1971 *Present :* **Samerawickrame, J., and Weeramantry, J.**

FATHIMA MIRZA, Appellant, *and* M. H. M. ANSAR, Respondent

S. C. 2/70—Quazi Court, 755/836/10

Muslim law—Shafi sect—Khula divorce—Non-availability of it to the wife in the face of the husband's resistance—Muslim Marriage and Divorce Act (Cap. 115), ss. 28, 98 (2), Rule 12 of Schedule 3.

Section 98 (2), read with section 28 and Rule 12 of the 3rd Schedule, of the Muslim Marriage and Divorce Act makes it mandatory that in all matters relating to any Muslim marriage or divorce, the status and the mutual rights and obligations of the parties shall be determined according to the Muslim law governing the sect to which the parties belong. Accordingly, where the parties belong to the Shafi sect, the wife is not entitled to obtain a Khula divorce from a court unilaterally without the consent and participation of the husband.

A khula divorce is one which is granted without any necessary requisite of fault on the part of the husband and is in this respect basically different from the fasah divorce. One of the circumstances in which a khula divorce initiated by the wife is granted is where the wife has an incurable aversion to the husband which renders life together "within the limits of God" impossible. The expression "within the limits of God" is generally understood to mean co-habitation with due performance of conjugal obligations.

Per WEERAMANTRY, J.—"A review therefore of the original sources, the commentaries of the great Islamic writers, the views of modern commentators and the dicta contained in the case law of this country would appear to point to the participation in the Khula divorce of the husband himself. This Court would be reluctant in the face of this body of authority to extend the law as hitherto understood in this country to enable a wife unilaterally to obtain this form of divorce from the public authorities."

APPEAL from an order of the Board of Quazis. The facts are set out in the judgment of Weeramantry, J., in the connected case *Ansar v. Fathima Mirza* at pp. 279 *et seq.* (supra).

H. W. Jayewardene, Q.C., with *M. S. M. Nazeem, M. Hussein* and *Ben Eliyatamby*, for the applicant-appellant.

C. Ranganathan, Q.C., with *M. T. M. Sivardeen* and *K. Kanagaratnam*, for the respondent-respondent.

Cur. adv. vult.

November 10, 1971. SAMERAWICKRAME, J.—

I agree with the order made by Weeramantry J., and the reasons set out in his judgment. An extension of the law as hitherto understood in this country to enable a wife unilaterally to obtain a khula divorce is not without some support from Muslim Law authorities and sources but, in my view, it must await a widespread acceptance by the Muslim community of the need for it. At present even the Board of Quazis do not appear to consider favourably such an extension of the law. It is not for this Court, " to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant ". (Judge Learned Hand in *Spector Motor Service, Inc. v. Walsh*, 1944). Having regard to the rapid pace at which traditional notions are shed in these days, it may not be correct to regard the possibility of an extension of the law as distant.

WEERAMANTRY, J.—

This appeal is taken by the wife against the refusal of the Board of Quazis to award her a khula divorce.

The facts are as set out in the previous judgment* and the only question for decision upon the present appeal is the availability under our law of a khula divorce to the wife in the face of the husband's resistance to such a claim and his refusal to participate in any procedures requisite towards effecting such a result.

The contention of the appellant on this matter is that such a divorce may be obtained at the instance of the wife from an independent third party, namely, the Court and that the Court has power to award such a divorce without the consent of the husband, and even against his will. The contention of the respondent on the other hand is that the husband's participation is essential to the grant of a khula divorce and that it cannot be granted by an external authority independently of the husband. In other words it is submitted that one of the essential ingredients of the khula divorce is the act of the husband himself in granting it.

* *See pp. 279 et seq. (supra).*

To assist us on this difficult question counsel have placed before us numerous authorities going back to the original sources and to the great commentaries on the Muslim law, and we are greatly indebted to them for their painstaking research into this very interesting problem.

A khula divorce is one which is granted without any necessary requisite divorce of fault on the part of the husband and is in this respect basically different from the fasah divorce. One of the circumstances in which a khula divorce is granted is where the wife has an incurable aversion to the husband which renders life together " within the limits of God " impossible. The expression " within the limits of God " is generally understood to mean cohabitation with due performance of conjugal obligations.

It is evident from the facts of this case that the appellant wife had reached such a stage in her feelings towards her husband that it was no longer possible for her to live with him " within the limits of God ".

Against this background I proceed to an examination of the intricate legal question argued before us.

Now, the word " khul " in its origin means literally " to put off ", and the concept in the law of divorce is derived from the symbolic act of throwing away a cloak, a shoe or a similar piece of clothing. Similarly by a khul the marriage is, so to speak, cast off, and it was apparently in ancient times a customary mode among the Arabs of dissolving a marriage [1].

The source of authority for this type of divorce in Islam is twofold—Verse 229 of Sura 2 of the Qur'an and two of the traditions of the Prophet.

When we address our minds to the question before us it is necessary for us to have regard to the fact that the school of law governing Muslims in Ceylon being the Shafi school, the availability of this relief independently of the husband is to be examined in terms of the teachings of that school.

It is true that the doctrine of Taqlid which requires the views of each school to be rigidly followed in the areas where its authority prevails has recently come in for some criticism as tending to petrify or narrow the operation of rules of law [2]. For a Muslim no doubt the whole of the Qur'an is his province and he is not necessarily tied down to interpretations which one or other of the great schools have placed upon the sacred law. We agree that no teaching or juristic interpretation can prevail against the Qur'an or the hadiths of the Prophet, for the former is the bed-rock of all Muslim law and the latter are second in authority only to the Qur'an itself. Yet where there is a conflict of interpretation and we are seeking to ascertain the views of a particular school upon a Qur'anic passage or a Muslim tradition, the views of the doctors of that school who have given

[1] *Encyclopaedia of Religion and Ethics edited by James Hastings, Vol. VII, p. 868.*

[2] *See MstKhurshid Bibi v. Baboo Muhammad Amin, P.L.D. (1967) S.C. 97-149.*

to the problem the benefit of their deep knowledge of the Qur'an and of Muslim tradition, are factors which would carry the greatest authority with a court.

Moreover, as far as we in Ceylon are concerned, the matter is made statutory for us by the Muslim Marriage and Divorce Act (Cap. 115) which by section 98 (2) makes it mandatory that in all matters relating to any Muslim marriage or divorce, the status and the mutual rights and obligations of the parties shall be determined according to the Muslim law governing the sect to which the parties belong.

Indeed the Act gives recognition to this principle at more than one point. Thus section 28 provides that in regard to a divorce sought by the wife on account of the fault of the husband, the Muslim law governing the sect to which the parties belong will determine what amounts to a "fault". So also, Rule 12 of the 3rd Schedule expressly states that the order to be made (in the case of a divorce by a wife) shall be such as may properly be made under the Muslim law governing the sect to which the parties belong.

As far as the parties to this case are concerned there is no doubt that the governing law is the Shafi law. It is true the Pakistan Supreme Court has adopted a somewhat liberal attitude towards the doctrine of Taqlid in recent times [1], but whatever liberality may characterise the attitude of the Pakistan Supreme Court towards this doctrine, our approach to the problem must necessarily be different in view of our Statute law.

It is important to remember that when that Court in *Mst. Khurshid Bibi v. Baboo Muhammad Amin* [2] expressed the opinion that there is no warrant for the doctrinaire fossilisation of views implicit in the invented doctrine of Taqlid, they were giving expression to a view which was reached against a different statutory background to that obtaining amongst us, at any rate in regard to matrimonial matters.

We must therefore address ourselves to the question whether the Shafi school looks upon a khula divorce as one to be decreed by a court or to be granted by the husband.

We have been addressed at some length by Mr. Jayewardene on behalf of the appellant with a view to showing that, whatever be the views of the school applicable in Ceylon, still the history in Ceylon of the matter under consideration shows a long-standing and traditional recognition of the authority of an external third party. For this argument he relies principally on the 1806 Code, under section 75 of which a bride wishing to be divorced is obliged to inform the priest of her intention. The latter is required before acceding to the divorce to deliberate with the commandants on both sides in the presence of the native commissioners. If the parties do not wish to abide by the decision they are at liberty to lay their case before the competent judge.

[1] *Ibid.*

[2] *P. L. D. (1967) S. C. 97–149.*

A consideration of such provisions would not help us however when the matter we are considering is one of Muslim marriage and divorce as governed by the provisions of the present Act, with its express requirement that the law of the sect be applied. If the law of the sect should not commit the matter to such an external third party, the circumstance that it was so committed under the Code of 1806 cannot alter this result.

I pass now to the fundamental authority in Islam for the grant of a khul divorce, namely, verse 229 which, in view of the overwhelming importance of the Qur'an as the fountain head of Islamic law, must necessarily be the point of commencement for any study of khul.

The great Qur'anic scholar Mawlana Abul Kalam Azad in The Tarjuman al Qur'an[1] has translated this verse as follows :—

> "A return to each other is permissible even after divorce has been pronounced twice (in two successive months). Thereafter two ways are open before the husbands—an honourable retention or a graceful parting (after the pronouncement of divorce for the third time in the third month). And it shall not be proper for you while divorcing your wives to take away anything out of what you have given them. It will be different if the husband and the wife agree to any such arrangement out of a fear that they cannot keep within the bounds set by God. *Then*, if you fear that the two cannot keep within the bounds set by God, no blame shall attach to either for what the woman herself gives away for her redemption. These are the bounds of God ; therefore overstep them not, for, they who overstep the bounds of God, are indeed transgressors."

Much importance has been attached to the presence of the word "you" in this verse for the word "you" in the phrase "if you fear" suggests that a third party other than the parties themselves is to bring his mind to bear on the question. In all the Qur'anic translations which I have examined this word "you" appears. Indeed in some of them the translators interpolate after the word "you" the word "judges" within brackets so as to indicate that this is a matter for the judge who is hearing the dispute in question. Thus Abdullah Yusuf Ali in "The Holy Qur'an[2]" interpolates the word "judges" after the word "ye" by way of explanation, and in a note to the text states that if there is any fear in... the husband refusing the dissolution of marriage...then in such exceptional cases it is permissible to give some material consideration to the husband, but the need and equity of this should be submitted to the judgment of impartial judges, that is, properly constituted courts.

Likewise Maulana Muhammad Ali states[3] that the words "if *ye* fear" evidently refer to the properly constituted authorities.

The acceptance of the interpretation that the word "you" refers to the judges does not however resolve the problem before us, for the word "then" links this sentence to the sentence which speaks of husband and

[1] *Vol. II, p. 103.* [3] *Vol. I, p. 90.*

[2] *The Holy Qur'an, 5th ed., p. 99.*

wife both agreeing to such an arrangement fearing that they cannot keep within the limits of Allah. It seems therefore that it is in that situation, namely, where both spouses are agreed that they cannot continue together, that the judge comes in as the representative of the community to determine whether in fact the spouses cannot keep within the limits of God. The role of the judge then arises only in the context of the essential pre-requisite of the spouses first agreeing to such an arrangement out of a fear in themselves that they cannot keep within the limits of God.

It is true that not every translation brings out the importance of this word "then" but Mawlana Abul Kalam Azad is not alone in rendering this translation.

For example Maulana Mohamed Ali's translation [1] runs as follows:-

> "Divorce may be (pronounced) twice; then keep (them) in good fellowship or let (them) go with kindness. And it is not lawful for you to take any part of what you have given them, unless both fear that they cannot keep within the limits of Allah. *Then* if you fear that they cannot keep within the limits of Allah, there is no blame on them for what she gives up to become free thereby. These are the limits of Allah, so exceed them not; and whoever exceeds the limits of Allah, these are the wrongdoers."

If more than one translation should stress the connection between this sentence and that which went before, while some appear not to stress the connection, it is not unreasonable to assume the existence of the connection in the original, though its importance may be under-emphasised in some of the translations.

Indeed even translations which do not stress this connection make it quite clear that the sentence relating to ye (judges) is dependent upon the preceding sentence.

Thus Mohamed Marmaduke Pickthall translates the verse [2] as follows:—

> "Divorce must be pronounced twice and then (a woman) must be retained in honour or released in kindness. And it is not lawful for you that ye take from women aught of that which ye have given them; except (in the case) when both fear that they may not be able to keep within the limits (imposed by) Allah. *And* if *ye* fear that they may not be able to keep the limits of Allah, in that case it is no sin for either of them if the woman ransom herself. These are the limits (imposed by) Allah. Transgress them not. For whoso transgresseth Allah's limits: such are wrongdoers."

The word "and" in this translation seems to be a strong indication of the connection between this sentence and that which goes before. Indeed on any construction it would seem artificial to read the sentence containing the word "ye" as though it stood in isolation, without regard to its context.

[1] *The Holy Qur'an, 5th ed., p. 98.*

[2] "*The Meaning of the Glorious Koran*", *Mentor: Religious Classics, p. 64.*

Having regard then to these considerations, the order by the judge would not be available in cases where both parties are not so agreed, and it is only the wife who fears inability to keep the limits ordained by God.

Having made these observations in regard to the Qur'anic verse, I proceed now to turn to the Hadiths which are the other primary source of authority in Islam for a Khul divorce. It is necessary to do so, however, in the light of the teachings of the Shafi school.

When we consider the commentaries of the Shafi school upon these traditions we must remember that, whether they refer expressly to the Qur'anic verse or not, there can be no doubt that they are written against the background of the verse in question, for it is inconceivable that any Islamic commentator could in a discussion of a matter of Islamic law possibly lose sight of the Qur'anic verse which constitutes the very foundation of the concept in question. When therefore writers of the Shafi school make their comments upon the traditions of the Prophet relating to the Khula divorce it is but reasonable to assume that these are comments which have regard both to the Qur'anic verse and to the traditions of the Prophet. I do not think there can be much substance in the contention that these comments lose sight of the basic provisions of verse 229 itself.

The traditions in question are briefly as follows :—

Jamilah, daughter of a sister of Abdulla Bin Ali Sahool is related to have gone to the Prophet and stated that although she had no reason to reproach her husband, Sabet, either on grounds of morals or of faith, she disliked him and that having embraced Islam she did not want to be guilty of infidelity. The Prophet inquired whether she was prepared to return the garden which she received from her husband as dowry. She answered that she was ready to do so. The marriage was then brought to an end but whether it was upon an order of the Prophet which operated independently of the husband or whether it was upon an indication by the Prophet to the husband that he should grant her a divorce has been much debated.

In regard to Habiba, daughter of Sahl, the Tradition is that she likewise approached the Prophet saying that Sabet was so short and ugly that if she did not fear God, she would have spat at him when he came to her. This too ended similarly and has raised the same debate.

Before examining the actual records of these Traditions it is necessary to say a word about the manner in which the Traditions were recorded.

The word " Hadith " would appear to have the general meaning of being a communication or narrative in general, whether religious or profane. In Muslim law however it has the particular meaning of a record of the actions or sayings of the Prophet and his companions[1].

[1] *Encyclopaedia of Islam, p. 116.*

Now, a proper Hadith of the Prophet not only sets out what the Prophet said or did, but also sets out the names of the persons who had handed on the Tradition to one another. This part, the Isnad or Sanad, is the "support" of the Tradition and if there is a chain of communication, that chain of communication is set out with great particularity before the text or substance of the Hadith itself.

Consequently in all collections of Hadiths the Isnad or Sanad which is the test of reliability of each Hadith is closely scrutinised by each commentator, and depending on the care and sense of discrimination of the compiler, the various compilers of Hadiths ranked among themselves in order of reliability and authority.

Having regard to the great reverence which naturally attaches to the Hadiths of the Prophet throughout the whole Islamic world, some of the collectors of these Hadiths have gone to tremendous trouble to examine these Hadiths critically, inquiring when and where the original transmitter lived, whether he was personally acquainted with the previous transmitter from whom the Tradition came down to him, and how dependable each link is in the chain of transmission. Accordingly some of these compilers are considered very reliable and some considered weak.

In course of time it came to be generally accepted that six of these collections were considered authoritative, all of them collections of about the 3rd century A.H. They came to be looked upon as sacred books of the second rank next to the Qur'an. These six are in order of reliability the collections of (1) Al Bukhari (2) Bukhari Muslim (3) Abu Dawud (4) Al-Trimidhi (5) Al-Nasai and (6) Ibn Madja. These collections are referred to as the six books [1] and their order of reliability is as set out above [2]. Particular weight and esteem attach to the collections of Bukhari and Muslim.

Although Ibn Madja's collection has been included among the six, it was long viewed with suspicion on account of many "weak traditions" in it [3].

The Pakistan Supreme Court in *Khurshid Bibi v. Muhamad Amin*, after referring to these two traditions of the Prophet, concludes that they indicate that the Prophet decreed a divorce, or in other words, that they indicate authority in an external third party to put the spouses apart.

Now it would appear that the version of the Hadiths relied upon by the Supreme Court of Pakistan in *Bibi v. Amin* [4] is Ibn Madja's version and according to this version it is said that upon Habiba indicating to the Prophet that she was willing to return the garden "the Prophet of Allah *separated* them". In regard to the Tradition of Jamilah, the Pakistan judgment apparently relies on Bukhary for the version that "the messenger of Allah *ordered* him and he separated her".

[1] *Encyclopaedia of Islam, p. 119.* [2] *See Muslim Law, by Vermon, 1962 ed., p. 11.*
[3] *Encyclopaedia of Islam, p. 119.* [4] *At p. 132–3.*

As we have observed, however, Ibn Madja's would appear to be the least reliable of the six collections of Hadiths. Moreover the actual version of Bukhari [1] does not say that the Prophet *ordered* Sabet to divorce her. Bukhari in fact gives the version in these terms: 'The Prophet said "accept the garden and divorce her once".' Of this, Asqalani, a great authority on Shafi law says [2] "It is an order of guidance and correction and not of compulsion".

What is more important however seems to be the fact that even in the quotation given by the Pakistan Supreme Court the Prophet has not himself separated them as a judge would, but either asked or ordered Sabet to divorce her. In other words it seems clear that the desired result has been achieved through the instrumentality of the husband, for if the Prophet had desired to separate them as by a decree of court, there was nothing to prevent him from decreeing accordingly without requiring Sabet to give his wife a divorce.

There is also another tradition which should be borne in mind in this connection, and that is the statement of the Prophet that "The most detestable of lawful things near Allah is divorce." [3]

Having now reviewed the relevant passage in the Qur'an and the relevant Hadiths, it is necessary to move on to the writings of the Shafi jurists.

At the very commencement it is necessary to make some observations regarding the writings of Imam al Shafi himself, for without some understanding of his personal career one may well arrive at a wrong conclusion regarding his views on many juristic matters.

Confusion regarding Imam Shafi's views often results from a failure to appreciate that his juristic writings fall into two distinct periods of activity, and that it is the views expressed by him during the latter period that are properly the views of the Shafi school.

Al Shafi, apparently a distant relation of the Prophet, was born in A.D. 767. He studied in Mecca, and after some years in Medina and in the Yemen, took up residence in Baghdad in 810 A.D. and set up as a teacher there. He returned finally to Egypt in A.D. 815.

His earlier juristic period dates back to his years in Iraq and the later period to his years in Egypt. When examining any item from his truly amazing output of writings (he is thought to have written over one hundred volumes) it is necessary therefore to distinguish between the writings of his earlier period and the writings of his later or Egyptian period. In his earlier period he was a follower of Hanafi but it was in the later period that he set himself up as an independent jurist and founded a school of his own.

[1] *Al-Hadis, Karim, Vol. 2, p. 703.* [2] *Fathul Bari, Part 9, p. 322.*

[3] *Al Hadis, ibid. p. 702.*

Most of his works have not survived and the bulk of surviving titles appear in the Kitab ul umm, a collection of his writings and lectures running to seven volumes published in Cairo in 1321-25, long after his death. The views of Shafi have been recorded also by some of his outstanding followers such as Ibn Hadjr Al-Asqalani.

It would appear from the Kitab ul umm[1] that Imam Shafi had said that khula is a talak and therefore will not occur except by the means by which talak will occur.

Although the Kitab ul umm is a collection of Shafi's works from both periods, still it is a collection by a disciple (Sulaiman al Muradi) who is generally thought to be a representative of his later teachings.[2] This would therefore incline us to the view, in the absence of a contrary passage, that Imam Shafi's later view was that khula was a talak. It may be noted also that the Kitab ul umm is generally used as a source book for Shafi jurists, and a statement appearing therein carries great weight as an authoritative pronouncement by Imam Shafi.

We have been referred also to the Fathul Bari, Volume IX, page 308 by Asqalani.

This incidentally is a passage referred to also by the Supreme Court of Pakistan in *Khurshid Bibi v. Amin*[3].

The passage as cited in the Pakistan decision would appear to indicate that the earlier view of Shafi was that khul is a divorce, that is to say one granted by the husband whereas his later view was that it is a dissolution of marriage and not a divorce, that is to say one granted by an external authority.

Through the industry of learned counsel we have, however, been furnished with a full translation of the passage wherein the quotation cited by the Pakistan Supreme Court appears. It would appear that the chapter on khula states that the jurists hold three different opinions on this matter all based on various pronouncements of Shafi.

What the Pakistan Supreme Court refers to is only one of these views. A little above the statement of this view there is in the Fathul Bari a statement to the effect that Shafi had stated in his new books (the new Fatwas he issued in Egypt) that khula is talak (that is to say granted by the husband) and in elaboration of this it is stated further on, that Shafi in his best-known work—Al Imla—had expressed the view that khula is talak. The commentary states further that it is the view of the majority of jurists that it is a word that cannot be "owned" except by a husband. After the expression of the view cited by the Pakistan Supreme Court, there is the third view which is stated to be mentioned in the Umm, that if the husband does not intend talak there will not be a separation at

[1] *Part IX, p. 180.* [2] *Shorter Encyclopaedia of Islam, p. 513.*

[3] *P.L.D. (1967) S.C. 97-149 at p. 126.*

all. It would appear therefore that this is the last view of Shafi. Moreover the text itself says that according to Mohamed Ibn Murdazy, this is the last word of Shafi.

To say the least therefore it does not appear to be altogether clear that there is unambiguous authority from the writings of Imam Shafi to the effect that a khula divorce can be granted by the judge alone without the intervention of the husband.

Passing from Shafi to his disciples, we have the views of Al Qastalani referred to at page 127 of the Pakistan judgment. Qastalani is there quoted as having stated that khul is not valid in the absence of the Sultan or the judge. This is an interpretation on the basis of the Qu'ranic verse "If you fear disagreement between them", to the effect that the fear there referred to is ascribed to others than the spouses, and that therefore the verse implies the public authorities.

Here again we have been furnished with a translation of Qastalani showing this passage[1] in its context.

It would appear that immediately before the passage cited by the Pakistan Supreme Court is the sentence "the author of Fathul Bari said that Buhkari, by bringing it out thought of pointing out what Saeed Ibnu Mansoor announced, reporting from Hassen ul Baary, who said "Khul is not valid in the absence of the Sultan". The passage quoted is not therefore the view of Qastalani but merely a recapitulation of the views of others. What is significant, however, is that immediately after this passage, Qastalani goes on to say "Annanhas has rejected it (that is the interpretation that the verse implies public authorities), saying that it is a statement to which neither the grammatical position nor the word or meaning lent their support". The author goes on to observe that if talak is allowed without the judge, then khula is also like that. Here again the view actually expressed by Qastalani would appear to be different from the sense in which the Pakistan Supreme Court understood it. It cannot therefore be stated that the Shafi school unambiguously holds that such a divorce may be granted apart from the instrumentality of the husband.

I proceed to refer to a few more jurists of the Shafi school in order to ascertain whether we can say with assurance that in the view of the Shafi school a khula divorce may be obtained by the wife without participation of the husband.

Ibn Hadjar Al-Haitami, a famous Arabic jurist of the Shafi'ite school born in 1504 in Egypt, wrote a commentary on the Minhadj Al Talibin of Al-Nawawi. This commentary became, next to the Nihaya of Al-Ramli, the authoritative code of the Shafi'ites. The followers of Ibn Hadjar and of Al-Ramli at first put up a vigorous fight against each other, but ended by considering both Ibn Hadjar and Al-Ramli as the decisive authorities on the Shafi'ite point of view[2]. Consequently Ibn

[1] *Irshad-al-Sari, Vol. 3, 149.* [2] *Encyclopaedia of Islam, p. 167.*

Hadjar's Tuhfat and Al-Ramli's Nihaya have been regarded almost as the law books of the Shafi school since the 16th century[1].

Legal opinions or Fatwas of Shafi jurists must necessarily therefore take into account the commentary of Ibn Hadjar. This commentary is known as the Tuhfathul Al-Muhtadj [2]. In a chapter headed "Khula" this work states as a pre-requisite to the validity of the khula that it should "come out from the husband" and that it is essential that the husband should be a person whose talak is valid because khula is a talak.

Likewise Al-Ramli, sometimes known as "Little Shafi", in his commentary Nihayat-al-Mukhtaj [3], on Navavy's Minhadj states that the Khula should come from the husband and that the husband should be a person whose talak is valid because khula is a talak.

Al Mahally who wrote a commentary on Navavy's Minhadj and sets out the Shafi'ite viewpoint [4] states that the separation of spouses by pronouncing the word khula is a talak. Again Al Bajoory states in his commentary on the Shafi book Matan Abu Shiya [5] that one of the five essential factors of a khula is the husband and that khula is a form of talak. The same view, namely that the husband is one of the five essential factors for khula, is expressed also by Sulaimanul Bujairamy in his commentary on the Shafi book Matan Abu Shiya[6].

Passing now to one of the prime authorities, the Minhadj-et-Talibin itself[7], this authority deals in chapter 36 with Khula and in chapter 37 with Talak (The chapters are headed Divorce and Repudiation respectively in the English translations but these words mean Khula and talak respectively, as is set out both in the Table of Contents at page IX and in the Glossary at pages 561 and 564). Now, in the chapter on khula it is stated that divorce is the separation of husband and wife for a compensation paid by the wife, whether the husband uses the word "repudiation" or the word "divorce". It goes on to say that divorce is permitted only to a husband who can lawfully repudiate his wife. The clear implication is that the khula divorce is a process in which the husband's participation is essential. Throughout the chapter there is no discussion which appears to visualise the khula as being possible by the unaided action of the wife.

Indeed at page 322 the situation is expressly contemplated of the wife taking the initiative in obtaining such a divorce but it is made quite clear that the wife must ask to be repudiated and the husband must consent. This matter is put beyond doubt by the observation immediately thereafter that "this is a bilateral contract of the same nature as a piece of job work".

[1] *Ibid, p. 445. See also Aghnides Mohamedan Theories of Finance, p. 191; This work in its valuable bibliography classifies Arabic sources according to schools.*

[2] *Part III, p. 227.* [3] *Part VI, p. 388.* [4] *Part III, p. 333.*

[5] *Part II, pp. 153-4.* [6] *Hashyathul Bujairamy, Part III, p. 352.*

[7] *Nawawy's Minhadj et Talibin—translated into English from the French edition of Vanderberg by S. C. Howard, p. 320.*

In the result then the view of the Shafi school seems to be that even in a khula divorce the participation of the husband is required. Certain it is that the Shafi jurists have taken this view of the khula upon a consideration not only of the hadith but also of the relevant Qur'anic verse, and in that state it is scarcely competent for this court upon a reading of the Qur'anic verse to pronounce otherwise. The fact that the Pakistan Supreme Court in *Mst. Khurshid Bibi v. Muhammad Amin* has reached a different conclusion does not bind us, for the Pakistan Court was examining a situation in which the ruling law, namely, that of the Hanafi school, was silent on the question, and assistance was therefore sought from the writings of jurists of the other schools. We are in an altogether different position, as the writings of the governing school, namely, the Shafi school, do contain authority on the matter we are investigating and it is not necessary for us to search further afield as the Supreme Court of Pakistan was obliged to do.

Moreover, although the Supreme Court of Pakistan did refer to the writings of jurists of the Shafi school among others, it was not particularly concerned, as we must be in this jurisdiction, to find out specifically what the views were of the Shafi school and more especially what the latest views were of Imam Shafi himself.

We have also seen how in regard to some of the writings of the Shafi jurists themselves, a reading of them in their proper context would appear to indicate a somewhat different result to that which the Pakistan Court reached, not being particular to focus its attention upon the question whether the statement of Imam Shafi expressed his original or later views.

Having said so much in relation to the original authorities we should now refer briefly to the views of modern commentators and the dicta contained in the case law of this country.

I proceed to refer to a few passages from some of the accepted modern commentaries on the Muslim law.

According to Baillie[1], khula is in law a demission or a laying down by a husband of his right and authority over his wife for an exchange, to take effect on her acceptance, by means of the word khula. He goes on to observe that the presence of the Sultan is not required as a condition of the legality of khula.

Hamilton[2] likewise is of the view that whenever "enmity takes place between husband and wife, and *they both have reason to apprehend* that the ends of marriage are not likely to be answered by a continuance of their union, the woman need not scruple to release herself from the power of her husband, by offering such a compensation as may induce him to liberate her. The notion of agreement between the spouses is implicit in this pronouncement.

[1] *Digest of Mohamedan Law, 1957 ed., p. 305.*

[2] *The Hedaya, Crady's ed., 1963, p.*

Likewise, Wilson's Anglo-Mohammedan Law[1], describes a Khula divorce as being accomplished by means of appropriate words spoken or written by the two parties or their respective agents, the wife offering, *and the husband accepting*, compensation out of her property for the release of his marital rights.

Mulla's Principles of Mohamedan Law[2], in its enumeration of the various forms of divorce, lists khula as a divorce by agreement between husband and wife. It goes on to observe[3] that such a divorce is effected by an offer from the wife to compensate the husband if he releases her from her marital rights and an acceptance by the husband of the offer. It is noteworthy that this edition[4] expresses disagreement with the decision in *Balqis Fatima's case*[5] (which held that a wife could obtain a khula divorce from a court) and suggests that it requires reconsideration. The editor of the 16th edition refers in his addenda[6] to *Khurshid Bibi's case* and points out that the view expressed regarding *Balqis Fatima's case* is not his own. However that may be, it seems clear that the editor who put in the note of disagreement with *Balqis Fatima's case* did so because he felt that decision to be not in consonance with the principles enunciated by Mulla in his text. It may be observed that the view that *Balqis Fatima's case* needed reconsideration was the view of the previous editor who had edited the 15th edition, that is Sir Sied Sultan Ahmed, who, like Sir Dinsha Mulla, was a former Law Member of the Governor-General's Executive Council. He had also been a judge of the High Court of Patna.

So also, Fyzee[7], in classifying the forms of dissolution of marriage known to Muslim law, refers to dissolution by act of parties, dissolution by the wife, dissolution by mutual consent, and dissolution by judicial process. The khul appears in this classification under divorce by mutual consent. The two essential conditions for a khula divorce are stated to be[8] (1) mutual consent of the husband and wife, and (2) some consideration passing from the wife to the husband. The author points out that the word "khul", as already observed, means "to take off clothes" and therefore "to lay down one's authority over a wife". This would seem to suggest in other words an act of the husband relinquishing his matrimonial authority.

Tyabji[9] describes khula as a mutual agreement between the husband and the wife to dissolve the marriage for some consideration proceeding from the wife to the husband. He points out[10] that such an agreement is called a khul if the wife alone is desirous of having the marriage dissolved. If both parties are so desirous it is called a mubaraat.

[1] *1930 ed., p. 146, s. 69.*

[2] *16th ed., edited by M. Hidayathulla, Chief Justice of India, p. 295, s. 319.*

[3] *At p. 296.* [4] *At p. 297.* [5] *P.L.D. (1959) Lahore 566.*

[6] *At p. 389.* [7] *Outlines of Muhamedan Law, Oxford University Press, p. 126.*

[8] *At p. 140.* [9] *Mohamedan Law, 3rd ed., p. 204.* [10] *At p. 232.*

In either event, it will be seen that agreement of both parties is necessary and we must not confuse the fact that khul arises from the desire of the wife alone with the notion that the wife alone by her unilateral act without the husband's participation therein can obtain it. All that is meant is that the wife alone desires the divorce and the husband has no desire to put the wife away but arrives at an agreement with her to do so for a consideration paid to him by her.

Passing now to the somewhat scanty dicta that do exist in our case law on the question of khula divorce, I would refer in the first instance to *Beebi v. Pitche* [1] where Jayewardene A.J. was considering certain provisions of the Code of 1806. He observes [2] "it may be that in view of section 85 a 'khula divorce' must be granted or confirmed by the judge. That can be done even at the present day. For it has been held that 'the sitting magistrate' or 'competent judge' of the court corresponds to the District Judge of the present day—*Ayesha Umma v. Abdul Careem* [3]."

An examination of the Code would appear to show however that section 85 relates back to section 80 which is a case where both parties wish to be divorced, and the observation of Jayewardene A.J. cannot therefore be understood to mean that a wife desiring a divorce from a husband who desires the marriage to continue can obtain that divorce from a court of law against the husband's wish. As Bertram C.J. observed in *King v. Miskin Umma* [4] "the functions of the 'sitting magistrate' under section 85 in the case of a khula divorce must be confined to the assessment of compensation *where a khula divorce has already been agreed upon by the parties.*"

In any event we must remember moreover that the position today is very different from the position under the Code of 1806. That Code was neither accurate nor comprehensive, being only a rough compilation of laws [5] and indeed by reason of its very incompleteness had been described by Akbar J. [6] as a calamity. It was largely to rectify this unsatisfactory state of the Muslim law relating to matrimonial matters that the legislature intervened with subsequent legislative measures, and that matters that arise for determination today must be determined in terms of the present Act.

In *King v. Miskin Umma* [7] Bertram C.J. makes the further observation that although it is a recognised principle of Mohammadan law that a husband is free to divorce his wife without assigning a cause, the wife's position is very different. He cites in support Sir Rowland Wilson's Digest of Anglo-Muhammadan Law, [8] to the effect that "the wife can never divorce herself from her husband without his consent but she may under some circumstances obtain a divorce by judicial decree".

[1] *(1924) 26 N.L.R. 277 at 282.* [2] *At p. 282.* [3] *(1880) 4 S.C.C. 13 at p. 14.*
[4] *(1925) 26 N.L.R. 330 at 337.* [5] *ibid. at 333.* [6] *1 C.L. Rec. 3.*
[7] *Supra.* [8] *4th ed., p. 143.*

This principle[1] is a general statement relating to all types of divorce. More specifically, in regard to the khula divorce Wilson observes,[2] as I have already pointed out, that "a khula divorce is accomplished at once by means of appropriate words spoken or written by the two parties or their respective agents, the wife offering and the husband accepting compensation out of her property for the release of his marital rights". It seems clear from this specific reference to the khula divorce that the agreement or participation of the husband is essential for its accomplishment.

It is true that Sir Roland Wilson later on cites[3] a Burmese authority to the effect that a court would decree khul on good cause shown by the wife, against the husband's wishes, but he also observes that such a course would to a certain degree assimilate the wife's position as regards divorce to that of the man, and that the point has never come up for judicial decision in that form in British India.

The passage cited by Bertram C.J. appears then to indicate a general principle that there is a fundamental difference between the position of the wife and the position of the husband in regard to their rights to obtain a divorce unilaterally. The principle which at the time of Wilson's work had not yet received consideration from the Courts of India, and which had the approval of Bertram C.J. is one which cannot lightly be reversed unless there is clear warrant under our law for doing so.

I next refer to the judgment of Canekeratne J. in *Noorul Halifa v. Marikkar Hadjar*[4] wherein he states that a wife can never divorce herself from her husband without his consent except that she may in certain circumstances such as ill-treatment, neglect or impotence, obtain a dissolution or cancellation of the marriage. Regarding the khula divorce he observes[5] also that "the woman can release herself from the marriage tie by giving up some property in consideration of which the husband is to give her a khula. She takes the initiative in asking to be repudiated. The divorce is the sole act of the husband though granted at the instance of the wife and purchased by her. Some valuable consideration passes from the wife as the party seeking the divorce to the husband. The wife offering, and the husband accepting, compensation out of her property for the release of his marital rights. It is called a divorce by khula."

He further states[6] that a khula divorce is nothing more than an offer by the wife to the husband to divorce her. The offer does not result in legal rights unless and until it is accepted by the husband and no steps can be taken by her in a court of law if the husband refuses to accept the offer. Consequently a khula divorce though in form a divorce of the husband by the wife operates in law as a divorce of the wife by the husband. It was not necessary however for Canekeratne J., expressly to decide on the matter in the context of the case before him.

[1] *Appearing in the 6th edition of Wilson's work at p. 138, section 60.*

[2] *6th ed. p. 146, section 69.* [3] *6th ed. p. 154.*

[4] *(1947) 48 N.L.R., 529 at 534.* [5] *ibid.* [6] *(1947) 48 N.L.R. 529 at 538.*

In the same case, Dias J., categorising the forms of divorce recognised by the Muslim law[1], describes the khula divorce as a dissolution of the marriage at the instance of the wife, upon whose compensating her husband the latter pronounces talak.

The case law of this country then, so far as the meagre references to this subject therein indicate, seems to lean against the view that the khula divorce is available to the wife without the participation therein of the husband.

It only remains to refer briefly to some of the recent Indian and Pakistan decisions preceding *Khurshid Bibi's case* wherein the matter has been considered.

I have already referred to the decision of the Full Bench of the Pakistan Supreme Court in *Khurshid Bibi's case*[2] and have indicated the reasons why, with the utmost respect to that court as a most authoritative interpreter of the Muslim law, we find ourselves unable to follow that decision in this country. That decision confirmed the view in *Mst. Balqis Fatima v. Najmul Ikram Qureshi*[3] where the Pakistan Supreme Court held that a wife could come before court and obtain a khula divorce if she was prepared to restore the benefits she had received and if the judge apprehends that the limits of God will not be observed.

There were however earlier decisions to the contrary, which were overruled by the Pakistan decision and we find that the decisions in some of those earlier cases would be more in consonance with our jurisprudence.

In *Umar Bibi v. Mohammed Din*[4] it was held that the act of divorce in khula is as much an act of the husband as it would be in *muharaat* (i.e. mutual release). This decision further held that it was not possible for a Quazi or court to effect a khula divorce in place of the husband. In that case Abdur Rahman J., points out that as regards both the wives of Sabet "the divorce is reported to have been granted by Qais and not pronounced by the Prophet although it may be admitted that out of the reverence that Muslims had for the Prophet of Islam, it would have been impossible for Qais to disobey his order. The point however remains that the divorce was granted by Qais and not by the Prophet ".[5]

I find myself very much in agreement with this view, as it appears to accord with the teachings of the school of Islamic jurisprudence which holds sway in this country.

In *Saida Khanan v. Mohamed Samy*[6], Cornelius A.C.J. referring to a khula divorce observes that he respectfully agreed with Abdur Rahman J., in *Umar Bibi v. Mohamed Din*. Cornelius A.C.J. said[7] that under the Muslim law matters of aversion or dislike cannot form a ground for the

[1] *ibid, at p. 539.* [2] *P.L.D. (1967) S.C. 97-149.* [3] *P.L.D. (1959) Lahore 566.*
[4] *(1945) A.I.R. Lahore 51.* [5] *ibid. at p. 56.*
[6] *(1952) P.L.D., W.P. Lahore 113 ; see Fyzee's Cases on Muhammadan Law in India and Pakistan, p. 169 at 186.*
[7] *ibid. at p. 188.*

wife to seek dissolution of her marriage at the hands of a Quazi or a court, but they fall to be dealt with under the powers possessed by the husband as well as the wife under Muslim law as parties to the marriage contract.

One other case to be referred to is the older decision in *Moonshee Buzul-ul-Raheem v. Luteefut-oon-Nissa*[1], wherein it was decided that the khul form of divorce takes place at the instance of the wife and with the consent of the husband.

A review therefore of the original sources, the commentaries of the great Islamic writers, the views of modern commentators and the dicta contained in the case law of this country would appear to point to the participation in the khula divorce of the husband himself. This Court would be reluctant in the face of this body of authority to extend the law as hitherto understood in this country to enable a wife unilaterally to obtain this form of divorce from the public authorities.

The contention of the appellant must therefore fail and I would uphold the judgment of the Board of Quazis and dismiss this appeal.

In view of all the circumstances of this case, I make no order in regard to the costs of this appeal.

Appeal dismissed.

[1] *(1861) 8 Moore's Indian Appeals, 379, reported in Fyzee's Cases on Muhammadan Law in India and Pakistan, p. 169 at 186.*