

Divorce, Khul: *Khurshid Bibi*

Summary of facts:

- Khurshid Bibi was married to Muhammad Amin, and her brother was married to his sister. Since there were no offspring of the wedlock, Muhammad Amin took a second wife. Within twenty days of the second marriage, their relations became strained. She demanded a separate house and though he promised it to her, he failed to fulfill his promise. She complained of maltreatment at his hands. There arose such differences between them that Muhammad Sharif, her brother, took out warrants under section 100, Criminal Procedure Code, and she left his house. The respondent's father convened two Panchayats, but efforts at reconciliation between the spouses failed.
- Khurshid Bibi then brought a suit for dissolution of marriage with Muhammad Amin, and he instituted a suit for restitution of conjugal rights. Her suit was dismissed, but her husband's suit was decreed against her on January 21, 1960. Muhammad Amin visited her at her parents' house to realize costs awarded to him in his suit.
- Khurshid Bibi then initiated a second suit against Muhammad Amin on February 22, 1960, alleging that he had orally divorced her on January 29, 1960 and agreed to give her a deed of divorce on the following day, but had not kept his promise. She prayed for a declaration that having been divorced by him, she was no longer his wife, and in the alternative, for a decree for dissolution of her marriage by *khula*. She was willing to give up her dower, since it had become impossible for them to live together as husband and wife. She also alleged that Muhammad Amin had not incurred any expenses in his marriage with her. In response, Muhammad Amin denied that he had orally divorced her or that she was entitled to dissolution of marriage by *khula*. He said their relationship was not so unhappy as to make it impossible for them to live together. He also claimed he had spent Rs. 2,000 on their marriage. He was opposed to divorcing her even if she were to give up her dower.
- The trial court did not believe that Khurshid Bibi's husband had orally divorced her. The trial court then decided that there was no likelihood of the parties being restored to a harmonious relationship. Since the plaintiff had filed a second suit for dissolution of marriage, she clearly was determined not to live with him or go to his house. Islam preferred separation rather than a married state in name only. So the court decreed the plaintiff's suit, dissolving her marriage in exercise of her right of *khula*.
- In Muhammad Amin's appeal, the District Judge held it was not possible to believe that immediately after the dismissal of her suit, the respondent would divorce her, and that if he had really wanted a divorce he would have given her a statement in writing. The Judge also stated that *khula* should not be granted because the Plaintiff had not come to court with a straightforward story, and because there was some truth to the fact that it was a case of *zid* (obstinacy) on her part because of his second marriage.
- In Khurshid Bibi's second appeal, the Single Judge of the High Court believed that because her brother was married to his sister, he could not afford to be inconsiderate towards her. Thus, he felt that if the defendant could not provide a separate residence for her it was because he lacked the means. He also felt that because she was not prepared to live with her husband because he had remarried, but that this was not a grounds for *khula* divorce. Her appeal was dismissed *in limine*.
- - Finally, Khurshid Bibi initiated a Petition for Special Leave to Appeal, which brings us to the case at hand in the Supreme Court.

Classification

Case Title: *Khurshid Bibi* (appellant) v *Muhammad Amin* (respondent)

Citation: P L D 1967 Supreme Court 97

Jurisdiction: Pakistan

Level of Court: Supreme Court, appeal by Special Leave

Name of Judges: S.A. Rahman, Fazle-Akbar, Hamoodur Rahman, Muhammad Yaqub Ali, and S.A. Mahmood, JJ

Keywords/Categories: divorce by Muslim women; *khula*; Muslim Family Law; dissolution of marriage

Source of Information: PLS

Religious background of litigants: Muslim, Hanafi

Legal Questions:

1. Can the wife claim *khula* as a matter of right on restoring or agreeing to restore, to the husband the dower or some other consideration given by the husband to her?
2. On what grounds can the wife claim dissolution of marriage under *khula*?
3. Is the *khula* different from *talaq*?
4. Is the consent of the husband required for the wife to obtain dissolution of marriage under *khula*, or can the Qazi dissolve the marriage even if the husband does not agree with it?

Resources:**Reference to the Quran, Verse 2: 229:**

“Such divorce may be pronounced twice; then, either retain them in a becoming manner or send them away with kindness. And it is not lawful for you that you take anything of what you have given them, unless both fear that they cannot observe the limits prescribed by Allah. But, if you fear that they cannot observe the limits prescribed by Allah, then it shall be no sin for either of them in what she gives to get her freedom. These are the limits prescribed by Allah, so transgress them not; and whoso transgresses the limits prescribed by Allah, it is they that are the wrong doers.”

- “This verse is the foundation of the law relevant to *khula*. The words “if you fear” are addressed to the community or those in authority and include the *Qazi*, who represents the community, for adjudication of disputes. The phrase “limits of Allah” is intended to the injunctions regarding the performance of conjugal obligations while living together” (p. 115).
- This verse “implies that the wife has to pay compensation to the husband in order to obtain dissolution of marriage by *khula*. This conclusion clearly emerges from its words ‘what she gives up to be free’” (p. 148).
- “This verse is also confers a right and privilege on the wife to seek dissolution of marriage through *khula*. However, this right is dependent on the Qazi reaching the conclusion that the spouses cannot live within the limits of God.”
- Third, the verse indicates that *talaq* is a different category than *khul*. *Khul* is the right of the wife and *Talaq* is the right of the husband. A *talaq* is pronounced by the husband on his own, but *khula* is sought by the wife and effected by the order of the Qazi for a consideration to be paid by her.
- Finally, the verse authorizes the Qazi to dissolve the marriage in appropriate cases, even without or against the will of the husband.

Reference to the Quran:

“Women have rights against men, similar to those that men have against them, according to the well-known rules of equity.”

- S.A. Rahman, J. quotes this verse of the Quran, and writes, “It would therefore be surprising if the Qu’ran did not provide for the separation of the spouses, at the instance of the wife, in any circumstances” (p. 114)

Reference to Hadith:

“Let no harm be done, nor harm be suffered in Islam.”

- S.A. Rahman, J. quotes this verse and writes, "In certain circumstances, therefore, if the husband proves recalcitrant or does not agree to release his wife from the marital bond, the Qazi may well intervene to give redress and enforce the Qur'anic injunctions" (p. 114). This would be supported by the verse in the *Hadith* because to do otherwise would be to force the wife into an unhappy relationship, which would lead to suffering.

Reference to verse 19, Sura Al-Nisa (iv):

"Nor should ye detain them that ye may take away a part of what ye have given them."

- S.A. Mahmood, J. quotes this verse and describes that the Quran "prohibits the wrongful or unwilling retaining of women, and favours their release...If the Qazi is satisfied that relations between the spouses are so embittered that a marriage relationship between the spouses consistent with the tenets of Islam is not possible, and a reconciliation is out of question, the husband's clinging to her would be injurious to her, and since she would be prejudiced by the continuance of the marriage, the express words of the Holy Prophet clothe the Qazi with ample authority to dissolve the marriage..." (p. 145).

Reference to Hedaya, Vol. II, p. 323:

"As Allah has enjoined that the husband should either retain the wife according to the well-recognized custom or release her with grace, if she is not kept accordingly, it is necessary for him to release her with grace, or the Qazi will release on his behalf."

- This verse once again affirms that if the husband is unwilling, the woman can still obtain a dissolution through the Qazi.

Reference to Hadith, and the story of Barairah:

"There is a Hadith of the Prophet, concerning Barairah who was married to a slave, named Mughis. She did not live with her husband who followed her disconsolate and weeping, in public. The Prophet advised her to go back to her husband. She asked if it was an order, and he replied that it was just a recommendation. She then refused to return to her husband, saying 'I have no need of him.'"

- S.A. Rahman, J. cites this story to illustrate that a wife can obtain a dissolution of marriage even if the husband is opposed to it (p. 119-120).

Reference to Hadith, and the story of Sabit's wife:

"Habiba, daughter of Sohl, was the wife of Sabit-bin-Qais-bin-Shamas and he was a short-statured and ugly man. She said, 'O Messenger of Allah. By God, if I did not fear God, I would have spat at his face when he comes to me.' The Messenger of Allah Said, 'Will you return his garden to him?' She said, 'Yes.' So she returned his garden to him and the Prophet of Allah separated them" (Ibn-i-Maja – Vol. I, p. 263).

- There are several versions of this story; in other versions, the wife's name is Jamila. However, "the generally accepted account of Jamila's case as well as that of Habiba makes it clear that the only ground on which the Prophet ordered the woman to be released from the marriage bond, was her intense dislike of her husband." The intense dislike of her husband was sufficient grounds for the wife to obtain a separation. This supports the current situation where the wife is able to obtain dissolution of marriage by *khul* for any reason, even if it is simply due to dislike, as long as she pays compensation.

Landmark Precedents:

Mst. Balqis Fatima v. Najam-ul-Ikram Qureshi, P L D 1959 Lah. 566

Under Muslim Law, the wife is entitled to *khula*, as of right, if she satisfies the conscience of the Court that it will otherwise mean forcing her into a hateful union.

S.A. Rahman, J. reached the conclusion that the view, taken by Kaikaus, J. in this case, "that the relevant verse of the Qur'an gives the right of *khula* to the wife subject to the limitation mentioned therein is correct" (p. 121).

***Umar Bibi v. Muhammad Din*, I L R (1944) 25 Lah**

S.A. Rahman, J. referenced this case, because it was decided that it is not possible for the court to grant dissolution or *khula* unless the husband consents to it (p. 120). In this case, “[t]he learned judge also expressed the opinion that even where there was mutual dislike or extreme incompatibility of temperament between husband and wife there can be *muwaddat*, *sukoon*, and *rehmat* in the married life (declared to be objectives of marriage by the Qur’an) with the procreation of children.” These objectives are defined as peace of mind, love, kindness, sympathy and compassion, specified in verse 21, chapter XXX, Part 21, of the Holy Qur’an (p. 144).

S.A. Rahman responded with a different opinion, saying that in such cases where there is a fixed aversion on the part of the husband or the wife, life becomes torture for both (p. 120). In this opinion, it is better to allow a *khula* or dissolution of marriage, rather than to force an unhappy union to continue – which would be against the limits of Islam.

Mst. Sayeeda Khanam v. Muhammad Sami

This case is similar in that it stressed the necessity of the husband’s consent for a *khula* divorce – something that has been refuted in the present case by both S.A. Rahman, J. and S.A. Mahmood, J. (p. 131). In this case, it was decided that “incompatibility of temperaments, aversion or dislike cannot form a ground for a wife to seek dissolution of her marriage at the hands of a Qazi or court, but is to be dealt with under the powers possessed by the husband and the wife under Muslim law, as parties to the marriage contract” (p. 133). This case defined *khula* as dissolution of a marriage by agreement between the parties for a consideration paid or to be paid by the wife to the husband (p. 140).

Islamic Experts/Authors Cited

1. On whether *khula* is equivalent to *talaq*:

Shaukani, Kitab-ul-Khul, Vol. III, p. 260 of his celebrated work Nail-al-Autar: His conclusion is that *Khula* is not a form of *talaq*, but a category apart from it. If this opinion is accepted, it is clear that *Khula* is not dependent on the will of the husband alone.

On the other hand, Ibn-e-Abbas relies on a Tradition of the Prophet, which specified that Sabet-bin-Qais’s wife, after the grant of *khula*, was ordered to pass one period of menstruation as her *iddat* and this would not be so if *khula* were *talaq* (S.A. Rahman, J. p. 116).

Urdu translation of Badayat-ul-Mujtahid by Allama Ibn-e-Rushud, p. 158, “*And the philosophy of khula is this, that khula is provided for the woman, in opposition to the right of divorce vested in the man*” (p. 112).

2. On the grounds on which the wife can seek *khula*

Sir Rowland Wilson in his book “Anglo-Muhammadan Law”: “*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 satisfactorily shows to impartial parties the impossibility of a happy married state*” (p. 146-147).

Shah Wali Ullah of Delhi in Al-Musawwa-min-Ahadith-al-Muatta, Vol. II: “*Even if she obtains khul without any reason (apart from personal dislike) it is lawful but not approved. The reason is that the Prophet and the Companions never inquired from her the reason for her (seeking) khul*” (p. 116).

Ameer Ali in Muhammadan Law, Volume II (1965 Edition) at page 478: “*If a woman be prejudiced by marriage, let it be broken off*” (p. 145).

Sha’rani in his book “Almizan-ul-Kubra,” Volume II, page 117: “*Imams agree in that the woman, if she dislikes her husband because of his ugliness or misconduct, she has the right to seek khul by*

payment of compensation. Even if there is nothing to cause her dislike and the husband and wife both agree upon khul; without any reason, it is lawful and is not condemned” (p. 117).

2. On whether the wife can claim khula as a matter of right on restoring or agreeing to restore to the husband the dower or some other consideration given by the husband to her
Sha'rani in his book, *Al-Mizan-ul-Kubra*, Vol. II, p. 119: *“Imams agree in that the woman, if she dislikes her husband because of his ugliness or misconduct, she has a right to seek khul by payment of compensation. Even if there is nothing to cause her dislike and the husband and wife both agree upon khul; without any reason, it is lawful and is not condemned.” (p. 117)*

4. On whether the wife can seek *khula* even without the husband’s consent:

Dr. Sabuni, p. 621 of his book, quoting Umar-ibn-Al-Khattab: *“When women desire khul, do not deny it.” (p. 117)*

Raddul Muhtar, a commentary of Hedaya: *“If the husband refuses to divorce his wife, she will make an application to the Qazi, and if her husband’s refusal to divorce her is zulm, the Qazi will act on his behalf for relieving her of zulm and it is permissible for the Qazi to dissolve the marriage.”*

Legal Reasoning:

1. Can the wife claim *khula* as a matter of right on restoring or agreeing to restore, to the husband the dower or some other consideration given by the husband to her?

S.A. Mahmood, J., writes, “Verse 2:229 of the Holy Qur’an implies that the wife has to pay compensation to the husband in order to obtain dissolution of marriage by khula. This conclusion clearly emerges from its words “what she gives up to be free,” or “by what she ransomes herself” (p. 148).

- Thus, the wife can claim *khula* as long as she gives up her dower or pays compensation.

S.A. Mahmood, J., writes, “...the wife has to return the benefits of the marriage and...has to refund no more than what she has received, for though Jamila was willing to give more than the garden given to her by her husband, the Holy Prophet said: “No, only the garden.” (p. 148).

- According to S.A. Mahmood, J., the wife is not *required* to give up more than her dower.

S.A. Rahman, J. has written, “She expressed a willingness to give up the dower, but the husband said he would not agree, even in that situation, to grant her khula. According to the Hedaya, it is “abominable” for the husband to obtain more than the dower, but it is legally permissible in the case of khula if he insists on getting restitution for the gifts he provided during the marriage to the wife.” (p. 121).

- However, it is *legally permissible* (though not required) for the wife to give up more than she has received – essentially, the cost of expenditures the husband has made on the marriage (e.g. gifts) if the husband requests it or if there is some sort of mutual agreement between husband and wife. In such cases, since it is a contract between husband and wife, it is legal; though it is considered “abominable,” the court cannot prevent such a situation.

2. On what grounds can the wife claim dissolution of marriage under *khula*?

As S.A. Rahman, J. writes, “...the wife is given the right to ask for *khula* in cases of extreme incompatibility though the warning is conveyed by *ahadith* against too free exercise of this privilege...” (p. 114)

He also writes, “The generally accepted account of Jamila’s case as well as that of Habiba makes it clear that the only ground on which the Prophet ordered the woman to be released from the

marriage bond, was her intense dislike of her husband. According to one text, she clarified that she found him to be ugly and repulsive, and in another that she felt like spitting at him. The Prophet being convinced that the spouses could not live together in conformity with their conjugal obligations, ordered the husband to separate her” (p. 118).

S.A. Mahmood, J. corroborates this view: “Thus, *khula* was decreed by the Holy Prophet on the ground that the wives having developed intense hatred for their husband, it had become impossible for them to live with him and to perform their marital obligations” (p. 138-139).

- From the above three quotes, it is clear that a wife can claim dissolution under *khula* even for reasons such as extreme incompatibility or intense dislike of the husband.

S.A. Mahmood, J. states that “*Khula* is thus a right conferred on the wife...The right is not, however, an absolute right by which the wife can herself dissolve the marriage, but is a controlled right. The success of her right depends upon the Qazi’s reaching the conclusion that the spouses cannot live within the limits of God” (p. 136).

- The wife can obtain *khula* even due to personal dislike or aversion, or any other reason, as long as it is proved that the spouses can no longer live together and fulfill their conjugal duties according to Islam.

5. Is the *khula* different from *talaq*?

S.A. Rahman, J. writes that, “There are good reasons for the view that *khula* is separation and not *talaq*, as the right of the husband to take back the wife after *khula*, does not exist, as it does in the case of *talaq-i-raja’i*, and the period of Iddat is different in the two cases” (p. 116).

- This shows that *khula* is different from *talaq*.

S.A. Mahmood, J. concurs when he writes that Verse 2.229 of the Qur’an “by making it not lawful for the husband, where he pronounces a *talaq* to take back anything from the wife and permitting it where she seeks *khul*, indicates that *talaq* is in a category different from *khula*. There is a clear difference between the two, for *khula* is the right of the wife, and *talaq* is the right of the husband. A *talaq* is pronounced by the husband on his own, but *khula* under the verse is sought by the wife, and is effected by the order of the Qazi for a consideration to be paid by her. The nature and character of *talaq* and *khula* are different, though their effect may be the same, namely, dissolution of the marriage tie...*Khula* is not the same thing as *talaq* and the two cannot be equated” (p. 136-137).

- Here, the judge explains that *khula* and *talaq* have different characteristics. After *khula*, the husband no longer has the right to take back the wife as the dissolution has been initiated by her. However, after a *talaq* has been pronounced, a husband still has the right to take back the wife. Thus the two are different in a critical aspect.
- The two are also different in the form they take; *talaq* is pronounced by the husband, but *khula* is sought by the wife and put into force either by the husband’s permission or the Qazi.

6. Is the consent of the husband required for the wife to obtain dissolution of marriage under *khula*, or can the Qazi dissolve the marriage even if the husband does not agree with it?

S.A. Rahman, J. states: “But where the husband disputes the right of the wife to obtain separation by *khula*, it is obvious that some third party has to decide the matter and, consequently, the dispute will have to be adjudicated upon by the Qazi...Any other interpretation of the Qur’anic verse

regarding *khula* would deprive it of all efficacy as a charter granted to the wife. It is significant that according to the Qur'an, she can "ransom herself" or "get her release and it is plain that these words connote an independent right in her" (p. 117-118). Additionally, "...the person in authority, including the Qazi, can order separation by *khula* even if the husband is not agreeable to that course" (p. 121).

S.A. Mahmood, J. concurs when he argues that Verse 2.229 of the Qur'an "virtually adds a ground for dissolution of marriage, and thus authorizes the Qazi to dissolve the marriage in appropriate cases, even without or against the will of the husband." He also writes that "dissolution is by the order of the Qazi and is not dependent on the consent of the husband or on his pronouncing a *talaq*. There are no words in the verse indicating that the consent of or *talaq* by the husband is necessary for *khula*" (p. 137). Thus, "...the Qazi can dissolve a marriage at the instance of the wife without the husband pronouncing a *talaq*. Therefore the authority vests in the Qazi to dissolve a marriage independent of the consent of the husband, whose refusal to pronounce a *talaq* makes no difference to his powers and authority" (p. 146).

- As seen above, the judges concurred in their opinion and endorsed the view of Kaikaus, J. in *Mst. Balqis Fatima* that under Muslim law, the wife is entitled to *khula*, as of right, if she satisfies the court that otherwise she would be forced into a hateful union – even if her husband does not want a dissolution. The dissolution does not rest on the consent of the husband, but depends on the order of the Qazi, who has the power to order dissolution of marriage. Since the dissolution can take effect without the husband's pronouncing the *talaq*, the Qazi has the power to dissolve the marriage by *khula* also independent of the husband's consent and his pronouncing a *talaq*.

In the current case, the judges concurred that it was clear that the relations between husband and wife were embittered. He was in a financial position to provide an extra residence for her, but he did not. He mistreated and abused her, and since she was not able to provide him with any children, it is clear he did not care for her. The wife was not willing to return to the marital home and fulfill any marital responsibilities. Thus, the Court was satisfied that there was no possibility of them living together and fulfilling their conjugal duties and responsibilities within the limits set by God. She was also willing to give up her dower in return for *khula*. Thus, she deserved a dissolution of marriage by *khula* despite the husband's refusal.

Conclusion

(A) A wife can claim *khula* on agreeing to restore to the husband the dower or some other consideration.

(B) The wife can claim dissolution of marriage under *khula* as long as there is personal aversion or dislike, and if the Qazi or Court finds that the husband and wife cannot live together in amity and fulfill the limits set by God.

(C) *Khula* is separate from *talaq* and is the right of a woman to obtain dissolution of marriage.

(D) The consent of the husband is not required for the wife to obtain dissolution under *khula*, if the Qazi finds they cannot live together in harmony and if the wife is willing to provide compensation in return.

Commentary

This 1967 Supreme Court case in Pakistan is a landmark decision because it affirms the right of a Muslim wife to obtain dissolution of marriage through *khul*. This case significantly improves the rights of Muslim women because they are able to obtain dissolution of marriage if they harbor dislike or aversion towards their husbands, even if they do not have any other reason for the dissolution.

Most significantly, this judicial decision has granted women the right to *khula* even in the face of opposition from their husbands. This gives substantial freedom to Muslim wives, and allows them

to obtain a separation even *if* their husbands do not agree, as long as they provide some compensation or give up their dower in return, and as long as a Qazi or the Court finds that the couple cannot live together in harmony fulfilling their marital responsibilities according to Islam. That was the case for Khurshid Bibi, and she was able to obtain a dissolution through this Supreme Court decision.

Women now have been given an important legal tool and the right to dissolution of marriage, which gives them increased bargaining power in a marital relationship.

As Shaheen Sardar Ali has written in her review of this case, this ruling "...has also served as a reminder that Islam has definitely raised the status of women, and it is our sacred duty to our religion not to let misconceptions and narrow interpretation of the Quran and Hadith concerning them cloud the horizons of Islamic Law by making it appear as if it were a religion merely of men, for men, and by men" (p. 60).

Additionally, in "Muslim Family Law," Menski and Pearl write that the Pakistani Supreme Court, "...in what would today be called a judgment marked by 'social activism,' decided that *khul* could be effected without the consent of the husband...the Supreme Court's decision made the wife more equal in relation to demanding a divorce..." (p. 322-323).

Still, there are aspects of this judgment that remain problematic with regards to women's rights. Most clearly, the wife is required to give up her dower or provide compensation in order to obtain *khula*. On the other hand, men simply have to pronounce a *talaq* and do not have to provide any compensation. Particularly problematic is the fact that it is legal, although "abominable," for the husband to demand more than the dower from the wife, including compensation for gifts and other expenses he has incurred due to the marriage. There are no legal protections for women in such cases, and can be truly difficult for those who are poor. Finally, the husband does not need to prove in court, or to a Qazi, that the marriage is an unhappy one, in order to get a divorce; this is a requirement for *khula*, however. Thus, further steps in the interpretation of the law are much-needed in order for women to have truly equal footing with men when it comes to dissolution of marriage and divorce.

Despite the shortcomings, the judgment gave women greater freedom to leave a marriage, and it is clear that Supreme Court judgment proves to be a step forward for the rights of Muslim wives.

Written by: Akhila Kolisetty

Reviewed by: Natasha Latiff and Anna Dugoni

Bibliography

Khurshid Bibi Vs. Mohammad Amin, P.L.D. 1967 Supreme Court. 97.

Khurshid Bibi Vs. Mohammad Amin, Reviewed by Mrs. Shaheen Sardar Ali, Journal of Law & Society, Vol. IV, No. 4, Faculty of Law, University of Peshawar, January 1985.

Menski, Werner and Pearl, D (1998) [*Muslim Family Law*](#). Sweet & Maxwell.