

**SUPREME COURT OF AZAD JAMMU AND KASHMIR**  
[Appellate Jurisdiction]

**PRESENT:**

*Mohammad Azam Khan, C.J.*  
*Raja Saeed Akram Khan, J.*

Civil Appeal No.298 of 2015  
(PLA filed on 18.05.2015)

Abdul Hameed son of Ameerullah, caste Rajpoot, r/o Panjore, Tehsil Naseerabad, District Muzaffarabad.

....APPELLANT

**VERSUS**

Mst. Naseema Bibi daughter of Faqeer Muhammad, w/o Abdul Hameed, r/o Sarli Sacha, Tehsil Naseerabad, district Muzaffarabad at present r/o Muhallah Shah Sultan, District Muzaffarabad.

..... RESPONDENT

(On appeal from the judgment and decrees of the Shariat Court dated 18.03.2015 in civil appeals No.31 and 32 of 2012)

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FOR THE APPELLANT: Raja Aftab Ahmed,  
Advocate.

FOR THE RESPONDENT: Mir Abdul Lateef,  
Advocate.

Civil Appeal No.299 of 2015  
(PLA filed on 19.05.2015)

Mst. Naseema Bibi daughter of Faqeer  
Muhammad, r/o Sarli Sacha, Tehsil  
Naseerabad, district Muzaffarabad at present  
r/o Muhallah Shah Sultan, District  
Muzaffarabad.

....APPELLANT

**VERSUS**

Abdul Hameed son of Ameerullah, caste  
Rajpoot, r/o Panjore, Tehsil Naseerabad,  
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(On appeal from the judgment and decrees of  
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FOR THE APPELLANT: Mir Abdul Lateef,  
Advocate.

FOR THE RESPONDENT: Raja Aftab Ahmed,  
Advocate

*Date of hearing:* 18.01.2017

**JUDGMENT:**

**Raja Saeed Akram Khan, J.**— The appeals (supra) by leave of the Court have been directed against the judgment and decrees of the Shariat Court dated 18.03.2015, whereby the appeal filed by the Abdul Hameed (appellant in appeal No.298), has been partly accepted, whereas, the appeal filed by Mst. Naseema Bibi (appellant in appeal No.299), has been dismissed. As both the appeals arise out of the same judgment, therefore, these are being disposed of through this single judgment.

2. The facts in brief are that the plaintiff, Mst. Naseema Bibi, filed three suits on 20.09.2010, in the Court of Judge Family Court, Muzaffarabad; one, for jactitation of

marriage, the second for recovery of maintenance allowance, and; the third for recovery of dower. It is averred in the suit filed for jactitation of marriage that the marriage between the spouses was solemnized on 31.03.2006, in lieu of dower amounting to Rs.4,25,000/-, out of which Rs.40,000/- were paid to the plaintiff at the time of *Nikah*, in shape of gold-ornaments, whereas, the remaining amount, i.e. Rs.3,85,000/- was fixed as deferred dower. It is averred that the defendant, Abdul Hameed also agreed to pay Rs.6,000/- per month to the plaintiff, Mst. Naseema Bibi. After a passage of fourteen days of the marriage, the defendant proceeded abroad and took away the jewelry from the plaintiff. Furthermore, two agreements were executed between the parties on 30.03.2006 and 23.12.2009 wherein, it was agreed that in case of non-fulfillment of the conditions of the

agreements, the right of divorce will be delegated and devolved upon the plaintiff. The defendant failed to fulfill the conditions imposed in the agreements, whereupon, the plaintiff exercised the delegated powers of divorce on 24.08.2010, in presence of the witnesses and now she has no relation with the defendant. She prayed that the defendant be restrained to write/call the plaintiff as his wife as she has divorced herself and in alternate she also prayed for decree for dissolution of marriage. In the second suit for recovery of maintenance allowance, the claim of the plaintiff is that the defendant himself agreed to pay Rs. 6000/- per month as maintenance allowance to the plaintiff but he did not pay the same, therefore, she is entitled to get the maintenance allowance from 24.04.2006 to 23.12.2009 and 10.02.2010 to 24.08.2010 and from 24.08.2010 to till the

completion of period of *iddat*, total amounting to Rs.3,33,000/-. In the third suit for recovery of dower, she claimed that the dower was fixed as Rs.4,25,000/- out of which only Rs.40,000/- were paid to her in shape of gold-ornaments. Later on, the defendant took the gold-ornaments back, therefore, the whole dower amount is outstanding against the defendant and she is entitled to get the same. The defendant-appellant, Abdul Hameed, also filed a counter suit for restitution of conjugal rights on 21.07.2011. In the counter suit the defendant refuted the version of the plaintiff, Mst. Naseema Bibi and submitted that she is still his wife and is bound to perform the marital obligations. The trial Court consolidated all the four suits and after necessary proceedings decreed the suit filed for jactitation of marriage and recovery of maintenance allowance while holding that the

plaintiff is entitled to get the maintenance allowance from February 2010 to November 2010 at the rate of Rs.5,000/- per month. The other suit for recovery of dower filed by the plaintiff, Mst. Naseema Bibi and the counter suit filed for restitution of conjugal rights were dismissed by the trial Court. Feeling dissatisfied, both the parties filed separate appeals before the learned Shariat Court. The learned Shariat Court vide impugned judgment dated 18.03.2015, while partly accepting the appeal filed by Abdul Hameed (appellant), set aside the judgment and decree of the trial Court to the extent of recovery of maintenance allowance, however, maintained the decree for jactitation of marriage. Hence, these appeals by leave of the Court.

3. Raja Aftab Ahmed Khan, Advocate, the learned counsel for the appellant, Abdul Hameed, argued that the judgments of the

Courts below are based on misreading and non-reading of evidence as well as misinterpretation of law. He contended that through the agreement dated 30.03.2006, it was agreed between the parties that if the appellant failed to purchase a separate house for the respondent (wife) then she will be entitled to exercise the power of divorce. As the appellant in compliance of the agreement had purchased a house and a plot for the respondent, therefore, the respondent could not exercise the power of divorce. The respondent exercised the right of divorce without lawful authority, therefore, the act done by the respondent has no value in the eye of law and she is still wedded wife of the appellant. He further added that the appellant has been paying the maintenance allowance to the respondent even when he was abroad and he proved this fact by producing the



documentary as well as oral evidence, however, the respondent is not entitled to get the maintenance allowance for the period in which she has not performed the marital obligations. Furthermore, the appellant had also given the gold-ornaments amounting to Rs. 40,000/- and Rs.50,000/- to the respondent at the time of *Nikah* but the Courts below have not considered this aspect of the case. He forcefully contended that in the Family Court Act, the provisions of Qanun-e-Shahadat, 1984 are not applicable but the trial Court erroneously passed the judgment on the strength of article 79 of Qanun-e-Shahadat and this aspect of the case also escaped the notice of the learned Shariat Court while passing the impugned judgment.

4. On the other hand, Mir Abdul Latif, Advocate, the learned counsel for the appellant, Naseema Bibi, strongly opposed the

arguments advanced by Raja Aftab Ahmed Khan, Advocate. He submitted that the dower was fixed as Rs.4,25,000/- out of which only an amount of Rs.40,000/- was paid at the time of *Nikah*. Later on, the gold-ornaments were also snatched by the respondent. In such situation, the appellant is entitled for recovery of the whole dower amount, i.e. Rs.4,25,000/- . The Courts below at one hand accepted the claim of the appellant that dower has not been paid to her but on the other hand illegally held that the appellant is not willing to live with the respondent, therefore, she is not entitled to get the dower amount. In continuation of the arguments he submitted that the Courts below failed to take into consideration that no case for dissolution of marriage on the ground of *khula* was made out rather the wife divorced herself while exercising the power delegated to her by her husband. He added that an

agreement was entered between the parties through which the right of divorce was delegated to the wife with the condition that she may exercise the same if the respondent does not fulfill the conditions laid down in the agreement. It has been proved that the respondent failed to fulfill the conditions of the agreement; therefore, the wife was fully empowered to exercise the right of divorce. In such scenario, the divorce cannot be termed as *khula* but the Courts below failed to appreciate this aspect of the case in a legal manner. He contended that according to the admitted documentary evidence, i.e. agreement dated 30.03.2006, the respondent was bound to pay Rs.6,000/- per month as maintenance allowance to the wife but he failed to pay the same. The appellant proved this fact but the Courts below without any justification deprived the appellant of her legal

right of maintenance. The learned counsel relied upon the cases reported as *Ch. Abdul Karim and 5 others v. Raja Muhammad Nisar and another* [1998 SCR 296], *Parveen Akhtar v. Muhammad Asghar and 3 others* [2002 SCR 178] and *Mst. Shamim Akhtar Samina v. Jaffar Hussand and 2 others* [PLJ 2006 Lahore 335].

5. We have heard the arguments of the learned counsel for the parties and gone through the record along with the impugned judgment. It is an admitted fact that the appellant, Abdul Hameed, through agreement-deed dated 30.03.2006, delegated the powers of divorce to his wife, i.e. the appellant, Naseema Bibi. The perusal of the agreement (supra) shows that some liabilities were fixed upon the appellant, Abdul Hameed, and he agreed that if he failed to discharge the same the power of divorce will be delegated to his wife. It will be useful to reproduce here some



vide agreement-to-sell dated 07.11.2009, will be under obligation to execute a sale-deed and transfer the land in the name of his wife and in case of failure she will be authorized to exercise the power of divorce delegated to her through agreement dated 30.03.2006. The appellant, Abdul Hameed, while recording his statement has admitted that he delegated the power of divorce to Mst. Naseema Bibi. The relevant portion of his statement reads as under:-

"یہ درست ہے کہ مظہر نے اقرار نامہ شرائط نکاح میں درج کرایا ہے کہ اگر مظہر شرائط اقرار نامہ پوری نہ کرے تو حق تنسیخ نکاح مدعیہ کو تفویض ہے اور وہ اسے استعمال کر سکتی ہے۔"

It is obvious from the record that the appellant, Abdul Hameed, himself delegated the power of divorce to his wife through an agreement. It may be observed here that under Sharia law there is no embargo upon the delegation of power of divorce to the wife. Many jurists in the books authored by them

have discussed the subject in hand, i.e. *Talaq Tafwid*. Mr. K.N. Ahmed, in his treatise titled Muslim Law of Divorce, Chapter 11, at page 183, has expounded as under:

“It has already been stated that a husband can divorce his wife without the intervention of the Court. He can either exercise the right of dissolving the marriage by himself or appoint an agent to exercise this power on his behalf or, in other words, he can delegate his power of divorcing his wife to another person who may be the wife herself. This delegation of power of divorce to the wife is called *Tafwid* and is well recognized in Muslim Law.”

Dr. Tanzil-ur-Rehman in his book *مجموعہ قوانین اسلام*, 2<sup>nd</sup> edition, under section 101, has dealt with *Talaq Tafwid* as under:-

101- شوہر کے لئے جائز ہے کہ وہ اپنی زوجہ کو حق طلاق تفویض کر دے مگر اس صورت میں خود اس کا حق طلاق ساقط نہ ہو گا۔

توضیح: شوہر کے اپنی زوجہ کو حق طلاق تفویض کر دینے کی صورت میں زوجہ خود اپنے اوپر طلاق واقع کر سکتی ہے۔"

Section 314 of the Mahomedan Law is also reproduced here which read as under:-

"314. (1) Delegation of power to divorce.- Although the power to give divorce belongs primarily to the husband, 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. A temporary delegation of the power is irrevocable, but a permanent delegation may be revoked."

After going through the above referred jurists' opinion derived from *Sharia* law, it is crystal clear that the husband may delegate the powers of divorce to his wife and pronouncing of the divorce by the wife amounts to the



husband's pronouncement. The delegation of power may be either conditional or unconditional. However, in this regard, only that condition should be valid which is not contrary to the Muslim law. There is a also plethora of judgments on the point. Reference may be made to the cases reported as *Aklima Khatun v. Mahibur Rehman and others* [PLD 1963 Dacca 602], *Abdul Haseeb v. Chairman, Arbitration Council and others* [2000 CLC 202] and *Mehnaz Mehboob v. Ishtiaq ur Rashid and another* [2006 YLR 335].

In the light of the relevant law on the subject, it can safely be said that Mst. Naseema Bibi was fully empowered to exercise the right of divorce which was delegated to her by the husband. The version of the appellant, Abdul Hameed, that he fulfilled all the conditions mentioned in the agreement dated 30.03.2006, therefore, the

right of divorce was no more left with the wife, is not supported by any evidence. Although, it appears from the record that through agreement-to-sell dated 07.11.2009, the appellant purchased the land measuring 6 *marla* along with a built-up house against a consideration of Rs.7,25,000/- and at the time of execution of agreement he paid Rs.2,25,000/- to the donor, however, it is also evident from the record that later on he failed to pay the remaining amount of Rs.4,75,000/- within the stipulated period. In such state of affairs, we are convinced that the appellant failed to fulfill one of the conditions mentioned in the agreement dated 30.03.2006 and there was no hurdle in the way of the appellant, Mst. Naseema Bibi to exercise the power of divorce. The findings recorded by the trial Court on issue No.2, that the plaintiff, Naseema Bibi had the right to divorce and she exercised the

same in presence of witnesses, moreover, the divorce deed was duly communicated to the defendant, Abdul Hameed, therefore, the divorce would become final on expiry of 90 days, are in accordance with law and the learned Shariat Court rightly upheld the same.

6. While adverting to the point agitated by the learned counsel for the appellant, Mst. Naseema Bibi, that the appellant is entitled to get the dower as well as maintenance allowance, we have carefully perused the record. The trial Court after evaluating the evidence brought on record has recorded the findings on issue No.1 and 2 that the appellant by exercising the power of divorce delegated by the husband divorced herself but on the other hand while considering the divorce as *khula* held that she is not entitled to get the decree for recovery of dower. It may be observed here that the

marriage can even be dissolved on the basis of *khula* when the wife has no other valid legal ground for dissolution of marriage and she insists for dissolution. This Court in a recent unreported judgment titled *Raja Muhammad Gul Hussain v. Azmat Bibi* (civil appeal No.178 of 2016, decided on 07.12.2016) while dealing with the proposition has held that:

“8. According to the celebrated principle of law, in case the wife has no other valid ground for dissolution of marriage and still she wants dissolution of marriage, then there are two conditions to be fulfilled; one to satisfy the Court that the relationship cannot be continued further within the limits prescribed by the God and the other is willingness of the wife to return all the monetary benefits she received from husband.”

In the instant case, the appellant Mst. Naseema Bibi has not claimed the dissolution

of marriage on the basis of *khula* rather she proved through evidence that she divorced herself by exercising the powers delegated to her. In such situation, the divorce cannot be termed as *khula* and the appellant, Mst. Naseema Bibi is entitled for recovery of dower. Although, the claim of the appellant, Mst. Naseema Bibi is that at the time of *Nikah*, out of total dower amount Rs.4,25,000/-, the appellant, Abdul Hameed paid Rs.40,000/-, in shape of gold-ornaments but later on he took the same back, therefore, the whole dower amount is outstanding against him, however, she failed to prove this fact that the gold-ornaments were taken away by the appellant, Abdul Hameed. The appellant, Abdul Hameed also failed to prove that he paid the whole dower amount to Mst. Naseema Bibi through cogent evidence. In such situation, it can easily be concluded that remaining dower

amount Rs.3,85,000/- is outstanding against the appellant, Abdul Hameed and the appellant, Mst. Naseema Bibi is entitled to get the same. In a case reported as *Sajid Hussain Tanoli v. Nadia Khattak and 3 others* [2013 CLC 1625], same proposition came under consideration wherein it has been held that:-

“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 costs."

(Underlining is ours)

7. So far as the question of recovery of maintenance allowance is concerned, it may

be observed here that payment of Rs.6,000/- per month as maintenance allowance was one of the conditions of the agreement-deed dated 30.03.2006. It is evident from the record that after solemnization of marriage the relation between the spouses became strained, whereupon, reconciliation was made on 23.12.2009. The reconciliation-deed shows that at the time of reconciliation the only claim of the appellant, Mst. Naseema Bibi was that the appellant, Abdul Hameed, violated one of the conditions of agreement dated 30.03.2006, i.e. he failed to purchase the land or construct the house for the appellant, Mst. Naseema Bibi. The relevant portion of the reconciliation-deed is reproduced here which read as under:-

"یہ کہ فریق اول نے بوقت نکاح ایک اقرار نامہ محررہ 30-03-06 دیا تھا کہ فریق دوم کو 10 مرلہ اراضی خرید کر مکان بنا کر دے گا جو اسکی واحد ملکیت ہو گی لیکن فریق اول نے اس تحریر کے مطابق مکمل عمل نہ کیا تھا۔ محض چھ مرلہ اراضی مع مکان بمقام گوجرہ



متصل ٹالی منڈی مظفرآباد خرید کر بحق فریق دوم منتقل  
 کی تھی جس وجہ سے مابین فریقین ناراضگی پیدا ہو  
 گئی تھی۔ اب بروئے جرگہ برادری جملہ اختلافات ختم ہو  
 گئے ہیں۔-----"

At the time of reconciliation the appellant has not taken the stance that the appellant, Abdul Hameed has also not paid the maintenance allowance in compliance of the agreement dated 30.03.2006, meaning thereby, at that time no amount of maintenance was outstanding against the appellant, Abdul Hameed. Thus, we fully endorse the findings recorded by the trial Court on issue No.5 that the plaintiff is entitled to get the maintenance allowance during the intervening period from February 2010 to November 2010, however, the amount of maintenance allowance fixed by the trial Court, i.e. Rs.5,000/- is modified in view of the agreement dated 30.03.2006 as Rs.6,000/- per month. The findings recorded by the learned Shariat Court regarding the payment of maintenance allowance while

treating the divorce as *khula* being contrary to law as discussed in the preceding paragraph are not maintainable.

Nutshell of the above discussion is that the appeal filed by the appellant, Mst. Naseema Bibi is accepted in the terms that she is entitled to get the dower amount to the tune of Rs.3,85,000/- and also entitled for maintenance allowance at the rate of Rs.6,000/- per month from February 2010 to November 2010. The appeal filed by the appellant, Abdul Hameed being devoid of any force is hereby dismissed.

No order as to costs.

Mirpur,	<b>JUDGE</b>	<b>CHIEF JUSTICE</b>
___ .01.2017		
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Mst. Naseema Bibi	v.	Abdul Hameed