

## Judgment Sheet

**IN THE LAHORE HIGH COURT LAHORE  
RAWALPINDI BENCH, RAWALPINDI**

**JUDICIAL DEPARTMENT**

**Case No: ICA No. 64 of 2014**

Zahid Rahim

## Versus

Mst. Nighat Mushtaq etc.

## JUDGMENT

Date of hearing	<b>29.05.2014</b>
Appellant by	Sardar Abdul Aziz Khan Chandio, Advocate.
Respondent No.1 by	Mr Ghulam Asghar Khan, Advocate.

**Shahid Jamil Khan, J:-** This Intra Court Appeal is against dismissal of constitutional petition by learned Single Judge of this Court vide order dated 15.04.2014 in Writ Petition No.1012 of 2014. The petition was filed against preliminary decree for *Khula* by Judge Family Court, Rawalpindi though order dated 20.01.2014.

2. Facts, necessary for deciding this appeal, are that marriage of the appellant with respondent No.1 was solemnized on 25.08.2011. As per entry 13 of *Nikah Nama*, prompt dower was paid in shape of 5½ tola gold ornaments. Suit was filed, by respondent No.1, for dissolution of marriage on the basis of *Khula*, recovery of maintenance and dowry articles. It was asserted, specifically in paragraph No.1 of the plaint, that the dower of 5½ tola gold ornaments were taken back by the appellant to financially help his brother with a promise to purchase new gold ornaments. The appellant, however, failed to honour his commitment. In written statement; “restitution of conjugal rights” were claimed. The case was fixed for pre-trial reconciliation on 20.01.2014, statement of respondent No.1 was recorded; she expressed hatred towards the appellant and stated that it was not possible for her to live within the limits prescribed by Almighty Allah and requested for dissolution of marriage on the basis of *Khula*. It was noted at bottom of the statement that she was ready to

forego her right of dower. However, while announcing dissolution of marriage on the basis of *Khula*, the trial court observed that the controversy regarding payment of dower in shape of 5½ tola gold ornaments needs determination after recording evidence, therefore, following issue was framed: -

- “1. Whether the defendant is entitled to recover 5 ½ Tola gold ornaments as return of *Khulla*? OPP”

The appellant challenged this order in Writ Petition before this Court, which was dismissed, operative part of the order is reproduced for facility: -

- “4. ...In the instant case, the object of proviso to section 10(4) of the Family Courts Act, 1964 was to provide specific remedy without any undue delay so as to keep the wife in a state where she may be deprived of her right to remarry while she is of marriageable age. The learned Judge Family Court under the circumstances has rightly passed a decree for dissolution of marriage on the basis of “*Khula*”, pending final decision regarding the controversy about the return of dower, to be adjudicated upon at later stage because, otherwise even a frivolous claim of dower amount would become a tool to defeat the very objective for which the remedy is provided in the aforementioned provision of law. Respondent No.1 cannot be compelled to wait for the time till the issue regarding the return of 5½ tolas gold ornaments to the petitioner is finally decided by the learned Judge Family Court because in that case, the abovementioned respondent may cross the age of marriage.”

This decision is challenged in the instant appeal.

3. Learned counsel for the appellant submits that under proviso to Section 10(4) of the West Pakistan Family Courts Act, 1964, it was incumbent upon the Judge Family Court to restore the *Haq Mehr* to husband before passing decree for dissolution of marriage on the basis of *Khula*. Argued; that receipt of *Haq Mehr* was admitted by respondent No.1 in her plaint. He explains; return of *Haq Mehr* after payment changes its character to gift or loan to the husband. Submits; while exercising option of *Khula*, respondent No.1 has herself foregone right to dower. He concludes that a decree of *Khula* could not have been passed without restoring the dower to appellant, which in essence is a pre-condition under proviso to the Section 10(4).

4. Learned counsel for respondent No.1 has supported the reasons given by learned Judge in Chamber (reproduced above).

5. Heard, record perused.

6. Examination of the record shows that return of dower was explicitly asserted in the plaint by respondent No.1 but was denied by the appellant in written statement, therefore, was a fact in controversy. It is correct that respondent No.1 has foregone her right to dower in her statement for *Khula*, however, this statement is not found against the assertion by respondent No.1 in her plaint. She has forgone her right to enforce the promise for purchasing new ornaments for her.

7. To consider the argument that restoration of dower is a precondition for the option of *Khula*, it is imperative to examine the proviso to sub-section (4) of Section 10 of the West Pakistan Family Courts Act, 1964, which is reproduced: -

**“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.”** (emphasis supplied)

Plain reading of the proviso shows that legislature has envisaged the dissolution of marriage “forthwith” on failure of reconciliation. However, the part relating to restoration of dower comes after the word and which makes the later part disjunctive. It is incorrect to suggest that restoration of dower (*Haq Mehr*) is a condition precedent under the proviso. This view has already been examined some learned judges of this Court like in cases *Doctor Akhlaq Ahmad versus Mst. Kishwar Sultana and another* (1986 MLD 464 Lahore) and *Farzana Shaheen versus Malik Muhammad Iqbal* (1989 MLD 3888 Lahore) holding that payment of *Haq Mehr* is not a *sine qua non* for dissolution of marriage on the option of *Khula*.

8. We are also not convinced by the argument of learned counsel that on return of dower its character is change to gift or loan. This argument suggests for filing of separate suit for recovery of the amount which is no

more a dower. Such interpretation is against the legislative intent behind framing special law of Family Courts Act, 1964. The preamble of this Act reveals that the purpose of legislature is “*expeditious settlement and disposal of disputes relating to marriage and family affairs and matters connected therewith;*”. Returning or taking back of dower on any pretext by the husband is the „*matter relating to family affairs*” or at least it is „connected therewith”.

Since the trial court has already framed the issue, *whether the defendant is entitled to recover 5½ Tolas gold ornaments as return of Khulla?OPP*, therefore, we restrain ourselves from giving any further observation on this point.

9. No illegality, irregularity or jurisdictional defect is found in the decision by trial court in framing the issue regarding dower amount when the return of dower was asserted and denied by the parties.

10. For the reasons given above, the Intra Court Appeal fails.

The appeal stands dismissed.

(Mamoon Rashid Sheikh)  
Judge

(Shahid Jamil Khan)  
Judge

**APPROVED FOR REPORTING.**

‘Javaid’