IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
Mr. Justice Yahya Afridi
Mr. Justice Amin-ud-Din Khan
Mrs. Justice Ayesha A. Malik

CIVIL PETITIONS NO.4657 TO 4659 OF 2022
[Against judgment dated 28.11.2022 passed by the Peshawar High Court, Abbottabad Bench in WP Nos.394-A, 395-A and 310-A of 2017]

Ibrahim Khan ***...Petitioner(s)***
(in all cases)

Versus

Mst. Saima Khan and others ***...Respondent(s)***
(in all cases)

For the Petitioner(s) : Khawaja Shahid Rasool Siddiqui, ASC.
(in all cases)

Respondent(s) : N.R. *(in all cases)*

Date of Hearing : 15.02.2024

JUDGMENT

Ayesha A. Malik, J.- These Civil Petitions are directed against judgment dated 28.11.2022 passed by the Peshawar High Court, Abbottabad Bench (**High Court**) whereby writ petition filed by the Petitioner was dismissed whereas writ petitions filed by Respondent No.1 were allowed.

2. The basic facts are that Respondent No.1 filed a composite suit for jactitation of marriage or in the alternate, dissolution of marriage, recovery of dowry articles and maintenance on 07.08.2014. She filed a second suit for recovery of maintenance, possession of house or in the alternate, its market value, on 18.10.2014. Both suits were decided vide judgment and decree dated 26.11.2015 of the trial court; the claim of Respondent No.1 for dissolution of marriage was decreed on the basis of *khula* subject to the waiver of dower, being half portion of the house; her claim for maintenance was decreed along with three months *iddat* period maintenance; minor was also granted maintenance; dowry articles were decreed to the extent of Rs.15,000/-; whereas rest of the claim of Respondent No.1 was dismissed; suit filed by the Petitioner for conjugal rights was also dismissed vide the same judgment of the trial court. The appellate court, vide judgment dated 21.12.2016, modified the judgment and decree of the trial court by

way of enhancing the past and *iddat* period maintenance; likewise, the cost of dowry articles was also enhanced; and the remaining findings of the trial court were kept intact. Respondent No.1 then, by way of two separate writ petitions, challenged the judgments of the courts below, specifically agitating the grant of dissolution of marriage based on *khula* stating therein that she never sought *khula* rather sought dissolution of marriage on the ground of cruelty and prayed possession of her dower. The High Court, while considering the arguments of both parties, set aside the judgments and decrees of the trial and appellate court on the ground that the Petitioner had already divorced Respondent No.1 by way of *talaq* and, therefore, granting her *khula* was not necessary. Consequently, the High Court awarded her dower of half of a portion of the house.

3. The Petitioner challenges the decision of the High Court by stating that the decision of the trial court as well as the appellate court with respect to the decree of *khula* are correct as Respondent No.1 stated that she did not want to stay married to him, hence, the trial court granted her *khula*. His basic contention is that as he had not divorced Respondent No.1, thus, she is not entitled to dower.

4. The record shows that a suit for jactitation of marriage or in the alternate, dissolution of marriage, was filed by Respondent No.1 wherein specific ground of cruelty at the hands of her in-laws and husband was taken in the plaint. In her pre-trial reconciliation statement, she categorically stated that she was abused by her husband and his family and that she did not want to live with him on account of his cruel treatment. She also specifically stated that the Petitioner had admitted to having divorced her and contracted second marriage at the *jirga* that took place as well as at the police station; she claimed that the only basis on which he was willing to relieve her from the marriage was if she gave up custody of the minor daughter. So far as the evidence of the Petitioner is concerned, he denied having given her *talaq*; he denied the allegation of a second marriage and denied the fact that he had at any time abused Respondent No.1. The trial court in its judgment concluded that Respondent No.1 could not establish that the Petitioner had divorced her and that he had contracted a second marriage but since she did not wish to be with him, hence, granted her a decree for dissolution of marriage on the basis of *khula* and waived her rights to dower, being half portion of the

house, in consideration of the *khula.* The appellate court did the same by way of maintaining the judgment and decree of the trial court except it enhanced maintenance and cost of dowry articles. In the writ petition before the High Court, she again specifically took this plea that she sought dissolution of marriage on the ground of cruelty and never sought *khula* nor did she consent to the waiver of her dower. The High Court, on the basis of the evidence, concluded that in fact, the Petitioner had already divorced Respondent No.1 based on the evidence of the *jirga* and, consequently, held that there was no reason to grant her *khula* thereby maintaining her right to retain her dower.

5. Although on the basis of the facts of the case, the dispute is whether the Petitioner pronounced *talaq* or not, however, the Petitioner disputes the divorce and accepts the *khula*, hence, the real question is whether the court can *convert* a prayer for dissolution of marriage on the ground of cruelty to a prayer for seeking dissolution of marriage by way of *khula*, where the *khula* is not sought for by a woman.

6. As per *Principles of Mahomedan Law,*[1] Paragraph No. 319(2) provides that a divorce by *khula* is a divorce with the consent, and at the instance of the wife, in which she gives or agrees to give consideration to the husband for release from the marriage. It is a bargain or arrangement between the husband and wife whereby she may, as a consideration, release her dower and other rights for grant of *khula*.[2] The said Paragraph continues to state that *khula* is affected by an offer from the wife to compensate the husband if he releases her from the marriage. Once the offer is accepted, it operates as a single irrevocable divorce (*talak-i-bain*) and its operation is not postponed until the execution of the deed of *khula*. Paragraph No. 320 of the *Principles of Mahomedan Law* provides that a divorce effected by *khula* operates as a release by the wife of her dower, but it does not affect the liability of the husband to maintain her during her *iddat*, or to maintain his children by her. Therefore, in terms of the *Principles of Mahomedan Law*, a *khula* is essentially the release from the marriage that a woman can seek by agreeing to waive her dower. This Court in *Khurshid Bibi*[3] while examining the concept of *khula* held that *khula* is provided to a woman as a right that she may seek from the court if she seeks release from the marriage for which she must be willing to offer

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[1] DINSHAH FARDUNJI MULLA, PRINCIPLES OF MAHOMEDAN LAW (21st 1995 ed. 1906).
[2] Saleem Ahmad v. Govt. of Pakistan (PLD 2014 SC 43 at Para [18]).
[3] Khurshid Bibi v. Baboo Muhammad Amin (PLD 1967 SC 97).

compensation or release of dower.[4] *Khula* is an irrevocable divorce that the wife can seek in case of extreme incompatibility. It is the right of a woman for which she does not have to level any allegation; she simply has to say that she does not want to live with her husband.[5] In other words, *khula* can be granted to a woman without any fault of a husband.[6] As *khula* is a special and exclusive right given to a woman, which is not available to a man, she can seek dissolution on the basis of *khula* in which one of the consequences is that she can re-marry the same man, without entering into intervening or intermediary marriage i.e. *halala*.[7] In *Haji Saif-ur-Rahman*,[8] the Federal Shariat Court held that the right of *khula* granted to a woman by the Holy Quran and Sunnah is an *absolute* and *unique right* whereby a marriage can be dissolved through a court *at her will* and this right of a woman cannot be denied by the court of law. Therefore, *khula* is a basic right of a woman under Muslim family law.

7. On the other hand, dissolution of marriage on the ground of cruelty is sought under the Dissolution of Muslim Marriages Act, 1939 (**DMMA**). Under Section 2 thereof, a Muslim woman is required to establish the ground of cruelty in order for a decree to be passed for the dissolution of marriage. The right under the DMMA has been recognized in *Mukhtar Ahmed*[9] as being an independent right available to a woman under the DMMA with each ground being separate and enough for dissolution of marriage and that her legal rights cannot be curtailed on account of exercise of any ground under the DMMA. In fact, the law itself contemplates in Section 5 of the DMMA that, by way of dissolution of marriage, the right of the dower will not be affected.[10]

8. It is essential to look into the legislative history of the DMMA as to why this law was passed by the Central Legislative Assembly of British India. This law has been characterised as a *radical piece of social legislation* that granted women married under the Muslim family law *greater rights for divorce than those enjoyed by other women* in colonial India.[11] It is important to look into the background of this

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[4] Also held in Bilqis Fatima v. Najm-ul-Ikwam Qureshi (PLD 1959 Lahore 566). *Bilqis Fatima* was upheld by the Supreme Court in *Khurshid Bibi*.
[5] Ibid.
[6] MUHAMMAD ZUBAIR ABBASI & SHAHBAZ AHMAD CHEEMA, FAMILY LAWS IN PAKISTAN 144 (2018).
[7] Khurram Shehzad v. Federation of Pakistan (PLD 2023 FSC 286).
[8] Haji Saif-ur-Rahman v. Islamic Republic of Pakistan (Shariat Petition No.16/I of 2022).
[9] Mukhtar Ahmed v. Ansa Naheed (PLD 2002 SC 273).
[10] **5. Rights to dower not to be affected.** Nothing contained in this Act shall affect any right which a married woman may have under Muslim law to her dower or any part thereof on the dissolution of her marriage.
[11] Rohit De, *Mumtaz Bibi's Broken Heart: The Many Lives of the Dissolution of Muslim Marriages Act*, 46 The Indian Economic & Social History Review 105–130 (2009). https://doi.org/10.1177/001946460804600106.

legislation. Hanafi jurisprudence allowed a woman to exercise her right of *khula* only after the approval or consent of the husband.[12] It was apprehended by the lawmakers of the colonial period as it is against the principle of natural justice and equity that a woman cannot be allowed to get a decree of divorce even on the basis of cruelty and violence from her husband except in the circumstances that his approval is required. Quazi Mohammad Ahmed Kazmi authored the Bill and introduced it before the House in 1936 with the statement of objects and reasons as:

> ...no proviso in the Hanafi Code of Muslim Law enabling a Muslim woman to dissolve her marriage in case her husband neglected to maintain her, makes her life miserable by deserting or persistently maltreating her, or absconds leaving her unprovided for, and under other circumstances.[13]

9. To counter the above injustices, the DMMA was passed by the Central Legislative Assembly on 17.04.1936. It was hailed as *one of the most progressive enactments passed by the legislature.*[14] This legislation is considered as the by-product of the collective decision-making of various groups in society (politicians, *ulama* and women) for the protection of women's rights in the Muslim family law.[15] It, essentially, grants a statutory right to dissolve the marriage on the grounds given therein, and it also stipulates the consequence of the dissolution and when it takes effect. So, basically, the right to seek *khula* is not one of the statutory grounds under the DMMA that they are two distinct rights to dissolve a marriage at the instance of a woman.

10. Now the question is whether, in a prayer for dissolution of marriage on the ground of cruelty or any ground under the DMMA, the Court of its own motion can convert that prayer into a dissolution by way of *khula*. This question was raised before this Court in *Muhammad Siddiq*[16] wherein leave was granted to consider whether the High Court could decree the suit on a ground not raised in the plaint as the plaint did not seek dissolution on the ground of *khula* but merely dissolution of marriage on the ground of cruelty and non-payment of maintenance. This Court concluded that the High Court could not change the prayer by granting *khula* as the prayer of *khula*

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[12] Muhammad Munir, *The Law of Khul' in Islamic Law and the Legal System of Pakistan*, 2 LUMS Law Journal 33–63, 43 (2018).
[13] Statement of Objects and Reasons of DMMA as cited (*supra*) in Rohit De (2009) 113.
[14] KAUSER EDAPPAGATH, DIVORCE AND GENDER EQUITY IN MUSLIM PERSONAL LAW OF INDIA 115 (2014).
[15] Rohit De (*supra*).
[16] Muhammad Siddiq v. Ghufran Bibi (PLD 1971 SC 192).

has to be a specific prayer sought for by the wife.[17] Although the facts of *Muhammad Siddiq* are somewhat different, the issue being whether the wife sought dissolution on the ground of cruelty and non-payment of maintenance or whether she could be granted *khula*, which was not even prayed by her. *Muhammad Siddiq* concluded that since she sought dissolution on the ground of cruelty and non-payment of maintenance, the appellant was entitled to submit his defense in the court by submitting evidence before he was made liable to pay any maintenance. Hence, this Court granted the respondent her right to respond and defend the case given that it was titled under the DMMA.

11. Where a woman files suit for dissolution of marriage under the grounds of DMMA or through *khula*, there are procedural distinctions. Firstly, under Section 2 of the DMMA, various grounds (cruelty, assault, ill-treatment, etc.) are provided for judicial pronouncement of dissolving the marital relationship, which is also called *fuskh*. Hence, there must be some *cause* as per the DMMA to get a decree of dissolution of marriage under the DMMA. However, *khula* can be granted to a woman without establishing any ground or proving the cause to the court. Secondly, if the grounds under the DMMA are established by a woman, then Section 5 of the said law protects her right of dower as the same shall not be affected. Whereas in *khula*, she has to waive or forgo her right of dower. Lastly, in terms of procedure in the case of *khula*, once the pre-trial reconciliation fails under Section 10 of the Family Courts Act, 1964 (**FCA**), the court is bound to *immediately* pass a decree for the dissolution of marriage.[18] Whereas the decree for dissolution of marriage under the DMMA can only be passed after the recording of evidence under Section 11 of the FCA. Therefore, termination of marriage under the DMMA or by way of *khula* exists in distinct and different legal domains with separate consequences.

12. In the instant matter, the facts are very simple. Respondent No.1 sought dissolution of marriage with explicit details in the plaint of cruelty not only by the in-laws but also by the husband. She then gave a categoric statement in this regard in the pre-trial negotiations as well as during the course of evidence. Respondent No.1 was clear in her suits that she is not seeking *khula* rather the dissolution of marriage on the basis of cruelty. This fact is evident as she filed a second suit

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[17] Ibid.
[18] Syed Amir Raza v. Rohi Mumtaz (2023 SCMR 1394).

where she sought possession of the house in her dower which was not granted. The trial court without considering the evidence and the prayer of Respondent No.1, granted her *khula* and made her waive her dower, which decree was upheld by the appellate court subject to waiver of dower. We find that both courts erred in this respect as the right to seek *khula* is the exclusive and absolute right of the woman. She must in unambiguous and unequivocal terms express her intention to exercise such right before the court, that is to say, she must put her offer before the court that she seeks release from the marriage by waiving her dower and only then the court can grant her *khula*. Fundamentally, as stated above, the principle is that *khula* cannot be granted, if it has not been explicitly sought for by the woman because she has to give up her right to dower as per Section 10(5) of the FCA. Hence, a court cannot on its own pass the decree of *khula* if it has not been sought for by the woman. Therefore, her consent is vital. In this case, Respondent No.1 did not seek *khula*, hence, granting her the same, without her consent, was wrong.

13. The next issue is whether the Petitioner divorced Respondent No.1 or whether she was entitled to seek dissolution of marriage on the ground of cruelty. In this regard, the trial court and the appellate court have not given any definitive findings although they have discussed the evidence in great detail but choose to rely on the fact that since she does not wish to live with her husband, hence, she should be granted *khula*. The evidence shows that Respondent No.1 claimed that the Petitioner divorced her in the presence of a *jirga* and also at the police station. This statement was supported by Mukhtar Ahmed (PW-4) and Niaz Sar Khali (PW-5) and no question was put before them so as to shatter the veracity of their statements. As far as the Petitioner is concerned, he admitted that there were several *jirgas* but he did not admit the fact that he had already divorced Respondent No.1. However, by way of the evidence, it is clear that the claim of his having divorced Respondent No.1 is available and not rebutted. Consequently, the findings of the High Court in this regard are in accordance with law which do not call for interference by this Court. Furthermore, it is important to note whether the Petitioner divorced Respondent No.1 or whether she is entitled to dissolution of marriage on the ground of cruelty, in both situations, she is entitled to her dower, which is half of a portion of the house. The Petitioner's entire focus is on the fact that Respondent No.1 is not entitled to dower

which is the ground pressed before this Court. However, we find that there is no justification to deny her the dower to which she is fully entitled. So far as the remaining grounds of challenge by the Petitioner regarding maintenance and dowry articles, these are based on factual findings which have been decided by the trial court as well as the appellate court and even maintained by the High Court, wherein the cost of dowry articles and the rate of maintenance was enhanced. The factual findings of the courts do not call for any interference by the High Court as is held by this Court in *M. Hamad Hassan*.[19]

14. Under the circumstances, we find no illegality in the impugned judgment. The Petitions, being devoid of force, are dismissed and leave refused.

JUDGE

JUDGE

JUDGE

Islamabad
15.02.2024
'APPROVED FOR REPORTING'
Kehar Khan Hyder/-

[19] M. Hamad Hassan v. Isma Bukhari (2023 SCMR 1434).