

**2011 C L C 1211**

**[Quetta]**

**Before Jamal Khan Mandokhail and Mrs. Syeda Tahira Safdar, JJ**

**ATTIQ AHMED KHAN----Petitioner**

**Versus**

**NOOR-UL-SABA and another----Respondents**

Review Application No.4 of 2010 in Constitutional Petition No.595 of 2007, decided on 11th April, 2011.

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

----S. 5 & Sched.---Constitution of Pakistan, Art.199---Constitutional petition---Dissolution of marriage on ground of 'Khula'---Re-union after dissolution of marriage---Review of the judgment by High Court, application for---Suit filed by the plaintiff for dissolution of marriage on ground of Khula was decreed by the Family Court---Defendant challenged judgment and decree of the Family Court in constitutional petition, which petition having been dismissed by the High Court, the defendant had filed application for review of the judgment and decree on the ground that parties had decided for re-union---Plaintiff on whose request marriage was dissolved on the ground of Khula, conceded the request of defendant and stated that parties had settled their dispute and decided to re-union and were no more willing to implement the decree of 'Khula'---Pronouncement of 'Khula' by the court was a single divorce, as the defendant husband never accepted it voluntarily---Such kind of dissolution of marriage was known as "Talaq-ul-Ba'ayen"---Before re-union in such-like cases "Halala" was neither condition precedent nor the decree of 'Khula' was a hurdle in the way of re-union---No provision of law precluded the spouses from re-union, however, only condition was to perform a fresh 'Nikah'---Since, re-union of the parties after decree of 'Khula' was a result of a fresh contract, the judgment and decree had no restraining effect upon re-marrying---Review of the

judgments and decrees was not needed in circumstances---When the judgments and decrees attained finality, same would automatically become operative---Marriage having been dissolved, the judgments and decrees had become past and closed transactions---Once the judgment and decree had been implemented, those would not remain in field---No question of review thus would arise, in circumstances.

Fazal-e-Subhan v. Mst. Sabereen and others PLD 2003 Pesh. 1691 and Mst. Naila Parveen and others v. The State and 2 others PLD 2011 Lah. 37 **ref.**

## **(b) Civil Procedure Code (V of 1908)---**

---O. XLVII, R.1---Constitution of Pakistan, Art.199---Review of judgment passed in constitutional jurisdiction---Constitutional jurisdiction of High Court being an original jurisdiction, broad rules of the Civil Procedure Code were applicable---Right of review was a substantive right, provided by the Code, enabling correction of an error or a mistake in a judgment, to prevent injustice being done by the court---Such was a step towards correction of a decision, but in no case it was a rehearing on merits---Judgment passed in constitutional jurisdiction could be reviewed subject to the grounds, contemplated under O.XLVII, R.1, C.P.C. ---Review of an order or decree could be sought on discovery of new and important matter or evidence, on account of some mistake or error, apparent on the face of record or for any other sufficient reasons---Compromise arrived at between the parties, after a decision, would not come within any of grounds for review---Judgments and decrees could not be reviewed on basis of a compromise between the parties.

Talal Rind for Petitioner.

Nemo for Respondents.

## **ORDER**

**JAMAL KHAN MANDOKHAIL, J.**--- Facts in brief are that suit of the respondent for dissolution of marriage on the basis of "Khula" was decreed by the Family Judge-II, Quetta vide judgment and decree dated 1-9-2005. To challenge the judgment and decree, Constitutional Petition No.595 of 2007 was filed by the applicant/petitioner before this Court which was dismissed on 24th November, 2009.

2. Now the applicant/petitioner has submitted an application for review of the judgment and decree on the ground that the parties have decided to re-union. It is important to mention here that on the first date of hearing, the respondent was also present and she conceded the request of the petitioner. She stated that they have settled their dispute, decided to re-union and are no more willing to implement the decree for

"Khula".

3. We have asked the counsel for the petitioner as to whether in view of the injunction of Islam, after passing of a decree for dissolution of marriage, the spouses can re-union, without observing the procedure of "Halala".

4. The learned counsel for the petitioner submitted that he has already obtained a Fatwa from a recognized "Mufti". According to him, in case of re-union, after the dissolution of marriage on the basis of "Khula" there is no condition of "Halala". The learned counsel states that in view of development, the judgment and decree dated 1-9-2007, passed by Family Judge-II, Quetta and judgment dated 24-11-2009, passed by this Court be set aside by accepting the application for review.

5. We have heard the learned counsel for the petitioner and also considered the statement of the respondent. In spite of obtaining the decree for dissolution of marriage on the basis of "Khula" from the trial Court, the respondent/wife decided to re-join her husband. An identical issue arose before the Hon'able High Court of Peshawar, which has thoroughly been discussed by his Lordship Mr. Justice Malik Hamid Saeed in the case of Fazal-e-Subhan v. Mst. Sabereen and others, reported in PLD 2003, Pesh, page 169. Relevant portion of which is reproduced as under:---

(6) The principle of 'Khula' as laid down in various eminent commentaries on Muslim Law in the light of sayings of the Holy Qur'an and Sunnah is to the effect that when married parties disagree and are apprehensive that they cannot observe the bounds prescribed by the Divine Law the woman can release herself from the tie by giving up some property in return in consideration of which the husband is to give her a 'Khula' and when they have done this, a Talaq-ul-Ba'ayen, takes place. Hence Khula is a repudiation with consent and at the instance of the wife in which she agrees to give a consideration to the husband for her release from the marital tie. The decree granted to the respondent/wife in this case is also of the kind of 'Khula' because she was found unable by the trial Court to properly establish her assertion for the dissolution of marriage, but keeping in view the abhorrence shown by the wife towards the husband in her statement as well as her pleadings and the extent of unpleasantness of matrimonial relation between the parties, which even culminated into criminal proceedings, it was held by the trial Court that the relation between the parties has reached to the extent where the re-union between the two is impossible and only separation will be in the interest of both the parties.

(7) Maulana Muhammad Ashraf Ali in his book known as "Bahishiti Zaiwar", at page 20 (Fourth Part) has stated on the point as under:--

Two Fatwas; one by Mufti Saifullah Haqqani of Jamia Darul-Uloom Haqqania, Akora Khattak, and the other by Mufti Muhammad Naeem, District Khateeb of Kohat are also on the file, wherein it is stated that:---

and that:--

In view of the above, we are of the considered view that in case of divorce through 'Khula' it is not obligatory on the wife to re-marry a third person before entering into re-marriage tie with her first husband and same is the case here. The re-marriage with same husband of course would be subject to performance of another Nikah. Section 7(6) of the Muslim Family Laws, Ordinance also allows such re-union without 'Halala' hence we see no restraint either in the Muslim Family Laws Ordinance or in the injunctions of Qur'an and Sunnah, not to allow the prayer of the husband for re-union with his wife when she is ready to live again as wife of the petitioner within the limits of God.

6. In the present case too, the marriage was dissolved at the request of the respondent. Pronouncement of "khula" by the Court is a single divorce, as the husband never accepted it voluntarily, hence this kind of dissolution of marriage is known as Talaq-ul-Ba'ayen. Relying upon the dictum laid in the above cited judgment, it is declared that before re-union in such-like cases "Halala" is neither a condition precedent, nor the decree of "Khula" is a hurdle in the way of re-union. Reliance is placed on the case of Mst. Naila Parveen and others v. The State and 2 others, reported in PLD 2011 Lahore 37. There is no provision of law precluding the spouses from re-union, however, the only condition is, to perform a fresh "Nikah".

7. Since, re-union of the parties, after the decree of "Khula" is a result of a fresh contract, therefore, the judgment and decree have no restraining effect upon re-marrying hence, there is no need to review the judgments and decrees. Moreover, when the judgments and decrees attained finality, it automatically become operative, resultantly, the marriage becomes dissolved, in such view of the matter, the judgments and decree become past and closed transaction. Once the judgment and decree have been implemented, these do not remain in field, as such, no question of review arises.

8. No doubt, constitutional jurisdiction of a High Court is an original jurisdiction, therefore, broad rules of the Civil Procedure Code are applicable. Right of a review is a substantive right, provided by the Code, enabling correction of an error or a mistake in a judgment, to prevent injustice being done by a Court. It is a step towards correction of a decision, but in no case, it is a rehearing on merits. Hence, a judgment passed in a constitutional jurisdiction can be reviewed, subject to the grounds, contemplated under Order XLVII, Rule 1 C.P.C.

9. Without prejudice to above, the application has been filed on the ground of settlement or compromise between the parties. Review of an order or decree can be sought on discovery of new and important matter or evidence, on account of some mistake or error, apparent on the face of record or for any other sufficient reason. Compromise arrived at between the parties, after a decision, does not come within any of the stated grounds for review. Thus, on the basis of a compromise, the judgments and decrees cannot be reviewed.

10. In view of what has been stated and discussed above, the review application is hereby dismissed.