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

1) W.P No. 620-M/2018

Nisar s/o Watan Zada r/o Pia, Tehsil Khwaza Khela, District Swat.

(Petitioners)

Versus

Mst. Fauzia d/o Bakht Meraj r/o Pia, Tehsil Khwaza Khela, District Swat and 02 others.

(Respondents)

Present:

Muhammad Parwaish Khan, Advocate for the petitioner.

Mr. Muambar Khan, Advocate for the respondent No.1.

2) W.P No. 661-M/2018

Mst. Fauzia d/o Bakht Meraj r/o Pia, Tehsil Khwaza Khela, District Swat.

(Petitioners)

Versus

Nisar s/o Watan Zada r/o Pia, Tehsil Khwaza Khela, District Swat and 02 others.

(Respondents)

Present:

Mr. Muambar Khan, Advocate for the petitioner.

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

Date of hearing: **07.02.2019**

JUDGMENT

MUHAMMAD GHAZANFAR KHAN, J.- Through this single judgment, I intend to decide this W.P No. 620-M/2018 as well as the connected W.P No. 661-M/2018 as both emanating from the judgment and decree dated 03.05.2018 passed by learned Additional District Judge/Izafi Zilla Qazi,

Swat at Khwaza Khela whereby appeal of Respondent No.1/wife was partially accepted and judgment and decree dated 05.01.2018 passed by learned Judge Family Court was modified.

2. Brief facts of the case are that Respondent No.1/wife brought a family suit against the present petitioner/husband namely Nisar for recovery of dower in shape of 3 ½ tolas gold or its market value, recovery of maintenance and medical expenses for one year till completion of *iddat* period and lastly she prayed for dissolution of marriage on the ground of cruelty and inhuman behavior of the petitioner/husband.

3. The petitioner/husband filed his written statement in rebuttal of the plaint by raising so many legal and factual objections. After framing of issues and recording pro and contra evidence, the learned Family Court vide judgment and decree dated 05.01.2018 partially decreed the suit to the extent of dissolution of marriage on the basis of *Khula* and maintenance for *iddat* period in the tune of Rs.3,000/- per month. The trial Court held the present petitioner entitled for recovery of 7 tolas gold as dower from respondent/wife.

4. Being aggrieved, the respondent/wife preferred appeal against the judgment and decree of the trial Court. The appeal was partially accepted vide judgment/decree dated 03.05.2018 and resultantly the respondent/wife was held entitled for the fixed dower i.e 3 ½ tolas gold while decree of the trial Court regarding maintenance for *iddat* period was set aside. Both the parties, being aggrieved of the judgment/decree of the appellate Court, have challenged the same through these petitions.

5. During the course of arguments, certain legal propositions surfaced which I think are important for future guideline in family cases and need adjudication in the light of laid down principles. For this purpose, I deemed it appropriate to appoint M/S Abdul Halim Khan, Amir Gulab Khan, Malak Ahmad Jan, Gohar Ali Khan Advocates as *Amicus Curie* to assist the Court on the legal propositions:-

i) **Whether proviso to Section 10 (4) of the Family Courts Act, 1964 is contrary to the Act itself?**

ii) **Whether the *ibid* section is contrary to Article 35 of the Constitution of the Islamic Republic of Pakistan 1973?**

iii) **Whether right of *Khula* is the absolute right of the bride and what are the circumstances in which *khula* can be granted?**

iv) **In what circumstances half of the dower is payable to the bride before valid retirement? and**

v) **Whether the process of reconciliation as given in the Family Courts Act is proper?**

I am grateful to all the learned senior advocates who properly assisted the Court on the above said propositions of law. The learned counsels while arguing the case mostly referred to *Ayat* No. 229 of *Surah Baqara* in context with right of *Khula*. Mr. Abdul Halim Khan, Advocate also referred to some extracts from the book named نکاح، طلاق اور حلالہ (قران و سنت کی روشنی میں) by Musa Khan Jalazai on the subject cited above. The learned counsels hectically assisted the Court on the subject and besides the above named book, M/S Abdul Halim Khan, Malak Ahmad Jan Advocates as well as Mr. Hazrat Rehman Advocate, who also later on joined the panel of Amicu Curies on the request of the Court, also produced **PLD 1959 Lahore 566, PLD 1967 S.C 97, AIR 1945 Lahore 51, PLD 2013 Peshawar 1, PLD 2013 Peshawar 12, PLD 2016 Peshawar 1 and 1988 MLD 1207**.

In all the above-referred judgments, the question of *Khula* has been resolved. On the point of *Khula*, the basic judgment produced by learned

Amicus Curies is **AIR 1945 Lahore 51** in which the learned Judges, while reproducing a passage from page 305 of the Baillie's Digest of Muhammadan Law (Part 1 Edn.2), have discussed the question of *Khula*. The said passage as well as the dicta laid down in the judgment on the point of Khula are reproduced herein below.

> ***"Khoola means to put off, as a man is said to Khoola his garment when he puts it off. It also means to demit or depress generally. In law it is the demission or laying down by a husband of his right and authority over his wife for an exchange to take effect on her acceptance by means of the word Khoola and it is also validly effected by words of sale and purchase..... Its condition is that of talak or repudiation and its effect one irrevocable repudiation".***

These authorities have no room for doubt that in cases of khula, Mubaraat or ordinary talaq it is a husband or a person (including the wife herself) who has been authorized by the husband who can effect a khula divorce and that it is not possible for a Qazi or a Court to do so (khula) in virtue of the powers vested in either of them. The position taken by one of the trial Courts that the khula could be given by the Court independently of the husband's consent cannot, therefore, be accepted. This takes me to the next question formulated in an earlier portion of this judgment. Learned counsel for the appellant contends that the main object of a Muhammadan marriage being sukun (satisfaction or comfort lit. peace of mind), (Muaddat) (love) and (Rahmat) (kindness, sympathy or compassion) as deducible from the following Verse of the Holy Quran (Part 21, Chap. 30, Verse 21, pp.792-3 of Muhammad Ali's Translation:"

Laws

The concluding para, which is the gist of the above-referred judgment, is as under:

> **"I am thus of the opinion that if an (Hakim) is not satisfied about (shiqaq) (breach) or if he does not appoint arbiters from amongst the relations of either spouses or even when so appointed they do not agree as to separation, a divorce cannot be given. Moreover, according to the authorities to which I have referred I consider it doubtful whether a divorce could be given without the husband's consent even if the arbiters were agreed as to the separation. As to the tradition about Jameelah wife of Sabit Bin Qais reported, as above indicated, in Sahih-ul-Bokhari, it does not take us very much further. It is true that a divorce had been effected in that case but it must not be overlooked that the Prophet of Islam had ordered Sabit in that case to divorce his wife Jameelah in the words "Talaqaha Tatliqa" (give her an irrevocable divorce) according to the tradition reported at p.794 and "Amreho Jafarqaha" (the Prophet ordered him and brought about separation) according to what is reported at p.795. In either case the divorce is reported to have been granted by Qais and not pronounced by the Prophet although it may be admitted that out of reverence that Muslims had for the Prophet of Islam, it would have been impossible for Qais to disobey his order. The point, however, remains that the divorce was granted by Qais and not by the Prophet. For the above reason I am of opinion that a divorce could not have been granted by the Courts in either of these suits on the grounds of incompatibility of temperaments, dislike or hatred and they were rightly ordered to be dismissed by the District Judges. The appeals consequently fail and are dismissed with costs".**

The Court was confronted with another judgment passed by this Court at the principal seat in the case titled ***"Muhammad Faisal Khan V/s. Mst. Sadia and another"*** **(PLD 2013 Peshawar 12)** wherein khula as well as the circumstances justifying khula have been discussed. The relevant portions of the judgment are reproduced herein below:

> **"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.....**
>
> **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".

The august Supreme Court of Pakistan has rendered an elaborate judgment on the topic in the case titled ***"Mst. Khurshid Bibi V/s. Baboo Muhammad Amin"*** **PLD 1967 Supreme Court 97** wherein the term khula has been discussed in detail. The relevant head-notes of the judgment are reproduced herein below.

(b) Muhammadan Law - Marriage - Concept - Marriage among Muslims not a sacrament but a civil contract-Divorce Man and woman on equal footing in respect of rights of one against the other-If husband given right to divorce wife, latter too entitled to separation by means of khula-Warning against free exercise of

such rights by husband or wife placed on moral rather than legal plane, It is well-settled, that marriage among Muslims is not a sacrament, but in the nature of a civil contract, such a contract undoubtedly has spiritual and moral overtones and undertones, but legally, in essence, it remains a contract between the parties which can be the subject of dissolution for good cause. In this respect, Islam, the Din-al-Fitrat, conforms to the dictates of human nature and does not prescribe the binding together of a man and woman to what has been described as "holy dead-lock".

The Qur'an also declares: "Women have rights against men, similar to those that the men have against them, according to the well-known rules of equity" It would, therefore, be surprising if the Qur'an did not provide for the separation of the spouses, at the instance of the wife, in any circumstances. The Qur'an expressly says that the husband should either retain the wife, according to well-recognized custom (Imsak-un-bil-ma'roof) or release her with grace (Tasree-hun-bi-ihsan). The word of God enjoined the husband not to cling to the woman, in order to cause her injury. Another hadith declares Islam.) "Let no harm be done, nor harm be suffered in Islam". In certain circumstances, therefore, if the husband proves recalcitrant and does not agree to release the woman from the marital bond, the Qazi may well intervene to give redress and enforce the Qur'anic injunctions.

(c) Muhammadan Law - Divorce - Khula - Opinions of commentators of Qur'an as to meaning of verses bearing on "Khula" -Khula, whether equated with talaq-Wife whether not entitled as of right to claim khula despite unwillingness of husband to release her from matrimonial tie-Consent

of husband whether absolutely necessary -Whether even in case of khula it is husband's right to grant divorce and no separation could be ordered by Qazi-Words "Hakam" and "Mubara't" -Meanings-Khula, a charter granted to wife-Woman has a right to seek khula if she has fixed aversion to her husband-Classical instance of Sabit-bin Qais and Jamila-No possibility of reconciliation between husband and wife-Idle to have recourse to formality of appointing Hakams--Present trend of legislation on subject in Muslim countries-Observations in Umar Bibi's case [I L R (1944) 25 Lah. 542] that even where there was mutual dislike and extreme incompatibility of temperaments between husband and wife there can be Muwaddat (~), Sukoon (Z~) and Rehmat (J)-

Held: difficult to sustain-Terms on which decree for khula can be granted-Claiming more than dower itself in lieu of khula Abominable on part of husband but, nevertheless, if he insists it is permissible.

The question that fell for consideration in the case was whether a wife, under the Muslim law, is entitled, as of right, to claim khula, despite the unwillingness of the husband to release her from the matrimonial tie, if she satisfies the Court that there is no possibility of their living together consistently with their conjugal duties and obligations. The learned Judges concurred in their opinion and endorsed the view of Kaikaus, J., in Mst. Balqis Fatima v. Najmul Ikram Qureshi P L D 1959 Lah. 566 that under Muslim Law, the wife is entitled to khula, as of right, if she satisfies the conscience of the Court that it will otherwise mean forcing her into a hateful union. S. A. Rahman, J., delivered the leading judgment and S. A. Mahmood, J., added reasons of his own for reaching

J., added reasons of his own for reaching the same conclusion.

The learned Amicus Curie also referred to a judgment passed by Lahore High Court in the case titled ***"Mst. Balqis Fatima V/s. Najm-ul-Ikram Qureshi"*** **(PLD 1959 (W.P) Lahore 566).** In the said judgment the right of wife for khula has been highlighted. The relevant head-notes of the judgment are as under:-

(b) Muhammadan Law- Divorce- Khula- Wife entitled to dissolution of marriage on restoration of what she has received from husband in consideration of marriage if Judge apprehends that parties will not observe "limits of God", i.e., harmonious married state as envisaged by Islam will not be possible- Husband's assent not necessary- Judge may order partial or total restoration of benefits- Wife's right to be enforced by whatever procedure is available in Pakistan.

Held, (by the Full Bench) that the wife is entitled to a dissolution of marriage on restoration of what she received in consideration of marriage if the Judge apprehends that parties will not observe the limits of God.

This is not equivalent to granting a right to wife to come to the Court at any time and obtain a khula if she is prepared to restore the benefit she has received. There is an important limitation on her right. It is only if the Judge apprehends that the limits of God will not be observed, that is, in their relation towards one another, the spouses will not obey God, that a harmonious married state, as envisaged by Islam, will

> **not be possible that he will grant a dissolution. The wife cannot have a divorce for every passing impulse. The Judge will consider whether the rift between the parties is a serious one though he may not consider the reasons for the rift.**
>
> **That the wife may go wrong if dissolution is not ordered is rather a reason for grant of dissolution for Islam prefers divorce to adultery.**
>
> **The husband can effect a dissolution himself by pronouncing a divorce, while the wife has to approach the Court and she is to get a dissolution only if the Court regards further continuance of the marriage as not proper. But if it does regard continuance of marriage as improper, there is no further limitation on its jurisdiction to dissolve the marriage.**

Another judgment of the same Court in the case titled ***"Mst. Syeeda Khanam V/s. Muhammad Sami"*** **(PLD 1952 Lahore 113)** is also on the topic of Khula according to which:

> **--Khula and Mubaraat-Difference. In khula, the marriage is dissolved by an agreement between the parties for a consideration paid or to be paid by the wife to the husband, it being also a necessary condition that the desire for separation should come from the wife. Where the desire for separation is mutual, there too dissolution by mutual agreement for a consideration to be paid by the wife to the husband is lawful; but it is described that case as mubaraat.**

The Karachi High Court in its judgment in the case titled ***"Mst. Shagufta Jabeen V/s. Javed***

Iqbal and another" **(1988 MLD 1207)** discussed two classes of Khula by holding that:

> **---Khula--Meaning, scope and import of--Khula' signifies agreement between spouses for dissolving conjugal connection: it lies of compensation paid by wife to husband out of her property--Two classes of Khula: By mutual agreement and by order of Court--Dissolution of marriage by agreement takes place by husband's pronouncing Talaq and the other by decree of Court.—**

In another recent judgment delivered in the case titled *"Sajed Ullah V/s. Mst. Shakeela Naz and 3 others"* **(PLD 2016 Peshawar 1)** this Court observed that:

> **----S. 5 & Schd.----Family Court, jurisdiction of---Scope---Pronouncement of divorce on basis of Khula'---Procedure---Jirga/Arbitration proceedings, validity of---Islamic provisions relating to marriage, maintenance and Talaq were governed and regulated through Muslim Family Laws Ordinance, 1961---Exercise of right of Khula by wife was subject to satisfaction of judicial conscious of court---Unlawful decisions through Jirga system were practiced in Pakistan but when some provisions of law were violated by Jirga members or arbitrators that could not be protected---Talaq through Khula' could only be pronounced with intervention of court.**

6. In all the above said judgments, the principle qua the above propositions has been borrowed from the injunctions of Holy Quran,

Ahadith and from the book نکاح، طلاق اور حلالہ by Musa Khan Jalalzai. Now let switch over to the first question that whether proviso to Section 10 (4) of the West Pakistan Family Court Act, 1964 is contrary to the Act itself or otherwise, all the learned counsels were unanimous on the proposition that this sub-section is not only contrary to the Act itself but is also against the mandate of Article 35 of the Constitution of the Islamic Republic of Pakistan, 1973. The procedure for reconciliation in the Family Court Act has been provided in Section 10 (3) called pre-trail reconciliation while post-trial reconciliation is provided in section 12 (1) of the Act *ibid.* Both the sub-sections are reproduced below for ready reference:

> **10. Pre-Trial Proceedings.**
> (1) ----------
> (2) ----------
> (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.

Sub-section (1) of Section 12 reads:

> **12. Conclusion of trial.**
> (1) After the close of evidence of both sides, the Family Court shall make another effort to effect a compromise or reconciliation between the parties "within a period not exceeding fifteen days".
> (2) ----------

In sub-section (2) of section 12 it is provided that if such compromise or reconciliation is not possible, the Family Court shall announce its judgment and give a decree.

In 2002 by amendment dated 01.10.2002, proviso was added to Section 10 sub-section (4) which reads.

> 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.

A bare reading of the proviso to section 10(4) makes it clear that if the pre-trial reconciliation bears no fruit, the trial Court would have to pass a decree for dissolution of marriage forthwith which leaves no chance for the trial Court to attempt another reconciliation between the parties after recoding of evidence as envisaged in section 12 (1) of the Act.

7. The second question was that whether the above said proviso is contrary to the mandate of Article 35 of the Constitution of the Islamic Republic of Pakistan. It would be appropriate to reproduce the said Article for convenience.

> **35. Protection of family etc.**—The State shall protect the marriage, the family, the mother and the child.

Prior to insertion of the proviso to Section 10 sub-section (4), the enactment named West Pakistan Family Court Act, 1964 was in line with Article 35 of the Constitution. By adding the above said proviso though the intention of the legislature was expeditious disposal of family cases but it affected the entire family system and left negative impacts on entire family laws besides the family bond was badly disturbed with addition of the said proviso. Before the above said amendment, the ratio of divorce was not so high but after introduction of the said proviso the ratio of divorce has raised hundreds of times than before. Not only this but by this amendment the miseries of the spouses have been multiplied as the litigation does not end at the failure of first reconciliation but it takes a fresh start and the parties are indulged into a new litigation and a new controversy to prove or disprove the payment of dower etc. So, this provision of law i.e the added proviso has not only adversely affected the family life but has multiplied the miseries of the litigant spouses. Bare reading of Section 10 (3) and Section 12 (1) of the Family

Court Act, 1964 leads one to the conclusion that both the sections are mandatory in nature and the intention of the legislature was that to re-unite the spouses at any stage of the case but after adding the proviso the purpose of the Act was jeopardized. So, the proviso to Section 10 (4) needs rectification or a suitable amendment which could subsidize the agonies of the family and could protect the family life as mandated by Constitution. In the said proviso, the word "shall" used after "if reconciliation fails," may be substituted by word "may" or this proviso may be omitted from the statute to bring it in consonance with the scheme of Family Courts Act, 1964 and Article 35 of the Constitution of the Islamic Republic of Pakistan, 1973.

8. The third proposition was that whether *khula* is absolute right of the bride or otherwise and what are the circumstances in which the marriage can be dissolved on the basis of khula. Most of the above judgments are unanimous on the point that *Khula* can either be effected on mutual agreement of the spouses or with the intervention of the Court. Though some of the jurists are not in agreement with the view taken in the above referred judgements and their argument is that in Ayat No.35 of Sura Nisa, the

concept of Qazi figures nowhere. The Qazi, according to them, is not authorized to dissolve the marriage between the spouses on the basis of *Khula* rather the Qazi is supposed only to advise the spouses for reconciliation. But most of the jurists are not in agreement with the above view taken by some jurists as in case the role of Qazi/Court is withdrawn then there will be no end to the process of reconciliation because in such an eventuality the agreement between the spouses would become impossible nor the husband would ever like to divorce his wife either under the influence of hatred or revenge, so, the concept of the above said *Ayat-e-Karima* will become of no avail when the role of Qazi is excluded from the process of reconciliation. The main ingredient/cause on which separation by *Khula* has been based is the eventuality when it becomes impossible for the spouses to live together within the limits prescribed by Almighty Allah. Though the divorce is permissible but it has never been encouraged. In discussion on the above referred *Ayat* of the Holy Quran, at Page-293 of the book نکاح، طلاق اور حلالہ it is stated that:

حضرت عثمان رضی اللہ تعالیٰ عنہ اور حضرت علی رضی اللہ تعالیٰ عنہ کے فیصلوں کی جو نظیریں ہم تک پہنچی ہیں ان سے معلوم ہوتا ہے کہ یہ دونوں حضرات بینچ مقرر کرتے ہوئے عدالت کی طرف سے ان کو حکمنامہ اختیارات دیتے تھے

چنانچہ حضرت عقیل بن ابی طالب رضی اللہ تعالیٰ عنہ اور ان کی بیوی فاطمہ بنت عتبہ بن ربیعہ کا مقدمہ جب حضرت عثمان رضی اللہ تعالیٰ عنہ کی عدالت میں پیش ہوا تو انہوں نے شوہر کے خاندان میں سے حضرت ابن عباس رضی اللہ تعالیٰ عنہ کو اور بیوی کے خاندان میں سے حضرت معاویہ رضی اللہ تعالیٰ عنہ بن ابی سفیان کو بینچ مقرر کیا اور ان سے کہا کہ اگر آپ دونوں کی رائے میں ان کے درمیان تفریق کر دینا ہی مناسب ہو تو تفریق کر دیں۔ اسی طرح ایک مقدمہ میں حضرت علی رضی اللہ تعالیٰ عنہ نے حکم مقرر کیے اور ان کو اختیار دیا کہ چاہیں ملا دیں اور چاہیں جدا کر دیں۔ اس سے معلوم ہوا کہ بینچ بطور خود تو عدالتی اختیارات نہیں رکھتے البتہ اگر عدالت ان کو مقرر کرتے وقت انہیں اختیارات دے دے تو پھر ان کا فیصلہ ایک عدالتی فیصلے کی طرح نافذ ہو گا۔

Similarly according to the said book:

فان خفتم کا خطاب میاں بیوی کے ساتھ ساتھ دونوں خاندانوں کے سنجیدہ افراد اور حکام وامراء سب ک لئے عام ہے۔ حکام وامراء کو اس خطاب میں اس لئے شامل کیا گیا ہے کہ اگر خلع کا معاملہ حکام تک پہنچ جائے تو ان کے لئے لازم ہو گا کہ فریقین کو مناسب طرز عمل اختیار کرنے پر آمادہ کریں اور اگر فریقین خلع ہی پر مصر ہوں تو خلع کا معاملہ خوش اسلوبی سے طے کرادیں کیونکہ میاں بیوی کی علحیدگی اختیار کرنے میں ایک بلیغ نکتہ ہے جس کی صراحت حدیث نبوی ﷺ سے یوں ہے:

ترجمہ: حضرت جابر رضی اللہ تعالیٰ عنہ سے روایت ہے کہ رسول اللہ ﷺ نے ارشاد فرمایا کہ ابلیس اپنا تخت پانی پر بچھاتا ہے پھر وہ اپنے لشکروں کو (لوگوں کو بہکانے کے لئے) بھیجتا ہے۔ ان شیطانی لشکروں میں سب سے زیادہ مقرب اس کا وہ چیلا ہے جو لوگوں میں سے سب سے بڑا فساد ڈالے۔ کوئی شیطان ان میں سے آکر کہتا ہے کہ میں نے فلاں فلاں گناہ کرائے ہیں (یعنی فلاں سے چوری کرائی فلاں کو شراب پلائی) تو شیطان کہتا ہے تو نے کچھ بھی نہیں کیا پھر ایک اور کہتا ہے کہ میں میاں بیوی کے پیچھے پڑا رہا، ایک دوسرے کے خلاف ان کو بھڑکاتا رہا اور میں نے آدمی کا پیچھا نہیں چھوڑا یہاں تک آج اس کے اور اس کی بیوی کے درمیان علحیدگی کرا کے آیا ہوں۔ شیطان اس کے قریب ہو جاتا اور کہتا ہے تو نے بڑا کارنامہ انجام دیا ہے۔

It is clear from the above commentary of the renowned scholars that our religion has laid too much stress on the peace and tranquility between the spouses while separation between them has been

discouraged by providing a proper way for effecting reconciliation in case the relations between them become strained. Even if the efforts for reconciliation, as ordained by the Holy Quran, are proved fruitless, then as the last option the spouses have been allowed to part their ways when it becomes certain that they, while living together as husband and wife, will not keep the limits prescribed by Almighty Allah.

The situation of *Khula* has been described in Verse No. 229 of *Sura Baqara* which reads.

ترجمہ: طلاق دو مرتبہ ہے پھر روک لینا ہے بھلائی کے ساتھ، یا چھوڑ دینا ہے اچھے طریقہ پر، اور تمھارے لیے یہ حلال نہیں ہے کہ تم کچھ بھی لے لو اس مال میں سے جو تم نے ان کو دیا ہے مگر اس صورت میں کہ میاں بیوی اس بات سے ڈرتے ہوں کہ حدود اللہ قائم نہ رکھ سکیں گے سو اگر تم ڈرو اس بات سے کہ دونوں اللہ کی حدود قائم نہ رکھ سکیں گے تو کوئی گناہ نہیں ان دونوں پر اس بارے میں کہ عورت اپنی جان کا بدلہ دیدے، یہ اللہ کے حدود ہیں۔ سو تم ان سے آگے مت بڑھو۔ اور جو کوئی شخص اللہ کے حدود سے آگے بڑھ جائے تو ایسے لوگ ظلم کرنے والے ہیں۔

In *Tafseer Anwaar-ul-Bayan* by Hazrat Maulana Muhammad Aashiq Elahi Buland Shahri, at Page No. 323, *khula* has been discussed in the following words.

مرد کو طلاق کا اختیار دیا گیا ہے لیکن عورت کو بھی مرد کے نکاح سے نکلنے کے حق سے محروم نہیں کیا گیا ہے اگر کوئی صورت نباہ کی نہ رہے تو وہ مرد سے خلع کر سکتی ہے۔ خلع کا معنی یہ ہے کہ وہ مرد سے یوں کہے کہ میں اپنے مہر کے عوض

یا اپنے مال کے عوض آپ سے خلع کرتی ہوں مرد اسے منظور کرلے تو عورت پر ایک طلاق بائن واقع ہو جائے گی اور جو مال دینا طے ہوا ہے وہ عوت پر ادا کرنا واجب ہو گا۔

خلع کا یہ مطلب نہیں کہ عورت مرد کو خود سے چھوڑ کر علحیدہ ہو جائے یا حاکم کے یہاں دعویٰ کر کے بغیر کیس شرعی سبب کے جدائی کا فیصلہ کرالے، حاکم سے نکاح فسخ کرانے کے کچھ اصول اور قوانین ہیں بعض صورتوں میں قاضی کو شرائط فسخ ملحوظ رکھتے ہوئے نکاح فسخ کر دینے کا اختیار ہوتا ہے جس کی تفصیلات فقہ کی کتابوں میں مذکور ہیں اور جن صورتوں میں حاکم کو نکاح فسخ کرنے کا اختیار ہے ان میں یہ بھی ضروری ہے کہ حاکم مسلمان ہو غیر مسلم حاکموں کے فسخ کرنے سے مسلمان عورت کا نکاح فسخ نہیں ہو گا خواہ کیسی ہی مجبوری ہو۔

میاں بیوی دونوں جہاں تک ممکن ہو آپس میں نباہ کی کوشش کریں لیکن اگر دونوں کو اس بات کا ڈر ہو کہ اللہ کے حدود کو قائم نہ رکھ سکیں گے تو اس میں کچھ حرج نہیں کہ عورت مال دے کر اپنی جان چھڑالے اور اگر عورت کی طرف سے زیادتی اور نافرمانی ہو تب بھی مرد اتنا ہی لے جتنا مہر اسے دے چکا ہے اس سے زیادہ نہ لے۔ اور اگر زیادہ لے لیا تو قضاء جائز تو ہو گا لیکن مکروہ ہو گا۔ حضرت ثابت بن قیس رضی اللہ عنہ کی بیوی آنحضرت ﷺ کی خدمت میں حاضر ہوئیں اور عرض کیا کہ یا رسول اللہ مجھے ثابت بن قیس رضی اللہ عنہ کی عادت اور خصلت اور دینداری کے بارے میں کوئی ناراضگی نہیں ہے لیکن میں مسلمان ہوتے ہوئے ناشکری کو پسند نہیں کرتی (میرا ان سے دل نہیں ملتا لہٰذا علحیدگی کی کوئی صورت ہو جائے) آپ ﷺ نے فرمایا کہ کیا تم ان کا باغیچہ واپس کر دو گی (جو مہر میں دیا تھا) عرض کیا ہاں میں واپس کر دوں گی، آپ نے حضرت ثابت بن قیس سے فرمایا کہ اپنا باغیچہ قبول کرلو اور اس کو طلاق دے دو۔ (رواہ البخاری ص ۹۴ ج ۲)

اس حدیث سے خلع کا جواز معلوم ہوا اور آیت شریفہ (فَإِن خِفتُم أَن لاَّ يُقِيمَا حُدُودَ اللهِ فَلا جُنَاحَ عَلَيهِمَا فِيمَا افتَدَت بِهِ) کے سیاق سے معلوم ہوا کہ نباہ کی صورت نہ رہے اور حدود اللہ قائم نہ کر سکیں تو خلع کر لینے میں کوئی گناہ نہیں ہے۔ خواہ مخواہ بلا وجہ خلع کرنے اور چھوٹ چھٹاو کے درپے ہونا محمود نہیں ہے۔ حضرت ابوہریرہ رضی اللہ عنہ سے روات ہے کہ رسول اللہ ﷺ نے ارشاد فرمایا کہ چھوٹ چھٹاو کا مطالبہ کرنے والی اور خلع چاہنے والی عورتیں نفاق والی عورتیں ہیں۔ (رواہ النسائی ض ۱۰۷ ج ۲ والترمذی ض ۱۹۱ ج ۱)

مسئلہ: لفظ خلع سے خلع ہو جاتی ہے یعنی شوہر کے قبول کرنے پر عورت پر طلاق واقع ہو جاتی ہے اس کے بعد وہ عدت گزار کر دوسری جگہ نکاح کر سکتی ہے اور چونکہ طلاق مغلظہ نہیں ہے اس لیے دوبارہ شوہر اول سے بھی نکاح ہو سکتا

ہے۔ خلع کے علاوہ ایک طلاق بالمال بھی ہے اور وہ اس طرح سے ہے کہ مرد یوں کہے کہ میں تجھے اتنے مال کے عوض طلاق دیتا ہوں۔ اگر عورت قبول کرلے تو طلاق بائن واقع ہو جائے گی، اور عورت کو مقررہ مال دینا لازم ہوگا۔

فائدہ: مذکورہ بالا دونوں آیتوں میں اول دو رجعی طلاقوں کا ذکر ہے اس کے بعد خلع کا مسئلہ بیان فرمایا ہے۔ اس کے بعد تیسری طلاق کا ذکر ہے۔ (فَإن طَلَّقَهَا فَلا تَحِلُّ لَهُ مِن بَعدُ) میں چوتھی طلاق مذکور نہیں ہے بلکہ دو طلاق کے بعد بطور جملہ معترضہ کے خلع کا مسئلہ بیان کرنے کے بعد تیسری طلاق کو ذکر فرمایا ہے۔

The above explanation of the Ayat-e-Karima leads one to the conclusion that *Khula* is not absolute right of the wife as in the first instance it will be pronounced by mutual consent of the spouses and in case of any conflict between the spouses, the matter would be referred to Qazi for determination as is evident from the example of Hazrat Sabit Bin Qais and his wife which was decided by the Holy Prophet (Peace be upon him), so, in light of the above said Ayat of the Holy Book, the wife is not equipped with the right of pronouncement of talaq herself on the basis of Khula but it is either to be effected with mutual consent and in case of any conflict, the matter will be referred to Qazi for decision.

9. Another proposition i.e the fourth one, which emerged during the arguments, was that in which circumstances half of the dower is payable to bride if the marital tie between the spouses becomes

redundant before valid retirement. The learned counsels for the parties and learned Amicus Curie addressed this question as well in the light of injunctions of the Holy Quran. Before dilating upon the above said legal proposition, I will first take the original writ petitions filed by both the parties in which all the above said questions/legal propositions cropped up. The present writ petitions emerged from a suit filed by petitioner/plaintiff in W.P No. 661-M/ 2018 against the petitioner/defendant in W.P No. 620-M/2018 for recovery of 3 ½ Tolas gold ornaments or its price, recovery of maintenance and expenses incurred on medicines etc for a period of one year and till expiry of *Iddat* period; she also solicited for any other relief which the Court thinks just and appropriate. The learned trail Court, after recording pro and contra evidence, decreed the suit on 05.01.2018 to the extent of dissolution of marriage on the basis of *Khula* by directing the plaintiff to return seven tolas gold ornaments to defendant; she was also granted maintenance to the tune of Rs. 3000/- per month for *Iddat* period while rest of her claim was turned down. The plaintiff challenged the validity of the judgment/decree passed by the learned Family Court in appeal and the

appellate Court on 03.04.2018 partially allowed the appeal and modified the judgment/decree of the Family Court to the extent of payment of 3 ½ tolas gold ornaments in lieu of *Khula*, so, both the parties assailed the judgment of appellate Court in separate writ petitions.

Learned counsel for the petitioner/ plaintiff in W.P No. 661-M/2018 was of the view that the judgments and decrees passed by both the Courts below are not only in derogation of prevailing law but are also in negation of the Holy Quran and Sunnah. He maintained that findings of both the Courts below are arbitrary, capricious and fanciful being against the evidence available on the file and law itself.

The learned counsel for the petitioner/ defendant in W.P No. 620-M/2018 also termed the judgment/decree of the learned appellate Court as against the law and material available on the case file and also against the mandate of Section 10(4) of the Family Courts Act, 1964. He further argued that the learned appellate Court has erred in facts and law by passing the impugned judgment and decree as the judgement and decree of the trial Court was just, proper and was based on sound reasons after proper

appraisal of evidence available on the file.

The main controversy between the parties in the above said writ petitions is that whether plaintiff Mst. Fauzia was bound to return 7 tolas gold ornaments in lieu of dissolution of marriage on the basis of *Khula* as held by the trial Court or she is entitled to retain 3 ½ tola gold ornaments (half dower) and deliver the remaining half to defendant/husband as decided by learned appellate Court. To resolve this issue, I will borrow wisdom from Ayat No. 237 of Suran Baqara which is the only guideline provided for dissolution of marriage on the basis of *Khula*. Bare reading of the above referred Holy Ayat leads me to the conclusion that if the marriage is dissolved before valid retirement, the bride will be entitled to receive half of the dower but the mandate of the above said Ayat starts from the words ***"if you divorce them before valid retirement"*** then you will have to pay them half of the dower fixed at the time of Nikah. The learned counsel for defendant/husband was of the view that as 7 tolas gold ornaments were admittedly given to the plaintiff/wife and marriage has been dissolved on the basis of *Khula*, so, the plaintiff/wife was under obligation to return whole of the dowered

property to defendant/husband. He stated that as *Talaq* was pronounced on the whims and wishes of the plaintiff/wife, so, the judgment passed by learned trial Court was correct, in accord with law and mandate of Sharia but the learned appellate Court has erred in law by modifying decree passed by learned trial Court.

It is proved on the record that the marriage has not been consummated and has been dissolved prior to valid retirement, however, it is also proved on the record that it is the defendant/husband who pronounced *Talaq* through telephone, so, in such an eventuality the payment of half of the dower becomes incumbent upon him. It will not be out of place to mention here and also in reply to legal propositions emerged from the record of both the petitions that whether the eventuality of divorce, prior to valid retirement, entitles the wife for half of the dower fixed at the time of Nikah, the simple answer is that if *Talaq* is pronounced by the husband, as mandated by the above said Ayat of the Holy Quran, then the wife becomes entitled for receipt of half of the dower but in case the wife demands *Talaq* and on her demand *Talaq* is

pronounced by husband then she is not entitled to half of dower.

It is proved on the record that at the time of Nikah the plaintiff/wife had received the gold ornaments. Though she has denied the receipt of dower ornaments but at the same time she has admitted it correct that her photographs at the time of Nikah had been taken and she had worn the ornaments, so, when the receipt of ornaments is proved on the record then, as discussed above, the wife was bound to return half of the dowered ornaments to defendant/husband. To this effect the judgment of the learned trial Court was rightly set aside/modified by the learned appellate Court. However, as the learned appellate Court has decreed half of the dowered ornaments, so, no exception can be taken to the judgment and decree of the learned appellate Court being within the mandate of law and Sharia.

10. The last proposition was that whether the process of reconciliation as given in the Family Courts Act, 1964 is proper or needs some modification/amendment. All the learned counsels were of the firm view that the process of reconciliation as mandated in the Act itself is neither

proper nor in accord with the injunctions of Quran, so, they were of the firm view that the prosses of reconciliation should be changed and it should be brought in consonance with the injunctions of Quran to lessen the agonies of the spouses and to lessen the frequent occasions of *Talaq*. This question needs consideration of the legislature because no procedure is available either in Section 10 (3) or Section 12 (1) of the Family Courts Act, 1964 for conducting the reconciliation proceedings. Though the concept of reconciliation has been borrowed from *Ayat* No.35 of Surah *Nisa* which reads:

> ***Translation:*** *If you fear a split between them (the spouses), send one arbitrator from his people and one from her people. If they desire to set things right, Allah shall bring about harmony between them. Surely, Allah is All-Knowing, All-Aware.*

But no procedure for the Courts is available in the entire Act to attempt reconciliation in accord with the spirit of the above *Ayat-e-Karima* of the Holy Quaran, the result is that the Courts normally take the provisions of section 10 (3) as formality by writing a few words qua failure of reconciliation. In explanation to the above Ayat-e-Karima, in Tafseer-e-Haqqani by Al-Shaikh Abu Muhammad Abdul Haq Al-Haqqani at Page-236 writes that:

اس کے بعد بھی اگر عورت نہ سمجھے تو ایک شخص عورت کے کنبہ کا اور ایک مرد کے کنبہ کا جو دونوں کے حالات سے بخوبی واقف ہوں باہم فیصلہ کرادیں مگر نیک نیتی اور اصلاح مد نظر رکھیں تاکہ خدا ان میں توفیق دے کہ پھر ملاپ ہو کر خانہ آبادی ہو جائے اور جو کنبہ کے پنچ نہ ملیں تو اور نیک لوگ قائم کر لیے جاویں۔ امام شافعی اور مالک اور اسحٰق اور اوزاعی رحمتہ اللہ علیہم بلکہ حضرات عثمان و علی و ابن عباس رضی اللہ عنہم کا یہ قول ہے کہ اگر پنچوں کو بغیر طلاق کے اور کوئی چارہ نہ ہو اور باہم کسی طرح ملاپ ہوتا نظر نہ آوے تو ان کو اختیار ہے کہ طلاق دے دیں اور عطا اور حسن اور ابن زید اور امام ابو حنیفہ وغیرہم علماء رحمتہ اللہ علیہم یہ فرماتے ہیں کہ طلاق کا اختیار پنچوں کو نہیں۔ یہ بات میاں کے اور حاکم شہر کے ہاتھ میں ہے۔ ان کی اجازت ہو تو مضائقہ نہیں۔ حکماً من اھلہ میں ایک لطیف اشارہ اس طرف بھی ہے کہ حاکم و قاضی جو فیصلہ کرے تو فریقین کے حال سے بخوبی واقف بلکہ اسی قوم کا ہو تاکہ کوئی بات اس پر مخفی نہ رہے۔

In another prominent book namely انوار البیان فی کشف اسرار القرآن by Muhammad Ashiq Elahi Buland Shahri in explanation to *Ayat* No. 35 of Surah Nisa states:

جب دو آدمی ساتھ رہتے ہیں تو کبھی کبھی کوئی ناگواری کی بات پیش آہی جاتی ہے اور میاں بیوی کا تو روزانہ رات دن کا ساتھ ہے اس میں ناگواری پیش آجانا کوئی بعید بات نہیں۔ سمجھ دار میاں بیوی تو بات کو آئی گئی کر دیتے ہیں، گویا کہ کچھ تھا ہی نہیں۔ لیکن کبھی بات بڑھ جاتی ہے اور زیادہ ناچاقی ہو جاتی ہے اس لیے اللہ جل شانہ نے صلح کرنے کے بارے میں ایک طریق کار تجویز فرمایا ہے اور وہ یہ کہ جب میاں بیوی کے درمیان آپس میں اختلاف ہو جائے (ان خفتم بمعنی علمتم علی ماقال بعض المفسرین) تو ایک ادمی مرد کے گھر والوں میں سے اور ایک آدمی عورت کے گھر والوں میں سے بھیج دیں جو حکم (فیصلہ کرنے والے) ہوں گے، یہ دونوں طرف شکایتیں سنیں اور مصالحت کی کوشش کریں۔ جوڑ بٹھائیں جس کی بھی زیادتی ہو اس کو سمجھائیں اگر ان دونوں فیصلہ کرنے والوں میں نیک جذبات ہوں گے اور اخلاص کے ساتھ کام کریں گے تو اللہ تعالیٰ ان دونوں میں موافقت پیدا فرمادے گا انشاء اللہ۔ میاں بیوی کو بھی ایک دوسرے پر زیادتی کرنا اور ایک دوسرے کے بارے میں غلط بیان دینا جائز نہیں۔ اور جو لوگ فیصلہ کرنے کے لیے گئے ہیں ان کو بھی اختلاف بڑھانے کی باتیں کرنا اور مخالفت کی خلیج وسیع کرنا جائز نہیں۔ جو کوئی شخص غلط عمل کر کے غلط بات کہے گا اس کا مواخذہ ہو گا۔ اس

پر تنبیہ فرماتے ہوئے آیت کے آخر میں فرمایا کہ (اِنَّ اللّٰہَ کَانَ عَلِیماً خَبِیراً)(بے شک اللہ جاننے والا باخبر ہے) اللہ تعالیٰ کو سب کے ظاہر اور باطن کا علم ہے، جو شخص ظلم اور زیادتی کرے گا مستحق سزا ہو گا۔

Similarly, in معارف القرآن by الحافظ محمد ادریس صاحب کاندھلوی at Page-173, in explanation to the *Ayat-e-Karima* it has been written:

اگر تم کو یہ معلوم ہو جائے کہ میاں اور بیوی میں مخالفت ہے اور ایسی سخت کشمکش ہے کہ جس کو وہ باہم نہیں سلجھا سکے اور نہ یہ معلوم ہو سکا کہ قصور کس کا ہے اور دن بدن بدمزگی بڑھ رہی ہے تو اس مخالفت کے تصفیہ کا طریقہ یہ ہے کہ ایک پنچ یعنی ایک منصف جس میں تصفیہ کی صلاحیت ہو اور نیک ہو مرد کے خاندان سے مقرر کرو اور ایک پنچ اور منصف عورت کے کنبہ اور خاندان سے۔ پنچ کے مرد اور عورت کے اقارب میں سے ہونے کی قید اس لیے لگائی کہ اقارب کو بہ نسبت اجانب کے خانگی امور کا علم زیادہ ہوتا ہے نیز اقارب بہ نسبت اجانب کے صلح کرنے میں زیادہ کوشش کریں گے اور یہ شرط بطور استحباب کے ہے اگر دونوں پنچ مرد اور عورت کے کنبہ سے نہ ہوں اور اجنبی ہوں تو تب بھی جائز ہے اور دو پنچ مقرر کرنے میں مصلحت یہ ہے کہ مرد پنچ مرد سے اور عورت کا پنچ عورت سے تخلیہ میں ان کی دلی مرضی کو معلوم کرلے گا کہ نکاح پر قائم رہنا چاہتے ہیں یا نکاح سے علیحدہ ہونا چاہتے ہیں اگر یہ دونوں پنچ حقیقتاً اصلاح کا ارادہ کریں گے اور اپنے اپنے کنبہ کی پاسداری اور طرف داری نہ کریں گے تحقیق حال کے بعد جس کا جتنا قصور دیکھیں گے اس کو سمجھا کر راہ راست پر لانے کی کوشش کریں گے تو اُمید ہے کہ اللہ تعالیٰ ان دونوں میاں بیوی کے درمیان موافقت کرادے گا۔ بے شک اللہ تعالیٰ بڑا جاننے والا اور خبردار ہے اللہ تعالیٰ کو خوب معلوم ہے کہ میاں بیوی کے پنچ کس راہ پر جا رہے ہیں اور ان کی نیت کیا ہے۔

The above references are sufficient to lead one to the conclusion that Allah Almighty has provided a way of reconciliation between the spouses, so, the present law needs certain rectifications/amendments to be incorporated in the existing family laws especially Family Courts Act,

1964 with regard to the procedure of reconciliation. As now a days the procedure of reconciliation is neither just, proper nor in any way the existing procedure encourages the reconciliation process as mandated by Sharia between the litigant spouses being at daggers drawn and bent upon to part their ways with allegations and counter allegations, hence, in such circumstances they can never be expected to think over reconciliation with cool mind and good conscience. So, it is advisable that an amendment be introduced in the Family Courts Act for reconciliation between the spouses in the manner as discussed above according to the mandate of Holy Quran and Sunnah.

11. It is pertinent to mention here that the connected W.P No. 661-M/2018 was announced as allowed in the open Court, however, at the time of writing the judgment it appeared that the writ petition merited dismissal, so, the office was directed to fix the said petition for re-hearing on 08.03.2019 while winding up the discussion in this consolidated judgment was deferred till re-hearing of the connected petition. Learned counsel for the petitioner/wife in the connected petition was again heard at length, however, he could not produce

anything material in light of sharia to change my view which I have taken in light of the above detailed discussion. So, as a sequel to my above discussion, the instant petition i.e W.P No. 620-M/ 2018 as well as the connected W.P No. 661-M/2018, being devoid of merits, are dismissed. Copy of this judgment be sent to all the District Judges in Khyber Pakhtunkhwa for future guideline of the family Courts. The office shall also send copies of the judgment to Speaker of National Assembly and Federal Law Secretary as well as to Speaker of Provincial Assembly and Secretary Law of Khyber Pakhtunkhwa for consideration for the amendments suggested in the judgment.

Announced.
07.02.2019

Office
13/3/2019
WR