

**THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD.**

C.P.No.S- 245 of 2024

Mst. Bushra Khanum Vs. ADJ-IX, Hyderabad and 2 others

For hearing of main case.

Petitioner : Mst. Bushra Khanum d/o Masroor Hussain Khan, through M/s Riaz Ahmed Qureshi and Inam Ali Khuhro,, Advocate.

Respondent : Mirza Aurangzeb Baig s/o Mirza Hakim Ali Baig through Mr. Ghulam Sarwar Qureshi, Advocate.

Dated of hearing : 30.10.2025.
Date of Order : 30.10.2025.
Date of reasons : 17.10.2026.

ORDER

JAWAD AKBAR SARWANA, J: The Petitioner Mst. Bushra Khanam is aggrieved by the Order dated 09.03.2024 passed by the IXth Additional District Judge, Hyderabad in Family Appeal No.112 of 2022 wherein while allowing the appeal, learned Additional District Judge dissolved the marriage of the petitioner by way of 'Khula' vide Judgment dated 20.03.2023. About ten months later the petitioner filed a Review Application on 30.01.2024 supported by an application for condonation of delay under the provisions of the Limitation Act, 1908. The IXth Additional District Judge, Hyderabad after hearing the parties passed the impugned Order dated 19.03.2024 dismissing the said Review Application which is now under challenge before this regular bench.

2. Counsel for the petitioner contends that when the Respondent No.1 Mirza Aurangzeb Baig filed the Family Suit No.1342 of 2019 such suit was merely for Restitution of Conjugal Rights. In these proceedings the petitioner also filed Written Statement wherein in paragraph-5 of the said statement, she submitted under Oath as follows:-

“It is further submitted that the defendant / petitioner Mst. Bushra Khanam wants to live with the plaintiff [respondent No.3] and has love but the plaintiff careless man because all the facts mentioned in the above Para’s and above previous cases because the plaintiff nor neither love with the minor nor with his wife because since 2013 the defendant is residing with her parents and the plaintiff not sent the single penny for his minor nor his wife even special occasion like Eid, Bakra Eid and other days.”

He contended that there is no mention of Khula and the statement cannot by any scope of imagination be read as a declaration of Khula.

3. Learned counsel for the petitioner further contended that the petitioner never filed a Suit for Khula only the respondent No.1 had filed a Suit for Restitution of Conjugal Rights and in the circumstances the Court could not grant Khula without consent of his wife. He relied on Section 9(1)(b) of the West Pakistan Family Courts Act, 1964 and contended that as the petitioner-wife had made no counter claim for dissolution of the marriage including Khula, in the Written Statement in the Suit for Restitution of Conjugal Rights, it could not have been inferred in the pleadings sans her express consent, that she wanted Khulla from her husband. Additionally he argued that even the pre-trial proceedings under Section 10 which are mentioned in the Judgment dated 19.08.2022, Section 10 (4) provides that if no compromise or reconciliation is possible then the Court may frame issues and fix a date for recording of the evidence provided that it must be within the frame work of a Suit for Dissolution of Marriage. He contended that in this particular case this was a matter of Restitution of Conjugal Rights and not a case for dissolution

of marriage. He further contended that Divisional Bench Judgment of Peshawar High Court relied upon by the Family Judge was entirely distinguishable as the appellate Court was considering the matter arising from a suit for dissolution of marriage whereas the case in hand was a matter of Restitution of Conjugal Rights.

4. Learned counsel for the respondent No.3 vehemently opposed the jurisdiction of this Court on the grounds that this petition was bad in law as the petition was filed after almost 10 months and the appellate forum had also dismissed the application for review as well as the application for condonation of delay in filing of the review application. Therefore, this petition was liable to be dismissed.

5. Heard counsels and considered the material on record. This matter has been placed before this bench under the provisions of Article 199 (1) (a) (ii) of the Constitution of Islamic Republic of Pakistan, 1973 as amended by the 26th Constitution Act, 2024 wherein this Court as the regular bench must decide whether the matter brought before it is “without lawful authority” and / or “is of no legal effect”. This bench must consider whether the Judgment dated 19.08.2022 passed by the Family Judge and the Family Appeal No.112/2022 vide Judgment dated 20.03.2023 falls / comes within the frame work of the aforementioned article of the 1973 Constitution.

6. I have perused the record available in the petition and am unable to find any document including affidavit wherein the petitioner has expressed any hate and or aversion to the union of marriage between the petitioner and respondent No.3. To the contrary I have perused the Written Statement and do not find any indication on the part of the petitioner that she sought legal separation by way of Khula from her husband. The record reflects that the petitioner has under Oath stated that in fact she still loves her husband but that he has not reciprocated such love. At best, she expressed love for the

plaintiff while at the same time expressing doubt whether such love was being reciprocated by her husband. Therefore, in this context it is not understood how the Family Judge in the pre-trial proceedings could have made the observations as stated in the judgment. Indeed, the pre-trial proceedings under the Family Court Act, 1964 mandates that evidence is to be recorded in a suit for dissolution of marriage concerning Khula which was not the case before the Family Judge who still reached the conclusion that a case for Khula could be made out. The Supreme Court of Pakistan in the case of Dr. Faryal Maqsood v. Khuram Shehzad Durrani (PLD 2025 Supreme Court 262, 271), Paragraph-10 has observed as follows:

“10. Khula is one of the modes for dissolving a marriage. It can either be on the basis of mutual settlement/ arrangement between the spouses or it can be ordered by a court if the requisite conditions are met. This court in the case of Khurshid Bibi⁵ has held that Khula is a right and privilege of the wife to seek dissolution of marriage. It is a right which is exclusively conferred on the wife. Khula through judicial order is thus dissolution of marriage by the court/Qazi on the demand of the wife. It authorises the court to dissolve the marriage in an appropriate case against the will or consent of the husband. However, a court on its own cannot order dissolution of the marriage on the basis of Khula when it has not been sought by the wife either expressly or impliedly. It has further been observed that the question of Khula was a subject matter of a specific issue between the parties in the case before this Court. It has been noted in the judgment that the wife in her plaint had consented to the dissolution of marriage on the basis of Khula. The learned counsel for the defendant has placed reliance on Muhammad Arif's case⁶ in support of his contention that a court is competent to order dissolution of marriage on the basis of Khula even though it may not have been sought by or consented to by the wife. We have carefully perused the judgement rendered by a Bench consisting of two hon'ble judges of this Court but, with respect, we have noted that the Bench had not considered the law enunciated by this Court in KhurshidBibi's case (supra) which was rendered by a larger bench consisting of five hon'ble judges. The appellate court, therefore, fell in error by granting a decree for the dissolution of

marriage on the basis of Khula when it was not sought by the plaintiff nor had she given express or implied consent thereto as was the case in KhurshidBibi's case supra. The next question is whether the High Court had validly modified the decrees by ordering the dissolution of the marriage on the ground of cruelty.”

7. In view of the above, the appellate Court could not have imposed its own finding on the union and declared Khula on behalf of the petitioner. Declaration of Khula is the right of the wife and cannot be taken away or imposed or presumed on her part. The right solely rests with the wife. In the instant case the Family Judge could not have gone beyond the frame work of law and declared Khula on behalf of the wife, too. Additionally even otherwise the provisions of Section 10 (4) cannot be triggered in a Suit for Restitution of Conjugal Rights. It is available only in cases of suit for dissolution of marriage, and this was not the case before the appellate forum. Therefore, I find that the judgment and decree dated 20.03.2023 is “without lawful authority” and “is of no legal effect”.

8. Based on the above observations I must now address the issue of limitation. This petition was filed in this (High) Court on 29.05.2024 and impugned the review order dated 09.03.2024 which was a review of the Family Court’s judgment dated 20.03.2023 in Family Appeal No.112/2022. Be that as it may, I have found the judgment dated 20.03.2023 of “is of no legal effect” and / or “without lawful authority”. Thus in the circumstances the petitioner could have invoked the jurisdiction of the regular bench and challenged the same under the frame work of Article 199 (1) (a) (ii) of the 1973 Constitution. Therefore, once this Court determines that the order falls within the scope of Article 199 and the petitioner has arrived at the door step of the Court, the petitioner ought not be denied her remedy based purely on technical grounds.

9. Given the above, the petition is allowed and the impugned judgment dated 20.03.2023 is modified to the extent that in the appellate Court's judgment and decree dated 19.08.2022, the order as to the marriage of the petitioner having been dissolved by way of Khula is hereby recalled. Accordingly the judgment and decree dated 20.03.2023 in Family Appeal No.112/2022 stands modified in the above terms.

10. The Petition is disposed of in the above terms.

JUDGE

Tufail