

Form No: HCJD/C-121

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
(JUDICIAL DEPARTMENT)

PSLA No.04/2017

Dilshad Bibi

Versus

The State & 2 others

Petitioner by : Mr Ali Hussain Bhatti, Advocate.

Respondents by : Mr Owais Ul Islam, Advocate.

Mr Rabi Bin Tariq, State Counsel.

Date of Hearing : 19-02-2019

ATHAR MINALLAH, C.J.- Through this petition the petitioner, namely Dilshad Bibi, daughter of Muhammad Rafique Sheikh (*hereinafter referred to as the '**petitioner**'*), has assailed judgment, dated 27-05-2017, passed by the learned Additional Sessions Judge, Islamabad (West), whereby the appeal filed by Liaqat Ali Meer, son of Muzaffar Mir (*hereinafter referred to as the '**respondent**'*), was allowed and consequently his conviction was set aside on the sole ground that the trial court was not competent to exercise jurisdiction.

2. The facts, in brief, are that the petitioner and the respondent entered into a marriage contract on 15-05-2011, which was duly registered in Islamabad under the Muslim Family Laws Ordinance, 1961 (*hereinafter referred to as the 'Ordinance of 1961'*). For some time the couple lived in Islamabad and later moved to Muzaffarabad, Azad Jammu and Kashmir. Due to matrimonial differences, the petitioner returned to Islamabad on 08-01-2013. It appears that the respondent contracted a second marriage without the consent of the petitioner, which led to filing of a complaint by the latter seeking initiation of proceedings under sub section (5) of section 6 of the Ordinance of 1961. The complaint was considered by the Arbitration Council and the latter referred to the competent forum contemplated under Rule 21 of the West Pakistan Rules under the Muslim Family Laws Ordinance, 1961 (*hereinafter referred to as the 'Rules of 1961'*). It was alleged by the petitioner that the respondent had contracted another marriage without her permission, which is required under sub section (1) of section 6 of the Ordinance of 1961. The learned Magistrate, vide order dated 15-04-2014, framed the charge to which the respondent did not plead guilty. Three witnesses entered the witness box on behalf of the petitioner. The respondent on the other hand preferred not to be examined under oath and, therefore, his statement under section 342 of the Code of Criminal Procedure, 1898 (*hereinafter referred to as the 'Cr.P.C.'*) was recorded. The learned Magistrate, after recording of evidence and affording an opportunity of hearing to the parties, convicted the

respondent under sub section (5) of section 6 of the Ordinance of 1961 and sentenced him to undergo simple imprisonment for a term of one month and in addition imposed a fine amounting to Rs.5,000/- and, in the event of default, to undergo a further period of simple imprisonment of fifteen days. The respondent preferred an appeal which was dismissed by the learned appellate Court vide judgment, dated 16-06-2016. The said order was assailed by the petitioner before this Court through Criminal Revision No.58 of 2016, which was allowed, and the matter was remanded to the learned appellate Court vide judgment dated 10-02-2017. The learned Additional Sessions Judge, Islamabad (West) allowed the appeal vide order dated 27-05-2016, on the sole ground that since the respondent was a resident of Azad Jammu and Kashmir, therefore, the provisions of the Ordinance of 1961 were not applicable or attracted in his case. The petitioner has, therefore, challenged judgment, dated 17-05-2017, through the instant petition.

3. The learned Counsel for the petitioner has contended that; the learned appellate Court has misconstrued the provisions of the Ordinance of 1961; no objection was taken by or on behalf of the respondent regarding the jurisdiction of the learned trial Court; the respondent holds a National Identity Card issued under the National Database and Registration Authority Ordinance, 2000 (*hereinafter referred to as the 'Ordinance of 2000'*) and, therefore, he is a citizen of Pakistan and thus covered under sub section (2) of section 1 of the

Ordinance of 1961; the marriage contract between the parties was registered under the Ordinance of 1961 in Islamabad and the respondent resides within the jurisdiction of the Union Council where she had filed her complaint; reliance has been placed on the cases of '*Muhammad Zaman v. Uzma Bib and 4 others*' [2012 CLC 24] and '*Mst. Naseem Akhtar v. Director General Immigration and Passport and others*' [PLD 2006 Lahore 465].

4. The learned Counsel for the respondent, on the other hand, has argued that; the latter is not a citizen of Pakistan and, therefore, sub section (2) of section 1 is not attracted in his case; holding of National Identity Card issued under the Ordinance of 2000 is not a conclusive test for declaring or treating the respondent as a citizen of Pakistan; the learned appellate Court has correctly interpreted the provisions of the Ordinance of 1961 and, therefore, interference is not required while exercising revisional powers; reliance has been placed on the cases of '*Akbar Ali and 4 others v. District Judge, Faisalabad and 4 others*' [PLD 2006 Lahore 600], '*Muhammad Zaman v. Uzma Bibi and 4 others*' [2012 CLC 24], '*Majid Hussain v. Farrah Naz and others*' [2017 YLR 84], '*Rehmat Ullah v. Mst. Shamim Akhtar and another*' [1997 CLC 16].

5. The learned Counsels have been heard and the record perused with their able assistance.

6. The admitted facts are that the petitioner and the respondent had entered into a marriage contract in 2011 which was duly registered in Islamabad. The petitioner holds a National Identity Card issued under section 14 of the Ordinance of 2000 and enjoys all the privileges there under as a citizen of Pakistan. Pursuant to a complaint filed by the petitioner in the context of sub section (5) of section 6 of the Ordinance of 1961, proceedings were initiated and on conclusion of the trial the respondent was found guilty and, therefore, convicted and sentenced for contracting a second marriage without obtaining prior permission in the manner prescribed under the Ordinance of 1961 read with the Rules of 1961. The appeal preferred by the respondent was allowed vide the impugned judgment, dated 27-05-2017, rendered by the learned Additional Sessions Judge, Islamabad (West). The learned appellate Court had allowed the appeal on the sole ground of lack of jurisdiction on the part of the learned trial Court because the respondent could not be treated as a citizen of Pakistan and, therefore, was excluded from the purview of sub section (2) of section 1 of the Ordinance of 1961. In order to answer the question regarding the applicability of the Ordinance of 1961 in the case of the respondent, it would be beneficial to examine the provisions thereof.

7. The Ordinance of 1961 was promulgated and notified in the official gazette on 02-03-1961 with the object of giving effect to the recommendations of the Commission on Marriage and Family Laws.

Section 1 describes the extent of the application and commencement of the Ordinance of 1961. Sub section (2) of section 1 explicitly provides that it extends to the whole of Pakistan and applies to all 'Muslim citizens of Pakistan' wherever they may be. The expressions "Arbitration Council" and "prescribed" have been defined in clauses (a) and (d) of section 2 respectively. Section 3 gives an overriding effect to the provisions of the Ordinance of 1961 over any law, custom or usage and registration of Muslim marriages. Section 5 describes the procedure for registration of marriages. Section 6 deals with polygamy. Sub section (1) of section 6 is couched in negative language and provides that during the subsistence of an existing marriage, no man shall contract another marriage except with the previous permission in writing of the Arbitration Council. Sub section (2) provides that an application seeking permission shall be submitted to the Chairman in the prescribed manner together with the prescribed fee and shall state the reasons for the proposed marriage and whether the consent of the existing wife or wives has been obtained thereto. Sub section (3) empowers the Chairman to grant permission if satisfied that the proposed marriage is necessary and just. Sub section (4) further describes the manner in which the application has to be dealt with by the Arbitration Council. Sub section (5) provides the consequences in the event of contracting another marriage without the permission of the Arbitration Council. Clause (a) provides that a person who has contracted a marriage without the permission shall immediately pay the entire amount of dower, whether prompt or deferred, which may

be due to the existing wife or wives, and if not so paid, it shall be recoverable as arrears of land revenue. Clause (b) further provides that on conviction upon complaint, in addition to the payment of dower, the person would be punished with simple imprisonment which may extend to one year and/or a fine of five thousand rupees. In exercise of powers conferred under section 11 of the Ordinance of 1961, the competent authority has made the Rules of 1961. Rule 3 describes the jurisdiction of a Union Council. Clause (a) of Rule 3 describes the manner in which an application seeking permission to contract another marriage has to be dealt with. Rule 14 elaborates the guidelines for the purposes of determination required to be made by the Arbitration Council while considering what is just and necessary for an order to give permission for contracting a second marriage and in this regard some factors have also been described. Rule 15 is in respect of requirements for making an application under sub section (1) of the Ordinance of 1961. Rule 21 is couched in negative language and provides that no Court shall take cognizance of any offence under the Ordinance of 1961 or the Rules of 1961 save on a complaint in writing by the Union Council stating the facts constituting the offence.

8. The above provisions and the validity thereof were challenged through several petitions before the learned Federal Shariat Court. Section 6 of the Ordinance of 1961 was also examined. The learned Federal Shariat Court rendered an exhaustive judgment reported as *'Allah Rakha and others v. Federation of Pakistan and*

others' [PLD 2000 FSC 1], wherein the provisions of section 6 of the Ordinance of 1961 were declared to be valid and intra vires. It was eloquently observed that it did not have the effect of declaring the subsequent marriage as illegal but has merely prescribed the conditions required to be fulfilled before doing so, failing which the non-observance thereof would expose the husband to the consequences explicitly described therein. It was further observed that the spirit of the provisions was reformatory and that it has prescribed a corrective measure for the prevention of injustice to the existing wife/wives. In the case titled '*Syed Ali Nazwaz Gardezi v. Lt. Col. Muhammad Yusuf*' [PLD 1963 SC 51] the apex Court has held that the Ordinance of 1961 only penalises the person who contracts another marriage in contravention of the provisions thereof by making him liable to imprisonment or a fine or both but does not invalidate the marriage itself.

9. In the context of the facts and circumstances relating to the instant petition, it would be pertinent to refer to two other statutes i.e. the Pakistan Citizenship Act, 1951 (*hereinafter referred to as the 'Act of 1951'*) and the Ordinance of 2000.

10. The Act of 1951 was promulgated and notified in the official gazette on 13-04-1951 to make provisions for the citizenship of Pakistan. Section 2 defines various expressions including 'Alien', "Commonwealth citizen" and "British protected person". Section 3

extended protection to every person falling under the categories mentioned therein at the commencement of the Act of 1951. Sections 4, 5, 6, 7, 9, 13 and 14-B describe different categories of persons who are entitled to claim and be considered for the granting of citizenship of Pakistan. Section 14-B provides that a person, being a subject of the State of Jammu and Kashmir, who has migrated to Pakistan with the intention of residing therein until such time as the relationship between Pakistan and that State is finally determined shall, without prejudice to his status as such subject, be a citizen of Pakistan. Thus the former has been declared as a citizen of Pakistan and has to be treated as such.

11. The Ordinance of 2000 was promulgated and notified on 10-03-2000 with the object and purpose of, inter alia, providing for the registration of all persons and establishing the National Database and Registration Authority (*hereinafter referred to as the 'Authority'*). Section 2 defines various expressions including "Alien Registration Card", "Overseas Identity Card", "Pakistan Origin Card", etc. The Authority has been established under section 3 and its purpose, object, functions and powers are enumerated under section 5 *ibid*. Section 10 provides that the Authority shall issue or renew, or cause to be issued or renewed in such manner and terms and conditions, subject to every citizen who has attained the age of eighteen years and has got himself registered under section 9, a card to be called a National Identity Card. Likewise, other categories of cards i.e Pakistan Origin Card, Overseas

Identity Card and Alien Registration Card have been described under sections 11, 12 and 13 respectively. A plain reading of these provisions unambiguously shows that a National Identity Card is issued to a person under section 10 of the Ordinance of 2000 who is a citizen of Pakistan. A National Identity Card is, therefore, an acknowledgement or a certification by the State of Pakistan that the person to whom it is issued is a citizen of Pakistan and has to be treated as such unless his or her citizenship is revoked or acknowledged under the Ordinance of 1951 by the competent authority and in the manner prescribed therein. It is noted that the question whether or not a person holding a National Identity Card is a citizen of Pakistan can only be dealt with under the Ordinance of 1951 because the Ordinance of 2000 does not empower the Authority to decide such a status.

12. A plain reading of the Ordinance of 1961 read with the Rules of 1961 unambiguously shows that it extends to the whole of Pakistan and applies to all Muslim citizens of Pakistan. A man who intends to contract another marriage during the subsistence of an existing marriage has to observe the procedure and fulfill the conditions prescribed by the legislature otherwise the consequences of imprisonment or fine or both could ensue. The factors required to be taken into consideration by the Arbitration Council in granting permission for contracting a subsequent marriage have been prescribed in sub sections (2), (3) and (4) of section 6 of the Ordinance of 1961. The consequence for contracting another marriage in

contravention are prescribed under sub section (5) of section 6. The Arbitration Council cannot act mechanically while granting permission because the statute has declared that before doing so it has to be satisfied that such permission would be just and necessary. A husband who contracts another marriage during the subsistence of an earlier one in contravention of the provisions of the Ordinance of 1961 definitely exposes himself of the risk of being imprisoned or fined or to both.

13. In the facts and circumstances of the case in hand, it is an admitted position that the respondent, regardless of his place of residence, holds a National Identity Card issued to him by the Authority under the Ordinance of 2000. As long as the National Identity Card remains valid and subsisting, the respondent cannot claim to be a person who is not a citizen of Pakistan. The marriage was contracted between the parties and duly registered in Islamabad and, therefore, to the extent of the petitioner the cause of action in the context of section 6 of the Ordinance of 1961 has arisen in Islamabad. The case law relied upon by the learned Counsel for the respondent is distinguishable in so far as the instant petition is concerned. The appellate Court had definitely not taken into consideration the legal provisions of various statutes discussed hereinabove.

14. For what has been discussed above, the instant petition seeking special leave to appeal is converted into an appeal and allowed

by setting aside the impugned judgment, dated 27-05-2017. The appeal preferred by the respondent would be deemed to be pending and entrusted to a competent Court for decision afresh on merits after affording an opportunity of hearing to the parties. This Court expects that the appeal would be decided at the earliest.

(CHIEF JUSTICE)

Luqman Khan/*

Approved for reporting.