

ORDER SHEET  
**IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA**  
Constt. Petition No. S- 1101 of 2014.

Date of hearing	Order with signature of Judge
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25.05.2015.

Mr. Rafique Ahmed K. Abro, Advocate for  
petitioner.

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**Nazar Akbar, J-**. The petitioner by invoking constitutional jurisdiction of this Court has challenged dissolution of marriage by way of 'Khula' granted by learned Family Court-I, Shahdadkot to respondent No.2 by order dated 26.8.2014, in Family Suit No.20 of 2013.

2. Learned counsel has contended that the respondent No.2 has obtained 'Khula' from the petitioner on the ground of contracting second marriage by the petitioner and he claims that second marriage is no ground for seeking 'Khula'. There is no prohibition in Islam to contract second marriage by the petitioner. The petitioner claims that since no remedy is available under the law against the dissolution of marriage by way of 'Khula' he has filed this constitutional petition. However, he has not been able to show any case law on the point that when the legislator have declared that there shall be "**no appeal**" against dissolution of marriage by way of 'Khula', the constitutional petition can be entertained to defeat the explicit intention of legislators and the decree of dissolution of marriage by way of 'Khula' can be set aside.

3. I have gone through the impugned order dated **26.8.2014** and I am surprised to note that on **20.09.2014** learned counsel for petitioner/ defendant had filed written statement on behalf of the petitioner and the case was adjourned to **24.10.2013** for pre-trial proceedings. On

**01.02.2014** the pre-trial failed. It is indeed regrettable that instead of dissolution of marriage on **01.02.2014**, on failure of pre-trial, the learned Family Court unnecessarily framed issues and recorded evidence and thereby dragged the case to further six months when ultimately by impugned judgment dated **26.8.2014** 'Khula' was granted. Since the only relief claimed by the respondent No.2 in her plaint was for dissolution of marriage, on failure of the pre-trial the Court was under statutory obligation to dissolve the marriage forthwith by following the mandatory command of the provisions of Section 10 of the Family Courts Act, 1964, which is reproduced below for convenience:

**"10. Pre-trial proceedings. ---- (1)** [When the writing statement is filed, the Court **shall** fix an early date for a pre-trial hearing of the case.]

(2).....

(3).....

(4).....

[Provided that notwithstanding any decision or judgment of any Court or Tribunal, the Family Court in a suit for dissolution of marriage, **if reconciliation fails, shall pass decree for dissolution of marriage forthwith** and shall also restore to the husband the Haq Mehr received by the wife in consideration of marriage at the time of marriage.] "

4. The above proviso was added to **Section 10** of the Family Courts Act, 1964 by Amendment Ordinance LV of 2002, dated **01.10.2002**, and therefore, it was mandatory for the trial Court to pass the decree for dissolution of marriage forthwith instead of framing the same issue for trial. **Section 14** of the Family Courts Act, 1964, provides that no appeal shall lie from the decree by a Family Court for dissolution of marriage by way of 'Khula' except in terms of **Section 14, (2) (a)** whereby appeal is provided on dissolution of marriage for the reasons given in **clause (d) of item (viii) of section 2** of the Dissolution of Muslim Marriages Act, 1939; which is not the case of the

petitioner. In-fact the appeal has been prohibited/barred by **Section 14** of the Family Courts Act, 1964; which reads as follows: -

**14. Appeal.** --- (1) Notwithstanding anything provided in any other law for the time being in force, a decision given or decree passed by a Family Court shall be appealable: ---

- (a) .....
- (b) .....

(2) No appeal shall lie from a decree by a Family Court: ---

- (a) for dissolution of marriage, except in the case of dissolution for reasons specified in clause (d) of item (viii) of section 2 of the Dissolution of Muslim Marriages Act, 1939;
  - (b) .....
  - (c) .....
- (3) .....

5. The above provision of law prohibiting the husband from filing an appeal against 'Khula' is continuation of the legislative intention of adding the proviso to **Section 10** of the Family Courts Act, 1964, to provide protection to women from the rigors of litigation. As long as **Section 10** and **Section 14** of the Family Courts Act, 1964 are in the field, the prayer of the petitioner to set aside decree of 'Khula' by Family Court cannot be entertained in exercise of constitutional jurisdiction by this Court. The petitioner is not supposed to be aggrieved by the order of the Court, in-fact his grievance is against the law and the provisions of Family Courts Act, 1964, which have taken away the right of appeal against the dissolution of marriage by way of 'Khula'. However, he has not challenged the law. The provisions of Family Courts Act, 1964 which debars the aggrieved husband from filing an appeal is in-fact special provisions of law providing protection to women. It has been

enacted in terms of **clause (3) of Article 25** of the Constitution of Islamic Republic of Pakistan, 1973; as an special provision for protection of women; which reads as under: -

**25. Equality of citizens.** ---- (1) All citizens are equal before law and are entitled to equal protection of law.

(2) .....

(3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children.

6. It is settled law that when the law has barred an appeal, the party cannot be permitted to circumvent that law by recourse to the extra ordinary jurisdiction of the Court. In coming to this conclusion I am fortified by the case law reported in **PLD 1994 Karachi 67** (*Syed Ali Azhar Naqvi v. The Government of Pakistan and 3 others*) In this case the Division Bench of this Court has relied on **1972 SCMR 297** and **1976 SCMR 450**, to hold that the constitutional jurisdiction cannot be invoked to defeat the express provision of any act/ law. The relevant para 11 and 12 from the case reported in **PLD 1994 Karachi 67** are reproduced below:

“11. The question, therefore, arises if when the law has barred an appeal or other remedy from an interlocutory order, should the party be permitted to circumvent that law by recourse to the extraordinary jurisdiction of the Court. This question has not been settled by the catena of decisions. In *Muhammad Saeed v. Mst. Saratul Fatima* and another PLD 1978 Lah. 1459, a High Court held as under:---

“It, therefore, follows that what the Legislature held to be an interlocutory order not by itself fit to be appealable, should not by such a device be held fit enough to attract the more important, and at a higher level, the Constitutional jurisdiction.”

12. In *Mumtaz Hussain alias Bhutta v. Chief Administrator of Auqaf, Punjab, Lahore* and another **1976 SCMR 450**, the Supreme Court observed; "As the said Ordinance has taken away the right of the petitioner to interim relief, learned counsel submitted that this was a ground which entitled the petitioner to prosecute a writ petition despite the pendency of the proceedings in the District Court. The argument is misconceived because the writ jurisdiction of the superior Courts cannot be invoked in aid of injustice and in order to defeat the express provisions of the statutory law. That was also the view taken by this Court in *Sayyed Muhammad Ali Shah Bokhari v. The Chief Administrator of Auqaf, Punjab, Lahore and others* **1972 SCMR 297** and we respectfully agree with it."

7. In view of the above, the contention of learned counsel that there is no alternate and efficacious remedy available with petitioner is misconceived. It is not the case that the appeal is not provided under the Family Courts Act, 1964, it is the case in which appeal has been intentionally prohibited by the act of parliament. The petitioner has failed to appreciate that a woman cannot be forced to reside even with her parents against her own will. Similarly, a woman cannot be forced to live/ co-habit with a man with whom she does not want to live any more and has even approached the Court of law for dissolution of her contract of marriage to avoid forcible exercise of conjugal rights or any other unwanted torture of whatever magnitude it may be. Therefore, any interference in the impugned order on whatever ground would militate against the lawfully enacted special provisions of law for protection of women. In this view of the above legal and constitutional position the right accrued to respondent No.2 under the impugned judgment and decree by operation of special law is protected.

8. Another aspect of this case is that by now it is settled law that 'Khula' can be granted by the Family Court even in a case in which the lady/ plaintiff has miserably failed to

establish any allegation leveled by her in the plaint for seeking dissolution of marriage. The Family Court's findings of 'Khula' are always based on the sole fact that the Court attempted reconciliation between the plaintiff and her husband and failed. Such findings of Family Court are not supposed to be on any elaborate evidence of parties to provide a room to the petitioner to challenge such findings through constitution petition on the ground of misreading and non reading of evidence. Therefore, when respondent No.2 has categorically refused to reside with the petitioner before the Family Court at the pre-trial stage, the petitioner has no right to seek factual finding of 'Khula' reversed by invoking the constitutional jurisdiction of this Court. it would amount to deprive the freedom of life to respondent No.2.

9. The petition was dismissed in limine by a short Order dated 25.5.2015, and these are the reasons for the same.

Judge

Ansari/\*