

JUDGMENT SHEET.
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

W.P. No. 869/2021

Jehanzeb Khan

Versus

Chairman, UC-15, Arbitration/Union Council, Islamabad, etc.

Petitioner by: Mr. Nouman Amin Farooqi, Advocate.

Respondents by: Mr. Rabi Bin Tariq, State Counsel.
Mr. Saqib Ali Mumtaz, Advocate for
respondent No.1.
Abdul Rasheed, ASI.
Tahir Ali, Secretary Union Council, Lohi Bher,
Islamabad.

Date of Decision: 30.01.2024.

MOHSIN AKHTAR KAYANI, J: Through this writ petition,
the petitioner has prayed for the following relief:-

- (i) *Direction may be issued to Respondent No.1, to issue the certificate for effectiveness of Divorce under Section 7 of the Muslim Family Law Ordinance, 1961 in case MFL/77/2020, in pursuance of the irrevocable nature of divorce and the statement recorded by Respondent No.1 on 25.11.2020;*
- (ii) *Declare that Respondent No.2 is not the widow of the Shahzeb Khan, the deceased son of the petitioner, and accordingly, be declared a divorcee;*
- (iii) *Award costs of litigation;*
- (iv) *Grant any other relief which this Hon'ble Court deems appropriate in the circumstances of the matter, in the interest of justice.*

2. Learned counsel for the petitioner contends that petitioner's real son Shahzeb Khan was married to respondent No.2 on 21.12.2018 and subsequently due to strained relations, he divorced respondent

No.2 on 02.07.2019, which has further been clarified through second and third joint notice dated 14.11.2020; that petitioner's son Shahzeb Khan approached the office of Chairman Arbitration Council, UC-15 Lohi Bher, Islamabad for issuance of effectiveness of divorce certificate on 25.11.2020, also recorded his statement on the said date before the Chairman; that matter was adjourned to 23.12.2020 and then 27.01.2021 whereas respondent No.2 never put appearance and in the meanwhile petitioner's son Shahzeb Khan died on 19.01.2021 prior to the issuance of effectiveness of divorce certificate by the Chairman Arbitration Council; that Chairman Arbitration Council has refused to issue certificate though petitioner claims that once divorce has been pronounced the same could not be withdrawn, especially in this case when all three divorce have been pronounced, even prior to the death of petitioner's son Shahzeb Khan.

3. Conversely, respondent No.2 has never put appearance before this Court despite notice and even after adopting substituted mode of service. Record has been produced by the Secretary UC Lohi Bher, Islamabad.

4. Arguments heard, record perused.

5. Perusal of record reveals that petitioner's son Shahzeb Khan married to respondent No.2 on 21.12.2018 and they were blessed with one son born on 14.05.2020. Though petitioner's son pronounced first divorce on 02.07.2019 as per his claim but second and third divorce was announced on the same date on 14.11.2020 as per record. Chairman Arbitration Council was approached on 25.11.2020 for

issuance of certificate for effectiveness of divorce, who issued notice to respondent No.2 for 23.12.2020 and 27.01.2021 through registered post but no one has put appearance on behalf of respondent No.2 and in the meanwhile petitioner's son Shahzeb Khan died prior to the issuance of certificate on 19.01.2021. As per stance of petitioner certificate for effectiveness of divorce be issued accordingly, which was refused by the Chairman Arbitration Council.

6. When confronted, Secretary UC states that petitioner's son died prior to the completion of timeline provided in Section 7 of the Muslim Family Laws Ordinance, 1961, which prescribed period of 90 days from the day on which notice under sub-section (1) of Section 7 was delivered to the Chairman. Admittedly, executor of divorce i.e. Shahzeb Khan was died prior to the completion of 90 days' time provided in the law, therefore, question arises as to whether Chairman Arbitration Council can issue certificate for effectiveness of divorce, in such scenario, this court has been guided with the principles settled in primary source i.e. the Holy Quran, whereby question of *iddat*, question of *talaq* has been explained in verse 230 of Surah Al-Baqarah in which concept of three divorces has been mentioned. Similarly, last chance to husband for final decision before expiry of waiting period either to retain or release the wife decently has also been explained in Surah At-Talaq verse 2, which are the key principles for every Muslim to be followed in letter & spirit. The Quran has also provided the mechanism of resolution among the husband and wife in Surah An-Nisa verse 28.

7. While considering these principles, this court is mindful of the fact that different kinds of *talaq* have been explained in Muhammadan Law including but not limited to Talaq Ahsan, Talaq Hasan, Talaq-ul-Biddat, which is irrevocable. Learned counsel for the petitioner has cited judgments reported as AIR 1932 PC 25 (Saiyid Rashid Ahmad and another vs. Anisa Khatun and others), PLD 1982 Lahore 825 (Muhammad Rafique vs. Ahmad Yar and Another), 1992 SCMR 1273 (Allah Dad vs. Mukhtar and another), 1994 SCMR 2098 (Mst. Zahida Shaheen and another vs. The State and another), 1996 MLD 1689 (Zubaida Khatoon vs. Administrator UC Uch Gillani, Tehsil and District Bahawalpur and another), PLD 1996 Lahore 65 (Mst. Anila vs. Muhammad Munir and others), 2002 MLD 778 (Mst. Ambreen Shah vs. Chairman, Union (Arbitration) Council/Administrator, Union Committee and others), 2006 CLC 1525 (Mst. Zarina Begum vs. Major Aziz-ul-Haq and 3 others), 2014 YLR 2315 (Ms. Roheela Yasmin vs. Ms. Neelofar Hassan and 6 others), 2018 CLC 1125 (Muhammad Afzal Khan vs. Chairman Arbitration Council and another), 2022 SCMR 650 (Munir Hussain and 3 others vs. Province of Sindh and others) in order to explain his point of view.

8. No doubt by and large all the judgments explain qua the validity and effectiveness of divorce based upon different circumstances in each case even reiterated the stance that *Talaq-e-Bain* becomes irrevocable at once. The other principle highlighted is the concept of Section 7 of the Muslim Family Laws Ordinance, 1961,

which provides a notice in writing by the husband who has divorced his wife, to the Chairman and its copy to the wife. The violation of this provision is punishable with simple imprisonment for a term of one year and fine which may extend to five thousand rupees or with both. Subsection (3) of this section speaks of *talaq* being effective until the period of ninety days expires from the day on which notice is delivered to the Chairman. Shariat Appellate Bench of Supreme Court of Pakistan has also highlighted the concept of notice of *talaq* to the Chairman is not mandatory under the Injunctions of Islam in case Allah Dad *supra*. Even in case Zahida Shaheen *supra* Supreme Court acknowledges the failure to send a notice to Chairman of local council does not render the divorce ineffective in Shariah. However, primary question remains the same as to whether divorce certificate be concluded if the person who claims for issuance of effectiveness of divorce certificate dies prior to the completion of 90 days period. This aspect has in some extent been considered in case Muhammad Afzal Khan *supra*. The relevant portion is reproduced as under:-

The purpose of Arbitration Council is to hold reconciliation proceedings between the spouses and if the matter is not reconciled, the Chairman Arbitration Council has to issue certificate of effectiveness of Talaq after expiry of 90 days, whereas it is prerogative and authority of the person, who files the application along with notices of Talaq for issuance of certificate of effectiveness of Talaq to withdraw the same before expiry of the 90 days and if the said application is not withdrawn by the applicant (whether the applicant is husband or wife), the Chairman Arbitration Council cannot refuse to issue certificate of effectiveness of Talaq, especially in those cases, when the other side does not appear for reconciliation proceedings. Similarly, if wife (in

case of delegated right of divorce) has approached the Chairman Arbitration Council for issuance of certificate of effectiveness of Talaq and notices have been issued to other side, whereas the other side fails to appear before the Chairman Arbitration Council and in the meanwhile the applicant (wife) or the person, who applied, dies then it can only be presumed that the executor of the notices of Talaq had intention to pronounce Talaq as the same can be gathered from the documents of Talaq. Reliance is placed upon Malik Khalid Riaz v. The Administrator, Arbitration Council, Hafizabad and another (2016 CLC 1522).

9. Though the above case law is also somewhat different in one aspect that 90 days period in case **Muhammad Afzal Khan** *supra* has already been elapsed/expired when the person who applied for issuance of certificate was alive, who later on died much after the expiry of the period but before issuance of certificate. This court has also gone through the judgment reported as **2017 CLC 516 (Mst. Roheela Yasmin vs. Ms. Neelofar Hassan and 6 others), 1994 SCMR 1720 (Mushtaq Ahmed and another vs. Mst. Sat Bharai and 5 others)**, which clearly stipulates that time frame provided in Section 7 is meant to cooling down the husband in which parties might reconcile with each other, therefore, phrase used in subsection (3) of Section 7 of the Muslim Family Laws Ordinance, 1961 has great significance unless revoked earlier expressly or otherwise shall not be effective only the expiration of 90 days from the date on which notice under subsection (1) is delivered to the Chairman, therefore, as per **Mushtaq Ahmed** *supra* from the facts narrated above the intervening period of notice before the Chairman Arbitration Council is meant for reconciliation and procedure provided under the law disseminate the

intention of reconciliation only in which either husband can revoke the divorce or reconcile the matter, however, if husband died prior to the completion of 90 days of service of notice *talaq* had not become effective in terms of Section 7 of the Ordinance.

10. Now it has been settled that in case of death of a husband or wife during the iddah period, the *talaq* becomes ceased. Guidance may be taken from 2003 YLR 2623 (Sardar and 3 others Vs. Muhammad Khan alias Malla and 06 others), whereby, the Hon'ble Lahore High Court has also held that *Talaq* pronounced by Sultan Ali, deceased followed by written notice had not become final in accordance with the injunctions of the Quran and Mst. Dhami continued to remain widow of Sultan Ahmad, deceased, entitled to inherit his estate. Furthermore, in recent judgment reported as PLD 2023 [Peshawar] 88 (Mst. Musarat Vs. Aziz Ahmad and others), Peshawar High Court held that "*in view of reproduction of the relevant Islamic Law on the subject it is established that in case of Talaq Rajia (Talaq Ahsan and Talaq Hassan) given during the days of, would have no effect on the right of widow to have share in the legacy of her husband if her husband dies before the completion of Iddat period of the wife. Similarly in case of or which is given on the death bed would also have no effect upon the right of widow in the legacy of her husband if such husband dies before the completion of her Iddat period and as in the present case divorce deed was written on 27.08.2018, therefore, the Iddat period would have completed on 27.11.2018 but much before it, her husband died on 03.10.2018, therefore, in view of the aforesaid exposition of Islamic Law on the subject on the date of*

her husband death (03.10.2018) she was entitled for her Shari share in the legacy of her husband". Presumption is attached that if the husband was alive, he may have had the option to revoke the *talaq* notice submitted to the Chairman Arbitration Council before the expiry of Iddah period. Therefore, such divorce ceased after the death of husband during the Iddah period and it shall not be established.

11. In Pakistan, the Muslim Family Law Ordinance, 1961, has abolished triple *talaq*. As per the procedure laid down in section 7, it largely applied to one or two pronouncements only, excluding three pronouncements. However, some portions of section 7 are in clear contravention of the dictates of Islamic law, adding to the peculiarity of this precarious section. Court opinions on triple *talaq* are split. Moreover, the law laid down in the Muslim Family Law Ordinance does not recognize triple *talaq*. In our neighboring country (India) the concept of triple *talaq* has been abolished and criminalized under the Muslim Women (Protection of Rights on Marriage) Act, 2019, came into force with retrospective effect from the 19th day of September, 2018, followed by the decision of Supreme Court of India in Civil No.118 of 2016. The Indian Courts view has always been against the instantaneous pronunciation of triple *talaq* creating immediate and irrevocable effect. In AIR 1979 All. 257 (Marium Vs. Md. Shamsi Alam), Writ Petition No.45 of 1993 (Rahmatullah Vs. State of UP), (1981) 1 GLR 358 (Jiauddin Ahmed Vs. Anwara Begum), and finally in Writ Petition (Civil) No. 118 of 2016 (Shayara Bano Vs. Union of India and others), the Indian Courts gave verdict against

pronouncement of triple *talaq* in creating immediate effect. In *Shayara Bano Vs. Union of India and others* case supra, justice Josephin took the view as follows:

“The Holy Quran has attributed sanctity and permanence to matrimony. However, in extremely unavoidable situations, talaq is permissible. But an attempt for reconciliation and if it succeeds, then revocation – are the Quranic essentials steps before talaq attains finality. In triple talaq, this door is closed, hence, triple talaq is against the basic tenets of the Holy Quran and consequently, it violates Shariah. What is held to be bad in the Holy Quran cannot be good in Shariah and, in that sense, what is bad in theology is bad in law as well”

Moreover, according to Ibn Taimiyah, Iban al-Qiyam, and the Shia Imamiyah, three pronouncements of the word *talaq* in one session equals only one *talaq*. Most Arab, as well as many Muslim states such as Egypt, Syria, Jordan, Iraq, Sudan, Morocco, Kuwait, Yemen, Afghanistan, Libya, Kuwait, Qatar, Bahrain, and the United Arab Emirates, have, while formulating their own laws, followed Ibn Taimiyah’s and Ibn al-Qiyam’s positions on this issue.

12. In view of above, instant writ petition is not made out and same is hereby **DISMISSED** as respondent No.2 / Mst. Humera Kiyani, is widow of Shahzeb Khan due to death of Shahzeb Khan in Iddah period before conclusion of timeline provided for effectiveness of divorce.

(MOHSIN AKHTAR KAYANI)
JUDGE