

[Peshawar]

Before Waqar Ahmad Seth and Mrs. Irshad Qaiser, JJ

SAJID HUSSAIN TANOLI---Petitioner

Versus

NADIA KHATTAK and 3 others---Respondents

Writ Petition No.277 of 2010, decided on 28th May, 2013.

(a) Muslim Family Laws Ordinance (VIII of 1961)---

---Ss. 7 & 8---Talaq-e-Tafweez---Scope---Kinds---Power to give divorce vested with the husband who might delegate the same to the wife or to a third person---Person to whom such power was delegated might then pronounce the divorce accordingly---Such divorce was known as "Talaq-e-Tafweez"---Delegation of power called "Tafweez" by the husband to his wife, conferred on her the power to divorce herself---Tafweez was of three kinds; Ikhtiar; Amr-ba-yed and Mashiat---Wife could not sue to enforce the authority to have been given to her but she could sue after she had given effect to it to make the husband liable for her dower or to restrain from seeking conjugal relations.

PLD 1995 Lah. 187; 1999 YLR 2399 and PLD 2011 Lah. 265 rel.

(b) West Pakistan Family Courts Act (XXXV of 1964)---

---S. 5, Sched.---Muslim Family Laws Ordinance (VIII of 1961), Ss.7 & 8---Constitution of Pakistan, Art.199---Constitutional petition---Talaq-e-Tafweez---Scope---Suit for recovery of maintenance allowance and dower---Contention of the wife was that due to cruel and humiliating attitude of the husband she was compelled to exercise her right of delegation of divorce---Validity---Wife was entitled to exercise her right of Talaq-e-Tafweez and to be separated from her husband---Same could not be termed as Khula---Talaq once pronounced would be effective after expiry of 90 days---Nikah Nama with all its contents had been admitted by the husband---Right of divorce had been delegated to the wife by the husband---No condition or contingency existed in the Nikah Nama---Wife had exercised delegated power of divorce and had repudiated herself through notice duly served upon the husband and copy of which was sent to Union Council in view of Ss.7 & 8 of Muslim Family Laws Ordinance, 1961 stating therein that by

virtue of Talaq-Tafweez it was not possible for her to live with the husband as wife---Notice was exhibited without any objection on the part of husband---Once a person pronounced divorce, the power so delegated became irrevocable and such would operate as Talaq of the wife by the husband---Dissolution of marriage in the present case could not be considered as divorce by khula---Husband admitted that the dower was rightly fixed but failed to prove the payment of the same---Both Courts, in circumstances, had rightly decreed the amount of dower in favour of wife---Constitutional petition was dismissed.

PLD 1963 Dacca 602 and 2000 CLC 202 rel.

Miss Sumera Swati for Petitioner.

Mrs. Shabnum Nawaz for Respondents.

Date of hearing: 28th May, 2013.

JUDGMENT

MRS. IRSHAD QAISER, J.--- Petitioner Sajid Hussain Tanoli, through this writ petition has challenged the judgment and decree dated 10-3-2010, passed by learned Additional District Judge-IV, Abbottabad as well as the judgment and decree dated 7-1-2010, passed by Judge Family Court-XI, Abbottabad with the prayer that on acceptance of the present writ petition, the judgment and decree of both the Courts below be set aside/modified and suit of the petitioner regarding the restitution of conjugal rights and recovery of car be decreed while the decree for recovery of dower in favour of respondent-plaintiff No.1 be set aside and the past and future maintenance allowances of respondent-plaintiff No.2 be decreed as per financial condition and status of petitioner.

2. The brief facts of the case in small compass are that Mst. Nadia Khattak respondent-plaintiff No.1 had brought a suit for recovery of past as well as future maintenance for minor Dia Sajid plaintiff No.2 along with recovery of Rs.10,00,000/- as dower against petitioner.

3. As per averments of plaint, parties were married to each other on 16-6-2008. As a result of this wedlock spouses were blessed with a daughter namely Dia Sajid. In the beginning the relation between the parties remained cordial and harmonious, however, later a dispute arose due to the conduct of defendant husband, who used to torture her physically and mentally. He used to blackmail her as he is very greedy person and plaintiff bore all the cruelty for the sake of honour of her family. She also afforded the birth expenses of plaintiff No.2. Due to the cruel and humiliated attitude, she was compelled to settle herself with her brother, as her parents are dead; that whenever she asked the defendant for rehabilitation he demanded different things including car in lieu of settlement. This behaviour of defendant compelled her to exercise her right of delegation of divorce, as given to her in Column No.18 of Nikah Nama and she issued notice on 16-8-2008. Since the defendant had neither paid any maintenance allowances nor dower, fixed in the Nikah Nama, therefore, she is entitled for dower of Rs.10,00,000/- and maintenance allowance for minor daughter. Defendant/petitioner was summoned, who attend the Court and contested the suit mainly on the ground that he had never delegated the powers of Talaq-Tafweez

to plaintiff and she had neither any right to issue a notice of divorce nor to repudiate the marriage.

4. The learned trial Court framed the issues from the pleadings of the parties. After recording evidence and hearing of arguments, the learned trial Court vide judgment and order dated 7-1-2010 passed decree for recovery of Rs.10,00,000/- as dower in favour of respondent No.1 and future maintenance allowance at the rate of Rs.5000/- Per Month with 25 per cent increase per annum in favour of respondent No.2 till her marriage. Decree was also granted in favour of petitioner against respondent No.1 for recovery/return of car or its price. Both the parties being dissatisfied with the findings of the trial Court filed their respective appeals and have called in question vires of the said judgment and decree. Both the appeals were partially allowed by making modification in the impugned judgment and decree of trial Court in the manner that minor is entitled to past maintenance w.e.f. June, 2008 at the rate of Rs.3000/- per month with 10 per cent increase per annum and future allowance at the same rate till her marriage. While relief to the extent of recovery of car was reversed. Hence, the writ petition.

5. It is contended by the learned counsel for the petitioner that both the Courts below, while passing the impugned judgment, erred at law by not equating the delegated power of divorce with that of Khula. They caused grave miscarriage of justice at the cost of misinterpretation of settled law; that no divorce has been effected between the parties. Rather the marital tie is still in existence that is why the petitioner has filed a suit for restitution of conjugal rights. That he had never delegated any right of Talaq-e-Tafweez to his wife through Nikah Nama; that Column No.18 of Nikah Nama has wrongly been interpreted by the Courts below. That the respondent could exercise this right in accordance with Sharia, if at all delegation of right is admitted to be correct, it would amount to khullah and not simple divorce as this is only prerogative of husband / male spouse to exercise right of divorce and not the female spouse, who can seek khula only. Thus respondent cannot ask for recovery of dower. That appellate Court failed to read the evidence produced by the parties inter se regarding question of car. Hence, taking the issue out of the ambit of Schedule-II of Family Courts Act, 1964 is in utter violation of Article 25 read with Article 29 of Constitution. That the present financial status of the petitioner while fixing the maintenance of minor has totally been ignored by Courts below.

6. These arguments were rebutted by learned counsel of respondent who relied on the judgments/decree of the Courts below. It is contended that it is proved from the record and as admitted by petitioner that power of divorce has been delegated to her at the time of Nikah in Column No.18 of Nikah Nama. It has rightly been exercised by her and issued notice to petitioner and now the divorce has become final on the expiry of a period of 90 days. It cannot be considered as khula and thus, the decree of Rs.10,00,000/-has rightly been granted in her favour.

7. We have heard at length both the parties and have perused the oral as well as documentary evidence available on record.

8. A meticulous recital of available record would transpire that facts to this extent appeared to be undisputed that parties were married on 16-6-2008 in consideration of dower amount of Rs.10,00,000/- and Nikah Nama was executed. They were blessed with a daughter, but unfortunately the relation between the parties became strained and she was compelled to leave the house of her husband. Now the main question for determination is that whether respondent-plaintiff was possessed with the power of Talaq-e-Tafweez duly delegated by the petitioner and she had rightly exercised this right in accordance with shariah?. Whether Talaq is the exclusive right/power of husband and any other mean for dissolving the marriage, may that be delegated right to the wife, shall not be equated with Talaq, but to be treated as khullah?. Whether the decree for dower has rightly been given to plaintiffs?.

9. Although the power to give divorce belongs to the husband, yet he may delegate the power to the wife or to a third person, either absolutely or conditionally, and either for a particular period or permanently. The person to whom the power is thus delegated may then pronounce the divorce accordingly. Such a divorce is known as "Talaq by Tafweez". The delegation of option called "Tafweez" by the husband to his wife, confers on her the power to divorce herself. Tafweez is of three kinds:

- (a) Ikhtiar, giving her the authority to divorce herself.
- (b) Amr-ba-yed, leaving the matter in her own hand.
- (c) Mashiat, giving her the option to do what she likes.

All these when analyzed, resolve themselves into one, viz, leaving it in her or somebody else to option to do what she or he likes. The wife cannot sue to enforce the authority alleged to have been given to her, but she sues after she has given effect to it, to make the husband liable for her dower or to restrain him from seeking conjugal relations.

10. The Holy Quran being a Code itself provides that it is a simple Deen and anybody, who makes it complicated will stand ostracized. The provisions of Islam in respect of divorce are very simple and balanced. The God has fixed the limits and no one can transgress over it. Here, guidance is sought from Ayat No.28, 29. Sura Al-Ahzab 33 of Holy Quran wherein it is mentioned as;---

11. The matter has been interpreted by Maulana Modudi in Tafseer-ul-Quran in the following words;---

Reference is made to PLD 1995 Lahore 187, wherein it is held that:---

"Under Mohammadan Law,

"Husband enjoys an absolute power of divorce to his wife. He may delegate this power to his wife by way of a contract. As a man in person repudiates his wife so he may commit the power of repudiation to his wife to repudiate herself. This power may be conferred on a third party as well. (Wilson Anglo Mahomedan Law, Edn. VI and Baillie Digest of Mahomedan Law, Book H, Chapter III).

When such power of repudiation is conferred on the wife or some third person the divorce will take effect, if the power so conferred is exercised Mahomedan Law by Tayyabjee and Buffatan Bibi v. Sh. Abdul Salim AIR 1950 Calcutta 304. This power can be a conditional

power or rests upon the happening of some contingencies. IT can also be unconditional. When it rests upon the happening of certain contingencies then the wife should exercise the delegated power of divorcing herself when the condition entitling her to exercise that power is fulfilled. But if that power is unconditional she may exercise the same when and where required. In both these circumstances a formal pronouncement of Talaq is necessary."

Reference is also made to 1999 YLR 2399.

At this stage it would be proper to give reference to the relevant provisions of Muslim Family Laws Ordinance, 1961.

Section 7 of Muslim Family Laws Ordinance, 1961 provided that:---

(1) "Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of talaq in any form whatsoever, give the Chairman a notice in writing of his having done so, and shall supply a copy thereof to the wife.

(2)

(3)

(4) Within thirty days of the receipt of notice under subsection (1), the Chairman shall constitute an Arbitration Council for the purpose of bringing about reconciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation.

(5)

(6)

12. Section 8 of the Ordinance *ibid* further provided that;

"Where the right to divorce has been duly delegated to the wife and she wishes to exercise that right, or whereby any of the parties to a marriage wishes to dissolve the marriage otherwise than by Talaq, the provisions of section 7 shall, *mutatis mutandis* and so far as applicable, apply."

13 This Section specifically provides for this form of Talaq i.e. "Talaq-e-Tafweez", whereby

husband delegating the right of divorce to the wife or to a third person either absolutely or conditionally and either for a temporarily period or permanently and laid down that the procedure provided in section 7 for divorce shall have to be followed. The words of section 7(1) "after the pronouncement of Talaq in any form whatsoever" will de note also the divorce in writing which has been recognized by the Muslim Jurist.

Reference is made to PLD 2011 Lahore 265, wherein it is held;--

"Where wife exercised the delegated right of divorce, S.8 of the Muslim Family Laws Ordinance, 1961 provided that provisions of S.7 of the Muslim Family Laws Ordinance, 1961 would apply mutatis mutandis---No formal mode for exercise of the right was prescribed---Notice in writing to the Chairman, Arbitration Council about the exercise of the right was the only requirement---Wife had duly made the pronouncement by executing the deed and transmitting the copies to the husband and the Chairman, Arbitration Council---Petitioner's contention that divorce was not `talaq' so the execution of divorce deed did not amount to `talaq' was misconceived---Divorce meant dissolution of marriage (talaq) and separation---Under S.7(3) of the Muslim Family Laws Ordinance, 1961, notice of `talaq', if not revoked, will become effective after expiry of 90 days of its delivery to the Chairman, Arbitration Council---Constitutional petition was dismissed."

Keeping in view the above discussion, it is manifestly clear that wife is entitled to exercise her right of Tafweez of Talaq and she is entitled to be separated from her husband. It cannot be termed as Khullah. In such situation Talaq once pronounced would be effective after expiry of 90 days, unless it is revoked by the husband or by wife exercising her right of "Talaq-i-Tafweez". This would be so notwithstanding conduct of the parties.

14. Keeping in view the above principle in mind it is to be seen whether the right of divorce was delegated to respondent by petitioner and she has rightly exercised this right? In the present case, both the parties produced the copies of the Nikahnama carrying a stipulation against Column No.18 about the delegation of Talaq Tafweez. From perusal of contents of Nikah Nama, marked as Exh.P.W1/6, it transpires that the following entries were made in column No.18.

This Nikah Nama has been exhibited without any objection on the part of the petitioner/defendant. The Nikah Nama produced by defendant also carries the same entries with following words;

15. Copies produced by both the parties do not disclose any difference except the change in wording of entry in Column No.18 but making no difference in interpretation. Petitioner was examined as DW.6. In his cross-examination he categorically admitted Nikah Nama along with all its contents to be true.

16. Both the deeds and the admission of petitioner clearly show that right of divorce has been delegated to the wife/respondent in accordance with shariah. A careful perusal of the registered Nikah Nama would show that no condition or contingency existed over there. Meaning thereby the delegation of Talaq Tafweez by the petitioner; was unconditional. Since the entries against Column No.18 of Nikah Nama are very clear and respondent/plaintiff has exercised that delegated powers of divorce i.e. Talaq Tafweez and has repudiated herself, through a notice dated 16-8-2008 Exh.P.W1/1 duly served upon the petitioner and copy of which is sent to Union

Council according to sections 7 and 8 of Muslim Family Laws Ordinance, 1961 stating therein that by virtue of Talaq Tafweez as it is not possible for her to live with the petitioner as wife and husband and she repudiates herself. The notice was exhibited without any objection on the part of the petitioner. In her statement as P.W.1, respondent has given the detail of entries in Column No.18 of Nikah Nama as well as the issuance of receipt of notice. Though, she was cross-examined in length but petitioner was not able to rebut the contention of plaintiff, rather in his statement he admitted the relevant entry in Column No.18 of the Nikah Nama. It is proved from record that the petitioner has delegated the power of divorce to his wife.

17. According to Muhammadan Law once a person to whom the power of divorce is delegated pronounces divorce, the power so delegated becomes irrevocable and this will operate as Talaq of the wife by husband.

Reference is made to PLD 1963 Dacca 602. Reference is also made to 2000 CLC Lahore 202 wherein it is held;

"Sections 7 and 8 of Muslim Family Laws Ordinance, 1961 Divorce-Delegated power of divorce only that divorce would become final on the expiry of a period of 90 days, which was pronounced by a person having validity delegated power of divorce-where the question of delegation of right of divorce of the wife was undisputed or was such as was admitted by husband to be correct, in that event the divorce would have become final on the expiry of period of 90 days."

18. Since the right of "Tafweez of Talaq" is delegated right, therefore it cannot be termed as khulla by making wife liable to return dower. There is much difference between prayer of Khulla and exercise of delegated right of divorce. In latter wife can repudiate marriage herself, while in former, wife has to seek divorce/dissolution of marriage from her husband or from Court. In such a state of affairs, dissolution of marriage in the present case cannot be considered as divorce by khula. It appears from record that the petitioner has not raised such plea of khula at the trial stage and now he raised this plea only to deprive the respondent from her dower amount. He admitted that the dower mentioned in Column No.13 and 14 of Nikah Nama was rightly fixed but he failed to prove the payment of dower amount of Rs.10,00,000/-. Both the Courts below have rightly granted a decree of dower Rs.10,00,000/- in favour of respondent. Moreover, the finding of the appellate Court in respect of maintenance allowance and recovery of Liana car or price thereof is also correct and need no interference of this Court by exercising the right of writ jurisdiction. We see no substance in the present petition; which is dismissed with no order as to cost.