SUPREME COURT OF AZAD JAMMU AND KASHMIR
[Appellate Jurisdiction]

PRESENT:
Raja Saeed Akram Khan, J.
Sardar Abdul Hameed Khan, J.

Civil appeal No.231 of 2017
(PLA filed on 04.07.2017)

Naheeda Parveen daughter of Muhammad Sharif, caste Narma, r/o Sari Awera, Tehsil and District Bagh.

….APPELLANT

VERSUS

Nadeem Hussain son of Abdul Rasheed Abbasi, r/o Lone Motar, Tehsil and District Bagh.

….. RESPONDENT

(On appeal from the judgment and decree of the Shariat Court dated 05.06.2017 in family appeal No.107 of 2015 and 23 of 2017)

FOR THE APPELLANT:	Shahid Ali Awan, Advocate.
FOR THE RESPONDENTS:	Raja Aftab Ahmed, Advocate
Date of hearing:	16.11.2017

JUDGMENT:

***Raja Saeed Akram Khan, J.*—** The titled appeal by leave of the Court has been filed against the judgment and decrees passed by the Shariat Court on 05.06.2017. The learned Shariat Court through the impugned judgment while accepting the appeal filed by the respondent, herein, dismissed the suit filed by the appellant for recovery of dowry articles and modified the judgment and decree passed by the Family Court for dissolution of marriage in the terms that the marriage is dissolved on the ground of *khula* instead of cruelty.

2. The facts as emerged from this appeal are that the plaintiff-appellant in the year 2014, filed three suits in the Court of Judge Family Court, Bagh; one for recovery of dower, the second for recovery of maintenance allowance; and third for recovery of dowry articles, whereas, the respondent, herein, also

filed a cross-suit for restitution of conjugal rights. The trial Court after necessary proceedings, dismissed the suit filed by the appellant for recovery of dower and decreed the other suits filed by the contesting parties vide consolidated judgment dated 27.10.2015. On 10.12.2015, the appellant filed another suit in the Family Court for dissolution of marriage on the ground of cruelty. The Family Court vide judgment dated 28.02.2017, decreed the suit accordingly. The respondent challenged the judgments of the Courts below through separate appeals before the Shariat Court. The learned Shariat Court vide consolidated judgment dated 05.06.2017 decided the appeals in the terms indicated in the preceding paragraph, hence, this appeal by leave of the Court.

3. Mr. Shahid Ali Awan, Advocate, the learned counsel for the appellant argued that

the impugned judgment is against law and the facts of the case which is not sustainable in the eye of law. He contended that the appellant sought decree for dissolution of marriage on the ground of cruelty and non-payment of maintenance allowance and proved her claim by producing the cogent evidence, whereupon, the learned trial Court decided the matter in favour of the appellant. The learned Shariat Court without appreciating the evidence available on record passed the impugned judgment in a slipshod manner and disturbed the well reasoned judgment passed by the trial Court. He added that the adjustment of the dowry articles against consideration of *khula* is against law and justice. The appellant is the owner of the dowry articles who cannot be deprived of her legal right. The impugned judgment is also

against the pleadings of the parties which is liable to be set aside.

4. On the other hand, Raja Aftab Ahmed, Advocate, the learned counsel for the respondent strongly controverted the arguments advanced by the learned counsel for the appellant. He submitted that the impugned judgment is perfect and legal which does not warrant any interference by this Court. He contended that according to section 2(ii) of the Dissolution of Muslim Marriage Act, 1939, a woman is entitled for decree of dissolution of marriage on the ground of non-payment of maintenance allowance if the husband failed to provide her maintenance for a period of two year, whereas, in the case in hand the requisite period had not been elapsed when the appellant sought decree for dissolution of marriage. The trial Court without appreciating the law on the subject passed the

judgment which has rightly been set aside by the Shariat Court. He contended that the appellant also failed to prove the element of cruelty, therefore, the learned Shariat Court was fully justified to dissolve the marriage on the ground of *khula* instead of cruelty.

5. We have heard the arguments of the learned counsel for the parties and gone through the record along with the impugned judgment. The perusal of the record shows that the trial Court dissolved the marriage on the ground of non-payment of maintenance allowance and cruelty. The learned Shariat Court modified the decree passed by the trial Court and dissolved the marriage on the basis of *khula* in the following manners:-

> "Keeping in view the circumstances of the case it is ordered that Nikah between the parties is dissolved on

> the basis of Khluah for consideration of articles of dowry."

It may be observed here that according to the celebrated principle of law the marriage can be dissolved on the basis of *khula* when a wife without any valid ground wants dissolution of marriage. In the case in hand, earlier the suit filed by the respondent for restitution of conjugal rights was decreed by the trial Court and the appellant, herein, had not challenged the said judgment and decree passed by the trial Court. Later on, she filed suit for dissolution of marriage on the ground of non-payment of maintenance allowance and cruelty. The evidence brought on record shows that the appellant took the stance that she is not ready to live with the respondent at any cost, thus, in such a situation, when the respondent intended for reconciliation and the appellant did not ready for the same, the

learned Shariat Court rightly dissolved the marriage on the basis of *khula*. However, the question; whether the learned Shariat Court was justified to dissolve the marriage on the ground of *khula* against the consideration of dowry article; is of vital importance. To appreciate this point we have examined the record. The perusal of the record shows that initially the appellant filed a suit for recovery of dower amounting to Rs.2,50,000/- paid to her by the respondent at the time of *nikah* in shape of gold-ornaments. The trial Court in the light of the evidence brought on record by the parties dismissed the suit for want of proof. The appellant did not challenge the judgment and decree passed by the trial Court, meaning thereby, she admitted the version of the respondent that the gold-ornaments are still in possession of the appellant. The appellant also filed a suit for recovery of dowry articles

amounting to Rs.2,60,000/-. Although, the respondent while filing the written statement and recording the evidence took the stance that the value of the dowry articles is not more than rupees 20 to 25 thousands and the learned trial Court has also not given any definite opinion on this issue, however, the learned Shariat Court concluded the matter in the terms that amount of gold-ornaments, which are in possession of the appellant, and the dowry articles, which are in possession of the respondents, is almost the same, therefore, instead of returning the gold-ornaments the marriage is dissolved on the basis of *khula* against a consideration of dowry articles. The respondent has not challenged the judgment and decree of the Shariat Court before this Court which itself shows that he admitted the fact that the value of gold-ornaments and the dowry articles is the same.

As the value of the dowry articles and the gold-ornaments is the same, therefore, dissolving the marriage by the Shariat Court on the basis of *khula* against a consideration of dowry articles instead of gold-ornaments is mere an adjustment. However, still the option is available to the appellant that if she wants to get the dowry articles, then she will have to return the gold-ornaments amounting to Rs.2,50,000/- to the respondent.

6. Keeping in view the controversy involved in the matter, here we would also like to shed light on the point that the appellant filed a suit for recovery of maintenance allowance on 03.01.2014. The suit was decreed in favour of the appellant by the Family Court on 27.10.2015. The respondent challenged the judgment and decree before the Shariat Court, but the learned Shariat Court while passing the impugned judgment

and decree has not attended and resolved the point of maintenance allowance. The respondent has not challenged the judgment and decree of the Shariat Court before this Court, meaning thereby that the judgment and decree passed by the trial Court regarding the payment of maintenance allowance is intact. It is settled principle of law that maintenance allowance cannot be substituted for consideration of *khula* as the maintenance is the right of wife and duty of husband. Thus, as the respondent has not challenged the judgment and decree of the Shariat Court rather the learned counsel for the respondent during the course of arguments fully supported the judgment of the Shariat Court, therefore, the appellant is entitled to get the maintenance allowance as fixed by the trial Court till the expiry of *iddat*.

This appeal stands disposed of in the terms indicated above. No order as to costs.

Mirpur,
_.11.2017. **JUDGE** **JUDGE**