

IN THE FEDERAL SHARIAT COURT
(Original Jurisdiction)

PRESENT

Mr. Justice Sh. Najam-ul-Hasan, Chief Justice
Mr. Justice Allama Dr. Fida Muhammad Khan
Mr. Justice Mehmood Maqbool Bajwa

SHARIAT PETITION NO.01/K OF 2017

1. Muhammad Hassan S/o Muhammad Ishaq
R/o Flat No.C-29, A-1, Apartment,
Abul Hassan Isfani Road, Karachi Petitioner

Versus

1. Federation of Pakistan,
Through Secretary, Ministry of Law,
Justice & Human Rights of Pakistan
Islamabad.

2. The IInd Civil & Family Judge
At Karachi West.

3. EmanBibi D/o NazarHussain
R/o House No. A1-38, SITE town,
NazariaMohallah, Frontier Coloy
Karachi Respondents.

For the Petitioner ... Mrs. HawaLadhani
Amir,Advocate

Date of Institution ... 19.06.2017

Date of Hearing ... 27.09.2017

Date of Decision ... 27.09.2017

JUDGMENT

ALLAMA DR. FIDA MUHAMMAD KHAN, JUDGE. This petition filed by Muhammad Hassan under Article 203-D of the Constitution of Islamic Republic of Pakistan assails, *inter alia*, Section 8 of Muslim Family Law Ordinance 1961 on the ground that it is repugnant to the injunctions of Islam as contained in the Holy Qur'an and Sunnah of Holy Prophet ﷺ. 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.”

2. We have heard the learned counsel for the petitioner in detail. She elaborately discussed the contents of the impugned section with various implications being caused to the parties while deciding the cases pertaining to dissolution of marriage on the basis of Khula by the family Courts. She contended that the proceedings of Khula in the Courts are against the injunctions of Islam as this practice has been causing a lot of trouble to the husbands. She referred to a personal case of the petitioner. She submitted that attimes the wife gets decree without returning the dower *etc* to the husband, as is the case of the petitioner.

3. The crux of her submissions was about the necessity of adding an explanation to the effect that the decree should not be passed in any such case unless the dower *etc.*, is duly returned to the husband.

4. In her petition the learned counsel has made the following prayers:

1. *To declare that the Section 8 of Muslim Family Court Ordinance, 1961, Khula is not as prescribed Quran and Sunnah and the Court cannot decide the matters in accordance with the injunctions of Islam as this is a matter of Islamic society hence would be dissolved accordingly.*
2. *To direct the respondent 1 to perform his duty by modifying, amend and add Section 8 of Muslim Family Law Ordinance, 1961, in accordance with Sharia as prescribed in Chapter 2 Surah Baqrah Verse 229 and Al-Bukhaari, Hadish No.253 & 254 with its spirit.*
3. *To direct the respondent No.1 to modify / add / change in the Section 8, of Muslim Family Laws Ordinance, 1961 after the words otherwise than by Talaq must be present Nikkahnama showing correct dower or certificate issuing by the concerned department or registration authorities. Nikkah Registrar or arbitrator committee of the societies or Qazi of Nikkah showing the dower decided at the time of Nikkahbe added.*
4. *To give the cause to the Federal Government in the case of law respect to matter in the Federal Legislative list.*
5. *To declare that the Khula obtaining by the respondent No.3 from the respondent No.2 is against the Quran and Sunnah and the same is null and void hence set aside.*
6. *To order to the respondent No.3 to rejoin the petitioner and perform conjugal rights under the prescribe limits of Almighty Allah.*

7. *Any other relief which this Hon'ble Court deems fit and proper."*

5. We have anxiously considered the matter from all angles. In this connection, it is pertinent to mention that the Federal Shariat Court performs its functions as provided in Chapter-3A of the Constitution of Islamic Republic of Pakistan. Its jurisdiction is mentioned in Article 203-D which reads as follow:

"203-D.Powers jurisdiction and functions of the Court.
(1) The Court may [either of its own motion or] on the petition of a citizen of Pakistan or the Federal Government or a Provincial Government, examine and decide the question whether or not any law or provision of law is repugnant to the injunctions of Islam, as laid down in the Holy Qur'an and Sunnah of the Holy Prophet, hereinafter referred to as the injunctions of Islam."
(Underlined by us)

This Article read with Article 203-B(c) fully elaborates the limits of jurisdiction conferred on this Court by the Constitution. Article 203-B(c) reads as under:

"Law" includes any custom or usage having the force of law but does not include the Constitution, Muslim personal law, any law relating to the procedure of any Court or tribunal or, until the expiration of [ten] years from the commencement of this Chapter, any fiscal law or any law relating to the levy and collection of taxes and fees or banking insurance practice and procedure; and.."
(Underlined by us)

6. A bare perusal of both the above constitutional provisions makes it crystal clear that:

(a) The Federal Shariat Court has the power and jurisdiction to examine any law except the Constitution, procedural Law and Muslim Personal Law. Therefore,

any provision pertaining to Muslim Personal Law, unless it is unanimously held against the injunctions of Islam by all Muslim sects, cannot be examined and decided by this Court. Moreover, it is also pertinent to mention that whenever, this Court exercises its above mentioned jurisdiction, it can examine the impugned law only on the touchstone of Holy Qur'an and Sunnah of Holy Prophet (ﷺ) and not merely on the basis of any juristic opinion or Fatwa by any scholar belonging to any school of thought.

- (b) This Court has to deliver judgment regarding the impugned law or its provision with effect from some prospective date in the future as provided under Article 203-D(2)(b) of the constitution.
- (c) This Court cannot fill up any gap nor add explanation to the existing text of a statutory law just for the purpose of improving its phraseology or clarification of its meaning as that is the function of the Parliament.
- (d) Nowhere has the constitution provided grant of relief, in personam in Shariah Petitions, to any one in personal cases which has direct or indirect bearings on the law impugned before this Court.

7. We may further add that the prayers made by the petitioner at serial No.4,5 & 6, above, are aimed at getting relief in personam in his particular case and, as mentioned above, this Court cannot grant the same. Regarding the prayers made at para No.1, that the Court cannot decide the matters pertaining to Khulla, it suffices to mention that this contention is not supported by any verse of the Holy Qur'an or Hadith of the Holy Prophet ﷺ .

8. It will be appreciated that though the word “Sharia” itself has very wide connotation, the “Federal Shariat Court”, being the creation of the Constitution itself, cannot go beyond the jurisdiction conferred upon it by the above mentioned provisions.

9. So far as the personal case of the petitioner is concerned, this Court cannot hear and decide the same. However, we may add that dissolution of marriage by way of Khula is always and invariably “subject to return of dower” – unless waived off by the husband as a matter of grace – as held in so many judgments delivered by superior Courts including the one elaborate judgment of this Court in Shariat Petitions bearing No.3/L of 2005 (Saleem Ahmed Vs. Government of Pakistan), Sh.P.No.2/L/2006 (Muhammad SulemanYahyaVs Federation of Pakistan), Sh.P.No.1/K of 2007 (S. Mohiuddin M. Bukhari Vs Federation of Pakistan), Sh.P. No.2/K of 2007 (Sheraz Akram Vs Federation of Pakistan), Sh.P.No.3/K of 2007 (S. Madanad Mouzzam BukhariVs Federation of Pakistan) and Sh.P.No.1/l of 2007 (Ibad-ur-RehmanLodhi Advocate Vs Secretary M/o Law, Justice and Parliamentary Affairs Islamabad).

10. For the reasons stated above, this Court has no jurisdiction to entertain this Shriat Petition. Hence we dismiss it

in liminie. The petitioner may however seek relief at the appropriate forum, if advised to do so.

JUSTICE ALLAMA DR. FIDA MUHAMMAD KHAN

JUSTICE SH. NAJAM-UL-HASAN
Chief Justice

JUSTICE MEHMOOD MAQBOOL BAJWA

*Announced in open Court
On 27th September 2017
at Karachi*
Daud/**