THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Bench:
Justice Syed Mansoor Ali Shah
Justice Jamal Khan Mandokhail
Justice Athar Minallah

Civil Petition No.308-P and 1388 of 2019
(Against judgment dated 03.4.2019 of the Peshawar High Court, Peshawar passed in Writ Petition No. 1341-P of 2016)

CP 308-P/2019

Dr.Faryal Maqsood and another ... Petitioner
Versus
Khurram Shehzad Durrani and others ... Respondents

For the petitioners: Mr. Waseem ud Din Khattak, ASC
(Through Video link Peshawar)

For respondent No.1: Barrister Umer Aslam, ASC
Ch.Akhtar Ali, AOR.

CP 1388/2019

Khurram Shehzad Durrani ... Petitioner
Versus
Dr.Faryal Maqsood and others ... Respondents

For the petitioners: Barrister Umer Aslam, ASC
Ch.Akhtar Ali, AOR.

For respondent No.1: Mr. Waseem ud Din Khattak, ASC
(Through Video link Peshawar)

Date of hearing: 03.5.2024

O R D E R

Athar Minallah.- Dr.Faryal Maqsood ('**plaintiff**') and Khurram Shahzad ('**defendant**') have filed separate petitions and they have sought leave against the judgment dated 04.3.2019 of the High Court.

2. The plaintiff and defendant had tied the knot on 10.9.2007 and later they were blessed with a son, Asadullah Durrani ('**minor**') on 18.12.2008. The marital disputes had strained their relationship which ultimately led to their separation in 2012. The

plaintiff filed a suit on 28.7.2012 seeking a decree for recovery of the dower expressly recorded in the *Nikah Nama,* Ex.PW-1/1 and the dowry articles. It was asserted in the plaint that the marriage was dissolved pursuant to a pronounced oral divorce by the defendant. The latter contested the plaint by filing a written statement. He had denied having divorced the plaintiff. However, the dower agreed upon and mentioned in the *Nikah Nama* was not denied. He had taken the stance that the dower to the extent of Rs.500,000/- and fifty (50) *Tola* gold, had been paid at the time of execution of the *Nikah Nama*. The share in the house was also not denied. The defendant had sought restitution of conjugal rights since he had taken the stance that the marriage was not dissolved as had been asserted in the plaint. The trial court had framed nine issues out of the divergent pleadings. The issues as to whether the marriage had been dissolved and whether the defendant was entitled to a decree of restitution of conjugal rights had been specifically framed. The suit was partially decreed by the trial court vide judgment and decree dated 29.5.2014. The decree granted in favour of the plaintiff was regarding the recovery of Rs.500,000/- and possession of the share in the house or, alternatively, its market price which were settled as dower in the *Nikah Nama*. However, the claim of dower to the extent of fifty *Tola* gold was dismissed. The claim regarding dowry articles was also partially decreed, which included fifty one (51) *Tola* gold. A decree was also granted regarding payment of maintenance in favour of the minor. Moreover, a decree for restitution of conjugal rights was granted which was made

subject to payment of the prompt dower. Both the parties had challenged the judgment and the decree handed down by the trial court by preferring separate appeals before the Additional District & Sessions Judge-V, Peshawar and they were decided vide judgment and decree dated 29.2.2016. While the appeals were pending, the defendant took a second wife and, therefore, an application was filed for raising an additional ground in the context of dissolution of marriage. It was her stance that taking a second wife in contravention of the provisions of the Muslim Family Laws Ordinance, 1961 ('**Ordinance of 1961**') was one of the grounds for dissolution of marriage under section 2 of the Dissolution of Muslims Marriages Act 1939 ("**Act of 1939**"). This additional ground was considered by the appellate court because it is obvious from its judgment. However, the appellate court ordered the dissolution of the marriage on the basis of *Khula*. As a consequence, it was declared that the plaintiff was not entitled to claim dower. The return of fifty (50) *Tola* gold received as dower was ordered to be adjusted against the fifty one (51) *Tola* gold decreed as dowry. It is noted that the plaintiff had not asked, expressly or impliedly, for dissolution of the marriage on the basis of *Khula* in lieu of foregoing the recovery of dower. The judgment and decree dated 29.5.2014 handed down by the trial court was modified to this extent. The defendant did not challenge the judgment and decree passed by the appellate court while it was assailed by the plaintiff before the High Court by invoking its extra ordinary constitutional jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 ('**the**

Constitution'). The High Court allowed the petition vide impugned judgment dated 04.3.2019. The order of the appellate court regarding dissolution of the marriage on the basis of *Khula* was set-aside. However, the High Court ordered the dissolution of the marriage on the ground of cruelty. The decree of the trial court regarding recovery of dower and dowry articles was thus restored.

3. We have heard the learned counsels for the parties at great length and they have also filed their respective written submissions.

4. The questions that have emerged for our consideration are: whether the trial court had rightly decreed the suit and had granted the relief prayed therein regarding recovery of dower, dowry articles and maintenance; whether the issue framed regarding restitution of conjugal rights and the decree granted to this extent involved adjudication of the question of validity and subsistence of the marriage; whether the appellate court fell in error by failing to decide the additional ground specifically raised regarding the taking of an additional wife and, instead, ordering the dissolution of marriage on the basis of *Khula* and, that too, in the absence of an express or implied demand, prayer or request having been made by the plaintiff; whether the High Court had rightly ordered the dissolution of the marriage on the ground of cruelty; whether clause (iia) of section 2 of the Act of 1939 subsists as a valid and enforced ground for dissolution of marriage; whether, in the facts and circumstances of the case before us, the courts were competent to order the dissolution of

marriage on the ground of section 2(iia) of the Act of 1939; whether the decree of the suit by the trial court was sustainable without granting a decree for dissolution of marriage.

5. The case before us has two distinct features; firstly, the decree regarding the recovery of dower, dowry articles and maintenance, as was specifically prayed in the plaint filed by the plaintiff and the decree regarding restitution of conjugal rights or dissolution of the marriage contract. We will, therefore, discuss the former feature first. It is not disputed that the suit was filed with specific prayers regarding dower, dowry articles and maintenance. The plaintiff had taken the stance that the marriage was dissolved pursuant to pronouncement of oral divorce by the defendant. The latter denied this assertion and sought restitution of conjugal rights. The trial court had framed nine issues which, inter alia, included whether the marriage was dissolved and whether the defendant was entitled to a decree for restitution of conjugal rights. The parties had produced their respective evidences but the plaintiff could not succeed in discharging the onus of proving the dissolution of marriage on the basis of an oral pronouncement of divorce by the defendant. The trial court granted the prayers sought in the plaint to the extent of dower, except fifty (50) *Tola* gold because, on the balance of probabilities, it stood proved that its possession was given to the plaintiff and that it remained with her. The claim regarding the recovery of dowry articles was partially decreed which included fifty one (51) *Tola* gold. The maintenance in favour of the plaintiff and the minor was also decreed besides setting out a

visitation schedule. These findings were not disturbed either by the appellate court nor the High Court. The findings regarding entitlement of dower, dowry articles, maintenance and the visitation schedule were concurrently upheld by three competent courts. However, since the appellate court had ordered the dissolution of the marriage on the basis of *Khula*, therefore, the entitlement of the plaintiff to recover dower on this basis alone was denied. As will be discussed later, the court could not have ordered dissolution of marriage on the basis of *Khula* when no such intention was shown by the plaintiff either expressly or impliedly. But, in this case, notwithstanding the question of dissolution of marriage, the decree regarding dower, dowry articles, maintenance of the minor and the visitation schedule was distinct and sustainable on its own.

6. The terms of a contract of marriage between a man and a woman are contained in the *Nikah Nama*. The terms and conditions are meant to secure the rights and intentions of both the wife and the husband. The *Nikah* is a social contract between parties who are competent to enter into a valid marriage contract. It is settled law that a presumption of truth is attached to the *Nikah Nama* and it enjoys the status of a public document. A strong presumption of truth exists regarding entries recorded in the *Nikah Nama*. The titles of columns 13 to 16 relate to 'dower'. Column 17 of the prescribed form is titled as 'special conditions if any'. The prescribed form nor the headings of the entries are conclusive for the purpose of ascertaining the intentions of the two parties to the marriage contract. This Court has held in the

Haseen Ullah's case[1] that the *Nikah Nama* is the deed of marriage contract entered into between the parties and its clauses/columns/contents are to be construed and interpreted in the light of the intention of the parties. The headings are not sufficient to determine the intention of the parties. It is also a settled principle of interpreting a contract that a court cannot imply something that is inconsistent with the express terms and a stipulation not expressed in the written contract can also not be applied merely because it appears to be reasonable to the court.[2] We will now examine what the parties had intended regarding the dower which was settled between them and duly recorded in the relevant entries of the *Nikah Nama*. It is noted that 'dower' is obligatory because it is an essential requirement of a valid marriage contract. The validity of marriage remains effective even if the dower has not been expressly mentioned in the marriage contract because, in such a case, a reasonable dower, '*Mehr-ul-Misal*' is presumed. Dower may be prompt or deferred. In case the parties have not specified the nature of the payment of dower then in such an eventuality it is presumed to be prompt as has been provided under section 10 of the Ordinance of 1961. It can be in the form of cash or property or both. In the case before us, the parties had settled an amount of Rs.500,000/- to be paid as cash 'on demand' and this was recorded in column 13 of the *Nikah Nama*. In column 14 the nature of dower i.e whether prompt or deferred was not specified

---

[1] Haseen Ullah v. Mst. Naheed Begum and others (PLD 2022 SC 686)

[2] Housing Building Finance Corporation v. Shahinshah Humayun Cooperative House Building Society and others (1992 SCMR 19)

since it was left blank. In column 15 it was clearly stated that jewellery weighing fifty (50) *Tola* gold was present i.e at the time of execution of the contract of marriage. In column 16 it was unambiguously recorded that the share of the defendant in the house had been registered in the name of the plaintiff. The columns read together clearly shows that in case of the latter two distinct categories of dower settled between the parties, the nature of dower was prompt. The payment of the cash amount was, however, on demand. The defendant, in his written statement, has not denied the settlement of the aforementioned three categories of dower. There is also no dispute regarding the description of the property in which the share was given to the plaintiff as dower because it stood admitted by the defendant in his written statement. These findings have been concurrently decreed and upheld by three competent courts and we are satisfied that no error has been pointed out requiring interference therewith.

7. The next question is regarding the status of the marriage contract. The plaintiff, in her plaint, had taken the plea that the defendant had pronounced oral divorce and, therefore, the marriage had been dissolved and this factum was denied by the latter. The defendant had instead sought restitution of conjugal rights and a specific issue was framed in this regard by the trial court. The plaintiff could not prove the assertion of pronouncement of oral divorce and the trial court granted a decree for restitution of conjugal rights. The appellate court modified the decree of the trial court and ordered dissolution of

marriage on the basis of *Khula* but did not adjudicate upon the fresh ground of taking an additional wife in contravention of the provisions of the Ordinance of 1961. The High Court concluded that the dissolution of the marriage was justified on the ground of cruelty. The dissolution of marriage and its adjudication was a question directly involved in the trial of the suit and implicit in the issue regarding restitution of conjugal rights. The defendant had accepted the dissolution of the marriage on the basis of *Khula* as had been ordered by the appellate court. In the circumstances, there is no force in the argument of the counsel for the defendant that this question could not have been adjudicated because no such prayer had been sought by the plaintiff in her plaint. This question also had consequences for the decree granted in favour of the plaintiff for recovery of dower as was obvious from the decree granted by the appellate court by ordering dissolution of the marriage on the basis of *Khula*. We, therefore, have to consider whether the appellate court was competent to grant a decree for dissolution of the marriage on the basis of *Khula* and whether the High Court had rightly modified it by ordering dissolution of the marriage on the ground of cruelty. Moreover, did the appellate court fall in error by entertaining the additional ground regarding dissolution of marriage on the ground of taking an additional wife but failing to adjudicate upon it.

8. There are various modes for lawfully dissolving the contract of marriage between a husband and wife. The primary mode is pronouncement of divorce by the husband or in case the right

has been delegated to the wife then exercise of such right by her. The Act of 1939 was enacted to consolidate and clarify the provisions of Muslim law relating to suits for dissolution of marriage by women who are married under the Muslim law. Section 2 sets out the grounds for a decree for the dissolution of a marriage. The statute was amended and a new ground was inserted i.e. clause (iia) in the Act of 1939 through Muslim Family Laws Ordinance of 1961 ('**Ordinance VIII**'). These amendments were made to give effect to the recommendations of the Commission on Marriages and Family Laws. Later section 13 of the Ordinance VIII was omitted through section 3 read with item no.18 of the second schedule of the Federal Laws (Revision and Declaration) Ordinance, 1981 ('**Ordinance of 1981**'). It is noted that the insertion of clause (iia) in section 2 of the Act of 1939 had taken effect and was enforced. It is an admitted position that the Act of 1939 was not amended nor was clause (iia) of section 2 omitted or repealed there from. The effect of omission of section 13 of Ordinance VIII through the Ordinance of 1981 did not affect the insertion of clause (iia) in section 2 of the Act of 1939. Moreover, it is obvious from the language of section 13 of Ordinance VIII that the insertion made in the Act of 1939 was not intended to be of transitory nature nor that it shall take effect for a limited period. There is nothing in the language to construe that it was intended that the insertion would lapse on a specific date or on the happening of some contingency. The ground of dissolution of marriage inserted in section 2 of the Act of 1939 as clause (iia), i.e taking an additional wife in contravention of the

provisions of the Ordinance of 1961, hence continued to be validly enforced and subsisting. This Court in the case of Abdul Majid[3] has observed that the purpose of such omission or repeal was to strike out unnecessary enactments and cannot be construed as having brought any change in the relevant statute which was amended or in which provisions were inserted. The aim of the repeal or omission of those sections through which some other statute was amended was termed by this Court as 'legislative spring cleaning'. Section 7 of the Ordinance of 1981 expressly saved the effect of the repealed laws. It expressly provides that the repeal shall not affect the continuance of any such amendment unless a different intent was expressly stated in the law by which the amendment was made. Section 6-A of the General Clauses Act 1897 ('**Act of 1897**') provides that where any Central Act or Regulation repeals any enactment by which the text of any Central Act or Regulation was amended by the express omission, insertion or substitution of any matter, then, unless a different intention appears, the repeal shall not affect the continuance of any such amendment made by the enactment so repealed and in operation at the time of such repeal. As already noted, it is obvious from the clear language used in section 13 of Ordinance VIII that a different intention cannot be construed. The learned counsel for the defendant has drawn our attention to the judgment of the Peshawar High Court in the case of Rashid Ali[4] in support of his contention that clause (iia) inserted in

[3]Abdul Majid etc. v. Shahzada Asif Jan etc. (PLD 1982 SC 82)
[4]Syed Rashid Ali Shah v. Mst. Haleema Bibi and others (PLD 2014 Peshawar 226)

section 2 of the Act of 1939 stood repealed. With great respect, the view taken by the High Court appears to have been formed without taking into consideration the above factors, particularly section 7 of the Ordinance of 1981. The opinion of the High Court is per incuriam.

9. We, therefore, hold that the repeal of section 13 of Ordinance VIII through the Ordinance of 1981 did not affect the validity and enforcement of the insertion made in the Act of 1939 and, therefore, clause (iia) of section 2 of the Act of 1939 continues to be one of the valid, effective and subsisting grounds for dissolution of marriage. Clause (iia) of section 2 of the Act of 1939 enables a woman married under the Muslim Law to obtain a decree for dissolution of marriage if the husband has taken an additional wife in contravention of the provisions of the Ordinance 1961. Section 6 of the Ordinance of 1961 sets out the requirements and procedure which are to be complied with by a husband who intends to take an additional wife. It provides that a husband, during the subsistence of an existing marriage, shall not contract another marriage except with the previous permission in writing of the Arbitration Council. In conformity with these provisions a husband is required to file an application for permission under sub-section 1 of Section 6 of the Ordinance of 1961 to the Chairman of the Arbitration Council, stating therein the reasons for the proposed marriage and whether the consent of the existing wife or wives has been obtained thereto. On receiving the application, the Chairman asks the applicant and his existing wife or wives to nominate their respective

representative. After the Arbitration Council is satisfied that the marriage was necessary and just, it may grant permission subject to such conditions, if any, as it may deem fit to impose. In deciding the application the Arbitration Council is required to record its reasons for the decision. Any party may prefer the remedy of revision before the Collector concerned. The consequences for taking an additional wife in contravention of the aforementioned provisions have been expressly described under sub-section 5 of section 6 ibid. In case of contravention the husband becomes immediately liable to pay the entire amount of dower, whether prompt or deferred, due to the existing wife or wives and, secondly, on conviction may be sentenced to simple imprisonment which may extend to one year, or a fine or both. In order to invoke the ground under clause (iia) of section 2 of the Act of 1939 all that the wife is required to show is that the husband had taken the additional wife in contravention of the Ordinance of 1961 as set out in section 6 ibid. In the case before us, the defendant had taken an additional wife while the appeals against the decrees passed by the trial court were pending. An additional ground was taken by the plaintiff and it is obvious from the judgment of the appellate court that such a ground was entertained. It is also apparent from the judgment that the defendant had submitted a reply. It stood established that the provisions of the Ordinance of 1961 had been contravened since neither any application was filed nor the permission of the Arbitration Council was sought in accordance with the requirements set out under section 6 ibid. However, instead of

adjudicating this ground, the appellate court had ordered the dissolution of the marriage on the basis of *Khula*. This form of dissolution was accepted by the defendant as it was not challenged by him before the High Court. The learned counsel for the defendant has argued that the matter should be remanded to the appellate court because it would require recording of evidence. He has also advanced arguments in support of the dissolution of marriage by the appellate court on the basis of *Khula*. Before we examine the argument regarding remanding the case to the appellate court, it would be appropriate to advert to the question of whether the appellate court was justified in ordering dissolution of the marriage on the basis of *Khula*.

10. *Khula* is one of the modes for dissolving a marriage. It can either be on the basis of mutual settlement/arrangement between the spouses or it can be ordered by a court if the requisite conditions are met. This court in the case of Khurshid Bibi[5] has held that *Khula* is a right and privilege of the wife to seek dissolution of marriage. It is a right which is exclusively conferred on the wife. *Khula* through judicial order is thus dissolution of marriage by the court/Qazi on the demand of the wife. It authorises the court to dissolve the marriage in an appropriate case against the will or consent of the husband. However, a court on its own cannot order dissolution of the marriage on the basis of *Khula* when it has not been sought by the wife either expressly or impliedly. It has further been observed

[5]Mst. Khurshid Bibi v. Baboo Muhammad Amin (PLD 1967 SC 97)

that the question of *Khula* was a subject matter of a specific issue between the parties in the case before this Court. It has been noted in the judgment that the wife in her plaint had consented to the dissolution of marriage on the basis of *Khula*. The learned counsel for the defendant has placed reliance on Muhammad Arif's case[6] in support of his contention that a court is competent to order dissolution of marriage on the basis of *Khula* even though it may not have been sought by or consented to by the wife. We have carefully perused the judgement rendered by a Bench consisting of two hon'ble judges of this Court but, with respect, we have noted that the Bench had not considered the law enunciated by this Court in Khurshid Bibi's case *(supra)* which was rendered by a larger bench consisting of five hon'ble judges. The appellate court, therefore, fell in error by granting a decree for the dissolution of marriage on the basis of *Khula* when it was not sought by the plaintiff nor had she given express or implied consent thereto as was the case in Khurshid Bibi's case supra. The next question is whether the High Court had validly modified the decrees by ordering the dissolution of the marriage on the ground of cruelty.

11. The Act of 1939 has set out the grounds which entitles a wife married under the Muslim Law to obtain a decree for dissolution of marriage. Clause (a) provides that a marriage could be dissolved if the husband treats the wife with cruelty i.e. habitually assaults her or makes her life miserable even if such

---

[6]Muhammad Arif v. Saima Noreen and another (2015 SCMR 804)

conduct does not amount to physical ill-treatment. Cruelty may be mental or physical. This court, in the case of Mst. Tayyeba Ambareen,[7] has dealt with various forms of conduct or behaviour that would entitle a wife to seek a decree for dissolution of marriage on the ground of cruelty. In this case the trial court had framed a specific issue whether the plaintiff was mentally or physically tortured by the defendant. The former could not discharge the onus placed upon her and, therefore, it was decided in the negative. The High Court, while exercising its jurisdiction vested under Article 199 of the Constitution, could not have decided questions involving determination of facts requiring recording of evidence. No further evidence was recorded after the trial was concluded by the trial court. The High Court has also not recorded any reasons in support of its conclusion to order dissolution of marriage on the ground of cruelty. The High Court, therefore, fell in error by ordering dissolution of marriage on the ground of cruelty.

12. The defendant had taken an additional wife while the appeals were pending. Admittedly, the provisions of the Ordinance of 1961 and the requirements set out there in were not complied with. It is, therefore, not disputed that the additional wife was taken in contravention of the provisions of the Ordinance of 1961. The dissolution of the marriage was one of the issues involved and adjudicated upon by the courts. As already noted, the appellate court fell in error by ordering the dissolution of marriage on the basis of *Khula*. The ground for

[7]Mst. TayyebaAmbareen v. Shafqat Ali Kiyani (2023 SCMR 246)

dissolution of marriage in terms of clause (iia) of section 2 of the Act of 1939 was taken before the appellate court and it was also entertained as is obvious from its judgment. However, it was not adjudicated upon. The defendant had filed his reply and the latter had not denied the contravention of the provisions of the Ordinance of 1961 relating to taking an additional wife. The learned counsel for the defendant, in response of our query and after seeking instructions, had conceded that the additional wife was taken without the permission of the Arbitration Council in the manner contemplated under section 6 of the Ordinance of 1961. However, he has argued that the matter was required to be remanded to the appellate court for recording of evidence. This argument is misconceived because the contravention of section 6 of the Ordinance of 1961 stands admitted. Clause (iia) of section 2 of the Ordinance of 1961 provides that taking an additional wife by the husband in contravention of the provisions of the Ordinance of 1961 was one of the grounds for dissolution of marriage. In the case before us it will be a futile exercise to remand the matter to a lower court. Admittedly, neither the defendant had applied to nor the Arbitration Council had granted permission as contemplated under section 6 of the Ordinance of 1961. In the circumstances, we hold and declare the dissolution of the marriage between the plaintiff and the defendant on the basis of the ground described under clause (iia) of section 2 of the Act of 1939. We further hold that the appellate court and the High Court fell in error by ordering the dissolution of the marriage between the plaintiff and the defendant on the ground of *Khula*

and cruelty respectively. The decree of the trial court to the extent of restitution of conjugal rights is thus not sustainable. The judgments and decrees to the extent of restitution of conjugal rights and dissolution of the marriage on the ground of *Khula* or cruelty are declared to be illegal and accordingly set aside. The decrees granted by the trial court regarding dower, dowry articles, maintenance and visitation schedule shall, therefore, sustain and accordingly upheld.

13. We, therefore, convert the petitions filed by the plaintiff and defendant into appeals and they are allowed in the above terms. The decree granted by the trial court shall, therefore, stand modified accordingly.

Judge

Judge

Judge

Announced in open Court on **23rd October 2024**

Judge

APPROVED FOR REPORTING

Aamir Sh./RemeenMoin, LC