IN THE FEDERAL SHARIAT COURT
(Original Jurisdiction)

PRESENT

MR. JUSTICE DR. FIDA MUHAMMAD KHAN
MR.JUSTICE RIZWAN ALI DODANI
MR.JUSTICE MUHAMMAD JEHANGIR ARSHAD
MR.JUSTICE SHEIKH AHMAD FAROOQ

SHARIAT PETITION NO. 5/I OF 2011

Khawar Iqbal son of Afzal Iqbal,
Through his attorney Sohail Hameed son of Muhammad Abdul Hameed R/o C-2, Bridge Apartment, Clifton, Karachi
.... Petitioner

Versus

Federation of Pakistan .... Respondent
through Secretary M/o Law & Justice
Islamabad

For the petitioner ... Mr. Arshad Zaman Kayani, Advocate

For the Federal Government ... Mr. Muhammad Nazir Abbasi, Standing Counsel for Federal Government.

Date of Institution ... 27.07.2011

Date of hearing ... 24.04.2013

Date of decision ... 24.04.2013

JUDGMENT

DR. FIDA MUHAMMAD KHAN, Judge- By this Judgment, we propose to dispose of Shariat Petition, bearing No. 05/I of 2011, whereby petitioner Khawar Iqbal has challenged section 8 of the Muslim Family Laws Ordinance 1961, which authorizes a wife to exercise right of divorce to her husband, as has been provided thereunder in Column No.18 of the Nikahnama. The impugned section reads as under:-

> "8. **Dissolution of marriage otherwise than by Talaq.--** Where the right to divorce has been duly delegated to the wife and she wishes to exercise that right, or where any of the parties to a marriage wishes to dissolve the marriage otherwise than by talaq, the provisions of section 7 shall *mutatis mutandis* and so far as applicable, apply".

Though the petitioner has inter-alia discussed his personal case of "Talaq-e-Tafveez" duly delegated by him to his wife, in Nikah Nama, at the time of their Nikah which was duly exercised by his ex-wife Nadia and which was subsequently confirmed, as required under section 7 of the Ordinance, and thereafter challenged by him in Writ Petition before High Court. After its dismissal by Hon'ble High Court, however, he again challenged it before Hon'ble Supreme Court through CPLA but the same was also

declined. After exhausting the said remedies, the petitioner has challenged the relevant section of law through this petition. Relevant portions of his petition are reproduced hereunder:-

> " In fact, the section 8 of the Muslim Family Laws Ordinance, 1961, has neither described about the mode of exercising of delegated power of Talaq from husband to his wife i.e. wife pronounce Talaq to husband or repudiate herself from the matrimonial tie nor briefs any kinds thereof Talaq-e-Tafweez except referring to the provisions of Section 7 as mutatis mutandis to explain that after pronouncing 'Talaq', a notice to Chairman to be given in writing. The aforesaid both provisions are reproduce hereunder for ready reference as:
>
> > **"7) Talaq:** ....(1) Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of Talaq in any form, whatsoever, give the Chairman notice in writing of his having done so, and shall supply a copy thereof to the wife."
>
> As far as the Column No.18 of the Nikah Nama is concerned, it based on the Section 8 of Muslim Family Law Ordinance, 1961, which is also silent about any kind of Talaq-e-Tafweez from man to his woman. The public in general with lacks of Islamic knowledge and by bonafide mistake improperly adopting or wrongly exercising the delegated power of talaq which is against the spirit of law of Shariah (Muslim Personal Law).
>
> The provision of Section 8 of the Muslim Family Law Ordinance, 1961 has not followed the principle of Quranic verses and it requires to be interpreted in accordance with the principle of Shariah and requires to be amended through

proper legislation after declaring it repugnant in Shariah.

The Column No.18 of the Nikahnama under Section 8 of Muslim Family Law Ordinance, 1961 misled, misused, misinterpreted and misguided the common people. The consequences and worst impact for wrongly exercising or mishandling of the delegated power of Talaq from the man to his wife has generated the social evil and unwanted moral aptitude as well as promote the heinous crime of Zina/Adultery in our society. (Because, woman while remaining in matrimonial tie with her husband; contract another marriage with another man). Wrong interpretation and badly implementation of the provision of Section 8 of the Muslim Family Law Ordinance, 1961, as well as incorrect certification from the legal Institutions disturbed the Islamic society and create confusions in the minds of general public. It is also to say that the chairman of Arbitration Council mostly certifying/confirming like these kinds of Talaq without referring the matters to Family Courts for determining/declaring the validation of 'Talaq' according to Islamic Injunctions and Muslim Personal law.

That, in view of these circumstances, the following legal and Islamic questions of general public importance arise for determination in the light of Quran and Sunnah and principle of Shariah as:

a) Whether the right of divorce/pronouncement of Talaq vests with the husband or wife under the Injunctions of Islam?
b) Whether according to Shariah a wife can pronounce Talaq to/upon her husband by exercising her right of delegated power of Talaq?
c) Whether no formal mode for exercise of right of delegated power of Talaq is prescribed in the

provisions of Section 7 and 8 of Muslim Family Law Ordinance, 1961 except the requirement that a notice in writing must be given to the Chairman Arbitration Council about exercise of that right is not against the principles of Shariah?

d) Whether the provision of Section 8 of Muslim Family Ordinance, 1961 is repugnant to injunctions of Islam?

e) Whether the English word "Divorce" is suitable or substituted word or having parallel/same meaning and concept of Arabic & Quranic word "Talaq" in a Muslim society?

f) Whether the Column No.18 of Nikah-Nama under Section 8 of Muslim Family Law Ordinance, 1961 is in violation of the Islamic Injunction?

g) Whether under the principle of Islamic Jurisprudence/Shariah, the effecting of Divorce/Talaq upon a women by improperly adopting or wrongly exercising the delegated power of Talaq is Void (Batil) and she remains in the matrimonial tie with her husband?

h) Whether the woman who contract second marriage after obtaining a "Confirmation Certificate of Talaq" under Section 7 of the Muslim Family Law Ordinance, 1961 from the Chairman Arbitration Council by irregularly exercising or wrongly adopting the delegated power of Talaq under Shariah does not falls in criminal case of Hudood (Zina) for solemnizing "Nikah upon a Nikah"?

2. The petitioner has relied on the following:-

1. Verse No.1 of Surah Al-Talaq (LXV)
2. Verse No. 228 of Surah Al-Baqrah (II)

3. Versue No. 34 of Surah Al-Nisa (IV)
4. Verse No.28 & 29 of Surah Al-Ahzab (XXXIII)
5. Page 675 Part IV Kitabul Fiqh by Abdul Rehman Al-Jazeri
6. Pages 455-456 Chapter XIII Section IV Muhammadan Law by Syed Ameer Ali
7. Para No. 1637 page 255 and Para 1646 Page-258 Volume III Muhammadan Law by Molvi Muhammad Yusoof Khan Bahadur published by the publishers Allahabad (India)
8. Chapter III Fatawa Hindia Book Al-Talaq
9. Part II of Fatawa Alamgiri.

The petitioner has prayed that section 8 of Muslim Family Laws Ordinance, 1961, and Column No.18 of Nikahnama provided thereunder be declared as repugnant to the Injunctions of Islam.

3. We have heard learned counsel for the petitioner and learned Standing Counsel for Federal Government. Dr. M. Aslam Khaki and Dr. Muhammad Tufail who were in the Court room in another case, also assisted the Court.

4. Learned counsel for the petitioner, relying on some verses of Surah Al-Ahzab, Sura Al-Talaq and Surah Al-Baqrah, contended that the impugned section is against the Injunctions of Islam. Learned Standing Counsel for Federal Government submitted that being a Procedural Law the instant petition is not maintainable. Learned counsel on behalf of

Government of Punjab, placing reliance on PLD 1994 Supreme Court 607, also submitted that the petition was not maintainable. Dr. M.Aslam Khaki placing reliance on a Hadith, opposed the petition. Dr. Muhammad Tufail also submitted that although there was some ambiguity regarding the procedure of pronouncement of Talaq according to Column No.18, it has been unanimously held, by renowned Muslim Jurists, belonging to Sunni Schools of thought, that the right of divorce can be delegated to a wife by her husband any time.

5. We have thorough perused the Ayaat and Ahadith relied upon by the parties and have given our anxious consideration to the points raised in the petition.

6. Before discussing the impugned section, it would be appropriate to mention that prior to enactment of the Muslim Family Law Ordinance 1961, the Government of Pakistan had established a Commission on Marriage and family Law. The report of that commission was notified on 11th June 1956 through Gazette notification.

7. Regarding Talaq-e-Tafveez, it was recommended therein that:

> "The right of pronouncement of divorce by the wife granted to her by the husband in the marriage contract or after the marriage at any time is technically called Tafveez and is accepted as lawful by all Muslim jurists. Tafveez may be granted and exercised by the wife on certain conditions, but if no conditions are mentioned it is taken as an unconditional right. If the husband at the time of marriage or at any time during the married life has said to his wife that you can divorce yourself whenever you like, this right of the wife becomes absolute for the whole of her life."

Except one member of the said commission, Maulana Ihthesham-ul-Haq, who wrote a dissenting note on the report of the Commission, all other Members were unanimous in their views in this respect. Maulana Ihtesham-ul-Haq declared the delegation of power of Talaq to a wife, as "unnatural" and "incompatible with human nature". However, he did not specifically refer to any particular Verse or Hadith to show how, after delegation of power to a wife by her husband to divorce herself, she could not exercise this right. It was in the light of this report that the impugned law, Muslim Family Law Ordinance, 1961, was enacted and enforced. In Nikah Nama, there is a specific provision or box to highlight whether the husband has delegated power of Talaq to his wife or not. Except scholars belonging to Fiqh Jaferia, all other Muslim jurists of various schools of thought are unanimous on its permissibility, though with slight variation in its procedure.

8. In fact, Talaq al-tafwid serves as a check on a man who may be cruel to his wife, who may not maintain her in the appropriate manner, one who neglects his children/wife, or, one who is missing and his whereabouts completely unknown or is away for very long periods of time without providing his wife with the finances required for her maintenance - but still does not agree to give his wife the right to khul'a (separation) or refuse to divorce her at any cost. Under the Dissolution of Muslim Marriage Act 1939, twelve grounds have been provided and the wife has been given a right to approach a Court of competent jurisdiction on any one of the grounds to get her marriage dissolved or get release from the marital bond, in unavoidable circumstances of her strong aversion or other compelling reasons that make it impossible for her to live within the bounds prescribed by Injunctions of Islam.

9. As stated above, Ulema of this subcontinent have, by and large, accepted the legality of Talaq Tafweez.We find references in Fataw-I-Alamgeri,Fatawa-i-Sirjia,Fatawa-i-Qazi khan, Hidaya and other books of various schools of thought .In the following lines,the views of Maulana Khalid Saif,the author of "Qamoos-ul- Faqh" and Maulana Ashraf Ali Thanvi,the author of "Heela Najiza" regarding "Talaq Tafweez" are reproduced in verbatim.

Maulana Khalid Saif writes that:

تفویض طلاق :

فقہائے نے "تفویض طلاق " پر مفصل بحث کی ہے اور تفویض کے لئے عربی زبان میں جو مختلف تعبیرات اختیار کی جاتی ہیں ، جیسے : امر بالید ، اختیار ، مشیت ، ان کے اثرات و نتائج پر روشنی ڈالی ہے ، یہاں ان کا ذکر کرنا موجب طوالت ہو ، ...البتہ چونکہ تفویض طلاق نکاح کے مستقبل میں پیش آنے والی دشواریوں کے حل میں ایک مناسب تدبیر ہے اور خصوصیت سے ہندوستان کے موجودہ حالات میں مسلمان عورتوں کے مصائب کو دور کرنے میں اس سے نفع اٹھایا جا سکتا ہے ، اس لئے کچھ ضروری باتیں اس بابت عرض کی جاتی ہیں ۔

۱) بیوی کو کہے کہ "اگر تم چاہو تو اپنے آپ پر طلاق واقع کرلو " تو جس مجلس میں بیوی سے بات کہی ہے ، یا شوہر کے قاصد نے جس مجلس میں اس کی اطلاع دی ہے ، اسی مجلس میں طلاق واقع کرنے کا حق حاصل ہو گا ، اسی طرح اگر کسی تیسرے شخص سے کہا کہ تم چاہو تو میری بیوی کو طلاق دیدو ، تو یہ تو کیل نہیں ، تفویض ہوگی ، اور وہ شخص اس کے اندرہی طلاق واقع کرنے کا مجاز ہوگا ، مجلس کے بعد نہیں ۔(ہندیہ402/1)

۲) بیوی سے کہا : "تم اپنے آپ پر طلاق واقع کر لو " ، اور اس کی چاہت کا ذکر نہیں کیا یعنی یہ نہیں کہا کہ اگر تم چاہو تو طلاق واقع کر لو ، تب بھی تفویض ہے ، مجلس تک بیوی اپنے آپ پر طلاق واقع کر سکتی ہے اور شوہر اس درمیان اپنی بات سے رجوع نہیں کر سکتا ، اسی عبارت سے اگر کسی اور شخص کو حق دی کہ وہ اس کی بیوی پر طلاق واقع کر دے تو یہ تو کیل ہوگی ، طلاق دینے کا اختیار مجلس کے بعد بھی باقی رہے گا ، لیکن شوہر چاہے تواختیار واپس لے سکتا ہے ۔(حوالہ سابق)

۳) بیوی کو یا کسی تیسرے شخص کو تفویض طلاق کرتے ہوئے اس طرح کہے کہ "تو جب بھی چاہے ، اپنے آپ پر طلاق واقع کر لے ، تو اب یہ تفویض مجلس تک محدود نہیں رہے گی ، بلکہ وہ عورت جب بھی چاہے اپنے آپ پر طلاق واقع کر سکتی ہے ، یا وہ شخص اس کی بیوی کو طلاق دے سکتا ہے (الدرالمختار علی ہامش الرد476/2)

۴) اس بات کی گنجائش ہے کہ تفویض مشروط ہو ، مثلاً یہ کہ "اگر میں تم کو چھوڑ کر اتنے دنوں غائب ہو جاؤں تو تم کو اپنے اوپر طلاق واقع کرنے کاحق ہوگا " یا "اگر میں تمہاری موجودگی میں دوسری شادی کی یا تم کو بے جا مارپیٹ کی ، یا اتنی مدت تک نفقہ نہیں دیا ، تو اپنے اوپر طلاق واقع کر لو " ان صورتوں میں مذکورہ شرائط پائے جانے کی صورت ہی میں طلاق واقع کرنے کا اختیار ہوگا ۔(ہندیہ396-98/1)

دارالقضاءکو تفویض طلاق :

موجود ہ حالات میں سماجی مشکلات کو حل کرنے کے لئے "تفویض طلاق " ایک بہتر شکل ہے ، البتہ عورتوں کو حق طلاق تفویض کرنا نقصان سے خالی نہیں ، اگر خواتین اس حق کا صحیح استعمال کرنے کی صلاحیت رکھتیں تو شریعت نے مردوں کی طرح عورتوں کو بھی حق طلاق دیا ہوتا ، اس لئے خیال ہوتا ہے کہ تفویض طلاق کی ایسی صورت اختیار کرنی بہتر ہے جس میں طلاق دارالقضاءیا محکمہ شرعیہ کو دیا گیا ہو ، بیوی کے علاوہ دوسروں کو طلاق کا اختیار دینا بنیادی طور پر تو "توکیل " ہے اور وکالت کبھی بھی واپس لی جا سکتی ہے ، لیکن اگر کسی تیسرے شخص کی چاہت و مشیت پر طلاق کے استعمال کو موقوف کر دیا جائے تو "توکیل " کے بجائے ، "تفویض " ہے ، (الخانیہ524/1)اب شوہر اختیار کوواپس نہیں لے سکتا ، فتاوی بزازیہ میں ہے :

"لو قال لاجنبی طلاقها بیدک او طلقها ان شئت کفوله امر ک بیدک یقتصر ولا تملک الرجعة "(بدائع الصنائع224/3)

(اگراجنبی شخص سے کہا کہ عورت کا حق طلاق تمہارے ہاتھ میں ہے ، یا یہ کہے کہ " اگر تم چاہو تو طلاق دیدو " تو یہ "تمہارا معاملہ تمہارے ہاتھ میں ہے " کہنے کی طرح ہے کہ اس میں اختیار مجلس میں محدود رہے گا اور شوہر کو اس سے رجوع کرنے کاحق حاصل نہیں ہوگا ۔)

اور سراجیہ میں ہے ۔

"لو قال لاجنبی طلقها ان شئت ثم عزله لایصح "(السراجیہ 24)

(اجنبی شخص سے اپنی بیوی کی بابت کہے کہ اگر چاہو تو اسے طلاق دیدو، پھر اس کو اختیار سے معزول کر دے تو درست نہیں "۔

فتاوی بزازیہ میں ہے کہ اختیار طلاق کو اسی مجلس تک محدود مانا گیا ہے ، کیوں کر شرط کے لیے جو لفظ استعمال کیا گیا ہے وہ عموم کو نہیں بتاتا ہے ، اگر "ان شئت " (اگر تو چاہے) کی بجائے "متی شئت " (جب بھی تو چاہے) کہا جائے تو پھر بعد ازمجلس بھی اختیار باقی رہے گا ۔

پس اگر کچھ شرطوں کے ساتھ دارالقضا ءکو حق طلاق تفویض کیا جائے اور یہ وسعت برتی جائے کہ عورت قاضی شریعت کے پاس ثبو ت شرعی کے ذریعہ ان شرائط میں کوتاہی ثابت کر دے ، یا دوسرے قرائن کی بنا پر قاضی کو عورت کے بیان کی صداقت پر اطمینا ن ہو جائے تو وہ عورت کو طلاق بائن دے سکتا ہے تو شاید یہ زیادہ بہتر صورت ہو **.(قاموس الفقہ ، صفحہ 339 تا 340)**

A Prominent religious scholar,Maulana Ashraf Ali Thanawi has also discussed talaq Tafweez in his book,Hila Najiza.He writes that:

اس قسم کا کا بین نامہ لکھوانا (جس میں طلاق کا اختیارعورت کے ہاتھ میں دیدیا گیا ہواور بوقت ضرورت اس سے کام لینا شرعاً جائز ہے (اور اس اختیار دیدینے کو تفویض طلاق کہتے ہیں)اور شرطوں کا بیان نمبر (۲)میں آتا ہے ۔

(۲) اس کی تینوں صورتیں جائز ہیں چاہے نکاح سے پیشتر لکھوالیا جاوے چاہے عین وقت عقد میں زبان سے کہلوا لیا جائے چاہوں بعد میں لکھوایا جائے مگر پہلی اور دوسری صورت کے صحیح و معتبر ہونے کی ایک ایک شرط ہے ۔

پہلی صورت کہ یہ کابین نامہ نکاح سے پہلے لکھا جاوے اس کے معتبر ومفید ہونے کے لئے یہ شرط ہے کہ اس میں نکاح کی طرف اضافت و نسبت موجود ہو مثلاً یہ لکھا جائے کہ اگر میں فلاں بنت فلاں کے ساتھ نکاح کروں اور پھر شرائط مندرجہ اقرار نامہ ہذا میں سے کسی شرط کے خلاف کروں تو مسماۃ مذکورہ کو اختیار ہوگا کہ اسی وقت یا پھر کسی وقت چاہو تو اپنے اوپر ایک طلاق بائن واقع کر کے اس نکاح سے الگ ہو جائے اگر اس میں اضافت الی النکاح نہ لکھی گئی تو یہ اقرارنامہ محض بیکار ہوگا اس کی روسے عورت کو کسی قسم کا اختیار حاصل نہ ہوگا۔

اور دوسری صورت کہ عین ایجاب وقبول ہی میں زبانی شرائط مذکور ہوں اس کے صحیح و معتبر ہونے کی شرط یہ ہے کہ ایجاب عورت کی جانب سے ہو یعنی اولاً خود عورت (یا اس کا ولی یا وکیل یعنے قاضی نکاح خواں) عقد نکاح کے وقت یوں کہے کہ میں نے اپنے آپ کو (یا مسمات فلاں بنت فلاں کو) تیرے نکاح میں اس شرط پر دیدیا کہ اگر تم نے یہ کام کیا یا وہ کام کیا (جتنی شرطیں لگانا مقصود ہوں سب کو ذکر کر دیا جاوے) تو اپنے معاملہ کا اختیار میرے (یا مسماۃ موصوفہ کے) ہاتھ میں ہوگا یعنی شرائط مذکورہ میں سے کسی ایک شرط کی خلاف ورزی پر بھی اختیار ہوگا کہ اسی وقت یا پھر کسی وقت چاہوں (یا

چاہے) تو اپنے آپ کو ایک طلاق بائن دیکر اس نکاح سے الگ کر سکوں گی (یا کر سکے گی) اس کے جواب میں مرد ناکح یوں کہے کہ میں نے قبول کر لیا اس پر عورت کو اختیار ہوگا کہ وہ جب اپنے اوپر شرائط کے خلاف ظلم و مصیبت دیکھے اپنے آپ کو ایک طلاق بائن دیکر اس شوہر کے نکاح سے نکل جائے یعنی اس طرح کہدے کہ میں اپنے اوپر ایک طلاق بائن واقع کرتی ہوں ۔

اور اگر ایسا نہ کیا گیا بلکہ ابتدائے کلام (یعنی ایجاب) مرد کی جانب سے ہواور لڑکی والے قبول کے ساتھ تفویض طلاق کی شرط لگادیں تو نکاح بلا کسی شرط کے صحیح ہو جاویگا اور شرط بالکل بے کار جائی گی ۔

اور تیسری صورت کہ نکاح کے بعد کوئی اقرارنامہ اس قسم کا شوہر سے لکھوایا جاوے یہ صورت بھی صحیح اور بالکل درست ہے ۔

.....

لیکن عورت کو اس کے بعد بھی چاہیئے کہ طلاق واقع کرنے میں جلدی نہ کرے بلکہ اطمینا ن کے ساتھ سوچ سمجھ کر کام کرے اور تین باتوں کا ضرورت التزام کرے ۔

اول یہ کہ فوراً غصہ کے وقت اپنے اس اختیار سے کام نہ لے بلکہ ایک معتد بہ مدت تک غورو خوض کرے جس کی میعاد ایک ہفتہ سے کم نہ ہو ۔

دوسرے یہ کہ اپنے خیرخواہوں سے مشورہ کرے ۔

تیسرے یہ کہ سنت کے موافق استخارہ کرے اور ویسے بھی دعا کرے کہ اللہ تعالیٰ میرا دل ایسے کام کی طرف پھیر دے جو میرے لئے دین و دنیا میں بہتر ہو اس تمام کوشش کے بعد جو کچھ دل میں آئے اس پر عمل کرے اور اللہ تعالی پر بھروسہ رکھے ۔ اس طرح پر وہ خطرہ نہ ہوگا جو تفویض مطلق کی صورت میں ہوتا ہے فقط اللہ اعلم

(حیلہ ناجزہ ،صفحہ 19-24).

10. The jurists and commentators have mainly based the legality of Talaq Tafweez on the following Quranic verse and Hadith:

يٰٓاَيُّهَا النَّبِيُّ قُلْ لِّاَزْوَاجِكَ اِنْ كُنْتُنَّ تُرِدْنَ الْحَيٰوةَ الدُّنْيَا وَزِيْنَتَهَا فَتَعَالَيْنَ اُمَتِّعْكُنَّ وَاُسَرِّحْكُنَّ سَرَاحًا جَمِيْلًا ۔

وَاِنْ كُنْتُنَّ تُرِدْنَ اللّٰهَ وَرَسُوْلَه□ وَالدَّارَ الْاٰخِرَةَ فَاِنَّ اللّٰهَ اَعَدَّ لِلْمُحْسِنٰتِ مِنْكُنَّ اَجْرًا عَظِيْمًا۔

"O Prophet, say to your wives, "If you seek the world and its adornments, come, I shall give you of these and send you off in a good way. But if you seek Allah and His Messenger and the abode of the Hereafter, you should rest assured that Allah has prepared a great reward for those of you who do good." (33: 28-29)"

"عن عائشة رضى الله عنها قالت خيرنا رسول الله صلى الله عليه وسلم فاخترنا الله و رسوله فلم يعد ذلك علينا شيئا "(متفق عليه)

"Reported by Hazrat Aisha (R.A) that the Holy Prophet (peace be upon him) gave us an option, we preferred Allah and his Apostle over Worldly Gain" (Sahih Bukhari and Sahih Muslim).

11. Needless to mention that Islam gives great importance to harmonious matrimonial relations of both the spouses. Both have been authorized to strictly follow Injunctions of Islam for this purpose. However, in case it is absolutely unavoidable and the spouses feel completely unable to live amicable life within the bounds prescribed by Islam, both can sever the ties in a legally approved manner. Under Islamic law, power to give divorce, though belongs to husband, but he could delegate this power to his wife or to third person also, either absolutely or conditionally and either for a particular period or permanently. Section 8 of Muslim Family Laws Ordinance, 1961 has specifically provided this kind of Talaq, known as 'Talaq-i-Fafweez'. Person to whom such power is so delegated, could then pronounce it accordingly.

12. The Holy Quran and Sunnah have given detailed injunctions in this respect. Likewise the Muslim jurists have done excellent research in

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this respect and have discussed and laid down detailed rules for this purpose.

13. According to Fiqh-e-Jaafaria, however, Talaq-e-Tafweez is not allowed. Such type of delegation of his power to his wife, in their view, is not permissible. According to this Muslim school of thought which equally holds an authentic Juristic opinion, the divorce becomes effective only when it is uttered by a husband in presence of witnesses by using specific "Seeghas". This view has been specifically elaborated by the author of Al-Faqh al Mazahibil Khamsa, Muhammad Jawad Mughnia – a Lebanese scholar.

14. We may also mention that this Court is vested with powers under Article 203B(c) of the Constitution to examine any law or provision of law on the touchstone of Injunctions of Islam as contained in the Holy Quran and Sunnah of the Holy Prophet (S.A.W). This Court is barred from examining provisions of Constitution, procedural law and Muslim Personal Law. However, in a case reported as PLD 1994 SC p. 619, the Hon'ble Shariah Appellate Bench has held as follows:

"The interpretation of the expression "Muslim Personal Law", therefore, in a manner which reduces the effective role of Federal Shariat Court contemplated under the Constitution, in the process of Islamization of laws, in our view, will be contrary to the necessary intendment of the Constitution. We are, therefore, inclined to interpret the expression "Muslim Personal Law" in a manner which would enlarge the scope of scrutiny of all codified and statute laws not strictly falling within the meaning of "Muslim Personal Law". Keeping in view the preceding discussion, what then the expression "Muslim Personal Law" really means in the context of jurisdiction of Federal Shariat Court under Article 203-D of the Constitution. The expression "Muslim Personal Law" used in Article 203-B (c) of the Constitution while defining "Law" is not explained anywhere in the Constitution, Chapter 3-A which contains Article 203-B(supra) was introduced in the Constitution on 23.05.1980. Almost immediately after that on 18.09.1980, by P.O. 14 of 1980, the explanation to Article 227(1) of the Constitution was added which we have already reproduced earlier in our judgment. The effect of the explanation added to Article 227(1) (supra) was not considered in Mst. Farishta's case by this Court, perhaps for the reason that Mst. Farishta's case was decided on the basis of language of Articles 203-A and B and Article 227 of the Constitution, as they stood before substitution of present Chapter 3-A in the Constitution and addition of explanation to

Article 227 (1) (supra). The fact that this Court did not consider the effect of explanation added to Article 227(1) (supra) in Mst. Farishta's case is evident from the comparison in juxtaposition of the then Articles 203-A and B with Article 227 of the Constitution in the judgment at page 123/124 of the report in that case."

To us, it appears that the Constitutional scheme of Islamization of laws intended to keep the personal law of each sect of Muslims outside the scope of scrutiny of Federal Shariat Court under Article 203-D of the Constitution. The expression "Muslim Personal Law" used in Article 203-B(c), therefore, in our view means the personal law of each sect of Muslims based on the interpretation of Qur'an and Sunnah by that sect. The expression "Muslim Personal Law" used in Article 203-B(c) (supra), therefore, will be limited in its meaning only to that part of personal law of each sect of Muslims which is based on the interpretation of Holy Qur'an and Sunnah of Holy Prophet(peace be upon him) by that sect. Therefore, a law which a particular sect of the Muslims, considers as its personal law based on its own interpretation of Holy Qur'an and Sunnah is excluded from being scrutinized by the Federal Shariat Court under Article 203-D of the Constitution as it would fall within the meaning of "Muslim Personal Law". All other codified or statute law which apply to the general body of Muslims will not be immuned from scrutiny by the Federal Shariat Court in exercise of its power

under Article 203-D of the Constitution. Mere fact that a codified law or a statute law applied to only Muslim Population of the country, in our view, would not place it in the category of "Muslim Personal Law" envisaged by Article 203-B(c) of the Constitution.

The Federal Shariat Court refused to entertain the petitions of the petitioner on the ground that the Zakat and Ushr Ordinance being a codified law and applicable exclusively to the Muslim population of the country, fell in the category of "Muslim Personal Law" and, therefore, it was outside the jurisdiction of Federal Shariat Court, to examine this statute under Article 203-D of the Constitution. As we have reached the conclusion of that only by reasons of being a codified or statute law and applicable exclusively to the Muslim population of the country, a law would not fall in the category of "Muslim Personal Law" unless it is also shown to be the personal law of a particular sect of Muslims, based on the interpretation of Holy Quran and Sunnah by that sect. The Ordinance was not outside the scope of scrutiny of Federal Shariat Court under Article 203-D of the Constitution.

15. We feel that since the Muslim Schools of thought are not unanimous in respect of Talaq-e-Tafweez, as discussed in great detail in paras above, as such, the matter falls under the category of "Muslim Personal Law" which is outside the purview of this Court as defined

under Article 203B(c) of the Constitution, hence, the instant Shariat Petition, in view of the dictum laid down by the Honourable Shariat Appellate Bench of Supreme Court of Pakistan, referred to in paras above, is not maintainable and being misconceived is, therefore, dismissed in limine.

JUSTICE DR. FIDA MUHAMMAD KHAN

JUSTICE RIZWAN ALI DODANI

JUSTICE MUHAMMAD JEHANGIR ARSHAD

JUSTICE SHEIKH AHMAD FAROOD

Islamabad the 24th April, 2013

UMAR DRAZ/

Fit for reporting.