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JUDGMENT SHEET
LAHORE HIGH COURT
MULTAN BENCH, MULTAN

JUDICIAL DEPARTMENT

W. P. No. 12505 / 2020

Muhammad Mohsin Raza

Versus

Additional District Judge, Jatoi, District Muzaffargarh & 03 others

JUDGMENT

Date of Hearing:	17.10.2022
Petitioner By:	Mr. Muhammad Irfan Arabi, Advocate Mr. Muhammad Kaleem Ullah Chishti, Advocate
Respondent(s) No. 3 & 4 By:	Rana Mehboob Ali, Advocate
Assisted by:	Muhammad Zubair, Research Officer

ABID HUSSAIN CHATTHA, J: This constitutional Petition assailed the Judgments and Decrees dated 25.02.2019 and 12.02.2020 passed by learned Judge Family Court, Jatoi and learned Additional District Judge, Jatoi, District Muzaffargarh, respectively.

2. Precisely, Respondents No. 3 & 4 filed a suit for dissolution of marriage, recovery of maintenance allowance, dower and dowry articles against the Petitioner which was partially decreed by the Family Court. Respondent No. 4 as minor was allowed to recover maintenance allowance at the rate of Rs. 4000/- per month from the date of institution of the suit till his legal entitlement with an annual increase of 10% with effect from 25.02.2020. Respondent No. 3 (hereinafter referred to as the “**Respondent**”) was granted Rs. 15,000/- in aggregate as maintenance allowance for the period of *Iddat* and Rs. 100,000/- as alternative price of dowry articles. Her marriage with the Petitioner was dissolved vide order dated 19.01.2018. The claim of her dower was decreed to the extent of 75% of unpaid dower

mentioned in column No. 16 of the *Nikahnama* in the shape of residential house measuring 03 *Marlas*, 07 *sarsais* situated within the territorial limits of Committee, Shaher Sultan or alternative price thereof according to prevailing price schedule issued by concerned department at the time of payment and return of 25% of paid dower as mentioned in column Nos. 13 & 14 of the *Nikahnama*.

3. Both the parties preferred cross appeals against the Judgment and Decree passed by the Family Court which were dismissed by the Appellate Court.

4. Learned counsel for the Petitioner did not press the concurrent findings of fact recorded by the Courts below regarding grant of maintenance allowance and alternative price of dowry articles. Nevertheless, he vociferously laid challenge to entitlement of the Respondent to 75% of dower. He submitted that the Respondent had herself obtained *Khula* and as such, she was bound to completely return the paid dower and surrender the unpaid dower as consideration for seeking *Khula*. He vehemently argued that the principle is well-entrenched in *Islamic* jurisprudence and in this behalf, the rule that allowed return or surrender of up to 25% of admitted prompt dower or up to 50% of deferred dower encapsulated in Section 10 (5) & (6) of the Family Courts Act, 1964 (hereinafter referred to as the “**Act**”) has been declared repugnant to the injunctions of *Islam* by the Honorable Federal Shariat Court in case titled, “Imran Anwar Khan and others v. Government of Punjab through Secretary Ministry of Law, Lahore and others” (PLD 2022 Federal Shariat Court 25) (hereinafter referred to as the “**Imran Anwar Khan case**”).

5. Conversely, learned counsel for the Respondent submitted that the Respondent was entitled to dower as the return or surrender of complete dower as consideration of *Khula* is not an absolute rule and the Courts are fully empowered to determine the quantum of return or surrender of dower depending upon the facts and circumstances of each case. He contended that the impugned Judgments have been passed in consonance with law and the concurrent findings of fact recorded by the Courts below do not require interference by this Court in exercise of constitutional jurisdiction in the

absence of any illegality, irregularity, misreading or non-reading of evidence.

6. The following query is posed for determination to resolve the controversy triggered in the instant Petition:-

What are the principles governing the surrender or return of dower in case of dissolution of marriage or *Khula* in the light of Imran Anwar Khan case?

7. By way of background, it is stated that sub-Sections (5) & (6) were inserted in Section 10 of the Act through the Punjab Family Courts (Amendment) Act, 2015 (Act XI of 2015) dated 18.03.2015. Section 10 of the Act regulates the cases of dissolution of marriage which is reproduced below for ready reference:-

- “(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.
- (5) In a suit for dissolution of marriage, if reconciliation fails, the Family Court shall immediately pass a decree for dissolution of marriage and, in case of dissolution of marriage through *Khula*, may direct the wife to surrender up to fifty percent of her deferred dower or up to twenty-five percent of her admitted prompt dower to the husband.
- (6) Subject to subsection (5), in the decree for dissolution of marriage, the Family Court shall direct the husband to pay whole or part of the outstanding deferred dower to the wife.”

8. Section 2 of the Dissolution of Muslim Marriages Act, 1939 (the “**Act of 1939**”) provides grounds for seeking decree for dissolution of marriage to *Muslim* women which is reproduced below for easy reference:-

“A woman married under Muslim Law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely:—

- (i) that the whereabouts of the husband have not been known for a period of four years;
- (ii) that the husband has neglected or has failed to provide for her maintenance for a period of two years;
- (ii-a) that the husband has taken an additional wife in contravention of the provisions of the Muslim Family Laws Ordinance, 1961;
- (iii) that the husband has been sentenced to imprisonment for a period of seven years or upwards;
- (iv) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;
- (v) that the husband was impotent at the time of the marriage and continues to be so;
- (vi) that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease;
- (vii) that she, having been given in marriage by her father or other guardian before she attained the age of sixteen years, repudiated the marriage before attaining the age of eighteen years:
Provided that the marriage has not been consummated;
- (vii-a) Lian;
Explanation.— Lian means where the husband has accused his wife of *zina* and the wife does not accept the accusation as true.
- (viii) that the husband treats her with cruelty, that is to say,—
 - (a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or
 - (b) associates with women of evil repute or leads an infamous life, or
 - (c) attempts to force her to lead an immoral life, or
 - (d) disposes of her property or prevents her exercising her legal rights over it, or
 - (e) obstructs her in the observance of her religious profession or practice, or

- (f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the *Quran*;
- (ix) on any other ground which is recognized as valid for the dissolution of marriages under Muslim Law:
Provided that—
 - (a) no decree shall be passed on ground (iii) until the sentence has become final;
 - (b) a decree passed on ground (i) shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorized agent within that period and satisfies the Court that he is prepared to perform his conjugal duties, the Court shall set aside the said decree; and
 - (c) before passing a decree on ground (v) the Court shall, on application by the husband, make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the Court within such period, no decree shall be passed on the said ground.”

9. Section 5 of the Act of 1939 is also relevant to the issue in hand and is reproduced as under:-

“Nothing contained in this Act shall affect any right which a married woman may have under Muslim law to her dower or any part thereof on the dissolution of her marriage.”

10. *Nikah* is regarded as a civil contract which is solemnized against fixed dower or *Mehr* which is a denomination of property or a consideration in cash or kind paid or undertaken to be paid by the husband to his wife in the nature of gift in acknowledgment and recognition of her consent to marry him. Some dower is liable to be fixed but no limit is prescribed on the higher side. If dower is not mentioned in the *Nikahnama*, customary amount is payable. Unpaid dower operates as a debt and takes precedence over all rights acquired under a ‘will’ or by inheritance. A marriage between *Muslim* spouses can be dissolved by *Talak*, *Mubarat* or *Khula*. *Talak* is an arbitrary and unilateral act of the husband, whereby, he may divorce his wife. The spouses may agree to dissolution of marriage through their mutual consent which is termed as *Mubarat*. Corresponding to

the right to divorce accorded to a man, a *Muslim* woman is granted the right to obtain divorce through the Court by filing a suit which is called *Khula*. It denotes the right of a *Muslim* woman to seek dissolution of her marriage in which she gives or consents to give a consideration to the husband for her release from marriage as determined by the Court. The payment or surrender of consideration is an important ingredient of *Khula* and quantum thereof can be equal to or less than the fixed dower. Section 2 of the Act of 1939 stipulates that a *Muslim* woman can seek dissolution of marriage or *Khula* based on a variety of grounds listed therein. Ground (ix) of Section 2 of the Act of 1939 is a catch all provision which entitles a *Muslim* woman to file a suit for *Khula* on any ground recognized under *Muslim* personal law. Such grounds delineate such instances where a woman may not be at fault for seeking divorce by instituting a case for *Khula* but may be forced or compelled to do so when she arrives at a conclusion that she can no longer perform her obligations of *Nikah* within the limits prescribed by *Allah*, the Almighty. The jurisprudence of *Islamic* law ordains that when a wife in her case of *Khula* proves that she was not at fault for dissolution of marriage but was compelled to seek *Khula* for circumstances beyond her control, despite her best efforts to make the marriage successful, she does not require to surrender dower at all and would retain her complete entitlement to dower in a decree for dissolution of marriage. In contrast, if marriage is dissolved by the Court at the instance of the wife without any valid reason or without any fault of her husband, the wife is invariably required to surrender her complete dower. If both the parties are partly at fault, the amount of surrender of dower can be reduced, proportionately by the Court as the facts and circumstances of the case may warrant. In short, the Court had the discretion to determine the quantum of return or surrender of dower in a case of dissolution of marriage or *Khula* depending upon the facts and circumstances of the case. Therefore, when divergent pleadings regarding entitlement or surrender of dower are taken by the parties in a suit for dissolution of marriage, the proper course is to decide the same after recording of evidence. For reference see cases titled, “Dr. Anees Ahmad v. Mst. Uzma” (PLD 1998 Lahore 52); “Khalid Mahmood v. Anees Bibi and 2 others” (PLD 2007 Lahore 626); “Muhammad Kamran v. Mst. Samera

Majeed and others” (2018 YLR 1251); “Mst. Saima Irum and 3 others v. Tariq Javed and another” (2006 MLD 83); and “Mst. Zahida Bi v. Muhammad Maqsood” (1987 CLC 57).

11. However, Section 10 (5) & (6) of the Act were introduced in 2015 to regulate the question of surrender of dower in the case of *Khula* which prescribed a discretionary upper limit for the Court to order surrender of dower up to fifty percent of deferred dower or up to twenty-five percent of admitted prompt dower of the wife in favour of the husband. The Courts generally invoked Section 10 (5) of the Act even in a case of *Khula* where either the suit was decreed summarily or otherwise when it was proved that *Khula* was obtained by the wife for no fault of the husband.

12. The Judgment in the Imran Anwar Khan case was rendered in this context. It struck down the prescribed upper ceiling with respect to surrender of dower encapsulated in Sub-sections (5) & (6) of Section 10 of the Act being repugnant to *Islam* and as such, declared the same to be ineffective from 01.05.2022. The conclusion was drawn in quest of proposition as to whether at the time of dissolution of marriage in the case of *Khula*, the Holy *Quran* or *Sunnah* of the last Messenger of *Allah* (Peace Be Upon Him) require a *Muslim* woman to surrender or return the wealth, gift or dower to the husband received by her during the subsistence of marriage in any specific proportion or ceiling and how the Court should decide the quantum of dower while granting a decree of *Khula*. The said query was minutely and extensively deliberated by the Honorable Federal Shariat Court in the light of *Islamic* injunctions. It is, therefore, pertinent to examine and assess its impact on the pending cases involving the cases of *Khula*.

13. Before proceeding further, it is importantly recalled that the Honorable Federal Shariat Court has already declared that there is no specific *Quranic* Verse or authentic *Hadith* that provides a bar to exercise of jurisdiction by a competent Court of law to adjudicate upon the case of *Khula* filed by a wife against her husband in case titled, “Saleem Ahmad and others v. Government of Pakistan through Attorney General of Pakistan and 2 others” (PLD 2014 Federal Shariat Court 43). The following conclusions are extracted from the reading of the Imran Anwar Khan case:-

- (i) There is no prescribed specific ceiling in *Islam* regarding payment of compensation for seeking *Khula* in terms of return or surrender of dower in cash or kind just as there is no prescribed upper ceiling for fixation of dower;
- (ii) It is an established principle of *Sharia* that payment of dower and undertakings of *Nikah* become due on consummation of marriage and if not paid earlier are payable at the time of death, divorce or dissolution of marriage;
- (iii) Dower is wholly payable at the time of dissolution of marriage except where in a case of *Khula*, the Court orders return or surrender of whole or part of dower;
- (iv) As a general rule, if a husband pronounces divorce to his wife himself, he is not entitled to seek return or surrender of dower, gifts or any other benefit given by him to his wife during the subsistence of marriage;
- (v) More specifically, if a husband divorces his wife on his own accord without any fault on the part of wife, the husband does not have any right to demand return or surrender of dower or gift;
- (vi) A wife is entitled to seek *Khula* on any ground under Section 2 of the Act of 1939 by filing a suit in the Court of competent jurisdiction;
- (vii) If it is proved that there was no fault of the wife and she was compelled to seek *Khula*, the Court should not order return or surrender of any amount of dower in cash or kind;
- (viii) If it is proved that there was no fault of the husband and the wife sought *Khula* solely and merely on the basis of her personal dislike for her husband, the Court should order return or surrender of entire amount of dower in cash or kind;
- (ix) If it is proved that the husband and the wife are proportionally at fault for dissolution of marriage, the Court may order proportionate return or surrender of dower in cash or kind;
- (x) The order of return or surrender of dower in cash or kind shall not exceed the dower fixed in the *Nikahnama*;

- (xi) The Court is empowered to determine the quantum of return or surrender of dower in cash or kind, keeping in view the facts and circumstances of the case on the touchstone of fault of each spouse triggering dissolution of marriage; and
- (xii) The quantum of return or surrender of dower shall be decided in the light of aforesaid principles without resort to statutory upper ceiling stipulated in Section 10 (5) & (6) of the Act having been struck down as repugnant to injunctions of *Islam* after the cut-off date declared in the Imran Anwar Khan case.

14. Reverting to the facts of the instant case, it is noted that the Petitioner took a specific plea in his written statement to the effect that dower was fixed only for Rs. 5000/- and 03 *Tolas* of gold ornaments which had been paid at the time of *Nikah* and as such, nothing was payable as dower. The Family Court framed specific issue No. 2 regarding entitlement of the Respondent to a decree for dower in her favour and against the Petitioner in view of dissolution of marriage. Columns No. 13, 14 & 16 of the original *Pert* of *Nikahnama* (Exhibit P-3) revealed that Rs. 5000/- cash, 03 *Tolas* gold ornaments and 05 *Marlas* constructed house were listed therein as dower. As such, the version of the Petitioner based on oral evidence regarding non-fixation of 05 *Marlas* house was discarded for the reason that presumption of truth is attached to *Nikahnama* produced by the Respondent which could not be dislodged by counter evidence. Accordingly, the Courts below after due appreciation of evidence on record, concurrently held that at the time of *Nikah*, cash and gold ornaments were paid to the Respondent but 05 *Marlas* constructed house was not paid at that time or thereafter.

15. The Respondent had sought *Khula* by unequivocally averring in the plaint that the Petitioner habitually subjected the Respondent to physical torture. She was assaulted and expelled by the Petitioner from his house eleven months before the institution of suit when she was pregnant for about four months. The child was born during her forced desertion and during this period, the Petitioner did not approach her for rehabilitation. The Petitioner was also accused of bad character and drugs addiction. It was alleged that he consistently refused to pay maintenance allowance of the Respondent and

the minor. Citing torture and cruelty as the primary reasons to seek *Khula*, the Respondent submitted that having tried her best to make her marital life successful, she could no longer cohabit with the Petitioner within the limits prescribed by *Allah*, the Almighty. The assertions contained in paragraph No. 3 of the plaint were evasively denied by the Petitioner in his written statement and there was no specific denial of such charges. The Respondent testified the same facts in her deposition which was corroborated by the other witness produced by her. The Petitioner and his witness in their testimonies did not controvert or rebut the allegations of torture and cruelty. The Petitioner cited the instigation of Respondent's father as the sole reason on the part of the Respondent for demanding *Khula* without any plausible reason for such instigation which otherwise is quite unnatural. As such, the Respondent substantially proved the reasons for seeking *Khula* as per her pleadings and successfully established that she was not entirely at fault for failure of her matrimonial relationship. At the same time, the Respondent did not produce conclusive evidence of torture and cruelty on the part of the Petitioner to prove that she was not at fault at all. Therefore, it can safely be concluded that proportionally, the Petitioner was more at fault than the Respondent for the dissolution of marriage between them.

16. The Family Court after declaring the entire dower as prompt invoked Section 10 (5) & (6) of the Act and ordered that the Respondent was entitled to her dower but must return or surrender 25% of her admissible dower as consideration for *Khula*. In this context, the non-paid dower stipulated in the *Nikahnama* in the shape of house measuring 05 *Marlas* was reduced in measurement to 03 *Marlas* and 07 *Sarsais*.

17. Applying the principles of law enunciated in the Imran Anwar Khan case to the facts and circumstances of the instant *lis*, it becomes explicitly evident that decision of the Courts below regarding grant of *Khula* to the Respondent against return or surrender of 25% of dower is fully justified based on evidence on record in the wake of charges of cruelty, torture and use of drugs against the Petitioner since it was not a case of *Khula* simpliciter based on personal dislike of the Respondent against the Petitioner. Hence, notwithstanding that upper ceiling of surrender of dower contained in sub-Sections (5) & (6) of Section 10 of the Act has been struck

down by the Honorable Federal Shariat Court yet the decision is otherwise sustainable on the touchstone of principles of *Islamic* law reiterated and endorsed in the Imran Anwar Khan case.

18. In view of the above discussion, the impugned Judgments are maintained being bereft of any illegality, infirmity, misreading or non-reading of evidence. Hence, this Court is not inclined to interfere with the impugned Judgments in exercise of extraordinary and discretionary constitutional jurisdiction vested under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973. Accordingly, this Petition being devoid of any merit is **dismissed**.

(Abid Hussain Chattha)
Judge

Approved for reporting.

Judge

Waqar