

ORDER SHEET
IN THE FEDERAL SHARIAT COURT OF PAKISTAN
(Original Jurisdiction)

Shariat Petition No.11-I/2022

Khurram Shehzad son of Irshad Hussain, resident of School Mohallah, Near Utility Store, Jail Road, Mandi Bahauddin.

..... **Petitioner**

versus

1. Federation of Pakistan through Ministry of Law and Justice Commission of Pakistan, Islamabad through its Secretary, 3rd Floor, R&S Blocks, Pak. Secretariat, Islamabad.
2. Mst. Amina Sarfraz d/o Sarfraz Ahmed, resident of Lalazar Colony, Mandi Bahauddin.

..... **Respondents**

PRESENT

06. **07.02.2023** Sayyed Umer Sohail Shah, Advocate for/along with
Islamabad petitioner

PRELIMINARY HEARING:

ORDER

DR. SYED MUHAMMAD ANWER, ACJ: Through the instant Shariat Petition, the petitioner has made the following prayer:

“It is therefore, respectfully prayed that whole of the above-mentioned impugned provision / section 10(4) of the Family Court Act, 1964 may kindly be examined in the light of Quran and Sunnah and be declared un-Islamic and hence void being repugnant to the injunctions of Islam. It is further prayed that as a consequence thereof the respondent No.1 should be directed to amend the above mentioned provision in accordance with the tenants of Islam.”

2. The learned counsel for petitioner has mainly stressed that Khula so granted by the ordinary courts of law under Section 10(4) of the West Pakistan Family Court Act, 1964 without the consent of husband is quite against the injunctions of Islam. However, the learned counsel has further raised a ground in his petition regarding the dispute of Khula sought by the wife of the petitioner in the following manner:

“It is pertinent to mention here that respondent No.2 was got married with petitioner under Muslim Family Laws & Shariat-e-Muhammadi on 12-01-2009, however there is no child does exist / alive of the

spouse. The respondent No.2 got Khula from the court of Miss Iram Ali Malik, Learned Judge, Family Court Mandi Bahauddin in Family Suit No.24/2022 vide judgment / order on 04-03-2022, which order was passed without the consent of petitioner, as being husband the consent of petitioner while granting Khula is essentially required, but no such practice or law is being followed in the country, which is quite illegal and un-Islamic."

3. The petitioner has argued the case at length and relied upon the following Ayat of the Holy Quran and Ahadith of the Holy Prophet (SAW):

Surah Al-Baqarah (Verse-237)

وَأِنْ طَلَّقْتُمُوهُنَّ مِنْ قَبْلِ أَنْ تَمْسُوهُنَّ وَقَدْ فَرَضْتُمْ لَهُنَّ فَرِيضَةً فَرْيَضَةً فَنِصْفُ مَا فَرَضْتُمْ إِلَّا أَنْ يَعْفُوا أَوْ يَعْفُوَ الَّذِي بِيَدِهِ عُقْدَةُ النِّكَاحِ وَأَنْ تَعْفُوا أَقْرَبُ لِلتَّقْوَى وَلَا تَنْسُوا الْفَضْلَ بَيْنَكُمْ إِنَّ اللَّهَ بِمَا تَعْمَلُونَ بَصِيرٌ -

"And if you divorce them before you touch them or settle a bridal gift upon them, then (give them) half of what you have settled unless either the women act leniently and forgo their claim, or he in whose hand is the marriage tie acts leniently (and pays the full amount). If you act leniently it is closer to being God fearing. And forget not to act gracefully with one another, for indeed Allah see all that you do.

Holy Prophet SAW said, Hadees in Sunan Ibn e Maja, Kitab ul Talaq, Bab ul Talaq al Abad, Hadees #2081:-

حَدَّثَنَا مُحَمَّدُ بْنُ يَحْيَى، حَدَّثَنَا يَحْيَى بْنُ عَبْدِ اللَّهِ بْنِ بُكَيْرٍ، حَدَّثَنَا ابْنُ لَهَيْعَةَ، عَنْ مُوسَى بْنِ أَيُّوبَ الْغَافِقِيِّ، عَنْ عِكْرِمَةَ، عَنِ ابْنِ عَبَّاسٍ، قَالَ أَتَى النَّبِيَّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - رَجُلٌ فَقَالَ يَا رَسُولَ اللَّهِ إِنَّ سَيِّدِي زَوَّجَنِي أُمَّتَهُ وَهُوَ يُرِيدُ أَنْ يُفَرِّقَ بَيْنِي وَبَيْنَهَا. قَالَ فَصَعِدَ رَسُولُ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - الْمِنْبَرَ فَقَالَ " يَا أَيُّهَا النَّاسُ مَا بَالُ أَحَدِكُمْ يُزَوِّجُ عَبْدَهُ أُمَّتَهُ ثُمَّ يُرِيدُ أَنْ يُفَرِّقَ بَيْنَهُمَا إِنَّمَا الطَّلَاقُ لِمَنْ أَخَذَ بِالسَّاقِ " .

"A man came to the Prophet (ﷺ) and said: 'O Messenger of Allah, my master married me to his slave woman, and now he wants to separate me and her.' The Messenger of Allah (ﷺ) ascended the pulpit and said: 'O people, what is the matter with one of you who marries his slave to his slave woman, then wants to separate them? Divorce belongs to the one who takes hold of the calf (i.e., her husband).'"

Holy Prophet SAW said, Hadees in Sunan Nisai Hadees #3463, Sunan Ibn e Maja Hadees #2056:-

حَدَّثَنَا أَبُو زُهَيْرٍ بْنُ مَرْوَانَ، حَدَّثَنَا عَبْدُ الْأَعْلَى بْنُ عَبْدِ الْأَعْلَى، حَدَّثَنَا سَعِيدُ بْنُ أَبِي عَرُوبَةَ، عَنْ قَتَادَةَ، عَنْ عِكْرِمَةَ، عَنِ ابْنِ عَبَّاسٍ، أَنَّ جَمِيلَةَ بِنْتَ سُلُوفٍ أَتَتْ النَّبِيَّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - فَقَالَتْ وَاللَّهِ مَا أَعْتَبْتُ عَلَى ثَابِتٍ فِي دِينٍ وَلَا خُلُقٍ. وَلَكِنِّي أَكْرَهُ الْكُفْرَ فِي الْإِسْلَامِ لِأَطِيقُهُ بُغْضًا. فَقَالَ لَهَا النَّبِيُّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - "أَتُرِيدِينَ عَلَيَّ حَدِيثَهُ؟" قَالَتْ نَعَمْ. فَأَمَرَهُ رَسُولُ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - أَنْ يَأْخُذَ مِنْهَا حَدِيثَهُ وَلَا يَزِدَّادَ.

It was narrated from Ibn 'Abbas that: Jamilah bint Salul came to the Prophet (ﷺ) and said: "By Allah, I do not find any fault with Thabit regarding his religion nor his behavior, but I hate disbelief after becoming Muslim and I cannot stand him." The Prophet (ﷺ) said to her: "Will you give him back his garden?" She said: "Yes." So the Messenger of Allah (ﷺ) told him to take back his garden from her and no more than that.

Holy Prophet SAW said, Hadees in Sunan Saeed bin Mansoor, Kitab ul Talaq, Hadees #1270:-

مالك، عن يحيى بن سعيد، عن سعيد بن المسيب؛ انه كان يقول : الطلاق للرجال، والعدة للنساء (سنن سعيد بن منصور، كتاب الطلاق، حديث رقم 1270)
Malik, on the authority of Yahya bin Saeed, on the authority of Saeed bin Al-Musayyib; He used to say: Divorce is for men, and the waiting is for women. (Sunnan Saeed bin Mansoor, Kitab-ul-Talaq, Hadees No. 1270).

4. However, the documents, which the learned counsel has relied upon, relate to the case involving matrimonial dispute decided by the Family Court, Mandi Bahauddin against the petitioner. So far as the point of determination regarding Section 10(4) of the Family Courts Act, 1964 is concerned, the matter has already been decided by the Full Bench of this Court in the case of "Saleem Ahmad and others v. Government of Pakistan and others", reported as **PLD 2014 FSC 43**. The relevant portions of the judgment are reproduced as under:

"....."Khula" and "Mubarat" operated as a single, irrevocable divorce and even thereafter both the spouses could contract fresh marriage with mutual consent, of course if they wanted to, without any

intermediary marriage of the wife with another person.

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.....The word used here is (قوامون) plural of (قوام), which means a person responsible for administering managing and protecting the interests of a person or an organization and looks after its affairs. In the context, this verse 'refers to the responsibilities of the man who is required to protect, safeguard and provide for the needs of those under his supervision. Obviously, there are psychological and physiological differences between the sexes and they have to perform different roles but, admittedly, no one is superior to the other except by Taqwa (i.e. faith and good deeds). In fact they are complementary to each other. No one can ever exist without the other. Both have similar rights/responsibilities with different roles to play in life. Nevertheless Islam affirms their equality as human beings and advocates and duly protects their fundamental rights. All these three verses referred to again and again by the petitioner/counsel/Jurist Consult, thus do not specifically create a bar for court of competent jurisdiction to decree the case of "Khula" when reconciliation fails. After all what are the Courts of law established for? The courts are there to dissolve the disputes that arise between the parties. They can decide all type of matters including, admittedly, dissolution of marriage on certain grounds. One wonders why they are not authorized to decide the case of Khula, if a husband does not at all agree to the divorce of his wife and all the reconciliatory efforts fail. In this view of the matter we find that this verse has nothing to do with the subject of "Khula", in the context as has been agitated and argued."

[emphases added]

5. In addition to above, we would like to highlight a very important point regarding the legal effect of Khula i.e. according to Shariah, Khula operates

as a single irrevocable divorce, which means that both the spouses can contract a fresh marriage with mutual consent, of course if they want to, without any intermediary marriage of the wife with another person, which is known as “*Halala*” and is required in case when a husband pronounces divorce to his wife for the third time and that attained finality. This is one of the legal differences between *Talaq* pronounced by the husband and *Khula* sought by the wife from her husband. However, *Iddat* shall be incumbent upon the wife if she wants to contract marriage with someone else after *Khula*. *Khula* is a unique right given by Islam to women, which is not available to men, that a woman can seek the dissolution of marriage on the basis of *Khula* and to remarry the same man depends only on her will and consent, if she wants to, without entering into marriage with someone else as is necessary for a man if he once pronounced divorce to his wife, which attained finality, and then he wants to remarry that lady, he cannot do so unless the lady marries somebody else and that marriage dissolves in normal course either by divorce or due to the death of her second husband and she becomes a widow. This important aspect of *Khula* has also been discussed by the superior Courts in cases reported as *PLD 2013 Lahore 88 (Major Qamar Zaman Qadir v. Judge Family Court, Jehlum and others)*, *PLD 2013 Sindh 209 (Danish v. Mst. Fozia Danish and another)*, *2011 CLC 1211 (Attiq Ahmed Khan vs. Noor-ul-Saba and another)*, *PLD 2010 Karachi 131 (Muhammad Ayub Khan v. Mst. Shehla Rasheed and another)*, *PLD 2003 Peshawar 169 (Fazli-e-Subhan v. Mst. Sabereen and 3 others)*, *2000 MLD 447 (Gulzar Hussain v. Mst. Mariyam Naz)* and *PLD 1970 Lahore 1 (Mst. Nawab Bibi and 14 others v. Mst. Anwar Bibi and 6 others)*.

6. In the light of above referred judgments and arguments advanced by the learned counsel for petitioner together with the points he raised from the Holy Quran and Sunnah, we are of the same view as that of earlier held by the Full Bench of this Court in the case of *Saleem Ahmad and others* as discussed *supra*. Hence, the instant petition having no merit is hereby **DISMISSED** *in limine*.

(JUSTICE DR. SYED MUHAMMAD ANWER)
ACTING CHIEF JUSTICE

(JUSTICE KHADIM HUSSAIN M. SHAIKH)
JUDGE

*Khalid**

APPROVED FOR REPORTING.

(JUSTICE DR. SYED MUHAMMAD ANWER)
ACTING CHIEF JUSTICE