IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

C. P. No. S – 309 of 2019

Rashid Ali Noonari V. Mst. Zoya Noonari & another.

Date of Hearing: **01-10-2021**
Date of Decision: **21-01-2022**

Mr. Wajid Ali H. Shaikh, Advocate for the Petitioner.
Ms. Rizwana Jabeen Siddiqui, Advocate for Respondent No.1.

J U D G M E N T

Muhammad Junaid Ghaffar, J. **–** Through this Petition, the Petitioner has impugned Judgment dated 23.10.2019, passed by the 2nd Additional District Judge, Sukkur in Family Appeal No.03 of 2019, whereby Judgment of the Trial Court dated 06.12.2018 has been partially modified / set-aside to the extent of enforcement of conditions stated in column Nos. 18 & 19 of the Nikahnama.

2. Learned Counsel for the Petitioner has argued that the Trial Court in its Judgment had correctly appreciated the evidence to the extent of column Nos.18 & 19 of the Nikahnama; therefore, the Petitioner had not impugned such Judgment and had accepted the relief partially granted to the Respondent. According to him, Appellate Court has misread the evidence and has failed to appreciate contradictions; hence Judgment of the Appellate Court is liable to be set-aside.

3. On the other hand, Respondent's Counsel has argued that the Trial Court had erred and failed to appreciate that Nikahnama was never denied by the Petitioner; hence to that extent the Appellate Court has righty granted relief as per Column Nos.18 & 19 of the Nikahnama, therefore, no exception can be drawn and the petition is liable to be dismissed.

4. I have heard both the learned Counsel and perused the record.

5. It appears that Respondent had filed suit for past maintenance and recovery of dowry articles, wherein the Trial Court settled the following issues:

> "1. Whether plaintiff is entitled for maintenance? If yes, at what rate and up to what period?
>
> 2. Whether plaintiff is entitled for conditional amount mentioned in the Nikahnama?
>
> 3. Whether plaintiff is entitled for remaining dowry articles and same are lying at the house of defendant?
>
> 4. Decree?

6. The present controversy hinges upon Issue No.2 on which the Trial Court came to the following conclusion: -

> "**Issue No.2:** Plaintiff has submitted photocopy of Nikahnama annexed with her plaint. A bare reading of column No.18 & 19 of Nikahnama contained the stipulation that in case of divorce by the husband, a sum of Rs.1,000,000/- shall be paid to the wife. Before discussing this issue I would like to discuss the moot point involved in the instant suit is as to whether pronouncing of divorce by the husband can be made conditional or such right can be made dependent of any condition. In order to properly comprehend the matter in issue, it would be advantageous to first have a glance on the relevant facts, which form basis of the instant controversy. Admittedly parties were remained in matrimonial tie and same was ended by the pronouncement of divorce and terms of matrimonial tie were incorporated in Nikahnama wherein an entry in column No.19 was incorporated wherein the defendant (husband) was made liable to pay Rs.1,000,000/- to the plaintiff "in case of divorce". It is manifestly clear from the Divine Law (Quran). In Surah "Al-Talaq, in Surah "Al-Ahzab", so also Surah "Al Baqarah", that exercise of power of divorce is free from any encumbrance and such right cannot be abridged with conditions, as the relationship between husband and wife can only run with their free consent and such tie is beyond any restrictions, curtailing their right to live together or to part. Such terms and conditions care against the basic principle of law which require the parties to remain in marital ties in a peaceful and tranquil atmosphere and are not required to be bound by stringent conditions to remain in marriage bond. I have borrowed guidelines from MUHAMMAD ASIF. Versus. MST. NAZIA RIASAT, ETC. 1844 CLC 2018. For the foregoing reasons, I am of the considered view that Plaintiff is not entitled for the said relief i.e. conditional amount mentioned in the column No.19 of the Nikahnama. Issue replied accordingly".

7. Insofar as the petitioner is concerned, he was not aggrieved with the said judgment and had in fact conceded that as to the relief being granted by the learned Family Judge, the petitioner is still willing to abide by it. However, the Respondent being aggrieved to the extent of denial of relief regarding conditional amount mentioned in column Nos.18 & 19 of the Nikahnama, preferred Civil Appeal and the Appellate Court through

impugned Judgment has granted such relief to the Respondent on the ground that it was the family court which alone had jurisdiction in this matter and ought to have decreed the Suit in this regard as well.

8. As to the finding of the two Courts below is concerned, it appears that they have given divergent views as to the prevailing law and its applicability; (which would be dealt with later on in this opinion); however, as to the facts and the evidence led by the parties, and notwithstanding, that in law who was correct or not; both the Courts below have failed to appreciate the evidence on record as well as admitted existence of two different sets of Nikahnama and divergent endorsements in column Nos.18 & 19 of the said Nikahnama. It would be advantageous to refer to one of the Nikahnamas, wherein columns- 18 & 19 (**English translation**) reads as under:

18	Whether the husband has delegated the power of divorce to the Wife, if so under what conditions:	If groom Rashid Ali s/o Ashique Ali Noonari divorces his wife, in that case groom is liable to pay fine of Rs.100,0000/- (ten lacs rupees) to bride. Groom is bound.
19	Whether the husband's right of divorce in any way curtailed:	

9. Insofar as Respondent is concerned, the real mother of the Respondent, namely, Mst. Pathani, widow of Wazeer Ahmed appeared in the witness box and her cross-examination reads as under:

> "PATHANI WD/O WAZEER AHMED.
>
> CROSS TO MR. ABDUL WAJID SHAIKH ADVOCATE FOR DEFENDANT.
>
> Correct to suggest that Molvi Ahmed Din Noonari read over the Nikah of the spouses. ***Correct to suggest that prior to case he (sic) approached Molvi Sahab and asked to him why he did not write the terms and conditions in the Nikahnama*****.** Dowry articles included gold locket, ear rings, ring Bed, almari, iron peti, dressing table, 20 suits unstitched 5 stitched and dinner set. Correct to suggest that I did not produce bill/receipt of above articles. It is correct to suggest that in July 2017 plaintiff got ill and she was admitted in Civil Hospital Sukkur and all the medical expenses were borne by the defendant. It is correct to suggest that defendant is not involved any bad activity affidavit in evidence was read over to me by my Counsel about 2 to 2½ years ago my husband died. It is correct to suggest that I made complaint against the bad conduct of the defendant to the persons of the locality. It is incorrect to suggest that in August 2017 defendant came at my house. It is correct to suggest that it is mentioned in my affidavit in evidence that defendant come at my home and pronounced Talaq to my daughter. It is incorrect to suggest that I asked him to live with us as Ghar damad in case of refused he may pronounce Talaq to my daughter. It is correct to suggest that I can take back the dowry articles through nek

> mards and *the instant is filed because of terms and conditions mentioned in column No:18 of the Nikahnama.* It is correct to suggest that my daughter was happy with the defendant until his father was alive incorrect to suggest that I am deposing falsely at the instance of Jabbar"

10. Perusal of the aforesaid cross-examination clearly suggests that insofar as the Nikahanama is concerned, she admits that it was read over to both the parties and she has further admitted that ***"It is correct to suggest that prior to filing of the case, Molvi Sahab was approached and asked as to why he did not write the terms and conditions in the Nikhanama"***. Apparently, this piece of evidence suggests firstly, that in the Nikahnama the terms and conditions were not mentioned; and or secondly, that there was existence of two different copies of Nikahnamas, one on which the Petitioner has relied upon, wherein column No.18 & 19 were blank; and the other, which the Respondent has produced in evidence, wherein both these columns have been filled and some condition has been purportedly agreed upon by the parties which would be applicable on pronouncement of divorce. This has been completely ignored by the two Court below and instead without dilating upon this factual aspect of the matter and appreciating the evidence on record, finding has been recorded on legal plane which is not a correct approach. First the matter has to be dealt with on facts and after thrashing out the same, the law is to be applied. Though this may have been a case for remand of the same; but since the evidence as discussed is available on record; I have decided not to do so as it would delay the matter which under the Family Court Act is required to be decided expeditiously.

11. Coming to the merits of the case the only piece of evidence from which the Respondent seeks support, is the answer of the Petitioner to the Respondent's Counsel that ***"the original Nikahanama shown to the Defendant is admitted to be true and correct"***, but at the same time, the witness has said voluntarily that ***"I am not aware about the terms and conditions mentioned in Nikamama".*** Again in his cross-examination, he has answered that ***"It is incorrect to suggest that it is mentioned in Column No.18 of Nikahnama as condition that if I shall pronounce Talaq to the Petitioner, I shall pay Rs.1000,000/ to her"***.

12. The aforesaid contradictions in the contents of Nikhanama, specially column Nos.18 & 19, of which the Respondent had sought implementation; were to be proved and satisfied by the Respondent as the onus for doing so was upon the Respondent, which she had clearly failed to do so. Though

the conclusion of the Trial Court, whereby, the relief was refused to the Respondent was based more on a legal proposition which was then overturned by the Appellate Court again by relying on some Judgment; however, fact remains that before a Judgment or a precedent of a superior Court could be applied, first on facts, the matter has to be precisely ascertained as to whether the said law would apply or not. In this case, apparently, both the Courts below have failed to give findings on facts and on this very crucial point regarding contradiction and their being two different versions of the Nikahnama, one which has column Nos. 18 & 19 as blank, and the other, which has these columns filled with certain conditions as reproduced hereinabove. It needs to be noted that when the Petitioner entered into the witness box and has denied as to the contents of column No.18 & 19, then it was incumbent upon the Respondent to prove the said columns through evidence and more appropriately by bringing in evidence Nikah Khuwan or Maulvi, who solemnized the Nikah, when the Respondents own witness has replied that he was approached to seek clarification. This was never done, whereas, the evidence led on behalf of the Respondent is contradictory and hearsay; hence, cannot be relied upon. To that extent on merits, the Respondents has not case, whereas, the Appellate Courts finding would then has to be set-aside as the claim was not proved factually.

13. As to the legal issue involved in this matter, that whether the conditions mentioned in column No.18 & 19 of Nikahnama (though this is only subject to that if at all it had been proved that these conditions existed, which is not the case in hand) can be enforced, the learned Trial Court held that exercise of power of divorce is free from any encumbrance and such right cannot be abridged with conditions, as the relationship between husband and wife can only run with their free consent. Reliance was also placed on the case of ***Muhammad Asif***[1]. On the other hand, the Appellate Court by placing reliance on the case of ***Mst. Yasmeen Bibi***[2], held that when husband and wife agree to certain conditions in the Nikhanama, then the same is binding, whereas, in such cases the jurisdiction vests with the Family Court and to no other Court. Brief facts in the said case were that Yasmeen Bibi entered into a wedlock with Muhammad Ghazanfar on 8.5.1994 and it was stipulated in the Nikhanama that dower in cash, amounting to Rs.1,00,000/-

[1] 2018 CLC 1844
[2] PLD 2016 SC 613

fixed, shall be payable on demand, whereas, in column 17 it was further undertaken that an amount of Rs.1000/- will be paid as pocket money, and land measuring 200 Kanals in Moza Amir Shah, Tehsil and District D.I. Khan shall also be transferred in her name and she would be exclusively owner of the same. Matter went into litigation and suit was decreed for maintenance and for dower amount. Besides this, the landed property described in the column of "Nikah Nama" was also decreed. In Appeal the decree was modified by setting aside the decree of the trial court with regard to the land in dispute and also in respect of dower articles. In Revision the learned Lahore High Court held that the issues involved were beyond the jurisdiction of the Family Court, by relying upon the case of ***Muhammad Akram***[3], which view was based on the case of ***Allauddin Arshad***[4]. The Hon'ble Supreme Court came to the conclusion that firstly, the jurisdiction in such matters rests with the Family Courts established by way of a special law and not with ordinary civil courts as held by the Courts below; and secondly, that the landed property given to the wife in this case or even the undertaking to do so via Nikahnama for ultimate transfer in her name was conclusive in nature and may be considered as a part of dower or a gift in consideration of marriage. In essence it was held that such condition incorporated in the Nikahnama was enforceable. It was also held that this could be only be done by approaching the Family Court and not the ordinary court. In coming to this conclusion the Hon'ble Supreme Court affirmed the view taken in two judgments of the learned Peshawar High Court in the case of ***Muhammad Tariq***[5] and ***Dr. Fakhr-ud***[6] whereas the case of ***Muhammad Akram (Supra)*** was not approved. The relevant finding of the Hon'ble Supreme Court is as under;

> 17. As in this case the landed property, given to the wife, or the undertaking given in the "Nikah Nama", to be transferred to her name is conclusive in nature and may be construed as a part of dower or a gift in consideration of marriage therefore, it was falling within the exclusive domain of the Family Court at Multan, as the wife was/is residing there, which has not been denied by the respondent, therefore, in our considered view, the District Appeal Court and the learned Judge in Chamber of the High Court, Multan Bench, Multan fell into legal error by holding the view to the contrary. Any departure made from the true object and spirit of law, enacted by the Legislature would defeat the same, which is not permissible under any cannon of justice and principle of law, nor the Courts are having any authority or powers to import their own opinion therein, defeating the clear intention of the Legislature and when the provisions of Ss. 16 to 20 of the C.P.C. stand excluded from the

[3] PLD 2007 Lahore 515
[4] 1984 CLC 3369
[5] PLD 2006 Peshawar 189
[6] PLD 2009 Peshawar 92

> proceedings before the Family Court then, the question of its territorial jurisdiction would never arise, provided that the Family Court where the wife resides, shall have the exclusive jurisdiction over all such matters for the sake of convenience because Rule 6 of the West Pakistan Family Court Rules, 1965 so provides.

14. In a recent case of ***Fawad Ishaq***[7] the Hon'ble Supreme Court has dealt with somewhat similar issue. In that case Mehreen and Mansoor were married and agreed for certain terms and condition incorporated in the Nikahnama. After 16 years of marriage a dispute arose and Mehreen filed a suit claiming a house, measuring 1 kanal situated on plot No. 28 Abdara Road, University Town, Peshawar ("the Property"), or its prevailing market value of thirty-three million rupees, which she said constituted part of her dower (mehr) as mentioned in clause 16 of the Nikahnama. The suit was filed in Family Court-II, Peshawar. Mehreen arrayed Haji Muhammad Ishaq Jan and Mst. Khurshida Ishaq, respectively her father-in-law and mother-in-law, as the only defendants in the suit on the ground that such property as to be transferred by them. The suit was decreed by the learned Family Judge on 3rd May 2014. Both the father-in-law and mother-in-law filed separate appeals but both were dismissed, vide consolidated judgment dated 15.2.2017 by the learned Additional District Judge-X, Peshawar. Thereafter, they filed two separate writ petitions before the Peshawar High Court, but these too were dismissed, vide impugned judgment dated 17.12.2018. The said judgment of the Peshawar High Court was impugned bfore the Hon'ble Supreme Court by the two sons and one daughter of Haji Muhammad Ishaq Jan who had passed away and it was contended that the property in question was never owned by the husband of Mehreen and could not have been given to her by way of a court decree. The Hon'ble Supreme Court agreed with this contention and held that as to Mehreen and Mansoor are concerned, they could have entered into any such agreement or signed the Nikahnama to get married and the obligation to pay dower was to be incurred by Mansoor and remains his liability and the property of his mother could not be transferred by anyone else including her husband / father of Mansoor. Though the facts were not exactly similar; however, the principal of law is the same that the Nikahnama is an agreement pursuant to Form II of the Muslim Family Laws Ordinance, 1961 and by mutual consent, if both the parties have agreed upon certain terms to continue with the marriage and its dissolution, then it is obligatory upon them to fulfil those conditions and in case of violation, they can be enforced by the Family

[7] PLD 2020 SC 269

Court. But it may be of relevance to observe that insofar as this case is concerned, it has not dealt with or dilated upon the issue that Family Court has the exclusive jurisdiction to deal with these matters or not, as apparently it was not a matter in dispute. The relevant finding of the Hon'ble Supreme Court in the said case is as under;

> 17. Mst. Khurshida was not a signatory to the Nikahnama nor had she, at any stage, agreed to transfer the Property to Mehreen. Mst. Khurshida's husband could not have made a commitment on her behalf with regard to the Property. Mehreen also did not array her husband as a party to the suit even though he was a necessary party thereto. Mehreen undoubtedly had a valid claim against her husband with regard to the dower promised by him at the time of marriage, as mentioned in the Nikahnama, and could claim the value of the Property from him however she elected not to do so but instead lay claim to the Property. Be that as it may, Mehreen could still claim from her husband any part of her dower which remains unpaid.
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> 18. Therefore, for the reasons mentioned above, these petitions are converted into appeals and allowed by setting aside the judgments of the Courts below and by dismissing the suit filed by Mehreen against Haji Muhammad Ishaq Jan and Mst. Khurshid Ishaq. There shall however be no order as to costs.

15. As to the case of ***Muhammad Bashir***[8] is concerned, which has been cited by various High Courts as well as lower Courts in a number of judgments, it may be observed that the same being a leave refusing order is not a precedent to follow. In that case the matter originated from judgment dated 19.5.2006 passed by a learned Single Judge of this Court at Circuit Court, Hyderabad in C.P No. S-179 of 2005, through which judgment and decree of a family judge in Family Suit No.89 of 2004, was assailed, whereby, a decree of khula was passed in favor of the wife of the petitioner. The only ground urged was that in column No.17 of the Nikahnama it was agreed upon that in case khula is sought by the wife, she will have to pay Rs.2,50,000/- to her husband, and similarly, if petitioner / husband divorces her, he will have to pay the same amount. The family court while granting khula refused to grant this amount to the petitioner on the ground that firstly such condition and its incorporation in the Nikahnama was disputed by the wife, and secondly, the family court lacks jurisdiction in the matter and an ordinary court has to be approached. The learned Single Judge passed the following order in the petition;

> 6. I have considered the arguments advanced by Mr . Shoukat Ali Jafferi , advocate perused the case record and also the cases cited at the Bar. In the instant case suit for dissolution of marriage was instituted by the respondent No.1 on 4.12.2005, wherein written statement was filed by the petitioner on 3.2.2005. The Family Court while conducting further

[8] 2008 SCMR 186

> proceedings in the suit had taken recourse to Sections 10 (4) of the Family Court Act 1964, as amended by Amendment Ordinance of 2002, and rightly ordered dissolution of marriage between the spouse. As regards condition No.17 of the Nikahnama , as observed above, firstly the respondent No.1 has disputed its genuineness; secondly, prima facie , it appears that such entry in the Nikahnama restricting respondent No.1 from exercising her legal right , for seeking dissolution of marriage by way of Khula, ordained by Sharia, by imposition of condition of payment of Rs. 2,50,000/-, which seems to be very heavy amount looking to the purchase value of the currency in the year 1970, is against the public policy and thus it would be void and unenforceable before the Family Court. The cases cited by the learned counsel are also distinguishable thus of no help to the petitioner's case. 7. Considering these aspects of the case I find no substance in this petition which is dismissed in limine.

16. The aforesaid judgment was then impugned before the Hon'ble Supreme Court in the case of ***Muhammad Bashir*** and the Hon'ble Supreme Court while refusing leave to appeal had observed as follows;

> This petition for leave to appeal has been filed against the judgment of Sindh High Court. Hyderabad Circuit, Hyderabad dated 19-5-2005 in C.P.No.S-179 of 2005.
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> 2. The parties were married sometimes in the year 1970. Paragraph 17 of Nikahnama provided that in case the respondent wanted to obtain Khula she would have to pay a sum of Rs.2,50,000 to the petitioner and if the petitioner would divorce the respondent, he would pay a sum of Rs.2,50,000 to the respondent. The respondent filed a suit for obtaining dissolution of marriage on the ground of Khula on 4th December; 2004. This suit was decreed on 17-9-2005. Against the said decree the petitioner filed above constitutional petition before High Court of Sindh. Hyderabad Circuit which was dismissed by the impugned judgment. Hence this petition.
>
> 3. Contention raised on behalf of the petitioner is that learned Family Judge as well as the learned Judge of Sindh High Court failed to take into account paragraph 17 of the Nikahnama, the provisions of which have already been mentioned above. According to him it was incumbent upon the family Court to award Rs.2,50,000 while granting decree by way of Khula in favour of petitioner. When confronted with the question as to whether parties could place restriction on their respective rights given to them by Shariat Law, Mr. Akhlaq Ahmed Siddiqui was unable to advance any plausible ground. His only contention was that such condition was embodied in the Nikahnama by way of safety and for prolongation of marriage contract, as it would deter both the parties from bringing an end to the marriage contract. This contention to say, the least is absolutely frivolous as it is against the basic principle of law which require the parties to remain in marital ties in a peaceful and tranquil atmosphere and are not required to be bound by stringent conditions to remain in marriage bond.
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> 4. This petition is absolutely without any substance and is dismissed. Leave refused.

17. It is also a matter of record that before judgment in the case of ***Mst. Yasmeen Bibi*** was pronounced and the judgment of the Lahore High Court in the case of ***Muhammad Akram*** was disapproved, the Hon'ble Supreme Court, much earlier in time, had already approved the view taken by the learned Lahore High Court in ***Muhammad Akram*** in the case of ***Syed Mukhtar Hussain Shah***[9]. In fact, as against the view taken in ***Muhammad Akram's*** case, another judgment of the same Court in ***Nasrullah***[10] was also in field which had taken a contrary view. In that case the Hon'ble Supreme

[9] PLD 2011 SC 260
[10] PLD 2004 Lahore 588

Court had granted leave to reconcile the two views taken by the learned Lahore High Court. The leave granting order reads as under;

> "After hearing the learned counsel and respondent No.1 in person, we grant leave to appeal in view of the case Muhammad Bashir Ali Siddique v. Sarwar Jehan Begum (2008 SCMR 186) to consider the question. whether the condition of payment of sum of Rs.100,000 by the petitioner (husband) in the event of A giving divorce to the respondent (wife) as stipulated in the Nikahnama was a valid one and recoverable by filing a suit before a Family Court and to resolve the conflict of judgments of the Lahore High Court in the cases of Nasrullah v. District Judge (PLD 2004 Lahore 588) and Muhammad Akram v. Hajra Bibi (PLD 2007 Lahore 515).

18. After a threadbare discussion the Hon'ble Supreme had approved the view taken by the Lahore High Court in the case of ***Muhammad Akram*** and relevant observations are as under;

> 3. Heard. We have deemed proper to decide this matter in the terms whether the family Court has jurisdiction to entertain and adjudicate the claim of the respondent/plaintiff and not on account of the noted judgment of the Supreme Court. In this regard, it is specified that the Aci is a special law which is meant to cater for a specific object and special kind of cases strictly covered by the items mentioned in the schedule thereto. It is settled law that the civil courts are the courts of inherent and plenary jurisdiction competent to adjudicate all the disputes of the civil nature between the litigating parties. However, such jurisdiction stands ousted in. terms of section 9, C.P.C., either expressly or by necessarily implication. But in order to evaluate whether such jurisdiction has been taken away, the special law under which it is so done, must not only be strictly constructed but also be accordingly applied. Therefore, if in the above context the provision of section 5 of the Act are read with the entries of the schedule, there shall be no confusion or ambiguity about the cases falling within items Nos. 1 to 8 thereto. Entry No.9, which has been incorporated in the original schedule, by way of an amendment through Ordinance No.LV of 2002 reads as "personal property and belonging of the wife" and while considering and interpreting this (entry) for the purposes of jurisdiction in the case (Nasrullah 'supra) having almost the same facts and the claim, it has been held:--
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> > "Now the said condition by all means vests the respondent lady with a right to bring an action against the petitioner to claim the said amount upon proof that she was divorced without any reason attributable to her. This being so, the respondent lady is vested with a right of action or what is termed as "actionable claim" in the Transfer of Property Act, 1882. Now the moment the said condition becomes operative the petitioner became indebted to the respondent in the said amount. Even if such debt or beneficial interest so accruing is conditional or contingent, falls within the meaning of actionable claim which is a property and transferable as such. In my humble opinion claim of respondent wife to the said amount accruing to her upon an unjustified divorce by all means a property and clearly falls within Item No.9 of the Schedule read with section 5 of Family Courts Act, 1964."
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> Whereas, in the other judgment from the Lahore jurisdiction i.e. Muhammad Akram (supra), the proposition has been dealt conversely in the following manner:--
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> > "As regards the question, whether the suit is competent before the Family Court, it is the case of respondent No.1, and also held by the learned Additional District Judge that the matter falls within the Entry No.9 of the Schedule to section 5, i.e. "personal property and belonging of the wife". I feel amazed to note as to how the amount of Rs. 1,00,000 allegedly payable by the petitioner on account of the divorce or bad relations between the, parties, is the `personal property or belonging of respondent No.1, so as' to bring the case within the jurisdiction of the Family Court. Such personal property or belonging referred to in Entry No.9, in my considered view, is a residuary provision, which enables the wife to recover through the process of the Family Courts Act, 1964, whatever property she has

> acquired during the subsistence of the marriage, which is not the part of her dowry, through her own independent means or even through the means provided by the husband, such as her clothes, ornaments and items of personal use and nature, this may also include anything which has been gifted to the wife by the husband or any of his or her relatives or the friends; such property and belonging may be the one acquired by the wife out of the money given to her by the husband, her saving from household allowance, or pocket money, from the money provided by her parents and relatives. But definitely the aforesaid entry does not cover any amount which is not yet the property of the wife and she only has a claim to recover from the husband on the basis of any special condition incorporated in the Nikahnama. I am not convinced by the argument that the amount in question is covered under the rules of actionable claims as envisaged by section 130 of the Transfer of Property Act, 1882. The term "actionable claim" in general means, a claim for which an action will lie, furnishing a legal ground for an action and according to section 3 of the Transfer of Property Act, a claim towards a debt. On account of both the meanings such claim cannot be equated as a "personal property and belonging of the wife." Resultantly, in my considered view, the family Court has no jurisdiction in the matter and the suit in this behalf before the said Court was not competent."

4. In both the afore-mentioned conflicting legal opinions, the key proposition is about the applicability or otherwise of the term/concept "actionable claim". In one judgment, it has been strenuously relied upon and used as foundational for the interpretation of Entry No.9, while in the other it is completely discarded. Therefore, in order to resolve the matter, it seems expedient to ascertain, what is the true connotation of the said expression, in: its general terms; as defined in section 3 of the TPA and the application of this definition for the interpretation of the said entry. Besides it is also important to dilate-upon and express if the definition provided by a statute can be resorted to for the interpretation of another statute, though in the latter there is no mention or reference of such a definition or the expression at all.

5. In the above context, firstly I shall embark on to find out if such a concept is available in foreign legal systems. In English and American jurisprudence, the concept "actionable claim" as such, is not prescribed or provided; but to an extent it may be equated with their terms i.e. "chooses in action" or "chooses of action". Therefore, it shall be germane and significant to comprehend as to what does that mean. In Words and Phrases, permanent edition, it is propounded that the words "chooses of action" mean nothing more and can have no broader signification than the words "rights of action" which in other word means as a personal right not reduced into possession but recoverable by a law suit.

According to Halsbury's Law of England fourth edition "the expression 'choose in action' or 'thing in action' in the literal sense means a thing recoverable by action as contrasted with a chose in possession, which is a thing of which a person may have not only the ownership but also the physical possession". The meaning of the expression is also used to describe all personal rights of property which can only be claimed or enforced by an action, and not by taking physical possession. In English Law, as per classification the "chooses in action" are of two kinds, 'legal chooses in action' and 'equitable chooses in action' the former are those which could be recovered and/or enforced by an action at law, as for instance a debt, bill of exchange, or a claim on an insurance policy etc, whereas the equitable choose of action though again enforceable through the process of Courts, but in connection with the rights, share or interest relating to partnership, trust funds, legacy, under the will, right of the mortgagee to any surplus proceeds of the sale etc. However the subject matter, in both the categories of actions aforementioned (the suit) which may even be for the recovery of a "debt", by itself shall not be the personal property of the claimants until and unless the claim in the legal action has been allowed by the Court and a decree to that effect has been passed. It is thus clear from the preceding discussion that for interpreting the entry no help can be drawn from the foreign concept.

6. In our county, the noted term has not been provided in the Family Courts Act, 1964. It is also not defined in the General Clauses Act, 1897, which is the law applicable to all central legislations and is meant for the interpretation and provides guiding principles thereof, unless in a specific statute itself the provisions are available to supply the interpretative guidance to that legislation. It may be pertinent to mention here that some Parliaments of the world do pass one Act that is meant to provide definitions that are to be read into most other statutes. An Act of this nature is known as Interpretation Act and our

General Clause Act in some ways resemble thereto. But as mentioned earlier' the expression 'actionable claim' is not defined therein, which could buttress for such an interpretation.

7. The only statute in which the definition of "actionable claim" has been provided is the TPA and it reads as:

> "Actionable claim" means a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property, or to any beneficial interest in movable property not in the possession either actual or constructive, of the claimant, which the Civil Court recognize as affording grounds for relief, whether such debt or beneficial interest be existence, accruing conditional or contingent:

It is settled law that definition clause or a section in a statute is meant generally to declare what certain words or expressions used in that statute shall mean, the obvious object of such a clause is to avoid the necessity of frequent repetition in describing all the subject matter to which the word or expression so defined is intended to apply. It is a rule of interpretation of laws that when a word/expression is given a definite meaning in one Act of Parliament (statute) it does not mean that it shall ipso facto have the same meaning .in another Act of the Parliament, except in the cases in which Parliament has declared that two or more Acts be read together as one Act, or where on the rule/principle of legislation by reference, a definition of any earlier law may be borrowed or adopted as the definition for constructing the operative provisions of the later law. A definition thus appearing in one Act cannot be used to interpret the same word appearing in another Act, until it is specifically so referred and borrowed with a clear command of law. Because, the context, the purpose, the object and the requirements of every statute may vary from other; the definition of a word from one statute can not be safely imported to another, which if so resorted to without ascertaining the clear intention of the legislation by following the rules of interpretation, just as a matter of routine and course, it shall not only be hazardous, rather may distort and frustrate the object of the law and violate the legislative intent which is absolutely impermissible in law.

8. The definition of "actionable claim" in the TPA is strictly and exclusively relatable to the operative provisions of Chapter VIII of that Act, which by virtue of Sections 130 to 137 thereof inter alia, prescribes the requirements and the broad mechanism for the transfer and the assignment of the "actionable claims" so defined in section 3. It has no application beyond the tact even if any general concept emerges on account of the expression, it is restricted to the law it forms part and cannot be stretched to apply to any other law of the land, including the Family Courts Act, 1964, thus the interpretation of entry No.9 ibid as provided by Muhammad Akram v. Mst. Hajra Bibi and 2 others (supra) is the correct explication of law, which is hereby approved. However adding thereto, it may be held that if the ratio of Nasrullah dictum (supra) which is entirely and solely founded on the noted concept/ definition is taken to be correct, than a suit for Specific Performance, declaratory suits of any nature, or any other civil legislation between a wife and husband shall be amenable to the special jurisdiction of the family Court, which is not intent of the law. Because according to the literal approach of reading a statute, the statute has to be read literally by giving the words used therein, ordinary, natural and grammatical meaning. Besides, the addition and substraction of a word in a statute is not justified, except where for the interpretation thereof the principle of reading in and reading down may be pressed into service in certain cases; thus when in Entry No.9 'actionable claim' has not been provided by the legislature, it' shall be improper and shall impinge upon the legislative intent and the rules of interpretation to add this expression to the clause/entry.

9. In the light of above, this appeal is hereby allowed and the judgments and decrees of the courts below are set aside. No order as to costs.

19. From perusal of the above observations of the Hon'ble Supreme Court in the case of ***Muhkhtar Hussain Shah*** it is clear that the jurisdiction in such matters does not vest in the Family Courts; but with the ordinary Civil Courts, as and when an issue is in respect of claims by spouses against each other, regarding some promise or agreement made in the

Nikhanama or otherwise by way of an agreement, and all such claims would not fall within clause 9 of Part-I of Schedule to the Family Courts Acts, 1964 notified in terms of section 5 ibid and cannot be held to be the personal property and belongings of a wife.

20. Now the question arises as to how this Court can reconcile the two conflicting judgments of the Hon'ble Supreme Court in the case of ***Mst. Yasmeen Bibi*** and ***Mukhtar Hussain Shah***. It is obvious that ***Mukhtar Hussain Shah*** is earlier in time; but was not cited in ***Mst. Yasmeen Bibi***, whereas, in ***Yasmeen Bibi***, the Lahore High Court Judgment in ***Muhammad Akram's*** case which by then had already been approved in ***Mukhtar Hussain Shah*** was cited. In fact, the judgment impugned in ***Mst. Yasmeen Bibi*** had followed the Lahore High Court view in ***Muhammad Akram's*** case. The law as to stare decisis and binding precedents is by and large now settled, except the situation in hand. To recapitulate, the Judgment of Hon'ble Supreme Court is always binding on Sub-Ordinate Courts including a High Court under Article 189 of the Constitution of Pakistan 1973. If there are two conflicting views of the Hon'ble Supreme Court on a point of law, then the judgment rendered by a larger Bench is to be followed. Similarly, for a Division Bench of High Court, it is settled law that an earlier judgment of a Division Bench is binding on a subsequent Division Bench, and in case if any contrary view is being taken, then the matter has to be referred to the Hon'ble Chief Justice for constitution of a larger Bench to resolve the controversy as laid down by the Hon'ble Supreme Court in the case of ***Multiline Associates***[11] reiterated in the case of ***Amir Khan***[12]. There is also some misconception that the view enunciated in these cases only applies to the High Courts and not on the Supreme Court. This perhaps is an incorrect approach so to say. In ***Ardeshir Cowasjee***[13] it has been held that "*It may be pointed out that a Bench of the same number of Judges of the same High Court, or of the Supreme Court, cannot deviate from the view of an earlier Bench as rightly has been held in the case of Multiline Associates v. Ardsher Cowasjee and others PLD 1995 SC 423) (supra) in relation to the High Court"* and subsequently followed in ***Mst. SAMRANA NAWAZ***[14] by holding that *"We are, however, bound by the judgment delivered by a Bench of co-equal strength,*

[11] Multiline Associates v Ardeshir Cowasjee (1995 SCMR 362 / PLD 1995 SC 423) & Province of East Pakistan v Dr. Aziz ul Islam (PLD 1963 SC 296)
[12] Muhammad Amir Khan v Govt. of KPK (2019 SCMR 1021)
[13] Ardeshir Cowasjee v Karachi Building Control Authority (1999 SCMR 2883)
[14] Mst. SAMRANA NAWAZ and others v M.C.B. BANK LTD (PLD 2021 SC 581)

i.e., a three member Bench, in the said case and therefore cannot hold otherwise. It is now a well-established principle of practice and procedure of this Court that the earlier judgment of a Bench of this Court is binding not only upon the Benches of smaller numeric strength but also upon the Benches of coequal strength; a Bench of co-equal strength cannot deviate from the view held by an earlier Bench, and if a contrary view has to be taken, then the proper course is to request the Hon'ble Chief Justice for constitution of a larger Bench to reconsider the earlier view.[15] *For, the law declared by this Court should be clear, certain and consistent, as it is binding on all other courts of the country, under Article 189 of the Constitution of Pakistan, 1973. The doctrine of binding precedent promotes certainty and consistency in judicial decisions, and ensures an organic and systematic development of the law."* Therefore, it is clear from these pronouncements that this principle equally applies to the Supreme Court as well. But what happens when the situation is of a nature as is present in this case, when there are, admittedly two conflicting views of two separate benches of the Hon'ble Supreme Court of equal strength, holding divergent views as to the very jurisdiction of the Family Court in handling the issue as above. It is not a case wherein it could be seen that what facts are more akin to which judgment of the Hon'ble Supreme Court, and may be an effort is to be made to apply any one of them being more particularly applicable to the facts of a case in hand before the High Court or for that matter before a lower Court. The issue is purely legal and of jurisdiction; hence, this exercise cannot be undertaken. Not much case law is available in our jurisdiction which may exactly apply to the case in hand; except one. And in that case too, there is not much detailed discussion. It is the case of ***Syed Waqar Haider Zaidi***[16] originating from this Court. In that case the issue before the learned Division Bench was that whether a statement or admission in an earlier proceeding was binding on the same party in a subsequent case. The appellants case was that it was binding and therefore, application was filed before a learned single judge of this Court under Order 12 Rule 6 CPC which was dismissed. On the other hand respondents had opposed the same by placing reliance on the case of ***Naseer Ahmed***[17], wherein, the law laid down was that in law a party is bound by admission recorded in the pleading in a Suit, in which it is filed and not in a subsequent suit, whereas, though not cited by any of the parties the learned author Judge referred to the case of ***Durrani***

[15] Ardeshir Cowasjee v KMCA 1999 SCMR 2883 (5-MB) and Ameer Zeb v State PLD 2012 SC 380 (5-MB)
[16] PLD 2015 Sindh 472 (authored By Sajjad Ali Shah,J, now a Judge of the Hon'ble Supreme Court)
[17] Naseer Ahmed v Asghar Ali (1992 SCMR 2300)

Ceramics[18] wherein the apex Court applied the admission made by the Federation in a previous case to the effect that cess was not a sales tax, whereas, subsequently they had resiled to argue that it was an additional sales tax. The observation of the learned Bench of the High Court is relevant for the present purposes and reads as under;

> ***"However, the case of Naseer Ahmed (Supra) earlier in time was not referred in the subsequent case and the rule of precedent keeping in view that in both case Hon'ble Bench comprised of three Members, goes in favor of the earlier view."***

21. The principle which one can infer from this very brief observation is that the earlier view or the judgment earlier in time of equal strength of judges remains binding; notwithstanding, that whether it was cited or not before the subsequent bench; and can only be overruled by a larger bench or by a bench having more judges numerically. Therefore, the concept (though very negligible in following) that a judgment later in time shall always prevail is not a good law; nor has any support from precedents of the superior courts in our country. For this there is also one other very convincing reason. Per ***Multiline Associates***[19] reiterated in the case of ***Amir Khan***[20] and ***Mst. SAMRANA NAWAZ***[21] even for Supreme Court it is settled that if a subsequent bench of equal strength intends to differ from an earlier view, it cannot do so on its own; but has to refer the matter to the Hon'ble Chief Justice requesting constitution of a larger bench. This naturally happens when the earlier view has been cited before the subsequent bench which intends to have a different view. Now if this is so, then what happens if the earlier view has not been cited before the subsequent bench of equal strength, and that bench, without having any benefit of the earlier view, comes to a different conclusion. Can then it would be correct to hold that in such a situation the view later in time shall prevail. Certainly not. On this analogy there appears to be no justifiable reason to accept this view. A bench before whom the earlier view has been cited is bound by it and cannot deviate from that; whereas, the bench before whom the earlier view has not been citied, comes to a different conclusion and that subsequent view also becomes a binding precedent. This does not seem to have any rationale and therefore, the principle, if any, that the view later in

[18] Federation of Pakistan v Durrani Ceramics (2014 SCMR 1630)
[19] Multiline Associates v Ardeshir Cowasjee (1995 SCMR 362 / PLD 1995 SC 423) & Province of East Pakistan v Dr. Aziz ul Islam (PLD 1963 SC 296)
[20] Muhammad Amir Khan v Govt. of KPK (2019 SCMR 1021)
[21] Mst. SAMRANA NAWAZ and others v M.C.B. BANK LTD (PLD 2021 SC 581)

time will prevail and is binding does not seems to be correct so as to be followed blindly.

22. This principle; however, in India is followed somewhat differently. Over there, the majority and consistent view is that a judgment later in time shall always prevail; come what may, as apparently, the subsequent bench, notwithstanding sans any discussion on it, has overruled the same[22]. At the same time, there is also, though surprisingly, another view, which has also been followed, which is that the sub-ordinate Court, in that situation has to see which of the two judgments of the co-equal strength of Hon'ble Supreme Court depicts the correct proposition of law; or has interpreted the law correctly. A Full Bench of the Patna High Court in the case of ***Amar Singh Yadav***[23] has held that when there are two differing judgments of the Supreme Court, then, the High Court should follow that judgment which lays down the correct law. It has been further held that when judgments of the superior Courts are of co-equal Benches, and, therefore, a matching authority, then their weight inevitably must be considered by the rational and the logic thereof and not by the mere fortuitous circumstance of the time and date on which they were rendered. Equally, the fact that the subsequent judgment failed to take notice of the earlier one or any presumption that a deviation therefrom could not be intended, cannot possibly be conclusive. The Court went to further hold that when two directly conflicting judgments of the superior Court and of equal authority exist, then both of them cannot be binding on the Courts below. A choice, however difficult it may be, has to be made in such a situation and the date cannot be the guide. It has been further held that on principle, the High Court must in this context follow the judgment, which would appear to lay down the law more elaborately and accurately. The mere incidence of time, whether the judgments of co-equal Benches of the superior Court are earlier or later, and whether the later one missed consideration of the earlier, are matters which appear to be as hardly relevant, and, in any case, not conclusive. The said Court in arriving at this conclusion relied upon the judgment(s) of Jessel M. R. in ***Hamptons***[24] ***Miles***[25], authored by Kay, J, and ***Young***[26]. This was arrived at notwithstanding the split judgment of a five-member bench (3:2) in the case

[22] 4 (i) Gopal Krishna Indley vs. 5th ADJ, Kanpur, AIR 1981 All 300 (F.B.) (ii) UPSRTC vs. State Transport Appellate (Tribunal), U.P., Lucknow, AIR 1977 All 1 (F.B.)
[23] AIR 1987 Patna 191
[24] (1877) 5 Ch D 183
[25] (1883) 24 Ch D 633
[26] (1944) KB 718

of ***Govindnaik G. Kalaghatigi***[27], wherein it was held that the later of the two decisions should be followed. In ***Amar Singh Yadav (Supra)***, the Court also took notice of the fact the it is always difficult for making a choice between decisions of the superior court when they are in direct conflict with each other; but, such a duty can neither be skirted nor evaded. The Court cited Lord Denning in ***Seaford Court Estates Ltd***[28] that "*when a Judge comes up against such a truck, he is not to fold his hands and it is his duty to iron out the creases*", and when in such cases litigant's fortune depends thereon, the issue has to be frontally adjudicated upon. Various other High Courts of India[29] have also held that when there are conflicting judgments of Supreme Court of co-equal Benches, then, the High Court ought to follow the judgment which lays down the law more correctly.

23. Though being consistently followed, as against the principle that the one later in time shall be binding, in our jurisdiction, this proposition has not been followed and I have not been able to lay my hands on any such authority despite best possible efforts. In fact, I also took assistance from the Legal Research Centre of this Court, and they also could not come across any such authority from our jurisdiction, that either the later in time has to be followed; or the Court confronted with the two judgments, shall decide on its own that which of the two has settled the law correctly. It is axiomatic that in such a situation the Court confronted with such a situation having before it two conflicting views of the Hon'ble Supreme Court of equal strength cannot say that both the decisions are binding; but has to choose one of them as a binding precedent. And in our jurisdiction the best possible way to deal with such a situation is what has been discussed in Para No.19 hereinabove. It can't be that the decision of subsequent bench be followed which has not discussed the earlier view (for whatever reasons) as doing so, would negate the dictum laid down in ***Multiline Case***. Similarly, the second option that which of the two views of the superior court is correct, also appears not be the path to follow, as it would not only be too dangerous to sustain; but at the same time would be in direct conflict with Article 189 of the Constitution, and will also allow the High Courts and other sub-ordinate courts to exercise their discretionary authority in coming to the conclusion

[27] AIR 1980 Kanpur 92
[28] (1949) 2 All ER 155
[29] Indo Swiss Time Limited vs. Umrao and Ors. [AIR 1981 P&H 213 (FB)], The Special Land Acquisition Officer Vs. The Municipal Corporation of Greater Bombay (AIR 1988 Bom 9), Ganga Saran Vs. Civil Judge, Hapur, (AIR 1991 All 114), Simplex Concrete Piles (India) Limited v Union of India (2010) ILR 2 Delhi 699

that which of the two judgments of the Hon'ble Supreme Court holds the correct view. This sounds absurd as well somewhat strange and insulting to a superior Court, which if permitted, would definitely create anarchy and chaos in the functioning of the judicial system of the Country. Every now and then we would be faced with decisions holding that a view arrived at by the Hon'ble Supreme Court is incorrect because of the reasoning assigned by a High Court. It is too difficult to be reconciled.

24. To conclude, it may be observed that in case of conflicting judgments of the Hon'ble Supreme Court of equal strength, if the earlier view has not been cited; nor disapproved by a larger bench, that would remain a binding precedent, whereas, the view later in time would not be a binding precedent just because of being subsequently rendered.

25. As to the present case, the jurisdiction of the Court in respect of the dispute regarding clause 18 and 19 of the Nikahnama was to be dealt with as per dicta laid down by the Hon'ble Supreme Court in the case of ***Mukhtar Hussain Shah***[30]*.* Therefore, the relief so granted to the Respondent by the Appellate Court, besides being without jurisdiction, was otherwise not justified on admitted facts and the evidence available on record; hence, the petition is hereby allowed; the order of the Appellate Court dated 23.10.2019 stands set-aside; the judgment of the Trial Court dated 06.12.2018 stands restored; however, on the basis of the reasons given in this opinion.

26. The petition is hereby allowed in the above terms.

Dated: 21.01.2022

J U D G E

Ahmad

[30] PLD 2011 SC 260