

**Before Mian Fasih-ul-Mulk and Rooh-ul-Amin Khan, JJ**

**MUHAMMAD FAISAL KHAN---Petitioner**

**Versus**

**Mst. SADIA and another---Respondents**

Writ Petition No.1405 of 2011, decided on 10th October, 2012.

**(a) West Pakistan Family Courts Act (XXXV of 1964)---**

---S.10---Pre-trial proceedings---Compatibility with Muslim Law---Scope---Provision of S.10 of West Pakistan Family Courts Act, 1964 were fully in consonance with Muslim Law.

**(b) West Pakistan Family Courts Act (XXXV of 1964)---**

---S. 5, Sched. & S.10---Dissolution of Muslim Marriages Act (VIII of 1939), S. 2---Dissolution of marriage on ground of Khula'---Scope---Consent of husband for such dissolution would not be necessary---Judge, in case of husband's dis-agreement to dissolve marriage, could determine question as to whether spouses, if they continued living together, could observe limits of God or not---Duty of Judge to make genuine attempt for reconciliation between spouses---Judge in case of failure of reconciliation efforts could pass forthwith decree for dissolution of marriage---Where Judge while passing such decree, observed that wife was not willing to live with husband without any fault of his, then Judge would have no option but to restore to husband dower (Haq-e-Mehr) received by wife at time of marriage---Wife seeking divorce for having developed extreme hatred and disliking for her husband would have to restore the consideration of marriage (dower) to husband---Where in view of Judge husband by his arrogant, cruel and obnoxious nature or behavior compelled wife to seek "Khula", then she would be entitled to all due benefits along with dissolution of marriage---Principles and illustration.

Mst. Bilqis Fatima v. Najmul Ikram Qureshi PLD 1959 Lah. 566; Shahid Javed v. Sabba Jabeen and others 1991 CLC 805 and Sadiq Rasool Khan v. The Additional District Judge, Lakki Marwat 1991 MLD 1732 rel.

**(c) Dissolution of Muslim Marriages Act (VIII of 1939)---**

---S. 2---West Pakistan Family Courts Act (XXXV of 1964), S. 5, Sched. & 10---Khula, right of---Meaning---Burden of proof---Scope---Exercise of right of Khula by wife and duty of court--  
-Scope---Khula being right of wife to seek divorce by returning her dower to husband---Wife could exercise such right where circumstances made it impossible for her to live with her husband within limits of God---Where compelling the wife to live with her husband would give birth to hateful union or where she was not ready to live with her husband at any cost, then court would be bound to grant her right of "Khula" irrespective of the fact whether she claimed or omitted to claim such right in her plaint or failed to prove grounds, other than "Khula", taken by her for dissolution of marriage---Principles.

The right of the wife to claim dissolution of her marriage is recognized by the Holy Quran and Hadees and the technical term for the wife's right to divorce by returning her dower is called "Khula". "Khula" is an Arabic term, which literally means "to take out" and "remove". The definition of "Khula" as explained by the famous Hanifa Mujtahid Ibn-e-Human is as follows:

"To remove the union of marriage in exchange of financial settlement within the words of "Khula".

"Khula" is release from matrimonial bond and can be exercised by the wife, if the circumstances divulge that it is impossible for the parties to live within the limits prescribed by Allah and the compelling of wife to live with her husband, will give birth to a hateful union, then the Court is bound to grant the right of "Khula" to a woman where she has expressly claimed or has omitted to claim in her pleadings or in case the other ground for seeking dissolution of marriage could not be proved.

If the dissolution of marriage is claimed on any ground recognized under Dissolution of Marriages Act, 1939, then it is the duty of the wife and the burden lies on her shoulders to prove the allegation levelled for dissolution of marriage. If she successfully discharges her burden and proves the allegations, then the Court shall grant her decree for dissolution of marriage along with other benefits. But if she fails to prove the allegation, then the mere fact that the wife could not establish her allegation qua ground taken for dissolution of marriage would not disentitle her for dissolution of marriage on ground of "Khula". If the wife fails to substantiate her case on the grounds claimed in the plaint for dissolution of her marriage then the court is under legal obligation to dissolve the marriage but on the basis of "Khula", particularly when the wife is not ready to live with her husband at any cost.

Mst. Bilqis Fatima v. Najmul Ikram Qureshi PLD 1959 Lah. 566 and Shahid Javed v. Sabba Jabeen and others 1991 CLC 805 rel.

Under Muslim Law as well as the law of Pakistan, the wife is entitled to terminate the contract of her marriage one sidedly like "Talaq", but for the same she shall remit the dower amount, if not received, or pay it back to the husband, if so received. Where there is no dispute existing between the parties regarding dower, then in terms of proviso to section 10(4) of the West Pakistan Family Courts Act, 1964 a decree for dissolution of marriage, shall be granted to the wife immediately on the failure of reconciliation in pre-trial proceedings. However, if a dispute arises and the wife claims dissolution of marriage, on recognized grounds for dissolution of marriage, then court shall proceed with the matter and record evidence of the parties to ascertain her entitlement for dower and other benefits. If the courts, after pro and contra evidence arrives at a conclusion that the husband has compelled the wife by his arrogant, cruel and obnoxious nature or behaviour, then she is to be held entitled for all the due benefits along with

dissolution of marriage. On the other hand, if the court finds that the wife is adamant not to reside with the husband and the conscious of the court is satisfied that there is no fault of the husband, but the wife is claiming dissolution for her own personal reasons such as abhorrence or disliking of her husband, then the wife shall be directed to restore the consideration of marriage to the husband, for the reason that if she had developed extreme hatred and disliking for her husband, then she should also not like the benefits in the shape of dower from the husband.

2009 MLD 419; PLD 2009 Pesh. 92 and 2000 CLC 1337 ref.

Verse No.229 of Sura Baqra; Mst. Bilqis Fatima v. Najmul Ikram Qureshi PLD 1959 Lah. 566; Shahid Javed v. Sabba Jabeen and others 1991 CLC 805 and Sadiq Rasool Khan v. The Additional District Judge, Lakki Marwat 1991 MLD 1732 rel.

Muhammad Javed Yousafzai for Petitioner.

Neelam A. Khan for Respondents.

Date of hearing: 10th October, 2012.

## **JUDGMENT**

**ROOH-UL-AMIN KHAN, J.**---Briefly narrated the facts relevant for the disposal of the instant and the connected Writ Petitions Nos.3481 of 2011 and 5 of 2012 are that Muhammad Faisal Khan (hereinafter referred to as petitioner) and Mst. Sadia (hereinafter referred to as respondent) had contracted marriage in accordance with the Islamic Sharia, in the year 2009, wherein dower was fixed as Rs.100,000 in cash and 5 tolas gold ornaments, through Nikkah Nama and Iqrar Nama (Annexure A & A/1). The respondent filed a suit before the Judge Family Court at Swabi on 25-3-2010 for:--

- (i) Dissolution of marriage, on the ground of cruelty, beatings and not taking her due care.
- (ii) Recovery of dower amounting to Rs.100,000 in cash, 5 tolas gold ornaments.
- (iii) Recovery of maintenance allowance @ of Rs.6000 per month from 31-12-2009 till the expiry of "iddat" period and
- (iv) Recovery of dowry articles.

2. The petitioner contested the suit by filing written statement, vide which the allegations made in the plaint were rebutted. After framing issues, recording pro and contra evidence of the parties and hearing the learned counsel for the parties, the learned trial Court vide its judgment and decree dated 15-3-2011 partially decreed the suit to the following extent:--

(i) Dissolution of marriage.

(ii) Recovery of dower, amounting to Rs.100,000 in cash and 5 tolas gold.

(iii) Dowry articles as per findings on issue No.9 in favour of the respondent. However, her prayer for grant of maintenance allowance was rejected.

3. Feeling aggrieved from the decree of dissolution of marriage the petitioner has approached this Court through filing of the writ petition in hand (No.1405/2011), whereas against the partial decree of maintenance he filed appeal before the District Judge Swabi: The respondent also aggrieved of the partial decree has filed appeal before the ADJ (respondent No.2). Both the appeals were consolidated and disposed of vide common judgment and decree dated 26-10-2011, whereby the appeal of the respondent was partially accepted to the extent of payment of dower and she was held entitled for the recovery of cash amount of Rs.100,000, 5 tolas gold as dower and maintenance allowance @ Rs.6000 per month from the date of institution of the suit till the expiry of "Iddat" period, whereas the appeal of petitioner was also partially accepted to the extent of disallowing the respondent her dower of 5 tolas gold ornaments.(as received at the time of marriage).

4. Challenging the validity of the said judgments and decrees the petitioner filed Writ Petitions Nos.3481 and 1405 of 2011, while the respondent filed Writ Petition No.5 of 2012, which were clubbed together and pre-admission notices were issued to the parties vide order dated 2-8-2011, in response whereof the respondent engaged Miss Neelam A Khan, Advocate. As all the three writ petitions are connected, therefore, were admitted for regular hearing and counsel of the parties accepted notice in the Court, who argued the case at length.

5. Since all the three matters have arisen from the same suit, therefore, we propose to dispose of them through this single judgment.

6. Learned counsel for the petitioner argued that the judgment and decree of the trial court dated 25-3-2011 to the extent of recovery of dower and dowry articles, while the judgment of the appellate court to the extent of dower of cash amount of Rs.100,000 and grant of maintenance allowance @ Rs.6000 per month is against law, facts and material available on the file, because the respondent could not produce any cogent and reliable evidence in support of her claim in the plaint. It was further contended that the dower deed Exh.P.W.4/1 and Nikkah Nama were not proved through cogent evidence; she failed to prove any cruelty upon her by the petitioner, but despite that the courts below have passed the impugned judgments and decrees against the petitioner, therefore, the same are not sustainable in law and are liable to be set aside. In support of his submissions the learned counsel relied upon 2009 MLD 419 (Peshawar).

7. On the other hand, learned counsel for the respondent contended that the attitude of

petitioner towards the respondent was cruel and he used to subject her to physical torture; the respondent is entitled to the decree as prayed for in the plaint, but the learned trial court as well as the appellate court have partially decreed her suit by depriving her of the legal rights; that the appellate court has also failed to consider the law on the subject as envisaged by the West Pakistan Family Courts Act, 1964, while deciding issues Nos. 5 to 7. Lastly it was contended that the respondent is entitled to the decree as prayed for in the plaint. In support of her contentions the learned counsel relied on PLD 2009 Peshawar, 92 and 2000 CLC 1337 (Lahore).

8. We have heard the learned counsel for the parties and considered their arguments in the light of the evidence on record.

9. Record reveals that the respondent claimed dissolution of her marriage on ground of cruelty, which is one of the recognized grounds for dissolution of marriage under Dissolution of Muslim Marriages Act, 1939. To this effect, the learned trial court framed a specific issue No.7 in the following manner:--

Whether the defendant treats her with cruelty and ousted her from his house?

10. After discussing the entire evidence pro and contra produced by the parties, the learned trial court arrived at a conclusion that all the witnesses have failed to utter a single word regarding cruelty on the part of the husband, therefore, the issue regarding cruelty was decided in negative. Similarly the trial court while deciding issue No.10 at the very outset held that though the respondent has not succeeded in proving any type of cruelty on the part of the petitioner, but as the respondent categorically stated in her plaint that she will prefer death, in case she was forced to reside with the petitioner, therefore, she was held entitled to the dissolution of marriage as prayed for. The above said findings were affirmed by the appellate court vide judgment and decree dated 26-10-2011 with certain modification.

11. The controversy raised before us is to the effect that in case where the wife is not willing to live with the husband at any cost, even then she would be entitled to the ancillary benefits i.e. dower and maintenance?

Section 2 of the Muslim Marriages Act, 1939 provides (recognized grounds for a decree for dissolution of marriage, whereby a woman married under Muslim Law would be entitled to obtain a decree for dissolution of her marriage on any or more grounds, thus, the respondent has brought the suit for dissolution of marriage on one amongst the recognized ground for dissolution i.e. cruelty.

12. The West Pakistan Family Courts Act, 1964 was enacted to create Special Courts for regulating matrimonial/family disputes between the parties. Section 10 of the Act *ibid* provides a mechanism in pre-trial proceedings. For understanding and resolving the question in dispute, we deem it proper to reproduce section 10 of the West Pakistan Family Courts Act and transcript it in verbatim:--

"10. Pre-trial proceeding.

(1) (When the written statement is filed, the Court shall fix an early date for a pre-trial hearing of the case.

(2) On the date so fixed, the Court shall examine the plaint, the written statement (if any) and the precise of evidence and documents filed by the parties and shall also, if it so deems fit hear the parties, and their counsel.

(3) At the pre-trial, the Court shall ascertain the points at issue between the parties and attempt to effect a compromise or reconciliation between the parties if this be possible.

(4) If no compromise or reconciliation is possible the Court shall frame the issues in the case and fix a date for recording of the evidence)".

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

13. The above quoted section and particularly the proviso to its subsection (4) is fully in consonance with Muslim Law. The Legislature while introducing amendment in the Family Court Act, 1964 has derived wisdom from Quran and Sunnah. The right and mode of "Khula" has been described by Almighty Allah in verse No. 229 of Sura Baqra, translation of which is as under:--

"229. The divorce is twice, after that, either you retain her on reasonable term or release her with kindness. And it is not lawful for you (men) to take back (from wives) any of your Mahr (bridal money given by the husband to his wife at the time of marriage) which you have given them, except when both parties fear that they would be unable to keep the limits ordained by Allah (e.g. to deal with each other on a fair basis). Then if you fear that they would not be able to keep the limits ordained by Allah, then there is no sin on either of them if she given back (Mahr or a part of it) for her `Al-Khul' (divorce). These are the limits ordained by Allah, so do not transgress them. And whoever transgress the limits ordained by Allah, then such are the Zalimun (wrong-doers, etc.)".

The above quoted verse from the Holy Quran permits the dissolution of a marriage by wife on restoration of the dower consideration to the husband. It further reveals that for dissolution and termination of marriage contract, the consent of husband is not necessary as the words "if you fear" are addressed to the State, or the Judge, and the Judge would determine if the circumstances are such that there is apprehension that the spouses would not observe the limits of God. The reference to the Judge can only mean that he is empowered to pass an order even if the husband does not agree. In support of the above interpretation, reference may be made to two instances of Khula whereby marriage of Sabit Ibn-i-Qais was dissolved by the Holy Prophet Hazrat Muhammad (Peace be upon him) on a complaint made by Jamila for relieving her from the Nikah of Sabit Ibn-i-Qais in the following words:--

"Oh Prophet of God. Nothing can bring me and him together. When I raised my veil, he was coming from the front with some men. I saw that he was out of them the shortest and the ugliest. I swear by God I do not hate him because of any defect in him, religious or moral, but I hate his ugliness. I swear by God that if it was not for fear of God I would have spit at his face when he came to me. Oh Prophet of God, you see how handsome I am, and Sabit is an ugly person. I don't blame his religion or his morals but I fear heresy in Islam".

On hearing this the Prophet of God said to Jamila:--

"Are you prepared to return the garden that he gave you". She said: "Yest, Oh Prophet of God, and even more". The Holy Prophet said: "No more, but you return the garden that he gave you", and then the Holy Prophet said Sabit: "Take the garden and divorce her".

Another instance also pertains to the dissolution of marriage of Habiba, another wife of Sabit Ibn-i-Qais. (Ibn-e-Jarir said that Ayah No.229 of the Holy Quran was revealed about Sabit Ibn-i-Qais Bin Shammash and his wife Habiba bint-e-Abdullah Bin Ubbayya Bin Salul). It is stated by Imam Malik and Abu Daud that "One day early in the morning when the Holy Prophet came out of his house for Fajr prayer. He found Habiba standing there. He inquired from her what the matter was and she said. "I and Sabit can never pull together". When Sabit appeared, the Prophet of God said: "This is Habiba, daughter of Sehl. She has stated what God wished she should state". Habiba said, "O, Prophet of God, let Sabit take from me whatever he has given me from that is all with me". The Holy Prophet told Sabit to take back what he had given her and to release her". In some versions the words used are "khale sabilaha" and others "farigha". Both of them mean "divorce her".

At Tirmidhi reported that Robyai Bint-e-Muawwidh Bin Afra got a khula during the time of Allah's messenger and the Prophet ordered her to wait for one menstruation period for Iddah.

During the period of Khulafa-i-Rashidin, certain examples came forward wherein a lady came to Hazrat Usman for her release from Nikah of her husband in lieu of all that she owned. Hazrat Usman terminated the marriage directing her husband to take all that she had and to grant her a divorce.

The right of the wife to claim her dissolution of marriage is recognized by the Holy Quran and Hadees and the technical term for the wives right to divorce by returning her dower is called "Khula".

"Khula" is an Arabic term which literally means "to take out" and "remove". The definition of "Khula" as explained by the famous Hanifa Mujtahid, Ibn-e-Human is as follows:--

"To remove the union of marriage in exchange of financial settlement within the words of "Khula".

14. Under section 10(3) ibid the Trial Court before initiating the trial proceedings is under

legal obligation to make a genuine attempt for reconciliation between the parties. Trial Court shall remain instrumental and will make genuine efforts in resolving the dispute between the parties. If despite genuine efforts, reconciliation fails, the Trial Court under proviso of section 10(4), without recording evidence shall pass a decree of dissolution of marriage forthwith. At this juncture if the court observes that the wife without any fault of the husband, is not willing to live with him, then under proviso (ibid) the Court is left with no option, but to restore to the husband the Haq-e-Mehr received by the wife in consideration of marriage at the time of marriage.

15. "Khula" is release from matrimonial bond and can be exercised by the wife, if the circumstances divulge that it is impossible for the parties to live within the limits prescribed by the Almighty Allah and the compelling of wife to live with her husband, will give birth to a hateful union, then the Courts are bound to grant the right of "Khula" to a woman where she has expressly claimed or has omitted to claim in her pleadings or in case the other ground for seeking dissolution of marriage could not be proved.

Similar view was expressed in case of Mst. Bilqis Fatima v. Naimul Ikram Qureshi (PLD 1959 Lahore 566) in the following words:--

"Islam does not force on the spouses a life devoid of harmony and happiness and if the parties cannot live together as they should, it permits a separation. If the dissolution is due to some default on the part of the husband, there is no need of any restitution. If the husband is not in any way at fault, there has to be restoration of property received by the wife".

It is by now settled law that if the dissolution of marriage is claimed on any ground recognized under Dissolution of Marriages Act, 1939, then it is the duty of the wife and the burden lies on her shoulders to prove the allegation levelled for dissolution of marriage. If she successfully discharges her burden and proves the allegation, then the Court shall grant her decree for dissolution of marriage along with other benefits. But if she fails to prove the allegation, then the mere fact that the wife could not establish her allegation qua ground taken for dissolution of marriage would not disentitle her for dissolution of marriage on the ground of "Khula". If the wife fails to substantiate her case on the grounds claimed in the plaint for dissolution of her marriage then, the court is under legal obligation to dissolve the marriage but on the basis of "Khula", particularly when the wife is not ready to live with her husband at any cost. In case of Shahid Javed v. Sabba Jabeen and others (1991 CLC 805), it was held that the right of dissolution of marriage on the basis of Khula was independent right and failure of wife to establish grounds other than khula taken by her would not prejudice her right to seek khula.

16. In the instant case both the courts below have unanimously arrived at a conclusion that the wife has failed to prove the cruelty on the part of the petitioner and the courts have noted that the wife shall prefer death instead of living with her husband. Even then, the courts below while dissolving the marriage had granted decree for the recovery of dower. The findings of both the courts below are against the mandatory provision of section 10(4), which provides that, if the wife is adamant and attempts for reconciliation have failed, then there is a little choice for the court except to grant decree for dissolution of marriage forthwith and shall pass order of returning the husband the dower received by her in consideration of her marriage.

17. Under Muslim Law as well as the Law of the country, the wife is entitled to terminate the contract of her marriage one sidedly like "Talaq", but for the same she shall remit the dower amount, if not received, or pay it back to the husband, if so received. Where there is no dispute



existing between the parties regarding dower, then in the terms of proviso to section 10(4) of the West Pakistan Family Courts Act, 1964 a decree for dissolution of marriage, shall be granted to the wife, immediately, on the failure of reconciliation in pre-trial proceedings. However, if a dispute arises and the wife claims dissolution of marriage, on recognized grounds for dissolution of marriage, then the court shall proceed with the matter and record evidence of the parties to ascertain her entitlement for dower and other benefits. If the courts, after pro and contra evidence arrives at a conclusion that the husband has compelled the wife by his arrogant, cruel and obnoxious nature or behaviour, then she is to be held entitled for all the due benefits along with dissolution of marriage. On the other hand, if the court finds that the wife is not adamant not to reside with the husband and the conscious of the court is satisfied that there is no fault of the husband, but the wife claim dissolution for her own personal reasons such as abhorrence or disliking of her husband, then the wife shall be directed to restore the consideration of marriage to the husband, for the reason that if she had developed extreme hatred and disliking for her husband, then she should also not like the benefits in the shape of dower from the husband. In the case of Sadiq Rasool Khan v. The Additional District Judge, Lakki Marwat (1991 MLD 1732), this Court has held as under:--

"Undoubtedly a wife is entitled to 'Khula' if she satisfies conscience of the Court that it will otherwise mean forcing her into hateful union. Nonetheless a wife demanding separation on the basis of Khula, will return to the husband any tangible returnable benefits conferred on her by the husband".

18. In the instant case both the courts below had arrived at the conclusion that without any fault of the husband the wife is not ready to reside with him, but she was held entitled for the entire dower. It is pertinent to mention here that this mode of dissolution of marriage is not only against the Muslim Law and Law of the country, but also would encourage the separation between the spouses. It shall further commercialize the marriage contract for the reason that a greedy female/wife after her marriage would come and claim dissolution of marriage along with her marriage consideration and after completion of "Iddat" period, shall go for another and then another contract.

Resultantly, we partially accept this Writ Petition, modify the impugned Judgments and decrees of the courts below to the extent that the marriage between the parties shall remain dissolved but on the basis of "Khula", she is not entitled for the dower amount of Rs.1,00,000 and 5 tola gold ornaments. The respondent shall return back 5 tola gold ornaments to the petitioner, which she had already received, in lieu of dissolution of marriage on the basis of "Khula". However, the findings on issue No.9 regarding the return of dowry articles and maintenance allowance @ Rs.6000 per month from the date of institution of the suit till the expiry of "Iddat" period are maintained. All the three writ petitions are disposed of in the above terms.