

ORDER SHEET

Writ Petition No.30090 of 2023

ADJ, Sialkot, etc.

09.05.2023 Ch. Muhammad Usman Rafaqat, Advocate for the petitioner.

2. The factual background of the instant case is that Mst. Samina Rani, respondent No.3, moved a complaint under section 6(5) of the Ordinance against the petitioner for contracting a second marriage without permission of the Arbitration Council. The petitioner was summoned, and charge was framed to which he pleaded not guilty and claimed to be tried. During the course of cross-examination upon the complainant/respondent No.3, a question regarding birthplaces of her elder children was put to her, in response to which she offered that if the accused/petitioner took oath on Holy Qur'an that the two children were born at his house, she would withdraw the complaint, which was accepted by the accused/petitioner. However, the Judge Family Court, Sialkot vide order dated 18.04.2023 observed that oath on Holy Qur'an was

not applicable in criminal proceedings. Feeling aggrieved, the accused/petitioner preferred appeal before the Sessions Judge, Sialkot, which was dismissed vide order dated 27.04.2023, hence this petition.

3. Learned counsel for the petitioner contends that provisions of the *Qanun-e-Shahadat*, 1984, except for sections 10 and 11, do not apply to the proceedings before the Family Court in respect of Part I of Schedule as provided in section 17 of the Family Courts Act, 1964 (hereinafter referred to as the 'Act'). He maintains that in Part I of Schedule of the Family Courts Act, 1964, the matters have been specified regarding which the Family Court has jurisdiction to adjudicate upon and Sr.No.10 of the said Schedule mentions 'any other matter arising out of *Nikahnama*, therefore, complaint under section 6(5) of the Ordinance will also be considered a family dispute. He adds that due to mutuality of the promise between the parties, the party making offer has no right to resile from it after the offer is accepted and in the absence of any satisfactory or sufficient cause, the Court is obligated to implement the agreement and record the statement of the party concerned. Reliance has been placed on the case of *Sajid Mehmood v. Mst. Shazia Azad and others* (2023 SCMR 153).

4. Heard.

5. Polygamy is a subject matter covered by section 6 of the Ordinance. Sub-section (1) of section 6 *ibid* postulates that no man, during the subsistence of an existing marriage, shall, except with the previous permission in writing of the Arbitration Council, contract another marriage, nor shall any such marriage contracted without such permission be registered under the Ordinance. Sub-section (5) of section 6 of the Ordinance

stipulates consequences for contracting another marriage without the permission of the Arbitration Council in terms of making him liable to pay immediately the entire amount of the dower, whether prompt or deferred, due to existing wife or wives, if not so paid, to be recoverable as arrears of land revenue and prescribes it to be an offence triable upon complaint and punishable on conviction with simple imprisonment which may extend to one year and with fine of five hundred thousand rupees.

6. Section 20 of the Act deems the Family Court to be the Judicial Magistrate of the first class under the Code of Criminal Procedure, 1898 (hereinafter referred to as the 'Code') for taking cognizance and trial of any offence, *inter alia*, under the Ordinance. Cognizance of such an offence can be taken on the complaint of the Union Council, Arbitration Council or the aggrieved party and the Family Court is required to conduct the trial of an offence in accordance with the provisions of Chapter XXII of the Code relating to summary trials. In the case of Muzaffar Nawaz v. Ishrat Batool and another (2022 YLR 1920), while quashing trial proceedings conducted by the Magistrate, it was held by this Court that only the Family Court had the jurisdiction to try a complaint under section 6(5) of the Ordinance.

7. Section 17 of the Act curtails applicability of provisions of the Oaths Act, 1872, the *Qanun-e-Shahadat*, 1984 and the Code of Civil Procedure, 1908 in the following terms:-

(1) *Save as otherwise expressly provided by or under this Act, the provisions of the Qanun-e-Shahadat, 1984 (P.O. No.10 of 1984), and the Code of Civil Procedure, 1908, except sections 10 and 11, shall not apply to proceedings before any Family Court in respect of Part I of Schedule.*

(2) *Sections 8 to 11 of the Oaths Act, 1872 shall apply to all proceedings before the Family Courts.*

8. It is manifest from perusal of section 17(1) *ibid* that application of the *Qanun-e-Shahadat*, 1984 is excluded in respect of proceedings on matters falling in Part I of the Schedule to the Act. However, such exclusion has no applicability vis-à-vis criminal proceedings for the offences specified in Part II of the Schedule or section 20 of the Act including the offence under section 6(5) of the Ordinance. Therefore, the provisions of the *Qanun-e-Shahadat*, 1984 are applicable in criminal proceedings before the Family Court.

9. Article 163 of the *Qanun-e-Shahadat*, 1984 governs acceptance or denial of claim on oath, application whereof to laws relating to criminal cases has been expressly excluded under clause (3) of the said Article. This view is also supported by judgments of the Supreme Court of Pakistan in the case of Mst.Bashiran Bibi v. Nisar Ahmad Khan (PLD 1990 SC 83). Additionally, section 8 of the Oaths Act, 1873 specifies the power of Court to tender certain oaths and section 9 of the said Act embodies discretionary power of the Court to ask party or witness whether he will make oath proposed by the opposite party, while section 10 of the same Act outlines the administration of oath if accepted and section 11 of the aforementioned statute outlines status of the evidence so given to be conclusive proof of the matter as against the person who offered to be bound as above. However, in the case of Muhammad Amir Malik v. the state (1991 MLD 226), Division Bench of this Court held the provisions of section 8 to 11 of the Oaths Act 1873 to be not applicable to criminal proceedings.

10. Reliance of learned counsel for the petitioner on the case of *Sajid Mehmood* (supra) is misconceived

inasmuch as facts of the aforementioned case are distinct and distinguishable since that case involved a civil claim for the recovery of dower and dowry articles whereas the instant case related to criminal proceedings in a complaint for the offence under section 6(5) of the Ordinance triable by the Family Court under section 20 of the Act.

11. As regards the plea that complaint against the petitioner is a matter arising out of *Nikahnama* between the parties in view of item No.10 of Part-I of the Schedule to the Act, the same is clearly misconceived as the dispute between the parties is about the second marriage of the husband without permission which constitutes an offence under section 6(5) of the Ordinance for which a punishment has been prescribed. Jurisdiction of the Family Court to try the aforementioned offence is clearly specified in section 20 of the Act and Part I of the Schedule to the Act is of no relevance for that purpose.

12. For the foregoing reasons, this Court does not find any illegality or jurisdictional error in the impugned orders of both the Courts below calling for interference of this Court in exercise of writ jurisdiction. This constitutional petition is accordingly dismissed in *limine* being devoid of any force.

(RAHEEL KAMRAN)
JUDGE

Announced on 20.06.2023

JUDGE

Approved for Reporting

JUDGE