

**JUDGMENT SHEET**  
**IN THE ISLAMABAD HIGH COURT, ISLAMABAD.**  
**JUDICIAL DEPARTMENT.**

**CRL. REV. NO.58/2016**

**LIAQAT ALI MIR,**

**Vs.**

**THE ADDL. SESSIONS JUDGE, ETC.,**

**PETITIONER BY:**

Mr. Owais ul Islam, Advocate along with petitioner.

**RESPONDENTS BY:**

M/s Ali Hussain Bhatti, Rana Ghulam Asghar Khan and Imtiaz Ahmed Gujjar, Advocates for respondent No.3.

M/s Shah Khawar, ASC, Sher Afzal Khan AHC and Qaiser Imam Ch. AHC as amicus curiae.

Mr. Arshad Mehmood Kiyani, learned DAG and Mr. Muhammad Akram Gondal, learned state counsel.

**DATE OF HEARING:**

**14.12.2016 & 23.12.2016.**

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**SHAUKAT AZIZ SIDDIQUI; J.** This petition is directed against the impugned order dated 16.06.2016 passed by the learned Additional Sessions Judge, Islamabad (hereinafter “the impugned order”) whereby Appeal preferred by Petitioner, against order dated 14.06.2016, of Assistant Commissioner (Secretariat)/Sub Divisional Magistrate, awarding sentence of simple imprisonment of one month, with a fine of Rs.5000/- in a complaint u/s 6(5) of the Muslims Family Laws Ordinance, 1961 has been dismissed, being not maintainable.

2. Brief facts of the matter are that marriage between Petitioner and (Mst. Dilshad Bibi) “Respondent No.3” was solemnized on 15.5.2011 at Islamabad. They lived together for about one year at Muzafarabad, AJK, but their relations became strained, resultantly, Respondent No.3, came back to Islamabad and started dwelling here. On 08.01.2013, Respondent No.3, moved an application, addressed to the Chairman Arbitration Council, Islamabad, for initiation of proceedings u/s 6 of the Muslims Family Laws Ordinance, 1961 against Petitioner, alleging therein that her husband, during the subsistence of earlier marriage contracted second marriage without her permission.

3. The Chairman, Arbitration Council after conducting preliminary proceedings, forwarded the matter to "Illaqa Magistrate, P.S Secretariat, Islamabad, with the following remarks.

از دفتر چیئر مین ثالثی کونسل پلاٹ نمبر 35 سیکٹر 9-H اسلام آباد  
 بجانب: علاقہ مجسٹریٹ تھانہ سیکرٹریٹ ضلع اسلام آباد  
 مقدمہ نمبر MFL-ID/2013/13 مورخہ 29-05-2013  
 عنوان۔ استغاثہ زبردفعہ 6 مسلم عائلی قوانین مجریہ 1961ء  
 دلشادی بی دختر محمد رفیق شیخ ساکن مکان نمبر H-292، حلقہ نمبر 6 مسلم کالونی نور پور شاہاں  
 ضلع اسلام آباد نے درخواست گزاری ہیکہ میرے خاوند لیاقت علی میر ولد مظفر میر ساکن وارڈ  
 نمبر 1 محلہ امبور مظفر آباد نے میری اجازت کے بغیر دوسری شادی کر لی ہے۔  
 دوران سماعت دلشادی بی نے لیاقت علی میر کا دوسرا نکاح نامہ برائے ثبوت پیش کیا جس  
 سے ثابت ہوتا ہے کہ لیاقت علی میر نے بغیر اجازت دوسری شادی کر لی ہے جو کہ قانونی جرم ہے۔  
 لہذا استغاثہ زبردفعہ 6 مسلم عائلی قوانین مجریہ 1961ء ارسال خدمت ہے۔  
 (دستخط)  
 چیئر مین  
 ثالثی کونسل  
 ضلع اسلام آباد

On receipt of **complaint**, learned Magistrate, vide order dated 18.12.2013 summoned respondent No.3(applicant) for 23.12.2013, on which date, order of the issue of process against petitioner was passed, who put appearance on 14.04.2014, and following order was made by the learned Magistrate:-

14-4-2014: مستغیثہ حاضر، ملزم حاضر، ملزم کو ہدایت کی گئی ہے کہ وہ مچلکہ ضمانت اور ایک لوکل ضامن داخل کرے۔ مزید کارروائی آئندہ بتقرر 15-4-2014 کو پیش ہوویں۔

On the said date following order was passed;

15-4-2014: مستغیثہ غیر حاضر، ملزم حاضر، ملزم نے مچلکہ ضمانت تعدادی -/30,000 اور ایک ضامن داخل شد، آئندہ بتقرر 22-4-2014 کو پیش ہوویں۔ مزید برآں ملزم کو نقل تقسیم شد برائے فرد جرم عائد آئندہ بتقرر 22-4-2014 کو پیش ہوویں۔

On 22.04.2014, learned Magistrate was pleased to pass following order;

2014-4-22: مستغیثہ حاضر، ملزم برضمانت حاضر۔ ملزم پر فرد جرم عائد شد۔ ملزم نے جرم سے انکار کیا ہے، مگر ملزم اپنی صفائی میں شہادت پیش کرنا چاہتا ہے، مستغیثہ بطور گواہ حقیقی ماموں مجیب الرحمن اور علی اکبر کو شہادت کے لیے پیش کرنا چاہتی ہے۔ مزید کاروائی برائے شہادت مستغیثہ آئندہ بتقرر 2014-4-28 کو پیش ہوویں۔

After two dates of hearing i.e 28.04.2014 and 05.05.2014, proceedings were recorded on 12.5.2014, in the words reproduced herein below;

2014-5-12: مستغیثہ حاضر، ملزم غیر حاضر، مستغیثہ کی طرف سے گواہان پیش ہوئے، بیان قلم بند شد، مزید کاروائی آئندہ بتقرر 2014-5-19 کو پیش ہوویں۔

On the date fixed, learned Magistrate recorded proceedings as hereunder;

2014-5-19: استغاثہ کی گوائی (گواہی) مکمل شد۔ ملزم کی طرف سے جرح کے لیے کوئی پیش نہ ہوا ہے اور نہ ہی ملزم پیش ہوا ہے۔ ملزم کے برائے بیان (2) 340 ض۔ف کے تحت بیان کے لیے مورخہ 2014-5-26 کو پیش ہوویں۔

Matter kept on adjourning for multiple reasons but most of all for recording of statement of accused u/s 340 of the Code of Criminal Procedure, 1898 (hereinafter "the Cr.PC). However, on 12.11.2014 and 13.11.2014 following orders were passed.

2014-11-12: مستغیثہ حاضر، ملزم برضمانت حاضر۔ ملزم نے اپنا بیان قلم بند کروایا۔ ملزم زبانی بیانی ہے کہ میرا کونسل کسی دوسرے کیس کے سلسلے میں مصروف ہیں، لہذا آج کاروائی منوخر کی جائے اور آئندہ پیشی پر اپنا کونسل پیش کرے گا اور اپنا مکمل بیان ریکارڈ کروائے گا۔ اور بیان میں جو بات کہی ہے اس کا ثبوت بھی پیش کرے گا۔ فریقین کو آئندہ مورخہ 2014-11-13 بجے پیش عدالت ہوویں۔

2014-11-13: مستغیثہ بمعہ کونسل حاضر۔ ملزم بمعہ کونسل حاضر۔ منجانب کونسل لیاقت علی میر نے جراح (جرح) مستغیثہ پر قلم شد ملزم کو ہدایت ہوئی تھی کہ وہ اپنے ساتھ رجسٹری طلاق اور رجسٹری یا TCS کی رسید جوڈاک کے ذریعے طلاق بھجوائی گئی ہے وہ ساتھ لے کر آئے۔ مزید برآں ثالثی کونسل سے رپورٹ طلب کی جاتی ہے کہ ملزم نے مستغیثہ کو طلاق دے دی ہے، مزید برآں جاری شدہ ایشام طلاق نوٹری پبلک سے بمعہ رجسٹر طلب کیا جاتا ہے۔ مزید کاروائی منجانب کونسل مستغیثہ جراح (جرح) ملزم بتقرر 2014-11-18 پیش ہوویں۔

4. From here onwards matter kept on adjourning for different reasons but mostly due to non-appearance of the accused.

5. On conclusion of trial, learned Magistrate, held accused Petitioner guilty and by convicting him, awarded sentence of one month and fine of Rs.5000/- under Section 6(5) of the Muslims Family Laws Ordinance, 1961, vide impugned order dated 14.06.2016.

6. Being aggrieved of order of conviction, petitioner filed appeal u/s 409 r/w other enabling provisions of Cr.PC, which learned Appellate Court dismissed vide impugned order dated 16.06.2016 by observing that, since right of appeal is not provided under the Muslims Family Laws Ordinance 1961, therefore, appeal was not maintainable. Learned ASJ guided herself from the judgement of Honourable Supreme Court in the case “Syed Masroor Shah and others Vs. The State” reported as PLD 2005 SC 173. For convenience operative part of the impugned order is being reproduced, herein below;

**“There is no cavil to the proposition that the complaint is filed under the special law i.e Muslim Family Laws Ordinance 1961 where no statutory provision is provided with regard to the right of appeal and such right cannot be supplemented by application since it is settled law that right of appeal cannot be availed unless it is conferred in a clear manner by some enactment or statute or the rules having the sanctity of some law. Such right is to be specifically provided for and the same cannot arise by implication. Right of appeal is not a mere matter of procedure but is vested right of a party from the commencement of the action in the court of first instance. Parties by agreement cannot confer jurisdiction upon a Court. Right of appeal depends upon the language as used in the statute and if the words of statute are precise and ordinary meaning. Order passed by any court irrespective of the fact whether it is ordinary criminal court or Accountability statute. Right of appeal cannot be assumed unless expressly given by the statute. Wisdom is drawn from PLD 2005 SC 173.**

7. Learned counsel for Petitioner submitted that Impugned Order passed by learned ASJ is against the dictums laid down by the superior courts and basic principle of law, that against any action/order of penal consequences,

one cannot be left remedy less. Learned counsel further submitted that if in the estimation of learned ASJ appeal was not competent; she should have treated the same as revision petition, instead of knocking out Petitioner on a technical ground. Learned counsel added that judgement relied by the learned ASJ is not applicable in the facts and circumstances of case, rather judgement reported as 2011 YLR 1595, relied by Petitioner needed to be followed but even same was not referred to by the learned ASJ.

8. Learned counsel for Respondent No.3 submitted, without going into the merits of case, which may prejudice the case of either side that he has no objection, if matter is remanded back to the learned ASJ, by converting it into revision. Learned State Counsel also expressed the same view.

9. In order to appreciate the proposition and to find out real intent and purpose of law, with regard to right of appeal or revision, this court appointed M/s Shah Khawar, Sher Afzal Khan and Qaiser Imam, Advocates as “amicus curie” who very ably rendered valuable assistance and as such their effort is laudable.

10. I have heard the learned counsel for the parties as well as learned ‘amicus curie’, and learned Deputy Attorney General, appreciated the record and perused the Impugned Orders.

11. Before commenting upon the Impugned Order passed by the learned ASJ, I feel it appropriate to reproduce, Section 6, of the Muslims Laws Ordinance (VIII of 1961) (hereinafter “the Ordinance”) and Rule 21 of West Pakistan Rules (hereinafter “the Rules”) under the Muslims Family laws Ordinance, 1961:-

**“POLYGAMY. (1) 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 this Ordinance.**

**(2) An application for permission under sub-section (1) 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 existing wife or wives has been obtained thereto.**

**(3) On receipt of the application under sub-section (2) the Chairman shall ask the applicant and his existing wife or wives each to nominate a representative, and the Arbitration Council so**

***constituted may, if satisfied that the proposed marriage is necessary and just, grant subject to such conditions, if any, as may be deemed fit, the permission applied for.***

***(4) In deciding the application the Arbitration Council shall record its reasons for the decision an any party may, in the prescribed manner, within the prescribed period, and on payment of the prescribed fee, prefer an application for revision, (to the Collector) concerned and his decision shall be final and shall not be called in question in any court.***

***(5) Any man who contracts another marriage without the permission of the Arbitration Council shall:***

- (a) Pay immediately the entire amount of dower, whether prompt or deferred, due to the existing wife or wives, which amount, if not so paid shall be recoverable as arrears of land revenue; and***
- (b) On conviction upon complaint be punishable with simple imprisonment which may extend to one year, or with fine which may extend to five thousand rupees, or with both.***

Rule 21 reads as under;

***“21. No court shall take cognizance of any offence under the Ordinance or these rules save on a complaint in writing by the Union Council, stating the fact constituting the offence.***

12. Although, Ordinance and Rules do not contain any provision to convey, which procedure shall be applicable in respect of proceedings of the complaint but admittedly entire proceedings conducted by the learned trial court/Respondent No.2, under the provisions of the Cr.PC, 1898 as is evident from the orders passed from 18.11.2014 to 14.06.2014. From 18.11.2014 to 14.06.2016 interalia following orders, under the provisions of Cr.PC,1898 were passed by the learned trial court.

- *Cancellation of surety bond of Rs.30,000/- and acceptance of fresh bond of Rs.100,000/-.*
- *Cancellation of bail and issuance of non-bailable warrants of arrest of accused.*
- *Imposition of cost of Rs.1000/- upon accused.*
- *Entertaining of application under Section 249-A Cr.PC and passing of an order of its rejection.*
- *Procuring of evidence. Recording of statement under Section 342 Cr.PC.*
- *Initiation of proceedings under Section 342 Cr.PC.*
- *Initiation of proceedings under Section 514 Cr.PC.*
- *Receipt of an application under Section 540 Cr.PC.*

- *Direction to different authorities, for the arrest of accused and production before the court.*

Further, charge against accused was also framed, in accordance with the provisions of Cr.PC, 1898 relating to magisterial trial.

13. It is imperative to provide relevant definitions and applicable provisions from the procedure.

### **Chapter 1:**

*Sec.1(2) It extends to 1 [the whole of Pakistan] but, in the absence of any specific provision to the contrary, nothing herein contained shall affect any special or local law now in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.*

**3. Reference to Code of Criminal Procedure and other repealed enactments.** (1) In every enactment passed before this Code comes into force in which reference is made to, or to any, chapter or section of the Code of Criminal Procedure, Act XXV of 1861 or Act X of 1872, or Act X of 1882 or to any other enactment hereby repealed, such reference shall, so far as may be practicable, be taken to be made to this Code or to its corresponding chapter or section. (2) Expressions in former Acts. In every enactment passed before this Code comes into force the expressions 'Officer exercising (or 'having') the powers (or 'the full powers') of a Magistrate' 'Subordinate Magistrate, first class', and 'Subordinate Magistrate second class', shall respectively be deemed to mean 'Magistrate of the first class', 'Magistrate of the second class' and 'Magistrate of the third class', the expression 'Magistrate of a division of a district shall be deemed to mean 'Sub-Divisional Magistrate', the expression 'Magistrate' of the district shall be deemed to mean 'District Magistrate and the expression 'Joint Sessions Judge' shall mean 'Additional Sessions Judge'.

**4(h) 'Complaint'.** 'Complaint' means the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person whether known or unknown, has committed an offence, but it does not include the reports of a police-officer.

**(m) 'Judicial proceeding'.** 'Judicial proceeding' includes any proceeding in the course of which evidence is or may be legally taken on oath;

**(o) 'Offence'.** 'Offence' means any act or omission made punishable by any law for the time being in force; it also includes any act in respect of which a complaint may be made under section 20 of the Cattle Trespass Act, 1871.

**5(2) Trial of offences against other laws.** All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

**6(A). Classes of Criminal Courts** [6. Classes of Criminal Courts and Magistrates:– (1) Besides the High Courts and the Courts constituted under any law other than this Code for the time being in force, there shall be two classes of Criminal Courts in Pakistan, namely: (i) Courts of Session; (ii) Courts of Magistrates. (2) There shall be the following classes of Magistrates, namely: (i) Judicial Magistrates:– (1) Magistrates of the first class. (2) Magistrates of the second class. (3) Magistrates of the third class. (4) Special Judicial Magistrate. (ii) Executive Magistrates:– (1) District Magistrates. (2) Additional District Magistrates. (3) Sub-Divisional Magistrates. (4) Special

*Executive Magistrates.] [(5) Magistrates of the first class. (6) Magistrates of the second class. (7) Magistrates of the third class.] B. Territorial Divisions*

**28. Offences under Penal Code.** *Subject to the other provisions of this Code any offence under the Pakistan Penal Code may be tried: (a) by the High Court; or (b) by the Courts of Sessions; or (c) by any other Court by which such offence is shown in the eighth column of the second schedule to be triable; [Provided that the offences falling under Chapters VIII, X, XIII and XIV of the Pakistan Penal Code (Act XLV of 1860), except offences specified in section 153A and section 281 of the said Code, shall be tried by the Executive Magistrates and the expression 'Magistrate' used in the said eighth column shall mean Executive Magistrate of the respective class.]*

**29. Offences under other laws.** *(1) Subject to the other provisions of this Code, any offence under any other law shall when any Court is mentioned in this behalf in such law, be tried by such Court.*

**36. Ordinary powers of Magistrates.** *All [Judicial and Executive Magistrates] have the powers hereinafter respectively conferred upon them and specified in the third schedule Such powers are called their 'ordinary powers'.*

Similarly, in order to appreciate the proposition in hand it appears necessary to provide provision relating to Appeals and Revisions under Part-VII, Chapter XXI & XXXII of the procedure:-

**404. Unless otherwise provided,** *no appeal to lie. No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this or by any other law for the time being in force.*

**408. Appeal from sentence of Assistant Sessions Judge or [Judicial Magistrate].** *Any person convicted on a trial held by an Assistant Sessions Judge, [or any Judicial Magistrate] or any person sentenced under section 349 [...] may appeal to the Court of Session: Provided as follows:*

*[(a) Clause (a) Rep. by Act 12 of 1923. S. 23.] (b) when in any case an Assistant Sessions Judge [...] passes any sentence of imprisonment for a term exceeding four years, [...] the appeal of all or any of the accused convicted at such trial shall lie to the High Court: (c) when any person is convicted by a Magistrate of an offence under section 124-A of the Pakistan Penal Code, the appeal shall lie to the High Court.*

**409. Appeal to Court of Session how heard.** *Subject to the provisions of this section, an appeal to the Court of Session or Sessions Judge shall be heard by the Sessions Judge or by an Additional Sessions Judge or an Assistant Sessions Judge; Provided that an Additional Sessions Judge shall hear only such appeals as the Provincial Government may, by general or special order, direct or as the Sessions Judge of the division may make over to him. Provided further that no such appeal shall be heard by an Assistant Sessions Judge unless the appeal is of a person convicted on a trial held by a Magistrate of the second class or third class.]*

**413. No appeal in petty cases.** *Notwithstanding anything hereinbefore contained, there shall be no appeal by a convicted person in cases in which a High Court passes a sentence of imprisonment not exceeding six months only or of fine not exceeding two hundred rupees only or in which a Court of Session passes a sentence of imprisonment not exceeding one month only, or in which a Court of Session or [a] Magistrate of the first class passes a sentence of fine not exceeding fifty rupees only.*



**435. Power to call for records of inferior Courts.** (1) *The High Court or any Sessions Judge [...], may call for and examine the record of any proceeding before any inferior Criminal Court situate within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court and may, when calling for such record, direct that the execution of any sentence be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending examination of the record.*

14. Bare perusal of Section 1(2) of the Cr.PC, 1898 provide the reasons of the applicability. Definitions under Section 4(h) (m) (o) and Section 29 of Cr.PC 1898 shows that proceedings conducted by the learned trial court were “judicial proceedings” in a “complaint”, defined as offence under “other laws”. This aspect is clear by virtue of the provisions of Cr.PC, 1898, complaint under Section 6(5) of the Ordinance was entertained as “complaint” under Cr.PC, 1898 and the accused was tried accordingly. Now, question arises that if Ordinance and Rules do not contain any provision of Appeal, therefore, remedy of Appeal provided under Cr.PC, 1898 cannot be availed by any convict seems unreasonable. As mentioned above, offence u/s 6(5) of the Ordinance, tried by the “Ilaqa Magistrate” not for the reason that Ordinance and Rules require so, rather due to the provision and scope of Cr.PC, 1898 itself. Appeal is continuation of the trial, therefore, any trial conducted under Cr.PC, 1898, cannot restrict its applicability to the trial alone. Since learned Appellate Court guided itself from the wisdom laid down in the case of Syed Masroor Shah and others Vs. The State, reported as PLD 2005 SC 173, therefore, it is essential to appreciate, as to whether learned Appellate Court rightly relied on the dictum or not?

15. With utmost respect, I beg to observe that above pronouncement of apex court is not applicable to the facts and circumstances of the case in hand for the following reasons:-

- i) Application filed before Honourable Supreme Court was under Order XXXIII, Rule 6 of the Supreme Court Rules, 1980, seeking permission to file criminal petition for leave to appeal, which was dismissed on first hearing i.e 27.09.2004.*
- ii) Application brought before august Supreme Court was not by any convict, rather by a person, who was neither tried nor convicted under the provisions of NAB Ordinance, 1999.*
- iii) Section 5(f) AND Section 17 of the NAB, Ordinance 1999, provide reference to the Code of Criminal Procedure, 1898 and its applicability.*

**iv) Appeal provided u/s 32 of the NAB, Ordinance against conviction or acquittal; by any convict or the Prosecutor General, therefore, appeal under the Cr.PC, 1898 cannot be filed.**

16. In the case of the State Vs. Naeem Ullah Khan reported as 2001 SCMR 1461, august Supreme Court held as under:

*“Section 46 of the Act has to be construed liberally as right of appeal has not been expressly provided by the Act to both the convict and the acquitted persons, in such circumstances, if the right of appeal is negated or excluded from the word ‘proceeding’ it would be giving it a harsh and narrow meaning/interpretation and would amount to the denial of right of appeal to the convict, which would not only be unconstitutional but also un-islamic, therefore, we would construe the word ‘proceeding’ in the wider prospect in view of the nature and scope of the Act and interpret the same to include the right of appeal to both the convict and the acquitted persons, as such construction would be most befitting to the scheme of the enactment. Appeal is a continuation of the trial/judicial proceedings before the higher Court to consider the verdict of the lower court on legal and factual aspects, as such, appeal being a step towards the objective to be achieved, is included in the phrase ‘all proceedings relating to offences and criminal liabilities under this Act’ used in Section 46 of the Act, therefore, appeal/revision can be filed against conviction and acquittal as the case may be, as provided by the Code of Criminal Procedure.*

It is important to mention that, Section 46 of the Hazara Forest Act, 1936 reads as under:

**46. Procedure.—All proceedings relating to offences and criminal liabilities under this Act shall be governed by the Code of Criminal Procedure 1898.**

Above provision clearly shows that statute contained provision of the applicability of Cr.PC, 1898, whereas no such provision exist either in the Ordinance or the Rules, therefore provisions of the Cr.PC, 1898 govern and regulate the proceedings in the complaint u/s 6(5) of the Ordinance. I am fortified in my opinion by the judgement delivered in the case of Naseem Akhtar Durrani Vs. Mst. Abida Sultan, reported as 1992 MLD 93. It is held that:-

*“Though the Ordinance declared certain acts and omissions as punishable offences, but neither the ordinance nor the rules framed under it provided for a venue of the trial of the offences committed thereunder nor is there any other provisions in them to indicate about the jurisdiction of the court to try such offences. In the existing omission the court has to look to the provisions of Criminal P.C for searching out the venue for the trial of the offences and the jurisdiction of the courts to hold trial in respect of them. Section 5(2) of the CrL.*

*Procedure Code lays down that all offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions of the Cr.PC but subject to any enactment for the time being enforce regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. The act of contracting another marriage in violation of the provisions contained in Section 6 of the Ordinance is an offence under special law and therefore, in the absence of any provisions regulating the venue of its trial and providing for a separate court or procedure for trial in respect of it, the procedure in the criminal procedure code shall attract to the offence and its consequential trial.*

17. Besides above authoritative pronouncement, it may be observed that superior courts of the country always entertained the petitions surfaced out of judgments passed in Appeal or Revision from the proceedings of the trial of an offence u/s 6(5) of the Ordinance. Reference in this regard is made to 1989 P.CR.LJ 749, 2004 P.Cr.LJ 278 & 2011 YLR 1595.

18. Although not in respect of offence u/s 6(5) of the Ordinance, rather under the Code of Civil Procedure, 1908; august Supreme Court in the case of H.M SAYA & Co. Vs. Wazir Ali Industries, reported as PLD 1969 SC 65, settled the proposition in the following words:

*“It is true that there is no express provision permitting such party to prefer an appeal against such an order. This omission, however, cannot be understood to amount to prohibition. The Court ought not to act on the principle that every procedure is to be taken as prohibited unless it is expressly provided for. To give such a meaning to the omission would result in grave injustice. The Court should proceed on the principle that every procedure which furthers administration of justice is permissible even if there is no express provision permitting the same.”*

19. In view of above, it can be safely held that an appeal u/s 408/409 of Cr.P.C, 1898 can be brought by any convict, awarded sentence u/s 6(5) of the Ordinance, and learned ASJ wrongly dismissed the appeal.

20. Even otherwise any executive Magistrate empowered to conduct any trial under the Cr.PC, 1898 is court subordinate to the Sessions Judge, therefore, provisions of Section 435 & 439-A empowers the learned Session Judge to call for the record, in order to satisfy himself about the conduct of proceedings. In this regard guidance is being sought from the case of Muhammad Younus Vs. The State reported as 2000 YLR 2841, wherein his Lordship held as under:-

*“After the enforcement of the Legal Reforms Act, 1997 making amendment in section 408 whereby it has been provided that appeal shall lie from the order of conviction and sentence passed by the judicial Magistrate to the Sessions Judge, the learned counsel for the petitioner as well as the State are unanimous on the point that there is no forum provided by law for filing of appeal against the order of conviction passed by executive Magistrate of the Ist. Class. According to section 435, Cr.PC, as amended, the High Court as well as the Sessions Judge is having the power to call for and examine the record of any proceedings before any inferior Criminal Court situated within the limits of its or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality, or propriety of any finding, sentence or order recorded or passed and as to the irregularity of any proceeding of such inferior Courts. An explanation was added to the said section whereby all the magistrates were held to be inferior to Sessions Judge for the purpose of this section. The Sessions Judge is having the powers under section 439-A, Cr.P.C to exercise all those powers given to the High Court under section 439, Cr.P.C and which includes the powers under section 423, Cr.P.C, the powers of the Appellate Court to set aside the order of conviction or sentence or to modify it. The accumulative effect of section 435 read with section 439-A, Cr.P.C the Executive Magistrate Ist Class is inferior to the Sessions Judge and in the absence of any forum of appeal to challenge his order of conviction, the Sessions Judge is having the power to entertain a revision petition under section 435 read with section 439-A, Cr.P.C.*

21. In sequel to above discussion instant petition is allowed and Impugned Order dated 16.06.2016 is set aside, with a consequence that appeal filed by Petitioner shall be deemed to be pending, and learned ASJ is directed to decide the same on merits after affording an opportunity of hearing to both sides. Parties are directed to appear before the learned Appellate Court on 13.02.2017. Record of the learned trial court may be remitted back, along with copy of the judgement.

**(SHAUKAT AZIZ SIDDIQUI)**  
**JUDGE**

***Announced in Open Court on 10.02.2017.***

**JUDGE**

**Approved for Reporting.**  
**Blue slip added.**

“Waqar Ahmed”

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