

HIGH COURT OF AZAD JAMMU AND KASHMIR
(SHARIAT APPELLATE BENCH)

1. Family Appeal No.124/2023;
 Date of Institution. 19.04.2023,
 Date of Decision. 14.09.2023

Rizwan Shakar Son of Shairzaman Caste Mughal R/o
 Baseri, Tehsil Naseerabad Pattika District Muzaffarabad.

...Appellant

VERSUS

Sumera Shafique D/o Mohammad Shafique Kiani Caste
 Ghakhar R/o Ward No. 18, Chellah Bandi, Tehsil and
 District Muzaffarabad.

...Respondent

Family Appeal No.125/2023;
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 Ghakhar R/o Ward No. 18, Chellah Bandi, Tehsil and
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...Respondent

FAMILY APPEALS

Before:- **Justice Sadaqat Hussain Raja,**

Chief Justice

PRESENT:

Mr. Muzaffar Hussain Mughal, Advocate for the appellant.
Sardar Pervaiz Akhtar, Advocate for the respondent.

JUDGMENT:

The above titled partial appeals have been filed against the judgment and decree passed by the learned Additional District Judge/Judge Family Court, Muzaffarabad, dated 29.03.2023.

Facts of the case are that plaintiff, Sumera Shafique, filed four suits, 1st for dissolution of marriage on the basis of cruelty, 2nd for dower, 3rd for maintenance and 4th for recovery of dowry articles. The appellant, Rizwan Shakar, also filed suit for restitution of conjugal rights. The learned Court below consolidated all the suits and decreed the suit on basis of khula in favour of plaintiff/Sumera Shafique. The trial Court found that the husband had failed to provide maintenance to the wife for a period from 22.04.2021 to the period of Iddat and decreed the suit. The other suits were dismissed including the suit for restitution of conjugal rights filed by defendant/appellant. The appellant, Rizwan Shakar, filed separate appeals against the

suit decreed for dissolution of marriage on the basis of khula and the suit for maintenance allowance before this Court.

The plaintiff/respondent, Sumera Shafique stated in her suit filed before Court below that Nikah of supposes was solemnized on 23.04.2018 for a consideration of dower worth Rs. 6,00,000/- (Rupees 3,00,000/-as prompt dower) in shape of golden ornaments and Rs. 3,00,000/- as deferred dower in shape of 5 marlas land which consist of two rooms house along with kitchen and bath which was not given to her. After going through the process of law, the Court below dissolved the marriage on the basis of Khula and ordered that the plaintiff Sumera Shafique, has no right to claim dower as land consisting of two rooms kitchen along with bath and further decided that the appellant shall be entitled to get maintenance allowance from 22.04.2021 to the period of Iddat as Rs. 10,000/-.

Mr. Muzaffar Hussain Mughal, the learned counsel for the appellant has argued that the plaintiff/respondent failed to prove his case through cogent and convincing evidence. The learned counsel further argued that the plaintiff/respondent has left the house of appellant

through her own will and consent and the appellant is ready to re-settle with her. The learned counsel maintained that the appellant was abroad for earning his livelihood when the plaintiff/respondent left his house. He submitted that the court below fell in error while passing the impugned order because on the one hand the Court below dissolved the marriage on the basis of Khula and on the other hand the court below deducted some amounts of Khula without applying judicial mind which is against the injunction of Islam. He further submitted that dissolution of marriage on account of Khula is that the wife has to return what she has received from the husband. The learned counsel argued that the suit for dissolution of marriage on the basis of non-payment of maintenance allowance is a result of mis-reading and non-reading of evidence, hence, prayed for acceptance of appeals.

On other hand, Sardar Pervaiz Akhtar Advocate, the learned counsel for the respondent argued that the plaintiff has proved her case through cogent and convincing evidence. He further argued that the plaintiff remained deserted from September, 2018 but the respondent never

made any effort for reconciliation, so the court below has rightly dissolved the marriage on the basis of khula and rightly decreed the suit for maintenance allowance. The learned counsel further argued that when an extreme hatred has developed in the heart and mind of the plaintiff towards the defendant, therefore, it is impossible for her to live with the defendant.

I have heard the learned counsel for the parties and gone through the record of the case.

The learned counsel for the appellant mainly stressed on the point that the learned Family Court wrongly and illegally dissolved the marriage on the basis of Khula. The basis of the right of Khula is clearly explained in Verse No. 229 of Sura Baqra of Holy Quran which runs, Divorce may be (pronounced) twice; then keep (them) in good fellowship or let (them) go with kindness, and it is not lawful for you to take any part or what you have given them, unless both fear that they cannot keep within the limits of Allah; then if you fear that they cannot keep within limits of Allah, there is no blame on them for what she gives up to become free thereby, these are the limits of Allah, so do not exceed

them and whoever exceeds the limits of Allah, then those are the unjust.

The verse admittedly permits the termination of a marriage by the wife passing consideration to the husband. The question for consideration is whether this termination can be effected only by agreement between the husband and the wife or be not agreeable. The first point that deserve attention is that the words “if you fear” are addressed to the ulil-amr that is the State or the Judge. The words if your fear show that the Judge is to determine if the circumstances are such that there is apprehension of the spouses not observing the limits of God. If the parties agree, no such finding is needed and if without agreement there could be no termination of marriage, the determination by the Judge would become meaningless. The Judge is entitled to pass an order even though the husband does not agree. I quoted instances of Khula ordered by the Holy Prophet. Both relate to Sabit Ibn-i-Qais, in the first incident his wife Jamila came to the Prophet and stated her complaint in the following words:

“Oh Prophet of God, nothing can bring me and him together, when I raised my veil, he was coming from the front with some men, I saw that he was out of them the shortest and the ugliest. I swear by God I do not hate him because of any defect in him, religious or moral, but I hate his ugliness. I swear by God that if it was not fear of God I would have spit at his face when he came to me. Oh Prophet of God, you see how handsome I am, and Sabit is an ugly person. I don't blame his religion or his morals but I fear heresy in Islam. On hearing this the Prophet of God said to Jamila:

“Are you prepared to return the garden that he gave you”, She said; Yes Oh Prophet of God, and even more,”. The Holy Prophet said no more but you returned the Garden that he gave you, and then the Holy Prophet said to Sabit, Take the Garden and divorce her.

In the second incident is of Habiba, the other wife of Sabit, one day early in the morning when the Holy

Prophet (PBUH) came out of his house, he found Habib standing here. He inquired from her what the matter was and she said, I and Sabit can never pull on together, when Sabit appeared, the prophet of God said; This is Habiba, daughter of Sehl. She has stated what God wished should state.

Habiba said O, Prophet of God, let Sabit take from me whatever he has given me for that is all with me.” The Holy Prophet told Sabit to take back what he has given her and to release her. This is how the Holy Prophet (PBUH) enforced the right of Khula. In both the cases there was an order by him to Sabit to take back what he had given to the wife and to divorce her.

The right of the wife to claim a divorce is not only recognized by the Holy Quran and Hadith but also in Fiqh.. The object of marriage is the creation of a perfect and happy life by the conduct of the spouses and such a life can only be created if there be mutual love and affection and if the limits imposed by the God be observed. If for some reasons this is not possible, the object of marriage has been defeated and it is necessary that the door be opened to the parties for a

change. If on the object of the marriage being defeated, separation has not been allowed to the parties, this would have been a cruel limitation of the right of free choice and society would have been deprived of a happy married life. If the woman wants a divorce it can take place only by decision of the Judge because the husband has undertaken financial responsibilities with regard to this marriage. If the wife could divorce him on her own responsibility she would lose all that he had spent on her. It is necessary for the Judge to return back all the dower which was paid to wife by the husband.

In the instant case, the Court below decreed the suit to the extent of land measuring 5 kanal along with two rooms of house and also decreed the suit for maintenance. So, the appellant has to prove that his wife left his house on her free will and consent and she wants dissolution of marriage. In this regard, I have also perused the contents of Nikahnama, wherein, it transpires that total dower was fixed as Rs.6,00,000/-, wherein, Rs.3,00,000/- as prompt dower and Rs. 3,00,000/- as deferred dower in shape of two rooms house alongwith 5 marlas of land. I have also perused the

statement of plaintiff/Sumera Shafique. In her statement she categorically stated that after the marriage she remained settled with her husband for two to three months and they settled in Karachi and performed her part of marital obligations, however, the behavior of the appellant/defendant was very harsh and brutal towards her, he used to beat and abused and at last she was ousted by the appellant/defendant from his house. The plaintiff also stated that she returned from Karachi to Muzaffarabad with her parents. In cross examination, she admitted that she left the house of appellant in his absence. The plaintiff also deposed that she cannot live with her husband.

The appellant/defendant categorically stated that he wants to resettle the plaintiff. The appellant further deposed that the plaintiff left his house on her free will and consent. In the suit for maintenance, the appellant deposed that he never paid maintenance from 2021. He deposed as under:

یہ درست ہے کہ مدعیہ کو اپریل 2021ء سے کوئی خرچہ ادا نہ کیا از خود کہا کہ مدعیہ مظہر کے ساتھ آباد ہی نہ رہی۔

It is relevant to mention here that Khula is one of the recognized kind of divorce which is invoked by wife on offering compensation to husband for her release. It is

settled principle of law that under the Islamic injunctions when an extreme hatred has been developed in the heart and mind of a wife, it has become impossible for her to live with the husband then the wife can claim divorce on the basis of Khula. If a wife seeks dissolution of marriage on the basis of khula she must return all the benefits which she received as a dower. In my considered view, the appellant proved his case, hence, the plaintiff will be bound to return the entire dower.

So far as the suit for monthly maintenance allowance is concerned, the plaintiff deposed that she was pushed out of her marital abode in the year 2019. The defendant/appellant also deposed that the plaintiff went to her parent's home to meet with them and on instigation of other defendants, she refused to re-settle with him. The plaintiff in her statement stated that the respondent was taunting her and due to cruel attitude and mental torture she is unable to perform matrimonial relation. The mode of cross examination and suggestion put to the defendant during cross examination shows that the version of the plaintiff has been admitted. He stated during cross examination as follows:-

یہ درست ہے کہ مدعیہ کو اپریل 2021ء سے کوئی خرچہ ادا نہ کیا۔

It has, therefore, been admitted by the defendant/ appellant that the plaintiff was pushed out of her marital abode in the year 2021. It is the basic duty of the husband to maintain his wife. It may be stated here that the cruel attitude is not confined only to the extent of physical violence, it include the mental torture, hateful attitude of her husband or other inmates of the house and also includes other circumstances in which the wife is forced to abandon the house of her husband. So, the Court below has rightly decreed the suit for maintenance from 22.04.2021 till the period of iddat.

In light of what has been discussed above, the appeal filed by Rizwan Shakar, appellant is accepted by setting aside the judgment passed by the Additional District Judge/Family Judge, Muzaffarabad dated 29.03.2023, consequently their marriage is dissolved on the basis of khula. As depicted from Nikhanama that the Nikah between the parties was solemnized in lieu of Rs.6,000,00/- as Rs.3,000,00/- prompt dower and Rs.3,000,00/- as deferred dower from the husband at the time of Nikah. So, it is held that the wife is entitled to a decree for dissolution of

marriage in the suit for dissolution of marriage if she paid the whole dower as mentioned in the Nikahnama whether it is prompt or deferred dower.

The appeal No. 125/2023 filed by the appellant, Rizwan Shakar, for setting aside the decree for maintenance allowance is hereby dismissed with no order as to the costs.

Muzaffarabad
14.09.2023

CHIEF JUSTICE

Approved for reporting.

CHIEF JUSTICE