hazrat Abul A'la Maududi in Tafheem-ul-Quran, relevant Hadith and ruling of this Court **[Karim Ullah v. Shabana and 2 others (PLD 2003 Peshawar 146)]**, this Court in ***Dr. Fakhr-ud-din's*** case (supra) has observed:

"While exercising such discretion in that regard, the Judge while dissolving marriage on the ground of `Khula' amongst other, may take into consideration the following conditions and circumstances:

i. **If it is proved before it that the wife was neither disobedient nor was a major contributory or a cause for the hateful and strained relations, rather the fault on this account is attributable to the husband;**

ii. **In a case where `Khula' is sought by an orphan lady who has no resources or insufficient financial means to pay back the compensation/consideration or part of it, in such a situation, she had not to be forced to return the whole or part of the same as any strict view in the regard would force the lady to live a**

sinful life to arrange money for payment. Such a course would be in disregard for the injunctions of Islam being a detestable act;

iii. In case where the husband has taken some steps for contracting a second marriage without the required permission although it has not been solemnized by then and the fault of crossing the limits of Allah Almighty is well attributed to him;

iv. In case where the wife has spent the full blooming, the blossom full and peak of her life with the husband and at the fag-end of her life when her youth and beauty 'both have faded and is unable to remarry after divorce/'Khula'. The same shall be taken into consideration;

v. If the wife is a destitute and after divorce/'Khula', she is left with no shelter to live a graceful life and after considering all the surrounding circumstances, it is evident that she is unable to repay the dower or part of it; and

vi. The Judges of the Family Courts shall give deep thought to the facts and circumstances of each case so that the above concession based on the interpretation/construction of Islamic injunctions are not extensively misused.

The Judge may also consider other similar circumstances so' that the wife is not forced to live impious life for arranging money to repay in full or part of the consideration to the husband. Similarly, the husband is not to be let off from the payment or part payment of the dower if still outstanding enabling the divorced wife to live a pious life with grace and dignity."

Considerations iv and v are attracted in the circumstances of this case, as discussed in paras-13 & 14, above. Before I inch forwards to conclude the discussion, I deem it pertinent to observe that a Family Court has been conferred

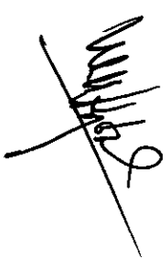
with parental jurisdiction by the West Pakistan Family Courts Act, 1964 ("Act"). The preamble of the Act reads as:

> **"WHEREAS, it is expedient to make provision for the establishment of Family Courts for the expeditious settlement and disposal of disputes relating to marriage and family affairs and for matters connected therewith."**

By virtue of section 17 of the Act, the provisions of the Qanun-e-Shahadat Order, 1984, and the Code of Civil Procedure, 1908, except section 10 and 11, are not applicable to family disputes. As the preamble shows, a Family Court has to *settle* a family dispute. A settlement of dispute is different from adjudication of a dispute. It is pertinent to explore the connotations of settlement of dispute. In this respect, reference may be made to Advanced Law Lexicon, on page 1567, offers the following explanation:

> **"<u>Dispute settlement.</u> Resolution of conflict, usually through a compromise between opposing claims, sometimes facilitated though the efforts of an intermediary.**
>
> **Dispute settlement refers to the working out of a mutually satisfactory agreement between the parties involved. Dispute settlement is primarily concerned with upholding established social norms (of right and wrong) and is aimed at bringing the dispute to an end, without necessarily dealing with its fundamental causes." (P Ramanatha Aiyar's, Advanced Law Lexicon, 2017, 5th Edition, by Shakil Ahmad Khan).**

Adjudication has been explained on page 129, Volume-1, as the legal process of resolving a dispute. It is the process of judicially deciding a case, involving the application of law to the facts through hearing by Court, after notice and consideration of legal evidence. Adjudication is a formal means of settlement of a dispute. The ouster of the Civil Procedure Rules contained in the Civil Procedure Code, suggest that the Family Court has to focus more on settlement than a typical adjudication. It is in this context that a Family Court is said to have been conferred with parental jurisdiction. It follows that a Family Court has to make the parties fully understand the importance of their marriage bond and sensitivity of far reaching implication on such relationship in the event of a dispute between them. Such a role of a Family Court may help resolve a dispute in a more satisfactory manner.



17. In light of the above discussion, the instant writ petition is partially allowed. The findings recorded by the learned Courts below to the extent of return of the paid dower comprising of 04 tolas gold ornaments by the petitioner/plaintiff to the respondent No. 1/defendant as consideration

for seeking *Khula,* are set aside. The rest of the findings are upheld. The learned executing Court is directed to hear both the parties and consider the conditions and circumstances outlined in the ***Dr. Fakhr-ud-din's*** case (supra), while exercising its discretion to determine either exemption from the whole or reasonable partial reduction in return of the aforesaid dower by the petitioner. The learned executing Court shall also explain to the parties the importance of parting ways pursuant to dissolution of marriage in a pleasant manner and avoid causing agony to each other, as directed in verses Nos. 229 and 231 of **Surah Al-Baqarah** of the Holy Qur'an.

Announced
Dt: 26.09.2022

JUDGE

Office 17/10