1. **P L D 1959 (West Pakistan) Lahore 566**

Before Shabir Ahmad, B. Z. Kaikaus and Masud Ahmad, JJ

Mst. BALQIS FATIMA-Plaintiff-Appellant

versus

NAJM-UL-IKWAM QURESHI-Defendant-Respondent

Second Appeal No. 39 of 1957, decided on 30th March 1959.

Summary of the Judgment

The Full Bench of three judges held that a Muslim wife is entitled to dissolution of marriage on restoration of dower if the Judge apprehends that parties will not observe the limits of God i.e., harmonious married state as envisaged by Islam will not be possible. For this, a husband's assent is not necessary. The judges clarified that this is not equivalent to granting a right to wife to come to the Court at any time and obtain a *khula* if she is prepared to restore the benefit she has received from her husband. There is an important limitation on her right: only if the Judge apprehends that the limits of God will not be observed, that is, in their relation towards one another, the spouses will not obey God, that a harmonious married state, as envisaged by Islam, will not be possible that the judge will grant a decree for dissolution of marriage. The wife cannot have a divorce for every passing impulse. The judge will consider whether the rift between the parties is a serious one though he may not consider the reasons for the rift.

Verse No. 229 of Sura Baqra is the basis of the right of *khula*. This verse permits the termination of a marriage by the wife upon returning her dower to the husband. The question for consideration is whether this termination can be effected only by agreement between the husband and the wife, or whether the wife can claim such termination even if the husband does not agree. The words "if you fear" in the verse being addressed to the state or the judge, they can only mean that the judge is entitled to pass an order even though the husband does not agree.

The judges observed that Islam does not force on the spouses a life devoid of harmony and happiness and if the parties cannot live together as they should, it permits a separation. If the dissolution is due to some default on the part of the husband, there is no need of any restitution. If the husband is not in any way at fault, there has to be restoration of property received by the wife and ordinarily it will be of the whole of the property but the judge may take into consideration reciprocal benefits received by the husband and continuous living together also may be a benefit received. The jurisdiction of the Qazi to dissolve a marriage in cases of *shiqaq* is limited only by what is stated in the Qur'an, i.e., "if you fear a breach" which means that there is real discord between the parties, and in the case of *khula* by the words "if you fear that they will not observe the limits of God". While effecting separation, the Qazi adjusts the financial matters so as to direct a partial or total restoration of the benefits received by the wife.

As regards procedure either the judges should appoint Hakams or themselves assume the jurisdiction of the Hakam in so far as it relates to dissolution for that is a judicial function. The word 'Hakam' is to be regarded in its ordinary sense of judge or arbiter. One who is only a conciliator is neither a judge nor an arbiter. Their Lordships were unable to accept the view that the jurisdiction of the Qazi is exhausted by the appointment of the arbiter, that if the effort at reconciliation fails, there is nothing further to be done and that the wife must be forced to live with the husband even though she be unhappy and may be in no way to blame and though the result would be that the spouses "do not observe the limits of God".

The Court referred to the following authorities:

Haquq-uz-Zaujain by Abul Ala Maudoodi p. 61; *The Religion of Islam* by Maulana Muhammad Ali at p. 673, 676; *Muhammadan Law* by Amir Ali Chapters on *Khula* and *Mubarat*; *1slamic Law* by Aziz Ahmad and *Bibi Sogra v. Muhammad Sayeed* 40 1 C 672; *Marriage Laws Commission Report* published in Gazette of Pakistan p. 1215; *Anglo-Muhammadan Law* by Sir Rowland Wilson at p. 154 ; Holy Quran, Part 4, Chap. 1V, verse 35 ; Holy Qur'an (Al Room 3.1) *Tarjman-ul-Qur'an* p. 284 by Abul-Kalam Azad; *Muslim Law* pp. 146-147; *Muhammadan Jurisprudence* by Abdur Rahim at pp. 178, 180, 181; *Tafsir-i-Haqani* Vol. III p. 209; *Mst. Umar Bibi v. Muhammad Din* AIR 1945 Lah. 51 and *Sayeeda Khanam v. Muhammad Sami* P L D 1952 Lah. 113 dissented from.

ORDER OF REFERENCE

KAIKAUS, J.---(3-4-1958) Mst. Balqis Fatima, the appellant, and Najmul Ikram, the respondent, in Regular Second Appeal No. 39 of 1957, were married at Lahore, on the 7th of October, 1949. There was only a *nikah*, the intention being that *rukhsati* will take place later on. Before, however, there could be a *rukhsati*, disputes arose between the parties and the wife never went to live with her husband. On the 2nd of January 1952, Mst. Balqis Fatima filed a suit for dissolution of marriage, out of which R. S. A. No. 39 of 1957 arises, on two grounds:

(1) that the husband had failed to provide maintenance for a period of more than two years; and

(2) that the husband was associated with women of ill-repute.

During the pendency of the suit, on the 23rd of August, 1954, Najmul Ikram too filed a suit for restitution of conjugal rights. Both the suits were consolidated. The trial Court found that the husband had failed to provide maintenance to the wife for a period of more than two years and decreed the suit. The suit for restitution of conjugal rights was, as a result, dismissed. On appeal, the learned District Judge came to the conclusion that if *rukhsati* had not taken place, it is the plaintiff wife who was to blame and not the husband, and, therefore, the wife had no right to maintenance. On this finding, he dismissed the suit for dissolution of marriage. However, he dismissed the suit for restitution of conjugal rights also on the ground that the relations between the parties were much strained and it would not be proper to force the wife to live with her husband.

2. Regular Second Appeal No. 39 of 1957 is an appeal by the wife against the decree of the District Judge, dismissing her suit for dissolution of marriage. The husband filed an appeal (Regular Second Appeal No. 91 of 1957) against the decree of the District Judge dismissing his suit for restitution of conjugal rights. That appeal was dismissed *in limine* by Muhammad Yaqub Ali, J. and the husband has filed L. P. A. No. 26 of 1957, against his judgment. Both these appeals are now before us for disposal.

3. In the appeal in the suit for dissolution of marriage, we find no reason to differ with the finding of the learned District Judge that the husband was in no way to blame for the *rukhsati* not taking place, and, therefore, the wife was not entitled to maintenance. This finding would have finished the appeal, but learned counsel for the appellant wife raised a new point that a *khula* is the right of wife, that is, the wife can at any time come to Court and demand a divorce on abandonment and restitution of any benefit which she may have received from her husband. As the point was one of pure law, we allowed it to be argued. In support of his argument, learned counsel for the wife placed reliance on what is contained in a book entitled "*Haquq-uz-Zaujain*" written by Maulana Abul Ala Maudoodi. In this book, Maulana Maudoodi has dealt exhaustively with the nature and incidents of *khula* and has recorded an emphatic opinion that *khula* is the right of the wife. He reproduces first the verse of the Holy Quran which says: "And if you fear that they (spouses) cannot be kept within the limits of Allah there is no blame on them or what she may give up to become free thereby." Maulana Maudoodi interprets these words as meaning that the wife will be entitled on payment to secure her release. He then supports his inference by reference to how the Holy Prophet acted in the well known cases of Sabit Bin Kais wherein the Holy Prophet had ordered Kais to divorce his wives on their restoration of what they had received from him. The commentator also quotes an instance from Hazrat Umar wherein he had allowed divorce to a woman on payment of some small amount because the woman had absolutely refused to live with her husband.

4. Maulana Maudoodi is not only a great religious scholar but comes from the orthodox school, and his opinion, by itself, could be the basis of a further investigation with respect to the rights of a woman for divorce. But there is some other authority too which supports him. According to the opinion of Maulana Muhammad Ali expressed in "The Religion of Islam" at page 673, there is an equality between the spouses with respect to divorce. After quoting the following verse of Holy Quran, "And if you fear a breach (*shiqaq*) between the two, then appoint a judge from his people and a judge from her people; if they both desire agreement, Allah will effect harmony between them, surely Allah is Knowing, Aware", and then referring to the following words, "And if they separate, Allah will render them both free from want out of His ampleness, and Allah is Ample giving, Wise", the learned commentator says:

> "This verse gives us not only the principle of divorce, which is *shiqaq* or a disagreement to live together as husband and wife, but also the process to be adopted when a rupture of marital relations is feared. The two sexes are here placed on a level of perfect equality. A breach between the two 'would imply that either the husband or the wife' wants to break off the marriage agreement and hence either may claim a divorce when the parties can no longer pull on in agreement. In the process to be adopted, both husband and wife are to be

> represented on a status of equality; a judge has to be appointed from his people and another from her people. The two are told to try to remove the differences and reconcile the parties to each other. If agreement cannot be brought about, a divorce will follow."

In the beginning of the Chapter of *Khula* and *Mubarat*, Mr. Amir Ali says:

> "Previous to the Islamic legislation, the wives had no right to claim a dissolution of the marriage on any ground whatsoever. In special cases only the power of divorce was expressly reserved in their favour by contract. As a general rule, neither the Hebrews nor the pre-Islamic Arabs recognised the right of divorce for women. The Koran allowed them this privilege which had been denied to them by the primitive institutions of their country."

This paragraph would seem to lay down that the wife has a right of divorce, though it is true that it is not explained further in this chapter as to how this right is to be exercised. At page 519 of the same book, it is stated that so far as Shias are concerned, in case of *shiqaq*, arbitrator may be appointed to settle their disputes and if no settlement can be effected, the marriage ought to be dissolved. In Islamic Law by Aziz Ahmad, the Malki Law relating to *khula* is thus explained:

> "According to Imam Malik when there is a dispute between the parties to a marriage, the judge should appoint two Hakims or arbitrators from the family of each, as is laid down in the Holy Quran, and if these Hakims fail to bring about a compromise, the Judge has the power to dissolve the marriage on such terms as he considers just and fair."

In *Bibi Sogra v. Muhammad Sayeed* (40 I C 672), Roe, J. had expressed the opinion, after reference to Muhammadan Law by Mr. Amir Ali, that if the wife wants to obtain a divorce without any justifiable cause, she has simply to abandon her claim to the settlement in order to secure a dissolution of her marriage.

4[sic]. The question is obviously an important one. We accordingly refer the following question to a Full Bench:-

Whether under the Muslim Law the wife is entitled to *khula* as of right?

As we are making a reference in the appeal arising out of the dissolution of marriage, the Letters Patent Appeal in the suit for restitution of conjugal rights will have to remain pending till this appeal is decided.

OPINION OF FULL BENCH

KAIKAUS, J.—Briefly the facts leading to this reference are that the simple *nikah* ceremony of the appellant, Mst. Balqis Fatima, and the respondent, Mr. Najm-ul-Ikram, took place in Lahore on the 7th of October 1949. Before *rukhsati* could take place, disputes arose between the families of the parties so that the spouses never lived together. On the 2nd of January 1952 i.e., about two, years and three months after the nikah ceremony, the appellant filed the suit, out of which Regular

Second Appeal No. 39 of 1957 arises, claiming dissolution of marriage, on the two following grounds:-

> (1) That the husband had failed to provide maintenance for a period of more than two years;
>
> (2) that the husband was associating with women of evil repute.

While this suit was pending, the husband too filed a suit for restitution of conjugal rights. The two suits were consolidated. The trial Court found that the husband had failed to provide maintenance to the wife for a period of more than two years, and decreed the suit for dissolution of marriage. The suit for restitution of conjugal rights was dismissed because of the decree for dissolution. On appeal by the present respondent, the learned District Judge found that the wife was not entitled to maintenance because it was she and not the husband who was responsible for *rukhsati* not taking place. As this was the only ground on which the suit for dissolution had been decreed, the learned District Judge accepted the appeal and dismissed that suit. However, he was of the opinion that the relations between the parties had become so strained that it would not be proper to pass a decree in favour of the husband for restitution of conjugal rights. He, therefore, dismissed the other suit also.

2. The wife filed an appeal against the dismissal of her suit for dissolution of marriage, while the husband preferred an appeal in the suit for restitution of conjugal rights. The appeal of the husband was dismissed *in limine* by Yaqub Ali, J. and the husband has filed L. P. A. No. 26 of 1957 against that judgment. The second appeal of the wife (Regular Second Appeal No. 39 of 1957) and the Letters Patent Appeal of the husband both came up for hearing before me and Shabir Ahmad, J. In the Regular Second Appeal we found no reason to disagree with the learned District Judge on the question as to who was to blame for the *rukhsati* not having taken place and we were of the opinion that the wife was not, under the circumstances, entitled to maintenance. This finding would have been sufficient for the disposal of the, appeal, but a new point was raised before us. It was contended that *khula* is the right of the wife, i.e., the wife can at any time come to Court and demand the grant of divorce on restitution of any benefit which she may have received from the husband. This was a pure question of law which, if conceded, would entitle the wife to a decree though the decree could be made only after she returned the benefit that she had received. Keeping particularly in view the fact that the learned District Judge had found the relations of the parties to be so strained as to stand in the way of a decree in the suit for restitution of conjugal rights, we allowed the point to be argued. Finding that there was some force in the contention of learned counsel for the appellant, we decided to make a reference of the point raised to a Full Bench, in view of its great general importance. Following is the question which has been referred:-

> "Whether under Muslim Law the wife is entitled to *khula* as of right?"

We find that in some authorities the word *'khula'* has been defined as an agreement between the husband and wife, and we want to make it clear that the question referred means no more than the following question:-

> "Is the wife entitled to dissolution of marriage on restoration of what she has received from the husband in consideration of marriage?"

The two questions have for us an identical import for we are not using the word *'khula'* in the sense of an agreement but in the sense of a dissolution on restoration of benefit received.

3. The verse of the Qur'an which is the basis of the right of *khula* is Verse No. 229 of Sura Baqra, which runs—"Divorce may be (pronounced) twice; then keep (them) in good fellowship or let (them) go with kindness, and it is not lawful for you to take any part or what you have given them, unless both fear that they cannot keep within the limits of Allah; then if you fear that they cannot keep within limits of Allah, there is no blame on them for what she gives up to become free thereby. These are the limits of Allah, so do not exceed them, and whoever exceeds the limits of Allah, these it is that are the unjust."

4. This verse admittedly permits the termination of a marriage by the wife passing consideration to the husband. The question for consideration is whether this termination can be effected only by agreement between the husband and the wife or whether the wife can claim such termination even if the husband be not agreeable. The first point that deserves attention is that the words "if you fear" are addressed to the "*ulil amr*" that is, the State, or the Judge. On this point there is no difference at all between the commentators and there could be no difference for the spouses are being referred to as 'they' in this part of the verse. The words 'if you fear' show that the judge is to determine if the circumstances are such that there is apprehension of the spouses not observing the limits of God. Now, what for is he to determine this question if after he has determined it, his finding is to have no effect on the matter? It is not the view of any of the schools of Muslim Law that if the spouses agree to a separation still a finding by the Judge that there is apprehension of transgression of limits of God is essential. All jurists accept that if parties agree, no such finding is needed. If without agreement there could be no termination of marriage and if in case of agreement nothing further was needed, the determination by the Judge would become meaningless. The reference to the Judge can only mean that he is entitled to pass an order even though the husband does not agree. The interpretation is supported by the two oft-quoted instances of khula ordered by the Holy Prophet. Both relate to Sabit Ibn-i-Qais. In the first incident, his wife Jamila came to the Prophet and stated her complaint in the following words:-

> "Oh Prophet of God. Nothing can bring me and him together. When I raised my veil, he was coming from the front with some men. I saw that he was out of them the shortest and the ugliest. I swear by God I do not hate him because of any defect in him, religious or moral, but I hate his ugliness. I swear by God that if it was not for fear of God I would have spit at his face when he came to me. Oh Prophet of God, you see how handsome I am, and Sabit is an ugly person. I don't blame his religion or his morals but I fear heresy in Islam."

On hearing this the Prophet of God said to Jamila:-

> "Are you prepared to return the garden that he gave you". She said: "Yes, Oh Prophet of God, and even more". The Holy Prophet said: "No more, but you

return the garden that he gave you", and then the Holy Prophet said to Sabit: "Take the garden and divorce her".

5. The second incident is of Habiba, the other wife of Sabit, and it is thus stated by Imam Malik and Abu Daud. "One day early in the morning when the Holy Prophet came out of his house, he found Habiba standing there. He inquired from her what the matter was and she said. "I and Sabit can never pull on together". When Sabit appeared, the Prophet of God said: 'This is Habiba, daughter of Sehl. She has stated what God wished she should state'. Habiba said, "O, Prophet of God, let Sabit take from me whatever he has given me for that is all with me". The Holy Prophet told Sabit to take back what he had given her and to release her". In some versions the words used are "*khale sabilaha*" and in others "*fariqha*". Both of them mean "divorce her."

6. I may state here that there is a version of this tradition reported by Abu Daood and Ibn Garir as coming from Hazrat Aisha wherein it is stated that Sabit had beaten Habiba so as to break her bone, but as pointed out by Maulana Maudoodi (page 68 of Haquq-uz-Zaujain) it appears from the words imputed to Habiba by Ibn Maja that the complaint of Habiba was not of beating but of ugliness. She had used the same words as Jamila, that is, "if I did not fear God, I would spit at his face". It should also be noted that the Holy Prophet had ordered restitution of property by Habiba which indicates that the dissolution was not for fault of the husband. If the divorce was due to cruelty, there is no reason why the dower should have been returned.

7. This is how the Holy Prophet enforced the right of *khula*. In both these cases there was an order by him to Sabit to take back what he had given to the wife and to divorce her. In neither case was Sabit in any way to blame, and so far as Jamila is concerned, she had expressly said that she found no fault with him and that the sole reason why she wanted a release was that he was ugly and she could not bear him, she being herself a handsome woman. In neither case did the Holy Prophet make any pronouncement as to the reasonableness of the attitude of the wife. He was just satisfied that the husband and wife could not amicably live together. He never asked for the consent of the husband.

8. The same appears to be the practice of the Khulafa-I-Rashidin. Before Hazrat Umar appeared a woman and her husband. The woman wanted a divorce. Hazrat Umar advised her to live with her husband, but she refused. At this Hazrat Umar shut her up in a dungeon which was full of refuse. After keeping her there for three days, he asked her how she had fared. She replied: "I swear by God, I have never passed more peaceful nights". At this Hazrat Umar said to the husband: "Give her *khula* even if it be in lieu of her earrings". (Kushf-ul-Ghumma). It will be observed that there was no inquiry into the grounds of the wife's refusal to live with the husband. Only Hazrat Umar was convinced that the wife was serious in her demand and was really unhappy with her husband whatever the reason. No fault had been found with the husband.

9. Rabi, daughter of Maooz, approached Hazrat Usman for a *khula* in lieu of all that she owned. Hazrat Usman ordered her husband to take all that she had and to grant her a divorce.

10. Maulana Abul-ala-Maudoodi, whose position as a distinguished religious scholar is not open to any doubt, has in his book entitled "Haqooq-uz-Zaujain" dealt exhaustively with the question of the right of the wife to a *khula* and has recorded an emphatic and fully reasoned opinion that the wife can claim *khula* as of right, subject only to the existence of an apprehension that the spouses will transgress the limits of God. He says (page 61) "Muslim Law just as it has given to the husband the right to divorce the wife with whom he cannot pull on has also given to the wife the right to get a *khula* from her husband whom she hates and with whom she cannot live". After explaining that there is a moral and legal side to the exercise of the right of *khula* and that morally it is wrong for the husband as well as the wife to exercise the right of divorce or *khula* just in order to satisfy their animal passions elsewhere, he continues: "But law which fixes the rights of persons ignores this aspect. Just as it gives the right of divorce to the husband, it gives the wife the right of *khula* so that in case of need there may be a liberty to each to get a release from the bondage of marriage and neither party be forced to continue in marriage where there is hatred in the heart, objects of marriage are being frustrated and married life has become a torture." As regards the abuse of power thus granted to the spouses, the law places all reasonable restrictions on the exercise of their power, but then to a great extent leaves the matter to the good sense of the party, and really none but the party or the Almighty can determine whether the need of the party is real or whether he or she is only a seeker after sexual enjoyment."

11. The importance of the opinion of Maulana Maudoodi is enhanced by the fact that he belongs to the orthodox school. He is not a person against whom a charge of heresy or schism can be brought.

12. Maulvi Muhammad Ali, another great religious scholar, the author of commentary on the Qur'an and of numerous religious books has in his "Religion of Islam" expressed a similar opinion. He says (page 676)—

> "The right of the wife to claim a divorce is, not only recognized by the Holy Qur'an and Hadith but also in Fiqh. The technical term for the wife's right to divorce by returning her dowry is called *khul*, and it is based on the Hadith already quoted, and the following verse of the Holy Qur'an. 'Divorce may be pronounced twice; then keep them in good fellowship or let them go with kindness; and it is not lawful for you to take any part of what you have given them unless both fear that they cannot keep within the limits of Allah, then if you fear that they cannot keep within the limits of Allah there is no blame on them for what she gives up to become free thereby' (2 : 229). By keeping 'within the limits of Allah' here is clearly meant the fulfilment of the object of marriage or performance of the duties imposed by conjugal relationship. The dowry is thus a check on the party who wants the divorce; if the husband wants to divorce the wife, the wife shall have the dowry; if the wife wants the divorce, the husband is entitled to the dowry. But it is the judges spoken of in v. 4 : 35, and referred to here in the words 'if you fear that they cannot keep within the limits of Allah,' that shall decide whether the husband or the wife is responsible for the breach and which of them is entitled to the dowry."

The word "dowry" is being used here in the same sense as the dower.

13. In 1956 a Commission was appointed by the Government of Pakistan to report on marriage laws. The Chairman of the Commission was Mian Sir Abdul Rashid, a retired Chief Justice of Pakistan. The report of the Commission is printed at page 1215 of the Central Gazette. With respect to the right of *khula* the report said:

> "The Commission is of the opinion that the provisions of the Dissolution of Muslim Marriages Act, 1939, do not require any modification. It was also agreed that supplementary legislation may be undertaken to make the *khula* form of *talaq* more certain and precise. About *khula*, that is divorce sought by wife, there is a consensus of opinion that Islam has granted this right to the woman if she foregoes the *mehr* or a part of it, if it is so demanded by the husband. There is a universally accepted Hadith about a *khula* case which arose between a woman of the name of Jamila and her husband Sabit-ibn-Qais. The Holy Prophet granted the divorce on the basis of extreme incompatibility of temperament only; no other accusation was made by the wife as a ground for the demand of divorce. We are recommending that incompatibility of temperament should not give the wife a right to demand a divorce except in the *khula* form."

14. In Aziz Ahmad's Muslim Law (page 235) the view of the Ahmadi (Qadiani) sect of Muslims is thus stated:—

> "*Ahmadiyya View*.—The Court has the power and must grant *khula* if it is so moved by the wife. It is maintained that incompatibility of temperament or hatred is a good ground for *khula* and the assertion of the wife that she hates her husband or that their temperaments differ must be accepted, provided that the Court may delay the decision for a reasonable time to assure itself that the wife is not acting under a temporary passion or under the influence of a third person. To be sure on the point, the Court may order her to give her husband an opportunity to see her and plead with her. If the wife refuses to obey the order of the Court, the decision may be postponed till she obeys it."

15. Amir Ali, the author of a well-known commentary on Muslim Law begins his chapter of *khula* and *mubarat* with the following words:—

> "Previous to the Islamic legislation, the wives had no right to claim a dissolution of the marriage on any ground whatsoever. In special cases only the power of divorce was expressly reserved in their favour by contract. As a general rule, neither the Hebrews nor the pre-Islamic Arabs recognised the right of divorce for women. The Koran allowed them this privilege which had been denied to them by the primitive institutions of their country.
>
> 'When married parties disagree', says the Fatawai Alamgiri following the Hedaya and the Badaya, 'and are apprehensive that they 'cannot observe the bounds prescribed by the divine laws, that is, cannot perform the duties imposed on them by the conjugal relationship, the woman can release herself from the tie by giving up some property in return in consideration of which the husband is to give her a *khula* and when they have done this a *talak-ul-bain* would take place.

This quotation gives the impression that the learned commentator regarded the passage in Fatawa-i-Alamgiri and the verse of the Qur'an on which the passage is based as recognising the right of the wife to secure a release, otherwise the words "Qur'an allowed them this privilege" would be inappropriate. Sir Rowland Wilson does not regard-this interpretation of the passage in Fatawa as impossible. He says (page 154 of Anglo-Muhammadan Law) —

> "As to judicial divorce for the husband's cruelty or adultery, the Hedaya and Fatawa-i-Alamgiri are silent, unless, indeed, we are to understand in a compulsory sense an isolated expression in an extract from the latter work, which is thus rendered by Baillie, page 304 : 'When married parties disagree, and are apprehensive that they cannot observe the bounds prescribed by Almighty God (or, in other words, perform the duties incumbent on them by the marriage relation), there is no objection to the woman's ransoming herself from her husband, with property, in consideration of which he is to give her a *khoola*". If this means that the *kazi* must, or may, on the wife's demand, compel the husband to give her a *khula*, we must further suppose (1) that he can pass such a decree on mere proof of incurable disagreement, or incompatibility, irrespective of actual cruelty or other breach of conjugal duty; and (2) that he can fix at his discretion the price at which the woman is to purchase her freedom. These propositions, if accepted; would to a certain degree assimilate the woman's position as regards divorce to that of the man, but the point has never come up for judicial decision in that form in British India. In Khalilal Rehman, (Burma, 1820), 49 I C 804, the grounds for a judicial divorce are stated in wide terms, including habitual cruelty, and perhaps even desertion and neglect."

And he adds his own opinion:

> "The Hadith in Tirmizi (I,368) that a woman who demands *khula* without necessity will loss heaven, implies that legally she can make good her demand, possibly without other reason than alleged 'aversion' or in modern equivalent 'incompatibility', but at least when she can satisfactorily show to impartial parties the impossibility of a happy married state."

16. Before proceeding further it will be proper also to reproduce the allied verse of the Qur'an which relates not to *khula* but to disagreement between the spouses and provides for the action that should be taken in cases of such disagreement. The two matters are connected for if the Qur'an does not envisage the continuance of a married life in case of a breach and provides for dissolution in such a case even without restoration of benefit, the claim of the wife to a *khula* as of right becomes stronger. That verse is No. 35, part 4, Chapter IV, and runs as follows:-

> "And if you fear a breach between the two, then appoint a judge (arbiter) from his people and a judge from her people; if they both desire agreement, Allah will effect harmony between them; surely Allah is Knowing, Aware."

This provision enables the judge to appoint arbiters in a case when there is a breach between the parties, one from the family of the wife and the other from the family of the husband, and the arbiters are first to make an effort at reconciliation. If they are

unable to effect a reconciliation but are of the opinion that the parties should be separated, they are to be separated, although there is a difference of opinion as to whether the arbiters themselves have the right to order separation or whether that is only the jurisdiction of the judge. In Umedatul Qari, the legal position is thus stated—

> "One of the arbiters should be from the side of the man and the other from the side of the woman, but if such people who will bring about settlement cannot be got from the friends of the parties, then it is permissible to appoint strangers. Verily if they (arbiters) differ, their order will not be promulgated but if they agree, it (their order) will be enforced in its entirety without any delegation.
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> "But there is a difference of opinion as to what is to happen if the judges (arbiters) agree on separating the parties. It is the opinion of (Imam) Malik, (Imam) Auzai and (Imam) Ishaq that it will be enforced independently of any authority and without the permission of the spouses. But the Kufies and (Imam) Shafei and (Imam Ahmad Ibne-i-Hanif are of opinion that they (arbiters) need permission because the right to divorce is with the husband; if he agrees in this (divorce) well and good but if he does not (agree to divorce) then the judge will effect a divorce. Ibne-i-Abi Sheba narrates of Hazrat Ali that he (Ali) said that Allah has permitted the arbiters to join the spouses and to separate them. Shabi is of opinion that whatever the arbiters decide will be enforced. Abu Salma is of opinion that if the arbiters wish they may bring the spouses together and if they wish they may separate. Mujahid is of the same opinion."

17. It will be observed that although there is difference of opinion as to whether the arbiters themselves are capable of effecting a separation, there is no difference of opinion as to whether the Court can do so. The jurisdiction of the Qazi to effect a separation depends only on whether there is "*shiqaq*" between the parties, which means a breach. If the breach is established, he has authority to effect a separation though he will first appoint arbiters who will make an effort at reconciliation and if they come to the conclusion that the parties are not capable of living together as husband and wife in a manner that is in accord with the Muslim conception of married life, they would order a separation.

18. That in the case of "*shiqaq*" there is jurisdiction in the Qazi to order a separation does not appear to be a matter of contest and is supported even by a careful study of the judgments which are cited against the right of the wife to a divorce, that is, Umar Bibi v. Mohammad Din (A I R 1945 Lah. 51) and Saeeda Khanam v. Muhammad Sami (P L D 1952 Lah. 113 (F. B.)). Later in this judgment, there is a full discussion of both these cases, but I may refer even at this stage to an objection raised by one of the Judges in the second mentioned case. It will be observed that the word used in this verse is "*hakam*" which is translated in some commentaries as "judge" and in others as "arbiter". One of the learned Judges had interpreted this as referring only to a conciliator. Whichever of these two meanings is adopted any contention that this verse only provides for reconciliation has, with all respect, to be rejected. A person called judge or arbiter cannot be only a conciliator. He must have a power of decision. The only reasonable inference from the use of this word is that the *hakam* has power to separate the spouses. Whether the order is by itself capable of enforcement as is

stated by some jurists or whether there is to be superadded to it the order of the judge as is stated by others, is really a matter of procedure. The question is whether it is the husband or the authority appointed by the State that is to determine whether the relationship is to continue, and the answer must be that it is the authority appointed by the State and the matter does not depend on the will of the husband. The answer must further be that the discretion of that authority is not hedged in by any rules. If it considers further continuance of marriage not proper, it puts an end to the marriage. As will appear from the quotation from Umdetul Qari, the view that *hakam* is to decide whether the relationship should continue has the support of as great a person as Hazrat Ali.

19. Amir Ali (Muhammadan Law, volume II, page 519, 1929 edition) says that the jurisdiction of the Qazi to grant a divorce is "founded on the express words of the Prophet: 'If a woman be prejudiced by a marriage, let it be broken off.' The Shiah Biharul-Anwar also lays down that in case of *nushuz* or *sheqaq* arbitrators may be appointed to settle the disputes, or the Judge may intervene; and "if no settlement can be effected, the marriage ought to be dissolved".

20. The question which we have to decide in this reference is really a part of the broader question as to the attitude of Islam towards a discord between the husband and the wife. If a husband and the wife cannot live together in peace and harmony, does Islam allow them to separate or does it force them to continue? In this connection let us first refer to those verses of the Qur'an which give the Qur'anic concept of married life. "It is one of His signs that He created from amongst you your mates that you may find solace in their company and created between you love and kindness". (Arrom 3.1) "It is He who created you from a single person and made your mate of like nature that you find solace in her." (Araf 24) "You are apparel for them and they are apparel for you." (Baqar 23). Little doubt is left in one's mind as to the answer to the broader question on a consideration of the verses relating to *Shiqaq* and *Khula* along with these verses. Maulana Abul Kalam Azad while dealing with the interpretation of the verse relating to *shiqaq* thus answers this question. (Tarjman-ul-Qur'an, page 284):-

> "It is not contemplated by a marriage that the parties should be tied together in all circumstances, nor that the wife should be just a means of satisfaction of the passions of the husband.
>
> The object of the marriage is the creation of a perfect and happy life by the conduct of the spouses and such a life can only be created if there be mutual love and affection and if the limits imposed by God be observed. If for some reason this is not possible, the object of the marriage has been defeated and it is necessary that the door be opened to the parties for a change. If on the object of the marriage being defeated, separation has not been allowed to the parties, this would have been a cruel limitation of the right of free choice and society would have been deprived of a happy married state of life."

21. Law in the Middle East is a treatise on Muslim Law as administered in the Middle East, and is a collection of contributions made by a number of scholars of Muslim Law. It thus answers the question (pages 146/147):-

"It is decreed that the fundamental principle of the marriage contract is that it is permanent and is to endure as long as the spouses live. But in order for it to continue it is not alone sufficient for the *shari'a* to lay down the law that it is permanent; the love which binds the two spouses together must continue also, for it is the tie on which the continuation of true married life depends. But the spouses might develop a strong aversion to each other, thus making love difficult. In such a case one of three choices must be made: (1) To continue the marriage despite this strong aversion, thus giving rise to ill-will and rancour. The continuation of this situation would not be to the interest of the family; (2) Physical separation while preserving the married state. This would be an offence against morality and might drive the two parties to vice. (3) Divorce, which breaks the marriage bond and makes an act of ill-will out of what had originally been an act of blessing. This is the soundest way, even though it means the destruction of the family.

"If, then there must be divorce when aversion is strong, in whose hands shall the decision regarding divorce lie? Shall both parties decide it jointly, shall the law decide it, or shall one of the two parties decide it?

"There is no doubt but that if the two parties agree on divorce it must be carried out. It is only necessary to see that this agreement has not taken place in a momentary fit of anger which might quickly pass away; Islam has made provision for such an eventuality as we shall make clear.

"There remain the other two cases, namely whether the Judge (*cadi*) is to determine when divorce can take place or whether this can be done by one of the two parties.

"If the woman wants a divorce it can take place only by decision of the *cadi* because the husband has undertaken financial responsibilities with regard to this marriage; he has made an advance payment on the bride-price and is to pay the balance upon divorce; he has furnished the house and has incurred many expenses. If the wife could divorce him on her own responsibility he would lose all that he had spent on her. It is therefore necessary for the *cadi* to intervene in order to ascertain that she has requested a divorce because she has been wronged. If such is the case, then the husband bears the consequences and loses the money which he has spent on her. If it is established that the aversion is on her part and that it is the cause of her seeking a divorce, then the *cadi* divorces them on condition that she reimburse the husband for all that he has spent on his marriage. This is the procedure of the school of Malik which was the practice also of some of the Companions of the Prophet and their successors. The intervention of the *cadi* was for the purpose of preventing the husband from being wronged if it were she who bore the aversion to him, so that the husband would not lose the money which he had spent on her."

22. I may also refer here to the question as to whether there are any limitations on the power of the Qazi to dissolve a marriage. That the Qazi has authority to dissolve a marriage is universally accepted. But is this power of his subject to any limitations? The Qazi dissolves a marriage if the husband is impotent or suffers from leprosy or insanity or if he has been absent for a long time or if he is unable to maintain the wife

or to perform the marital obligations. Are these grounds enumerated in the Qur'an or the Hadith? Let me state that neither the Qur'an nor the Hadith enumerates the ground on which dissolution can be brought. The Qazi has been dissolving marriages on the grounds aforesaid because he found that continuance of the marriage in the circumstances was not just and proper. The only limitation on the power of the Qazi to dissolve the marriage is his own conscience—his judgment that the marriage should not under the circumstances be continued. If the parties cannot live together as Islam intends they should live, they are to be separated. If the authority of the Qazi to dissolve a marriage were based on the verse relating to *shiqaq*, even in that case the only limitation on his part would be that a breach should exist between the parties. However, his jurisdiction goes beyond that for he can dissolve a marriage on the ground of impotency, insanity or absence of husband, or option of puberty, none of which is a case of *shiqaq*. His jurisdiction is based on the simple fact that Islam regards the marriage contract as being capable of termination. It has to be terminable because it is not a reasonably possible view that a marriage must continue even though the husband misbehaves or is unable to perform his obligations or for no fault of the wife it would be cruel to continue it.

23. To the husband the law grants full power of divorce. He can put an end to the marital tie at will whether he has a ground or not. It would be reprehensible that he should divorce one wife and take another just for sexual enjoyment, yet the law places no restrictions on his power of divorce and leaves the matter to his good sense. If such power be granted to the husband, why should there be a great disparity between the rights of the wife and the husband? One can understand that the husband having paid or taken on himself the responsibility of payment of dower, the wife should not be allowed to put an end to the contract so as to appropriate that which is paid or promised by the husband and she should be forced to restore the benefit she has taken. It is also argued sometimes that the female is fickle-minded and may on a passing fancy or a sudden impulse effect a separation. But assuming without conceding that in this respect the male is better than the female, the objection can be met with by giving the right to pronounce a divorce in a case where the wife wants it to the Qazi and not to the wife herself. The Qazi will in that case be able to see whether there is really any dispute between the parties and whether the wife is serious in her demand for dissolution. But it does not seem reasonable that while to one of the two contracting parties has been granted a plenary power to put an end to the contract, there should be no power given to the other party and the wife must in order to get a release prove some such misconduct on the part of the husband as will disentitle him to the continuance of the marriage. The wife ought, in reason, to have a right similar to that of the husband subject only to the order of the Court. She should approach the Qazi who may advise her and make an effort to effect a reconciliation, but if she be adamant and the Qazi apprehends that the limits imposed by God will not be observed, she can only be ordered to restore all the benefits she has received. The rights of the contracting parties should as far as the circumstances permit be at a par.

24. Let me review the argument in brief and state my conclusions. The only proper interpretation of the verse relating to *khula* is that *khula* depends on the order of the judge and not on the will of the husband. That is the implication of the words "if you fear" being, addressed to a judge, or the head of the State. The judge ought to grant *khula* if he finds that "they will not observe the limits of God". Contemporary opinion is unanimous on this interpretation. As regards the verse relating to *shiqaq* the clear

implication of "arbiter" is that there is power to order separation and the verse does not contemplate an attempt at reconciliation alone. So far as the power of the Qazi is concerned, there does not appear to be any dispute that he will be able to separate the parties in case of *shiqaq*. This would appear from the quotation from the Umdatul Qari. Islam does not force on the spouses a life devoid of harmony and happiness and if the parties cannot live together as they should, it permits a separation. If the dissolution is due to some default on the part of the husband, there is no need of any restitution. If the husband is not in any way at fault, there has to be restoration of property received by the wife and ordinarily it will be of the whole of the property but the judge may take into consideration reciprocal benefits received by the husband and continuous living together also may be a benefit received. The jurisdiction of the Qazi to dissolve a marriage in cases of *shiqaq* is limited only by what is stated in the Qur'an, i.e., "if you fear a breach" which means that there is real discord between the parties, and in the case of *khula* by the words "If you fear that they will not observe the limits of God". While effecting separation, the Qazi adjusts the financial matters so as to direct a partial or total restoration of the benefits received by the wife.

25. It may be objected that we would be, granting to the wife for the first time a right of release from the marital tie and it may be asked whether it is open to us to adopt a course different from that laid down by the old jurists. There are a number of replies to this objection. The first is that no Hanafi authority has been cited before us which may deal with the question as to whether the wife is entitled to a divorce on restoration of benefit, and it cannot be said that we are in direct conflict with any Hanafi authority. Parties are admittedly Hanafis. In fact before us no ancient jurist has been cited at all who may have discussed the question. The second reply is that there is admittedly jurisdiction in the Qazi in accordance with the verse relating to *shiqaq* to separate the spouses. As the quotation from Umedatul Qari shows there is no dispute as to the power of the Qazi to order a separation though there is dispute as to the power of the arbiters without the order of the Qazi. The only condition of this jurisdiction is the existence of discord. The difference between the jurisdiction granted by the verse relating to *shiqaq* and the jurisdiction granted by the verse relating to *khula* is that between circumstances that constitute *shiqaq* and circumstances that will raise an apprehension that the limits of God will not be observed. I do not think there is much difference between the two jurisdictions. If there is *shiqaq*, the parties will not be observing the limits of God and vice versa. The two verses should be read together and once we accept the jurisdiction of Qazi to order dissolution in case of *shiqaq*, there would be little difficulty in holding that the Qazi can order a *khula*.

26. Even if it were to be held that the passage reproduced from Umedatul Qari does not establish that all schools accept the jurisdiction of the Qazi to dissolve marriage in case of *shiqaq*, it cannot be denied that Imam Malik does hold this opinion and according to a well-recognized rule as between the different Sunni Schools the difference of opinion is not such as is regarded a matter of conscience and absolute compliance, and it is open to a Qazi of one school to decide according to the doctrine of another school. I reproduce below two passages from Abdur Rahim's jurisprudence which will clear the misapprehension that appears to exist on this question:-

> "No doubt the four teachers had each his own followers and these men, as time progressed, devoted themselves more and more to the task of developing

the particular doctrines of their respective masters until we arrive at the age of the writers on Usul, when the labours of these jurists who devoted themselves to the separate systematization of the principles laid down by the early teachers must have accelerated the tendency to form into distinct Schools. But even in their time the question of a difference of opinion among the masters was regarded as a matter for discussion and controversy, and it was not supposed that, because a certain view had found vogue among the principal exponents of a particular School, it was on that account binding on the conscience of a Sunni Muhammadan or on the Courts of justice in preference to any other view which had the support of some other Sunni School. It was not until very modern times that attempt was made by means of the doctrine of Taqlid to confine the Court and the jurists to one of the four Schools of law as distinguished from the others" (page 178).

"When a question depends upon juristic deduction a Qadi belonging to one School of Sunni law such as the Hanafi may decide it according to the Shafi'i law, if he prefers that view, or he may make over the case, to a Shafi'i Qadi for decision, if there is one available. In support of this a number of cases are mentioned. For instance, a Hanafi Qadi following the views of other Sunni Schools, in preference to those of his own School to the contrary, may declare that divorce by a drunken person is not valid, uphold a marriage contracted without two witnesses being present as valid, set aside the marriage of a minor contracted by his father in the presence of profligate witnesses, uphold the sale of a *muddabar* and perhaps of an *ummi walad* and so on. That this is the correct view of the law on the subject cannot be doubted not only upon principle but having in regard the array of authorities cited in its support, such as As-Siyaru'-I-Kabir, Jami'tul Futawa, Khazanutu'1-Muftiin, Majma'u'n-Nawazil, Al-Zakhira, Futawa Rashidu'd-din, Shaikhu'1-Islam, Abdu'1-Wahabu'ush-Shaibani, Shaikhu'1-Islam, Ata-ibn Hamza, and others. (Pages 180 and 181 of Abdur Rahim's Muslim Jurisprudence).

27. The third reply is that we are really dealing with the interpretation of the Holy Qur'an and on a question of interpretation we are not bound by the opinions of jurists. If we be clear as to what the meaning of a verse in the Qur'an is, it will be our duty to give effect to that interpretation irrespective of what has been stated by jurists. "Atiullah-ha-wa Ati-ur-Rasul" is the duty cast on the Muslim and it will not be obedience to God or to the Prophet if in a case where our mind is clear as to the order of the Almighty or the Prophet we fail to decide in accordance with it. We are concerned here with the interpretation of the verse relating to *khula* and as I have already stated its interpretation must be that the Court or the State has authority to direct a *khula*. Similar considerations apply to the interpretation of the traditions of the Prophet.

28. I will now deal with the cases that are cited against the right of the wife. The first case is *Mst. Umar Bibi v. Mohammad Din*. The allegations in that case were that the wife hated the husband and that it was not possible for her to live with her husband in peace and comfort. On these allegations two pleas were based: (1) The wife was entitled to a *khula* even though the husband be not willing, and (2) incompatibility of temperament, dislike or even hatred which arises justifiably or without justification can be a good ground for divorce. Abdur Rahman, J. (with whom Sir Traver Harries,

C. J. agreed) recorded, in the first place, two preliminary findings, one relating to the jurisdiction of the Qazi and the other as to the meaning of the word "recognised" in section 2 (ix) of the Dissolution of Muslim Marriages Act. He was of the opinion that the jurisdiction which the Qazi exercised under the Muslim Law vested in the Civil Courts and he was of opinion too that although the word used in section 2 (ix) of the Dissolution of Muslim Marriages Act is "recognised", it only means a ground on which a marriage could be dissolved if Muslim Law was applicable and did not imply that it was a ground which was already recognised by Muslim jurists. With both these conclusions I am in entire agreement.

29. On the first question that was raised before him, i.e., one relating to the right of the wife to a *khula*, the learned Judge simply referred to the definition of *khula* in Hedaya, Durrul Mukhtar and Baillie where the word '*khula*' was stated to be either an agreement or an act of the husband, and after quoting the definition the learned Judge said that the definitions left "no room for doubt that in cases of *khula*, *mubaraat* or ordinary *talaq* it is a husband or a person (including the wife herself) who has been authorised by the husband who can effect a *khula* divorce and that it is not possible for a Qazi or a Court to do so (*khula*) in view of the powers vested in either of them." Beyond a reference to the definition there is no discussion of the subject at all and there is no reference to the verse of the Qur'an dealing with *khula*.

30. On the second question the learned Judge began by saying:-

> "It will then become possible for any woman to get rid of the marriage tie-fickle minded and impressionable as she temperamentally is—on account of a passing fancy and besides being open to the objection that she would be taking advantage in that case of her own wrongful act and conduct, it will make the marriages more or less a farce."

When the verse relating to *shiqaq* was relied upon before the learned Judge for the proposition that if breach is apprehended, the marriage can be dissolved, the learned Judge said—

> "But I do not read any such indication in the verse. It only provides for a procedure, as I read it, to bring about a reconciliation, and contains a direction to (Ul-il-Amr) or a Qazi to appoint an arbiter from the husband's relations and another from the wife's relations whenever a breach is apprehended between the spouses. There is nothing, however, in this verse which could be read as authorising the arbiters to dissolve the marriage bond if they are unable to bring about a settlement or reconciliation."

The learned Judge then quoted the passage from the Umedatul Qari which I have already reproduced and said—

> "It will be noticed that out of the four Imams, so well recognized in India, there is first of all a difference according to this commentary between three Imams in regard to the question whether the decision of arbiters, if they were unanimous, would be enforced with or without the permission of the husband as it was he alone who held the power to give a divorce—Imam Shafei and

Imam Ahmad Ibn-i-Hambal being of the view that it could be enforced only with the husband's authority."

31. This is, with all respect, not a correct interpretation of that passage. The authority of the Qazi has not in that passage been doubted. The only question was whether the arbiters could themselves effect a separation or whether the Judge's order was necessary. The learned Judge then quoted from Tafseer-i-Kabeer where there is cited an instance of Hazrat Ali that he directed the arbiters to separate the spouses if they came to the conclusion that they should be separated and ended by saying—

> "I am thus of opinion that if an (Hakam) is not satisfied about (Shiqaq) (breach) or if he does not appoint arbiters from amongst the relations of either spouse or even when so appointed they do not agree as to separation, a divorce cannot be given. Moreover, according to the authorities to which I have referred I consider it doubtful whether a divorce could be given without the husband's consent even if the arbiters were agreed as to the separation. As to the tradition about Jameelah, wife of Sabit-bin-Qais reported, as above indicated, in Sahi-ul-Bokhari, it does not take us very much further. It is true that a divorce had been effected in that case but it must not be overlooked that the Prophet of Islam had ordered Sabit in that case to divorce his wife Jameelah in the words "Talaqaha Tatliqa" (give her an irrevocable divorce) according to the tradition reported at page 794 and "Amreho Jafarqaha" (the Prophet ordered him and brought about separation) according to what is reported at page 795. In either case the divorce is reported to have been granted by Qais and not pronounced by the Prophet although it may be admitted that out of reverence that Muslims had for the Prophet of Islam, it would have been impossible for Qais to disobey his order. The point, however, remains that the divorce was granted by Qais and not by the Prophet."

32. So the learned Judge did accept at least in the beginning that if the Qazi finds *shiqaq* he can order a separation. I have already stated my interpretation of this verse. In all translations of the Holy Qur'an the word "Hakam" is translated only as judge or arbiter and 'arbiter' cannot mean one who is merely a conciliator. There is also the incident of Hazrat Ali. In any case, the learned Judge too does not reject the proposition that the Qazi can dissolve the marriage if there is *shiqaq* and that is all that I say. I have already stated that between the circumstances that constitute *shiqaq* and those that lead to an apprehension that limits of God would not be observed there is little difference.

33. As regards the argument with respect to the Hadith relating to Sabit-bin-Qais that Sabit granted a divorce out of reverence for the Prophet, let me say, with all respect, that this is a misunderstanding of the attitude of the Holy Prophet towards his followers. The Holy Prophet never imposed his will on anybody where he was not entitled to force it as the Law-giver and the head of the State. He was very scrupulous of the rights of others. If in a matter where he was not entitled to pass an order it was his desire that a person should act in a particular manner, he would advise that person but at the same time would take care to point out to him that he was not bound to act in accordance with the advice and there are cases where the advice given was not accepted. The Holy Prophet would only order a person to do a thing if he as the head of the State was entitled to do so.

34. The second and the more important case against the right of the wife is *Sayeeda Khanam v. Muhammad Sami*. In that case the wife had claimed a dissolution of marriage on grounds of cruelty, failure to maintain, failure to perform marital obligations, accusation of adultery, incompatibility of temperament and aversion. The trial Court held that incompatibility of temperament was proved but it found itself unable to give relief on that ground because of *Mst. Umar Bibi v. Muhammad Din* (AIR 1945 Lah. 51). It decreed the suit, however, on grounds of cruelty and accusation of adultery. Its findings as to cruelty in the words of Cornelius, A. C. J., were the following:-

> "The plaintiff had undergone many privations and sufferings. Owing to a mishap to a member of the husband's family shortly after she entered it by marriage, she was described as *manhoos*. Her visits to her own relations were disapproved, and she was beaten whenever she stayed with her relations too long. Visits by her relations to her were also disapproved, and these led to the husband suspecting her of immorality. He carried his suspicion so far that he would not let her go to the kitchen, in case she might meet the cook there. When she protested against his accusations of immorality, he beat her. He did not care for her to look well, and, therefore, refused to allow her to wash and dress her hair. Once in the presence of one of her friends he beat her with a broom."

On appeal the learned District Judge disagreed with the trial Court on the question of cruelty. He was of opinion that the wife was self-willed and self-opinionated. He accepted that the wife disliked the husband but was of the opinion that she had to suffer this marriage till the husband gave her an excuse for getting the marriage dissolved. He said—

> "Among other things she seems to dislike her husband because she believes that he suffers from gout and also from some disease of the chest. I can understand the plaintiff's desire to get rid of a man whom she did not select and who is not up to her mark now, but so long as he chooses to retain her and so long as he does not give her an excuse for seeking the cancellation of her marriage with him, the ill-fated union must continue".

In the High Court, Kayani, J. (as he then was) was of the opinion that the above-quoted finding of the learned District Judge was sufficient to establish incompatibility of temperament. He was not inclined to agree with *Mst. Umar Bibi v. Mohammad Din* that incompatibility of temperament was not a good ground for dissolution and he referred the matter to a Full Bench.

35. In the Full Bench, Cornelius, A. C. J., (with whom the other learned Judges of the Full Bench concurred) though he agreed that there was improper conduct by the husband did not accept that the circumstances of the case fell within "incompatibility of temperament". I reproduce below his finding on this question verbatim:—

> "There are a number of acts of alleged cruelty adduced by the plaintiff, in regard to which she has led evidence, and for the purpose of determining whether there is indeed incompatibility of temperament, it is open to us to take these various acts into account. They have already been mentioned above, and

having regarded them both individually and collectively with care. I fail to see in them proof of such a degree of difference of dispositions or of reactions to particular incidents and influences, or even of lack of sympathy as would qualify for the description, 'incompatibility of temperament'. The instances are more readily traceable to bad manners, tendency to suspect the plaintiff's character, tendency, to give expression to such suspicion, and tendency to use violence towards the wife, on the part of the husband. For the display of bad manners, the plaintiff was not at all responsible; she did not time her arrival in the family herself and, therefore, it cannot be said that her husband's description of *manhoos* applied to her was his reaction to anything said or done by her. As regards the imputations of immorality, they arise out of visits by the plaintiff to her kitchen and to her relations, and here again, there is no question of reaction on the part of the husband to anything in the nature of a characteristic act by the plaintiff and, therefore, it is impossible to infer any clash of disposition here; at the most, a defect of mentality in the husband may be deduced. To the same category belongs his refusal to allow her to dress and look well. There remain the allegations of beating, and this is also of unilateral effect indicating a fault in the nature of the husband. Therefore, I would be inclined to say that in the present case, the evidence is hardly adequate to draw a conclusion of incompatibility of temperament between the spouses. For that, it would be necessary, by means of inferences drawn from instances of behaviour as between the spouses, to gain an impression concerning the mental characteristics and the general disposition and frame of mind of each of the spouses and thereafter to draw the conclusion that, having the minds that they possessed, it was impossible for them to adapt themselves to each other, and, therefore, they were incapable of living together in harmonious association. As I have remarked, the evidence on the record is insufficient for making such a survey and examination of the mentalities of the spouses in this case."

This finding would have disposed of the case but the learned Judge found that in the order of reference aversion towards the husband which would constitute *shiqaq* was also mentioned as a ground for dissolution of marriage and as the factum of aversion was admitted, the learned Judge proceeded to consider whether *shiqaq* could furnish a ground for dissolution. He dealt first with the tradition of the Holy Prophet relating to Jameela wife of Sabit. He was of the opinion that the version in the Hadith in Bokhari was a condensed one and did not state all the facts and be quoted the following extract from the Tafsir-ul-Kabir of Imam Razi:—

> "It has been reported that this verse (i.e. Verse 35 of Chapter IV) was revealed respecting the case of Jamila daughter of Abdullah son of Ubayy and her husband Sabet son of Qais son of Shemas. The facts were that she hated him with intense hatred and he loved her with intense love. She came to the Holy Prophet and said: Effect separation between me and him and I hate him. I saw him, from the side of my veil, coming amongst people. He was of the shortest stature, the ugliest in face and blackest in complexion. I do not prefer infidetily [sic] (Kufr) after having accepted Islam. Sabet addressed the Prophet as follows 'O Prophet of Allah, order her that she should return the garden I gave her'. The Holy Prophet said to her: 'What have you to say'? She replied: 'I agree and I will give more'. Then the Holy Prophet said: 'No, only the

garden'. Then the Holy Prophet said to Sabet: Take from her what you gave and clear her way Sabet did this and it was the first *khula* in Islam."

The learned Judge was of opinion that this was a case where the husband had himself made an offer to grant a divorce if the wife returned his orchard to him. He went on to say that if there was any doubt in his mind as to the correctness of interpretation that doubt was dispelled on a reference to the following two traditions of the Prophet:—

"I. Saoban reported that the Messenger of Allah said: Whichever woman asks her husband for divorce without fault, the fragrance of paradise is unlawful for her.

"2. Ibn Omar reported that the Apostle of Allah said: The most detestable of lawful things near Allah is divorce."

It was quite natural for Cornelius, A. C. J., to accept the version given by so learned a person as Imam Razi and no further effort seems to have been made by learned counsel appearing in that case to find out the exact words used by the Holy Prophet or the manner in which the incident took place, i.e., whether it was just an offer by the husband or whether he granted a release in obedience to the order of the Holy Prophet. It was a matter to be decided with reference to the various versions given in the compilations of traditions, but even the version in the Tafsir-ul-Kabir is that when Jameela told the Holy Prophet that she found no fault with her husband but wanted a divorce as she hated him and said: "Effect a separation between me and him as I hate him". The Holy Prophet never said: "You have no ground for dissolution and I cannot dissolve the marriage. It is only if your husband agrees that you can get a release". If he was powerless to interfere (in fact, according to tradition No. 1 he should have told her that the fragrance of heaven would be unlawful to her if she asked for a divorce), that is what he would have told her, but the Holy Prophet obviously sent for Sabit. He never told Sabit that it was up to him to agree or not. I have already stated and I repeat that the Holy Prophet was scrupulous about the rights of other persons and never assumed authority where he had none. He would always explain when he was giving advice that it was open to the person to whom he was tendering advice to accept his advice or not. One point to remember is that according to Tafsir-ul-Kabir, Sabit had intense love for Jameela. Does it seem reasonable to infer that he will agree of his own accord to give her a divorce. He would know well that the Prophet would not take it ill. That was the way of the Holy Prophet. He was never offended if his advice was not taken, for he recognized the rights of all to act as they like if they are not prohibited from so acting by law. Does the whole incident that is related in this Hadith create an impression that the Holy Prophet did not consider Jameela entitled to a dissolution[?]. Even according to the Tafsir-ul-Kabir Sabit had said: "O Prophet of Allah, 'order' her that she should return the garden I gave her." Was not the Holy Prophet passing orders? Sabit did not say "I am not prepared to grant a divorce till she returns my garden." He understood that the Holy Prophet was giving orders. And the Holy Prophet had said to Sabit : Take from her what you gave her and clear her way". Was this not an order? When Jameela said she was prepared to give more, he said: "No, only the garden". This too was an order. The Holy Prophet was obviously deciding a case. It may also be stated here that although Imam Razi is entitled to great respect he is only a commentator and he has to take the tradition from some traditionist. His source is not stated and it is not clear wherefrom he got his version. If there was any real difference between his version and that in Bokhari, we would be

entitled to accept the version in Bokhari. Cornelius, A. C. J., says this was according to Imam Razi, the first *khula* in Islam. Of course, it was, but it does not mean that it was just a matter of agreement.

36. It is unfortunate that before the learned Judge only this tradition was quoted. If to this tradition had been added the other tradition relating to the other wife of Sabit Bin Qais and the orders passed by Hazrat Umar and Hazrat Usman in cases already referred to where they ordered the husband to grant *khula*, I wonder if the learned Judge's interpretation would not have been affected. It will be observed that Hazrat Umar and Hazrat Usman had used the word '*khula*' when passing orders so that it will be impossible to argue that *khula* can be the result only of an agreement and not of an order passed by the Qazi. It is noteworthy too that there is no reference in the judgment to the verse of the Qur'an which deals with *khula* although the discussion is as to the right of the wife to *khula*. The words '*in khiftum*' in the verse which are according to unanimous opinion addressed to the person in authority, the Judge or the '*ulil amr*' become wholly inappropriate if there is no authority which such person is to exercise.

37. The learned Judge has regarded the two traditions quoted above as supporting the interpretation he has put on the tradition relating to Jameela. I say with great respect that they support the opposite interpretation. If a woman had not the right to get a *khula* without fault of the husband, what is the significance of saying that if she asks for a divorce without fault of the husband, the fragrance of heaven will be denied to her? It is only if she has option of asking for a divorce that this tradition will have a meaning. Sir Rowland Wilson (page 154 of the Anglo Muhammadan Law) has in a passage which I have already quoted and which I will repeat, made the same inference from this Hadith. He says:

> "The Hadith in Tirmizi (1,368) that a woman who demands *khula* without necessity will lose heaven, implies that legally she can make good her demand, possibly without other reason than alleged 'aversion' or in modern equivalent 'incompatibility', but at least when she can satisfactorily show to impartial parties the impossibility of a happy married state."

It is pertinent also to observe that the Holy Prophet was a party to the dissolution of the marriage of Jameela who was asking for a divorce without any fault of the husband, and if this tradition be accepted as authentic, he was a party to her deprivation of the fragrance of heaven. If the Hadith be authentic, it can only mean that religion grants rights to do acts which it disapproves and in fact the second tradition quoted is the strongest proof of this proposition. Divorce is regarded as detestable, yet divorce is allowed. No one would argue on the basis of the Hadith which says divorce is detestable that there is no power of divorce and similarly it cannot be argued that because fragrance of heaven will be denied to a woman who asks for a divorce without fault of the husband, she does not possess the option to have a *khula*.

38. The learned A. C. J., then entered upon a discussion of the verse relating to *shiqaq* and held that the word 'Hakam' did not mean either judge or arbiter as it appeared in the various translations of the Qur'an. He said:—

> "I am of the opinion that the meaning of the word 'Hakama', which should be accepted for the purposes of placing a correct interpretation upon Verse 35, is that which is in contradistinction with the judicial function. Having regard again to the Organisation of society, among the peoples to whom this Scripture was revealed, viz., on a tribal and family basis, it becomes reasonably possible that by *hakama* is meant persons from the tribes of the respective spouses who exercise authority over the members of their tribes to such a way that they are capable of restraining such person from acting in any particular way, or from acting wrongly, and such persons could only be those who were acknowledged heads of the tribe, i.e., the legitimate chiefs or otherwise the elders of the tribes."

No authority has been quoted for this interpretation and it is not suggested that the word 'Hakam' has ever been used in the Arabic language in the sense of a tribal elder. This interpretation assumes (1) that some authority existed in the elders of the tribes even after the establishment of the Muslim State at Madina, and (2) that in all cases a person with tribal authority did exist and if in any case he did not exist, this verse could not be availed of. After the Muslim State had come into existence no authority was being exercised by the tribal elders over the members of the tribe. At the same time there is good orthodox opinion in favour of the proposition that Hakam could be even from non-relatives if no relatives were available, the stipulation about relatives being only directory in nature. Let me here refer to page 209, Volume III of Tafsir-i-Haqani, a well-known and exhaustive commentary on the Qur'an where it is stated in the course of a comment on this verse that if people of the family be not available, any right-minded person can be appointed.

39. The learned A. C. J., then considered various authorities and concluded by saying that even if the Hakam had the power of separation that would be no warrant for the conclusion that the Qazi had that power. The simple reply to this argument is that the right of the wife to obtain a dissolution cannot be affected by the fact that the procedure needed for the enforcement of that right appears to be such as cannot be adopted by these Courts. The law provides that in matters of marriage and divorce Muslim Law shall apply to the Muslims. If the Muslim Law provides a particular procedure for the enforcement of a right of dissolution, either we regard that as a substantive provision and apply it as such or we regard that as a mere matter of procedure and having regard only to the substance of the right enforce it by whatever procedure is available. But the right of the wife cannot be defeated. Either we should appoint Hakams or we should ourselves assume the jurisdiction of the Hakam in so far as it relates to dissolution for that is a judicial function.

40. The view taken by the learned A. C. J., assumes that the whole procedure prescribed in this verse is for reconciliation and the moment the Qazi appoints the arbiters he exhausts his jurisdiction. The case decided by Hazrat Ali was referred to by the learned Judge but he was of the opinion that Hazrat Ali only disapproved of the conduct of the husband who was not accepting the order of the Hakam. Following is the report of the incident as it appears in the Tafseer-i-Kabir (page 129):

> "Imam Shafei has reported a tradition from Hazrat Ali and that has been reported by lbn Sirin from Ubaida. It is to the effect that a man and a woman came to Hazrat Ali and each one of them was accompanied by a number of

> persons. Hazrat Ali ordered that one *hakam* should be appointed from the man's family and one from the family of the wife, and addressing the *hukma*, he said: 'Do you know what your duties are? Your duty is to unite the couple if they can be united, and if you decide to separate, separate them.' The woman said she accepted what Allah had ordained whether the verdict be for or against her. But the husband said that he did not want separation. Hazrat Ali then said to the husband: 'You have uttered a lie. You should also have given the same undertaking as your wife'."

41. I would regard the word 'Hakam' in its ordinary sense of judge or arbiter. One who is only a conciliator is neither a judge nor an arbiter and I am unable to accept that the jurisdiction of the Qazi is exhausted by the appointment of the arbiter, that if the effort at reconciliation fails, there is nothing further to be done and that the wife must be forced to live with the husband even though she be unhappy and may be in no way to blame and though the result would be that the spouses "do not observe the limits of God". Take the very case with which the Full Bench was dealing. I have already quoted the findings of fact of the learned A. C. J. The wife was regarded by the husband as '*manhoos*'. She was suspected by him of immorality and was not allowed to go even in the kitchen because there she would meet the cook. Yet she was forced to remain attached to the husband. Is this what Islam contemplates? Is it possible that the husband and the wife can under the circumstances live happily? If the husband did not like the wife, he could divorce her at his will even though there was no blame on her. Yet the wife though she could not pull on with the husband without any fault in her, must be forced to live with him. Why should there be such a disparity between the rights of the spouses?

42. Let it not be understood that our answer to the question referred grants a right to wife to come to the Court at any time and obtain *khula* if she is prepared to restore the benefit she has received. There is an important limitation on her right of *khula*. It is only if the judge apprehends that the limits of God will not be observed, that is, in their relation towards one another, the spouses will not obey God, that a harmonious married state, as envisaged by Islam, will not be possible that he will grant a dissolution. The wife cannot have a divorce for every passing impulse. The judge will consider whether the rift between the parties is a serious one though he may not consider the reasons for the rift.

43. That the wife may go wrong if dissolution is not ordered is rather a reason for grant of dissolution for Islam prefers divorce to adultery.

44. The rights of the spouses as regards dissolution may be summed up by saying that the husband can effect a dissolution himself by pronouncing a divorce, while the wife has to approach the Court and she is to get a dissolution only if the Court regards further continuance of the marriage as not proper. But if it does regard continuance of marriage as improper, there is no further limitation on its jurisdiction to dissolve the marriage.

45. The answer to the question referred is that the wife is entitled to a dissolution of marriage on restoration of what she received in consideration of marriage if the judge apprehends that parties will not observe the limits of God.

SHABIR AHMAD, J.----I agree.

MASUD AHMAD, J.----I agree.

JUDGMENT OF DIVISION BENCH

Dates of hearing: 22nd and 23rd September 1958.

This judgment will dispose of Regular Second Appeal No. 39 of 1957, out of which had arisen a reference to the Full Bench with respect to a wife's right to *khula*, and the connected Letters Patent Appeal No. 26 of 1957, filed by the husband. Facts leading to this litigation have been stated in the order of the Full Bench but have to be repeated here. The parties were married on the 7th of October 1949. It was just a *nikah* ceremony without *rukhsti*, i.e, the wife continued to live with her parents. On the 2nd of January 1952 a suit for dissolution of marriage was filed by the wife on the following two grounds:—

(1) That the husband had failed to provide maintenance for a period of more than two years.

(2) That the husband was associating with women of ill repute.

During the pendency of the suit, on the 23rd of August 1954, a suit for restitution of conjugal rights was filed by the husband and both the suits were consolidated. The trial Court found against the husband on the question of maintenance, i.e., it found that the wife had a right to maintenance and had been deprived of that right for a period of more than two years. On this ground the suit for dissolution of marriage was decreed and the suit for restitution of conjugal rights failed on account of the decree for dissolution. On appeal by the husband the learned District Judge came to the conclusion that it was the wife who was to be blamed for the *rukhsati* not taking place and, therefore, she was not entitled to maintenance. Failure to maintain being the sole ground urged in support of the decree for dissolution, he dismissed the suit for dissolution. He was, however, of the opinion that the relations between the parties were very much strained and under the circumstances a decree for restitution of conjugal rights should also not be passed. He, therefore, dismissed the suit for restitution of conjugal rights also.

2. Both parties appealed to the High Court. The appeal of the husband was dismissed in *limine* and the husband filed a Letters Patent Appeal. The appeal of the wife was, however, admitted and was heard along with the Letters Patent Appeal of the husband. Both came up for hearing before me and Shabir Ahmad, J. We agreed with the learned District Judge that the wife was not entitled to maintenance, and had the matter rested here, we would have dismissed the appeal for dissolution of marriage. It was urged, however, before us that a wife was entitled to *khula* as of right, i.e., she was entitled to a dissolution on restoration of the benefit which she had received from the husband. As the point was one of law, we allowed it to be argued and considering its great general importance we referred it to the Full Bench. The following is the question which was referred to the Full Bench:—

"Whether under Muslim Law the wife is entitled to *khula* as of right?"

As has been explained in the judgment of the Full Bench, this question means no more than the following:—

> "Is the wife entitled to dissolution of marriage on restoration of what she had received from the husband in consideration of the marriage?"

This explanation has become necessary in view of the fact that in some authorities the word '*khula*', is defined as an agreement between the husband and the wife, and obviously it is not in that sense that it is used in the question that was referred to the Full Bench.

3. The Full Bench has given the following answer to the question:—

> "The wife is entitled to a dissolution of marriage on restoration of the benefit she had received from the husband if the Judge apprehends that parties will not observe the limits of God."

The words "will not observe the limits of God" have been taken from Verse 229 of Sura Baqr, in which Verse is recognized the right of the wife to a *khula*.

4. In accordance with the judgment of the Full Bench, we will now "determine whether there is apprehension that the parties will not observe the limits of God. What these words mean is that the parties will not behave towards each other as they are directed to by the mandates of the Almighty. In simpler words it means that the parties will not behave towards each other as husband and wife should in accordance with the Muslim concept of a marriage.

5. So we have to consider whether there is a serious rift between the parties, i.e., if we do not dissolve the marriage, the parties or one of them will go wrong. The facts are that after the institution of the suit for dissolution the husband filed a complaint in a Criminal Court at Abbottabad under sections 420 and 406, P. P. C. against the father and the brother of the wife alleging that they had cheated him of a sum of Rs. 2,500. According to the husband (hereinafter called the respondent) he had paid a sum of Rs. 2,500 to the father and the brother of the appellant some time after the marriage in order that ornaments for the appellant be prepared. This complaint was compromised, but it is clear even on the reading of the compromise that there was no reconciliation for it was stated that the civil suit will go on. The accused in that case paid a sum of Rs. 2,500 to the respondent and secured their acquittal.

6. In her statement as a witness the appellant had said that on her brother there had been a murderous assault at the instigation of the respondent during the pendency of the suit and also the women-folk of the family of the appellant had been insulted at his instance. There is no evidence to support this, but it shows the belief of the wife.

7. A suggestion had been made to the appellant when she was in the witness-box that there was amorous physical contact (*ikhtilat*) between her and the respondent before the marriage and that it was on account of this that her father was forced to marry her to the respondent. She rejected the suggestion. In one of the letters which she had written to the respondent she had said that she had suffered *badnami* for him, and the

suggestion made in cross-examination was that this *badnami* referred to the *ikhtilat* before the marriage.

8. The respondent had even made an allegation in the written statement that he had paid Rs. 7,000 to the brother of the appellant. This allegation, according to the plaintiff, is the wholly untrue. She is supported in this by the complaint filed at Abbottabad the brother was not named at all and at the time of the compromise when Rs. 2,500 were paid to the respondent, the respondent expressly withdrew the claim relating to Rs. 7,000.

9. The circumstances of the case appear to us to be eminently favourable for a dissolution. The parties have been litigating for a period of no less than five years. The respondent has prosecuted the father and the brother of the appellant. He brought a serious charge against the brother of the appellant which appears to be untrue. He brought a charge of amorous connection prior to marriage which has been repudiated. The appellant believed that the respondent was the cause of a murderous attack on the appellant's brother and of an insult to the women-folk of her family. It is also in evidence that even before the marriage the relations of the parties were strained. A reconciliation had been effected after the parties came to Pakistan on Partition from India, but according to the appellant there was a mental reservation on the part of the respondent's family in that reconciliation. Their intention was that she should be married and kept *mullaq*, i.e, she should not be properly treated and should not be allowed to marry elsewhere. One very important consideration is that as yet there has been no consummation of the marriage.

10. Great stress has been laid by learned counsel for the respondent on certain letters written by the appellant in which there are some expressions of violent love for the respondent. It does appear that there was some kind of romance between the appellant and the respondent, but the letters are of some dates in 1950 and 1951, and we see little force in the contention of the learned counsel for the respondent that the appellant has not changed at all and is making statements and prosecuting the suits only at the instance of her parents. She has made a statement in the witness-box that she is not prepared to live with the respondent at any cost. Considering all the circumstances, we see no reason to reject this statement. What happened after marriage could very well affect her attitude towards the respondent. In fact we had offered the respondent an opportunity to talk to the appellant and to win her over if possible (before the reference to the Full Bench), but this opportunity the respondent rejected saying that she should be sent to his house for a day or two, a request to which we could not possibly accede.

11. This is really a strong case for the wife. The parties cannot live together as husband and wife should and we would dissolve the marriage on the restoration of the benefit received by the wife. We find from the *nikahnama* that the wife had received ornaments of the value of Rs. 2,500 from the husband at the time of the *nikah*. We told the parties that the wife would be entitled to a decree for dissolution only if she paid the husband this sum of money. This sum has been paid to the counsel for the husband before us in Court. We, therefore, grant a decree for dissolution of marriage in the suit for dissolution of marriage. The appeal in the suit for the restitution of conjugal rights stands dismissed, but the parties will bear their own costs throughout in both the suits.

A. H. Order accordingly.