W.P. No. 9471/2017

Syed Sajid Hussain Abidi Iram Shehzadi Abidi etc.

11.05.2022 Mr. Fida Hussain Matta, Advocate for the petitioner.
Respondent No.1 ex-parte.

Through this Constitutional petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 petitioner has challenged judgment and decree dated 27.02.2017 passed by the learned Judge Family Court, Faisalabad whereby the marriage between the petitioner and respondent No.1 was dissolved on the basis of *Khula* in view of their statements recorded on the same date.

2. Brief facts giving rise to the filing of this Constitutional petition are that the petitioner got married to respondent No.1 on 28.08.2006 according to *Sharia-e-Muhammadi* by following *Fiqa Jafria* and from the wedlock three daughters namely, Syeda Nayab, Syeda Mubashira and Syeda

Gulnaz, were born who are alive. Initially, relationship obviously remained cordial between the parties but later it got strained and respondent No.1 started keeping herself away from the petitioner. About 4/5 months ago from filing of suit on 02.11.2016, it was alleged by respondent No.1 that she was ousted from the house of the petitioner whereafter she started living with her parents. She, thereafter, filed a suit for dissolution of marriage on the basis of *Khula* which was disposed of on 25.01.2011 on the statement of the respondent dated 21.01.2011 to the extent that she wanted to live with the petitioner. However, yet another suit for dissolution of marriage alongwith claim of maintenance allowance was filed on 13.04.2013 and again a compromise was affected between the parties resultantly the same was dismissed as withdrawn on 13.07.2013. Finally, third suit for dissolution of marriage was filed on 02.11.2016 in which a written statement

was submitted by the petitioner, whereafter the statements of the parties were recorded on 27.02.2017 in which the petitioner stated that he did not want to divorce respondent No.1 and had wanted to welcome her back home but the respondent No.1 stated that she could not reconcile with the petitioner and demanded a Khula. Consequently, on the same date the marriage was dissolved on the basis of Khula by the order of the court, reproduced as under:-

> "Today the case was fixed for pre-trail reconciliation. Statement of both the parties have been recorded. Defendant has stated that he wants to reconcile with the plaintiff even he is ready to accept any condition imposed upon him by the plaintiff. On the other hand plaintiff has stated that she does not want to reconcile with the defendant at any cost and wants her suit be decreed on the basis of khula. Therefore, keeping in view the present scenario, pre-trial reconciliation proceedings are declared as unsuccessful. It is settled principle of law that a wife unwilling to live with her husband cannot be compelled to do so. Hence, in the given circumstances, the suit of the plaintiff for dissolution of marriage is hereby decreed on the basis of Khula in terms of Sec. 10(4) of Family Court Act, 1964 subject to return of 25% of prompt dower, if any, to the defendant. Decree sheet be drawn up accordingly. File be consigned to record room after its due completion."

3. Learned counsel for the petitioner has taken a ground that according to his

personal law, the marriage does not dissolve unless the "*Seeghajaat"* are read in presence of the parties either by the husband or his representative/nominee/wakeel in presence of respondent No.1 or her representative/ nominee/wakeel. Learned counsel for the petitioner has also referred to the amendment in Section 7 of the Muslim Family Laws Ordinance, 1961 through second Amendment Act, 2021, according to which the divorce will be pronounced in presence of two witnesses. The said amendment is reproduced as under:-

> 1. **Short title and commencement.—** (1) This Act shall be called the Muslim Family Laws (Second Amendment) Act, 2021.
> (2) It shall come into force at once.
> 2. **Amendment of section 7, Ordinance VIII of 1961.**—In the Muslim Family Laws Ordinance, 1961 (VIII of 1961), in section 7,—
> (i) in sub-section (1), for the full-stop, occurring at the end, a colon shall be substituted and thereafter the following proviso shall be inserted, namely:—
> "Provided that where the parties belong to Fiqah-e-Jafria,—
> (a) the man may voluntarily and with his free will pronounce himself or through duly authorized attorney (Vakil) Talaq uttering in literal Arabic words (seegha) in the physical presence of at least two witnesses qualifying the requirements of clause (1) of Article 17 of the Qanun-e-Shahadat, 1984 (P.O. No. 1 of 1984);
> (b) the pronouncement of Talaq shall be ineffective if it is done jokingly or under anger, intoxication, insanity, duress or coercion of

> any kind and from any corner whatsoever; and
> (c) in case of dispute, with reference to clauses (a) or (b) arising due to difference of opinion, the parties or any of the parties may have recourse to a court of competent jurisdiction or by approaching the "Mujtahid-e-Alam" and the decision of Mujtahid-e-Alam shall have a status of an award and the same shall be dealt with in accordance with the provisions of the Arbitration Act, 1940 (X of 1940).
> *Explanation*.—The expression "Mujtahid-e-Alam (Faqih-e-Azam)" means a juris-consult, religious scholar or doctor of Shia school of thought well versed with Shariah having international repute and of such recognition. The Council of Islamic Ideology shall maintain a panel of Mujtahid-e-Alam having aforesaid qualifications."; and
> (ii) after sub-section (1), amended as aforesaid, the following new subsection
> "(1A) As enshrined in Article 227 of the Constitution of the Islamic Republic of Pakistan, the divorce and matters connected therewith or ancillary thereto shall be decided according to the personal law interpreted by Fiqah-e-Jafria (Shia school of thought).".

According to the learned counsel for the petitioner *Seeghajaat* must be read in the presence of the parties otherwise the marriage cannot be dissolved between the parties under Shia personal law. He has referred to *NAHEED FATIMA versus Syed AMIR AZAM RIZVI and others* **(PLD 1987 Karachi 670)**, *Mst. SHARIFAN versus ABDUL KHALIQ AND* ANOTHER **(1983 CLC 1296)**, *Mst. RESHAM BIB versus MUHAMMAD* SHAFI **(PLD 1967 Azad J & K**

32), *Syed ALI NAWAZ SHAH GARDEZI versus Lt.CoL. MUHAMMAD YOUSAF KHAN, COMMISSONER, QUETTA Division* **(PLD 1962 (W.P.) Lahore 558)**, *Mst. MARYAM BANO versus HUSSAIN ALI AND ANOTHER* **(1984 CLC 1961)**, *Syed AZHARUL HUSSAIN NAQVI versus HAMIDA BIBI alias ESHRAT JAHAN and 3 others* **(1987 CLC 1041)**, *THE STATE versus Syedda SALMA BEGUM AND ANOTHER* **(PLD 1965 (W.P.) Karachi 185)**, *Mst. ASMAT NIGAR versus Sayed IBRAR HUSSAIN SHAH and 2 others* **(2004 YLR 111)**, *Syed ASAD RAZA NAQVI versus Mst. SAIMA FATIMA and another* **(2014 MLD 254)** and *Mst. ZEBA versus ABDUL ALI* **(2002 SCMR 1315)** to support his argument.

4. The respondent No.1 was proceeded against ex-parte on 11.04.2022.

5. Ex-parte arguments heard. File perused.

6. Notably, both the parties have got their statements recorded in the presence of

the Family Judge. The petitioner has not denied the presence of respondent No.1 in the court. His only argument is that *Talaq* will become effective only after *Seeghajaat* read by him. In this context, it will be important to mention that under the personal law of *Fiqa Jafria* the divorce takes effect when the Arabic sentences (*Seeghajaat*) are read in presence of two witnesses. To trace out the relevant judicial precedents, the first famous authority is in case titled *Syed ALI NAWAZ SHAH GARDEZI versus LT.-Col. MUHAMMAD YUSUF KHAN, Commissioner, Quetta Division* reported as **(PLD 1962 (W.P.) Lahore 558)** in which Single Judge of this Court had dealt with the proposition in detail and held in para 74 that two witnesses are not only required as a proof of divorce under Shia law but essential to the very act of divorce as it is related to substantive law. Relevant extract at page 626 is reproduced as under:-

> ".....It will be noticed that it is not with regard to proof of divorce that the Shia law insists on two witnesses but to the very act of divorce

> and it cannot, therefore, be held that the matter related to proof and not to substantive law....."

In *Syed ALI NAWAZ SHAH GARDEZI versus versus Lt.CoL. MUHAMMAD YOUSAF KHAN, COMMISSONER, QUETTA Division* **(PLD 1962 (W.P.) Lahore 558)**, same view (supra) was followed with a further reference to Mulla's Principles of Mohammadan Law that under Shia law a Talaq must be pronounced orally in the presence of two competent witnesses and Talaq communicated in writing will not be valid unless the husband is physically incapable of pronouncing it orally. Extract from para 5 is reproduced as under:-

> "Mr. S. Anwarali has also invited my attention to Mulla's Principles of Mahommedan Law where it is again stated that a Talaq under Shia Law must be pronounced orally in the presence of two competent witnesses, and a talaq communicated in writing, is not valid unless the husband is physically incapable of pronouncing it orally."

Likewise, in *THE STATE versus Syedda SALMA BEGUM AND ANOTHER* reported as **(PLD 1965 (W.P.) Karachi 185)** same view was followed with a reliance upon Muslim

Law as administered in British India by Saksena according to which

> "Under Shia Law, a Talaq is of no effect unless it is pronounced:
> (1) Strictly in accordance with Sunna
> (2) in Arabic terms.
> (3) in the presence of at least two adult male witnesses."
>
> This follows that Talaq pronounced by respondent No.1 was not valid as it did not comply with the legal requirements prescribed by Sia Law. If a Shia is unable to pronounce Talaq in presence of wife in the prescribed manner then it cannot be pronounced in presence of two male witnesses and communicated to her in writing. There is nothing on record to show that the respondent No.1 was incapable of pronouncement in the prescribed form and manner before the witnesses."

In *Syed AZHARUL HASSAN NAQVI versus HAMIDA BIBI alias ESHRAT JAHAN and 3 others* reported as **(1987 CLC 1041)** it was held that Talaq pronounced by a Shia male had to be heard by two "Adil" males if it has to result in breaking of ties. Relevant extract from para 3 is reproduced as under:-

> "3. The precise question which came up for decision before the learned trial and appellate Courts as well as before this Court was whether or not the Talaq pronounced by the petitioner was valid. Whereas the petitioner insisted that Talaq pronounced by him was in consonance with the Muslim law as followed by Shias yet respondent No.1 asserted that no valid Talaq had been given by the petitioner and that the marriage continued to subsist. Admittedly, under Shia law pronouncement of Talaq by the petitioner was required to be

> heard by two adil males if it were to result in the breaking of marriage tie. The learned trial court, on the basis of the evidence led by the parties, reached the conclusion that the pronouncement of Talaq made by the petitioner did not conform to the requirement of Shia law inasmuch as it was not heard by two adil males and, therefore, respondent No.1 could not be said to have ceased to be his wife. This finding of the learned trial Court having been endorsed by the learned Additional District Judge the petitioner has invoked the extraordinary jurisdiction of this Court."

In *Mst. ASMAT NIGAR versus Sayed IBRAR HUSSAIN SHAH and 2 others* reported as **(2004 YLR 111)**, Division Bench of Peshawar High Court has given reference to the famous book; Muhammadan Law by Syed Amir Ali the Shia doctrine of Talaq was discussed. Relevant extract is reproduced as under:-

> "The requirement of valid Talaq under Shia Law is that it shall have no effect unless it is pronounced strictly in accordance with Shia Law, in Arabic words in presence of two adult male witnesses and the wife but when the presence/attendance of the wife cannot be procured, then the husband can pronounce the Talaq in specific Arabic words which is known as "Khutba Talaq", but in presence of two male witnesses and the same can be reduced into writing and forwarded to wife or it may be intimated to her otherwise.
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> 3. Amir Ali in his book Muhammadan Law, Vol. II, Seventh Edition has stated Shia Doctrine of Talaq as follows:-
>
> > "They do not allow a Talaq to be given in writing nor in any language other than Arabic when there is ability to pronounce the words necessary for a valid repudiation....Even an absent husband cannot effect a valid Talaq in writing. He must pronounce the words in the presence

> of witnesses, and the fact of his doing so may be recording in writing, which may be forwarded to the wife or it may be intimated to her otherwise."

In *Syed ASAD RAZA NAQVI versus Mst. SAIMA FATIMA and another* **(2014 MLD 254)**, a reference was given to *Mst. KANEEZ FATIMA versus WALI MUHAMMAD and another* **(PLD 1993 Supreme Court 901)**, while holding that Section 7 of the Ordinance, 1961 is to be applied and interpreted to the facts of the case. However, it was held that such Shia male can pronounce the divorce afresh. Para 14 is relevant and is reproduced as under:-

> ".....Since, the valid Talaq is a precondition for exercise of jurisdiction under section 7(1) of the Muslim Family Laws Ordinance, 1961, or initiating proceedings under it and since the Talaq in question is invalid from the very face of it, therefore, the respondent No.2 was not liable to act upon such invalid Talaq and as such any proceedings, it initiated, on the basis of invalid talaq, would be illegal and without lawful authority and of no binding effect. So far as the case-law cited by learned counsel for petitioner in connection with the provisions of section 7 of Muslim Family Laws Ordinance, 1961, is concerned, a larger Bench of Hon'ble Supreme Court of Pakistan, examined such question in the case of Mst. Kaneez Fatima v. Wali Muhammad (PLD 1993 SC 901) and observed in its judgment at page 910 as follows:--
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> "The provisions of section 7 of the Ordinance have remained controversial from the very beginning and there are conflicting views in general about it. In view of the Constitutional restraints the Courts

> cannot give any verdict on the conflicting claims challenging or justifying the provisions of section 7 of the Ordinance. However, keeping in view the facts of each case the applicability and interpretation of section 7 has to be construed in that light."
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> 15. In view of above, this petition is hereby disposed of accordingly.| with the observation that the petitioner will be at liberty to pronounce fresh Talaq to his wife the respondent No.1, keeping in view the C requirements prescribed under the Shia law and thereafter, respondent No 2 shall act in accordance with law without any delay. The listed/pending application (C.M.A. No.4609) filed by petitioner with a prayer to restrain respondent party and police concerned, from causing him any harassment etc., and from interfering in the matter of his second marriage, is also disposed of with direction to the police concerned to ensure that the harassment, if any, is not caused to the petitioner in violation of law."

A reference may also be given to *Mst. ZEBA versus ABDUL ALI* **(2002 SCMR 1315)** a leave granting order. Paras No. 3 and 4 are relevant and, therefore, reproduced as under for ready reference:-

> "3. Learned counsel appearing for petitioner, inter alia, contended that according to Shia School of thought, respondent Abdul Ali did not pronounce Talaq in Arabic (صیغہ) in presence of two witnesses. To substantiate his contention, he referred to para.2517 (page 377) of the book "(توضیح المسائل)". He also relied upon the cases of Syed Ali Nawaz Gardezi v. Lt. Col. Muhammad Yousaf (PLD 1963 SC 51) and Mirza Qamar Raza v. Mst. Tahira Begum and 14 others (PLD 1988 Kar. 169).
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> 4. It was argued by the learned counsel that the Family Court decided the issue "whether defendant has divorced plaintiff on 26-8-1996?" against the respondent, after having appreciated the available evidence on record, according to the principle of Qanun-e-Shahadat Order, 1984, but learned High

> Court in its Constitutional jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan disturbed the findings of the fact contrary to the settled law that the findings of facts are intervened very rarely unless it is established that the trial Court has recorded the perverse findings and had drawn conclusion which is contrary to law.
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> We have heard the learned counsel appearing for petitioner and have also gone through the judgment cited by him as well as the book "(توضیح المسائل)". In our opinion, the contention raised by the learned counsel needs examination in depth. As question of public importance is involved in instant petition as such leave to appeal is granted."

Notably, the amendment recently introduced is exactly in accordance with the precedents of the superior Courts of this country and the law discussed hereinabove.

7. In view of the above discussion, it can safely be concluded that a Shia male can always pronounce divorce in accordance with Shia Law which will be protected only by reading the "Seeghajaat" directly or through a representative/wakeel in the presence of female or her representative/wakeel whereafter divorce can become effective. This exercise can be undertaken in the present case even now, even with

retrospective effect, if need be. With this observation, instant writ petition stands **disposed of**.

(ALI BAQAR NAJAFI)
JUDGE

Shahzad

Approved for reporting.

JUDGE