

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
(JUDICIAL DEPARTMENT)

Crl. Misc. No.138-BC of 2020

"Muhammad Arif Vs. Shahid Mehmood and another"
&

Crl. Misc. No. 799-BC of 2019

"Muhammad Arif Vs. Ali Muhammad and others"

Petitioner By: Ch. Muhammad Kashif Gujjar, Advocate.
Respondents By: Mr. Zeeshan Gohar, Advocate.
Respondent No.1 in person.
State by: Malik Mazhar Javaid, and Mr. Zohaib Hassan Gondal, State Counsel with Tahir Khan Niazi, Inspector, along with record.
In person Mst. Adina Arif.
Date of Hearing: 12.03.2020.

Ghulam Azam Qambrani, J.:- Through this consolidated order, I intend to dispose of the Crl. Misc. No.138-BC/2020 and Crl. Misc. No.799-BC/2019.

2. In both cases, the petitioner seeks bail cancellation of bail granted in favor of respondents in case F.I.R Nos.240/2019 dated 30.07.2019 offence under Sections 365-B, 493-A, 494 & 34 P.P.C registered with Police Station Abpara, Islamabad.

3. Briefly stated facts of the prosecution case are that on 30.07.2019, at the written report of petitioner/complainant namely Muhammad Arif son of Rehmat Khan, above said F.I.R was registered wherein he has stated that his daughter namely Adina Arif went to Regional Training Institute, Sector H-8/2, Islamabad, for

attending the Nursing classes and on Friday, dated 26.07.2019, the petitioner was informed that his daughter who went to MCH Aapbara for training is missing from there since 11:20 a.m. It has been further alleged by the complaint that he had come to know through his own sources that his daughter has been abducted by the respondent Shahid Mehmood along with his companion Muhammad Usman; he contacted the father and brother of the above said Shahid Mehmood for recovery of his daughter but they did not help him. Initially, F.I.R was registered under Section 365-B P.P.C. The respondent Shahid Mehmood was arrested, he remained under investigation about thirteen days, who produced “*TalaaqNama*” of his first wife and “*NikahNama*” with his daughter namely Adina Arif. On 02.10.2019, the petitioner filed an application to the police wherein it was mentioned that in-fact the respondent Shahid Mehmood was married to his elder daughter namely Tanzila Arif, who is still his lawful wife and without pronouncement of “*talaaq*” to his first wife namely Tanzila Arif, he has contracted second marriage with his other daughter namely Adina Arif, thus accused is committing zina. On such application of the petitioner, Sections 493-A, 494 & 34 P.P.C were added.

4. The respondents filed bail applications before the learned Additional Sessions Judge, Islamabad,, who after hearing the parties, granted bail to the respondents Shahid Mehmood vide order dated 16.01.2020 and to the respondents Ali Muhammad, Muhammad Ali, Abdul Wahid and Qasim Abdullah vide order dated 22.11.2019, respectively. Feeling aggrieved, the petitioner has filed instant bail cancellation petitions.

5. Learned counsel for the petitioner contended that the accused Shahid Mehmood is the son-in-law of the petitioner, who was married earlier with the elder daughter of the petitioner namely Tanzila Arif; she is still under his nikah even then he performed nikah with the younger daughter of the petitioner, which is against the ordains of Allah and Shariah; that there was sufficient evidence on record against the respondents even then the learned Additional Sessions Judge-West, Islamabad, granted bail to the respondents; further contended that after grant of the bail, the respondents are extending threats to the petitioner, thus have committed misuse of the grant of bail, therefore, the bail granting orders may be cancelled.

6. Conversely, the learned counsel for respondents as well as learned State counsel opposed the contentions raised by the learned counsel for the petitioner contending that the petitioner, in the contents of F.I.R, has not mentioned that the accused Shahid Mehmood to be his son-in-law, rather only named him, which fact reflects that at the relevant time, the accused was no more his son-in-law; that in-fact the accused Shahid Mehmood, had pronounced talaaq to his first wife Tanzila Arif through divorce deed 20.07.2019, duly attested by the witnesses and during the course of investigation, this fact was also verified by the police. The nikah performed with the alleged abductee has also been verified. Lastly, urged for dismissal of the instant petitions.

7. Arguments heard; record perused.

8. Minute perusal of record reveals that initially F.I.R was registered against the respondent Shahid Mehmood with the allegations that he alongwith one Muhammad Usman has abducted his daughter namely Adina Arif. On arrest of the respondent Shahid Mehmood, it was disclosed that he has lawfully married with the above named Adina Arif. During the course of investigation, the petitioner filed an application to the police that the respondent Shahid Mehmood is his son-in-law; his elder sister namely Tanzila was still under his nikah and without pronouncement of talaaq, he had performed second nikah with his other daughter namely Adina Arif and thus he is committing zina. On said application, the police inserted Sections 493-A, 494 & 34 P.P.C.

9. Under "*Hanfi*" law, marriage with wife's sister during the subsistence of the previous marriage is only "*Fasid*" (invalid) and not "*Batil*" (void). In the present case the respondent Shahid Mehmood has contracted second marriage with the younger sister of his ex-wife after pronouncement of Talaq to his first wife on 20.07.2019. Thereafter, Mst. Adina Arif filed a complaint under Section 506 P.P.C before the learned Judicial Magistrate, Gujranwala, stating therein that she had contracted marriage with Shahid Mehmood and thereafter, on 04.09.2019 she got recorded her statement under Section 161 Cr.P.C. before the Investigation Officer wherein she also stated that she had contracted marriage with Shahid Mehmood with her free will. Further, the Investigation Officer also got verified that the respondent Shahid Mehmood had already divorced his first wife. Prima facie, the element of abduction is not proved. Under Sunni Law, an unlawful conjunction by way of marriage during Iddat

period renders the marriage irregular and not void and an irregular marriage becomes regular the moment the bottleneck is removed i.e. Iddat period expires. However, husband marrying during Iddat period cannot be made liable for consensual zina under Section 10(2), of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, along with his marriage partner.

10. Marriage of respondent Shahid Mehmood with Mst. Adina Arif may be irregular but the same cannot be treated as void. Union of Shahid Mehmood and Mst. Adina in consequence of nikah in between themselves as husband and wife cannot be regarded as un-Islamic or against Shariah.

11. Section 242 of Principles of Mahommedan Law by D.F. Mulla stipulates that the marriage may be valid (Sahih), or irregular (Fasid) or void (Batil) from the beginning. Section 253 lays down distinction between void and irregular marriage as under:---

S.253. Distinction between void and irregular marriage--(1) *A marriage which is not valid may be either void or irregular.*

(2) *A void marriage is one which is unlawful in itself, the prohibition against the marriage being perpetual and absolute. Thus, a marriage with a woman prohibited by reason of consanguinity (S.250), affinity (S.251), or fosterage (S.252), is void, the prohibition against marriage with such a woman being perpetual and absolute (a).*

(3) *An irregular marriage is one which is not unlawful in itself, but unlawful "for something else", as where the prohibition is temporary or relative, or when the irregularity arises from an accidental circumstance, such as the absence of witnesses. Thus, the following marriages are irregular, namely---*

*(a) a marriage contracted without witnesses.
 (S.244),*

(b) a marriage with a fifth wife by a person having four wives (S.255);

(c) a marriage with a woman undergoing Iddat (S.247);

(d) a marriage prohibited by reason of difference of religion (S.249);

(e) a marriage with a woman so related to the wife that if one of them had been a male they could not have lawfully intermarried (S.253)."

12. The case of respondent Shahid Mehmood for having married with Mst. Adina Arif, the younger sister of his first wife falls within the purview of section 253(3)(e). The effects of an irregular marriage have been laid down in Section 756 which stipulates as under:--

(1) An irregular marriage may be terminated by either party, either before or after consummation, by words showing an intention to separate, as where either party says to the other "I have relinquished you" (d).

An irregular consummation.

(2) If consummation has taken place--

(i) the wife is entitled to dower, proper or specified, whichever is less (Ss.276, 279);

(ii) she is bound to observe the Iddat, but the duration of Iddat both on divorce and death is three courses (S.246(2);

But an irregular marriage, though consummated, does not create mutual rights of inheritance between husband and wife (Baillie, pp.694, 701). It has been held that it does-create such rights, (b) but the decision, it is submitted, is not correct."

13. In the light of above two sections, it seems that the marriage of the respondent Shahid Mehmood with Mst. Adina Arif is not void, but irregular and as per above discussed law, the issues of this marriage would be legitimate. Therefore, it cannot be held that the

respondent Shahid Mehmood is committing Zina with his second wife.

14. There is no evidence that the respondents have tampered with the prosecution evidence or misused the concession of bail. The bail can only be cancelled if the order on the face of it is perverse and has been passed in violation of the principles for the grant of bail. In this regard, reliance is placed on the Judgments titled Muhammad Karam Vs. Zahid Iqbal and others(2008 SCMR 1715), “Muzaffar Iqbal Vs Muhammad Imran Aziz and others” (2004 SCMR 231), “The State Vs Khalid Mehmood” [2006 SCMR 1265], “Shahneel Gul and two others vs. The State” (2018 YLR 999) and “Ahsan AkbarVsThe State” [2007 SCMR 482].

15. The considerations for the grant of bail are quite different from the considerations for cancellation of bail. Once bail has been granted by a competent Court of law, strong and exceptional grounds are required for cancelling the same. In such cases, it is to be seen as to whether order granting bail is patently illegal, erroneous, factually incorrect and has resulted in miscarriage of justice whereas, the petitioner has failed to establish any such ground, in the instant case.

16. I have also gone through both the impugned orders, which are based upon legal principles and no illegality has been observed, therefore, requirement of Section 497(5) Cr.P.C is not visible, as no perversity, illegality or violation of Court order or tampering with prosecution evidence of this case has been established against the

respondents, therefore, instant petitions are misconceived and the same are hereby **dismissed**.

17. However, the observations made hereinabove are meant for disposal of these applications, which shall have no bearing on merits of the case.

(GHULAM AZAM QAMBRANI)
JUDGE

Announced in open Court, on ____ the day of March, 2020

JUDGE

Rana .M.Ift.

Approve for reporting.

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