When Britisher captured India and established their rule, they promulgated their own laws like civil procedure and criminal procedure code, Evidence Act and other but they did not encroach upon the family laws of the inhabitants irrespective of the fact that whether they were Muslims, Hindus or Sikhs. They were allowed to be governed by their own rules, custom and usages. In 1937,Muslim personal law (shariat) application act was passed and it was decided that the rule of decision will be the Muslim personal law (Shariat) 1937 where the parties are Muslims and the issue relates to Marriage, dissolution of marriage, Talaq, Ila, Khula, Mubarat, Lian, Maintenance, Dower, guardianship and Waqf. In 1939,Muslim married women's dissolution of marriage act was passed whereby Muslim married woman was given the right of seeking dissolution of marriage through the court of law on various grounds like cruelty, impotence, hatred and extreme discord etc and continued to be enforced in the territories of Pakistan even after partition. In 1961,Muslim family law ordinance was promulgated. The most striking feature of this ordinance was that its provisions could not be tested on the touchstone of Shariah and could not be declared void being repugnant to the fundamental rights. The constitutions of 1962 and1973 also excluded it from the jurisdiction of the courts of Pakistan. In 1980,when the Federal Shariat Court constituted, Muslim personal law was also excluded from its jurisdiction. In 1994,the situation changed when the apex Supreme Court, while disposing of Shariat petition on Zakat and Ushr ordinance, held that: All statutes and codified laws which apply to the Muslims in general, cannot be excluded from the jurisdiction of the Federal Shariat Court.(P.L.D 1994 S.C 607) As a result of this dictum, the Federal Shariat Court examined this controversial law for the first time and declared section 4 and 7 as repugnant to the Islamic injunctions.

By this petition, ostensibly, the provisions of Khula as contained in section 8 of the Muslim Family law ordinance 1961 and also 2(x) of dissolution of Muslim marriage act viii of 1939

have been challenged being inconsistent to Islamic injunctions, as appeared in the Holy Quran and Sunna of the Holy Prophet peace be upon him. Shariat Petition on the same subject, titled as S.P.NO 9/k of1992, Masood Ahmad AnsariVs state was dismissed in limine due to jurisdictional bar. At that time, the apex Supreme Court had not given any such verdict and constitutionally the Muslim personal law was beyond the ambit of our jurisdiction. So, the present petition cannot be dismissed on the same grounds.

It is pertinent to mention here the various conflicting judgments of superior courts on the issue of Khula.Earlier; it was held that: For the dissolution of marriage by way of Khula, the consent of the husband is necessary. Qazi or the court of law was not empowered to dissolve the marriage. (Umar bibiVs Muhammad Din A.I.R 1945 LHR 51)

In Saeeda Khanum Vs Muhammad it was held that incompatibility of temperiment, dislike or even hatred on the part of the wife for the husband is not valid grounds for divorce under Muslim law unless the husband agrees to it. (P.L.D 1952 LHR-113) In Fatima Vs Najmul Ikram, divergent viewpoint came forth and the court declared that: Wife entitled to dissolution of marriage on restoration of what she has received from husband in consideration of marriage if Judge apprehends that parties will not observe the limit of God i.e. harmonious married state as envisaged by Islam. In this Judgment the consent of the husband was considered not essential. (P.L.D 1959 LHR-566) Then comes the scholarly written and most elaborative judgment, delivered by the Supreme Court in the light of Islamic injunctions, on the issue of Khula.Though some leading Ulema have opposed and criticized the said judgment but the views taken by the Hon Judges, are also supported by Quranic verses and authentic Ahadith apart from the endorsement by some ancient Jurists. This judgment, at present holds the field. The superior as well as the subordinate court have been deciding matter pertaining to dissolution of marriage, basing the said judgment reported as Khurshid BagumVs Muhammad Ameen.(P.L.d 1967 SC-page 97) In Abdul Raheem Vs Mst

Shahida Khan case, the august Supreme Court held that: Person in authority, including Qazi, can order separation by Khula even if husband was not agreeable to that course. (P.L.D 1984 SC-329)

The petitioner has criticized this judgment basing the booklet written by the learned scholar and adhoc Judge of the august Supreme Court, Hon. Justice Taqi Usmani. Obviously the judgments of the Supreme Court are not appealable before the Federal shariat Court. Review petition before the same court cannot be filed due to time limit, fixed for the said purpose.

The petitioner has assailed neither provisions of Dissolution of Muslim marriage act 1939 nor Muslim Family law ordinance 1961.According to him, the way the superior as well as the subordinate courts are deciding the cases of dissolution of marriage by way of Khula, without taking into consideration the consent of the husband, basing the judgment of Supreme Court, P.L.D 1967 SC-97, is not in line with the Islamic injunctions, as appeared in the Holy Quran and Sunnah of the Holy Prophet.

The parameter of our jurisdiction is to examine any law or provision of law on the touchstone of Islamic injunctions. We may examine section 2(x) of the dissolution of Muslim marriage act1939 and section8 of Muslim Family law ordinance 1961and deliver an authoritative judgment on the issue of Khula.Other petitions on the same subject are also pending for hearing.

Submitted for further orders please.

9/5/2002

Fazal Elahi Qazi
SRA

Registrar

10/5/02

Hon J. 1

At least three copies of this research note be made for each Hon Judge. May be placed before the Full Bench whenever it is constituted to hear the instant petition.

16.5.2002

Registrar

Pl. comply.

SRA.

DR-J

16/5

16/5/2002