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

W.P.No. 1271 of 2016
Majid Hussain
Versus.
Farrah Naz & others

Date of Hearing: 07.06.2016
Petitioner by: Malik Shaukat Nawaz, Advocate,
Respondent No.1 by: Ms. Shabana Rafique, Advocate.

MIANGUL HASSAN AURANGZEB, J:- The petitioner (Majid Hussain) and respondent No.1 (Farrah Naz) got married on 08.08.2007 at Tehsil Rawlakot, District Poonch, Azad Jammu and Kashmir ("AJ&K"). Subsequently, the relations between the petitioner and respondent No.1 turned sour. On 11.07.2015, respondent No.1 filed a suit for dissolution of marriage on the basis of *Khula* before the Court of Senior Civil Judge, Islamabad, exercising the powers of Judge, Family Court. On 14.03.2016, the petitioner filed an application under Sections 1(2) & 5 of the West Pakistan Family Courts Act, 1964, read with Rule 5 of the West Pakistan Family Courts Rules, 1965, for the return of the plaint for its presentation before a court of competent jurisdiction. Respondent No.1 contested this application by filing a reply on 18.03.2016. Vide order dated 31.03.2016, the learned Judge, Family Court dismissed the said application and adjourned the matter for the filing of a written statement. Through the instant Writ Petition, the petitioner, impugns the said order dated 31.03.2016.

2. Learned counsel for the petitioner submitted that even though respondent No.1 was residing at Islamabad, the learned Judge, Family Court, Islamabad, had no jurisdiction in the matter because both the petitioner and respondent No.1 are not citizens of Pakistan; that the said contesting parties have their permanent residences at Rawalakot, AJ&K, and that their marriage was also solemnized over there; that on 03.09.2015, the petitioner instituted a suit for restitution of conjugal rights at

Rawalakot, but the learned Judge Family Court, did not take this vital aspect of the case into consideration while assuming jurisdiction; that respondent No1's temporary visit to Islamabad did not vest the learned Judge Family Court, Islamabad, with jurisdiction over the matter; and that AJ&K is a foreign territory for all intents and purposes and their citizens cannot take the benefit of the proviso to Rule 6(b) of the West Pakistan Family Courts Rules 1965. In making his submissions, the learned counsel for the petitioner has placed reliance on the cases of Mst. Fozia Vs. Aziz Ullah (2010 CLC 403), Shahdat Khan Vs Judge Family Court Rawalpindi (2014 CLC 1238), Rehmat Ullah Vs. Shamim Akhtar (1997 CLC 16) and Noor Hussain Vs. the State (PLD 1966 Supreme Court 88).

3. On the other hand, the learned counsel for respondent No.1 submitted that respondent No.1 was indeed residing at Islamabad, and therefore, the learned Judge Family Court, Islamabad, did have the jurisdiction over the matter; that respondent No.1, as a citizen of AJ&K could take the benefit of Rule 6 of the West Pakistan Family Courts Rules, 1965; that the benefit of the said rule is also extended to the citizens of AJ&K; that a writ petition is not maintainable against an interim order passed by the learned Judge Family Court, Islamabad. The learned counsel for respondent No.1 prayed for the dismissal of the instant writ petition.

4. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance.

5. The record shows that on 08.08.2007, the petitioner and respondent No.1 got married. Subsequently, over the years, the relations between the couple turned sour. On 10.07.2015, respondent No.1 instituted a suit for dissolution of marriage on the basis of *Khula* before the Court of the learned Civil Judge, Islamabad. On 14.03.2016, the petitioner filed an application under Sections 1(2) and 5 of the West Pakistan Family Courts Act, 1964 read with Rule 5 of the West Pakistan Family Courts Rules, 1965, praying for the return of the plaint on the ground

that both the petitioner and respondent No.1, were permanent residents of Tehsil Rawalakot, District Poonch, AJ&K, and that their marriage was also solemnized over there. The petitioner was of the view that only the courts in Tehsil Rawalakot, had the jurisdiction to adjudicate upon the suit for dissolution of marriage. Respondent No.1 resisted this application on the ground that respondent No.1 was residing at Islamabad, and that under the provisions of the West Pakistan Family Courts Rules, 1965, she could institute a suit for dissolution of marriage at Islamabad.

6. As mentioned above, vide the order dated 31.03.2016, the learned Judge Family Court, Islamabad, dismissed the petitioner's application for return of plaint, and fixed the matter for filing of the written statement.

7. Rule 6 of the of the West Pakistan Family Courts Rules, 1965, provides that the Courts which have the jurisdiction to try a suit, will be that within the local limits of which (a) the cause of action wholly or in part has arisen, or (b) where the parties reside or last resided together. According to the proviso of the said Rule, in suits for dissolution of marriage or dower, the Court within the local limits of which the wife ordinarily resides shall also have jurisdiction. Now the vital question that needs to be answered is whether the benefit of the proviso to the said Rule 6 can be extended to a plaintiff who is the citizen of AJ&K.

8. Section 14B of the Pakistan Citizenship Act, 1951, reads as follows:-

> ***"14B. Certain persons to be citizens of Pakistan.** A person who, being a subject of the State of Jammu and Kashmir, 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."*

9. Now, Section 14B *ibid* speaks of subjects of the 'State of Jammu and Kashmir' and not of subjects or citizens of 'Azad Jammu and Kashmir'. Who the subjects of the 'State of Jammu and Kashmir' are has been well-explained by the Supreme Court in the case of Inam-ul-Haq Vs. Chairman, F.P.S.C., Islamabad (2005 SCMR 622), in the following terms:-

"After the partition of the Sub-Continent in the year 1949, the State of Jammu and Kashmir was forcibly occupied by India. Some parts of the said State were, however, got liberated and are since called the Azad Kashmir Territory while the remaining parts of the same are still under the Indian occupation. Some residents of this Indian occupied Kashmir migrated to Pakistan and are living in different parts of Pakistan and the Azad Kashmir Territory, marking time to return to their homeland, on settlement of the Kashmir dispute. These immigrants and their descendants, though living in Pakistan and Azad Kashmir appear to have preferred to continue to retain their status as subjects of the State of Jammu and Kashmir and their said status appears even to have been recognized by the State of Pakistan."

10. The plaint is silent on whether respondent No.1 is a subject of 'State of Jammu and Kashmir' or a subject of 'Azad Jammu and Kashmir'. If respondent No.1 holds a State Subject Certificate, showing that she or her predecessors had migrated to Pakistan from the 'State of Jammu and Kashmir' she is to be considered as a citizen of Pakistan in terms of Section 14B of the Pakistan Citizenship Act, 1951. Simply because respondent No.1 came from AJ&K after her marriage broke down to live in Islamabad would not make her a citizen of Pakistan under section 14B ibid.

11. In the case of Akhtar Hussain Jan Vs. Government of Pakistan (1995 SCMR 1554), the appellant and his father had migrated from occupied Kashmir to Pakistan in 1971, and did not return ever since then; the appellant's father resided in Pakistan until his death in 1985; the appellant got married to Pakistani lady and had a child; and the appellant was doing business in Pearl-Continental Hotel at Rawalpindi. After taking these facts into account, the Hon'ble Supreme Court held that the case of the appellant was squarely covered under Section 14B of the Pakistan Citizenship Act, 1951, and that the appellant has attained the status of a citizen of Pakistan. Furthermore, it was held that the Pakistan Citizenship Act, 1951 was amended in 1973 and section 14B was inserted therein to confer Pakistan Citizenship on all Jammu and Kashmir State nationals who migrated to Pakistan with the intention to reside therein.

12. The status of the subjects of the 'State of Jammu and Kashmir' has also been recognized in the Azad Jammu and

Kashmir Interim Constitution Act, 1974, Section 2 whereof defines a 'State Subject' as follows:-

> ***"'State Subject' means a person for the time being residing in Azad Jammu and Kashmir or Pakistan who is a 'State Subject' as defined in the late Government of the State of Jammu and Kashmir Notification No. I-L/84, dated the 20th April, 1927, as amended from time to time."***

13. In the Opinion of Hon'ble Supreme Court of the AJ&K in President's Reference No. 1 of 1996, (PLD 1996 SC (AJ&K) 1), it has been held as follows: -

> ***"It may be observed that according to definition of "State Subject" it is no longer necessary in order to continuously enjoy the status of State Subject, that a State Subject must continue to reside in Azad Jammu and Kashmir. The definition lays down that a State Subject who resides in Pakistan shall also continue to be a State Subject. This provision seems to have been incorporated in order to cater to the situation which was created at the time of War of Liberation and thereafter, when a large number of State Subjects had to take shelter in Pakistan in order to save themselves from genocide and persecution let loose in the State."***

14. The learned Trial Court has placed reliance on some Office Memorandum 8/9/70, dated 24.06.1970 which apparently provides that even though AJ&K is not a part of Pakistan within the meaning of Article 1 (2) of the Constitution, it should for all practical purposes be treated like any other province. This is a preposterous proposition to say the least. AJ&K was not included in the territories of Pakistan as mentioned in Sub-Article (2) of Article 1 of the Constitution of the Islamic Republic of Pakistan, 1973. It was a foreign country for all practical purposes. In the cases of Noor Hussain Vs. State (PLD 1966 SC 88), Sakhi Daler Khan Vs. Superintendent Incharge (PLD 1957 (W.P.) Lahore 813), Hassan Kamran Vs. Federal Public Service Commission (1996 CLC 826), and Commissioner, Income Tax, Azad Jammu and Kashmir Vs. Haji Ali Khan & Co. (PLD 1985 Supreme Court (AJ&K) 62), it has been held that the territories of Azad Jammu and Kashmir did not constitute a part of Republic of Pakistan. Therefore, I don't see how any statute let alone notification/office memorandum can give a status of a province to AJ&K. In the case at hand, it is nobody's case that AJ&K falls

within the territories of Pakistan under Article 1 (2) of the Constitution.

15. The learned Trial Court has also placed reliance on section 83 of the Code of Civil Procedure, 1908 ("C.P.C."), and held that respondent No.1 as an alien could sue in Pakistan. This, however, is subject to the caveat that the Court in Pakistan in which the action is brought or a suit is filed has jurisdiction in the matter. In the case at hand, respondent No.1, in her reply to the petitioner's application for the return of plaint, has not denied that the parties are permanent residents of Tehsil Rawlakot, District Poonch, AJ&K; that the marriage of the parties was solemnized and registered in AJ&K; and that no cause of action accrued at Islamabad.

16. In the case of Masood Ahmad Malik Vs. Fouzia Farhana Quddus (1991 SCMR 681), the petitioner and the respondent had got married in the U.S.A. and had acquired American citizenship. Subsequently, they came to Pakistan, and the petitioner/husband pronounced *talaq* on the respondent/wife. The Chairman, Arbitration Council was of the view that since the parties had become American citizens, he did not have the jurisdiction to affect reconciliation between the parties. After that the petitioner filed a suit for jactitation of marriage before the Court of Senior Civil Judge, Islamabad, exercising the powers of the Judge, Family Court. The respondent applied for the rejection of the plaint on the ground that the Pakistani Courts had no jurisdiction to adjudicate upon the suit on the ground that since the parties were American citizens, the Muslim Family Law Ordinance, 1961 was not applicable to their case. The Hon'ble Supreme Court held that the learned Civil Court had the jurisdiction to adjudicate upon the matter because the *talaq* was pronounced at Islamabad, and both the parties were residing within the local limits of the jurisdiction of the Court of the Senior Civil Judge/Family Court, Islamabad.

17. It may be mentioned that in the case of Masood Ahmad Malik Vs. Fouzia Farhana Quddus (*supra*), the Hon'ble Supreme Court spurned the contention that Muslim Family Law Ordinance

1961 ("MFLO"), was not applicable to the parties, being foreign citizens, because section 3 and 5 of the West Pakistan Family Courts Act, 1964, had given an overriding effect to the MFLO. Section 1(2) of the MFLO made the said Ordinance applicable only to Muslim citizens of Pakistan wherever they may be. It was held that the words *"subject to the provisions of the Family Laws Ordinance, 1961"* employed in section 5 of the Family Courts Act, 1964 did not mean that jurisdiction under the said Act can be exercised only in a case where the parties are "Muslim citizens of Pakistan" and in no other case. Furthermore it was held as follows:-

> ***"A close examination of the provisions of the Family Courts Act, 1964 and those of the Muslim Family Laws Ordinance, 1961 shows that they do not operate exactly in the same field and that the scope of the Family Courts Act, 1964 is wider than that of the Muslim Family Laws Ordinance, 1961. In our view, the affect of the words in section 5 that the Family Courts shall have the jurisdiction to entertain suits relating to dissolution of marriage, jactitation of marriage etc. but subject to the provisions of the Muslim Family Laws Ordinance, 1961 imply only that where there is an inconsistency between Muslim Family Laws Ordinance, 1961 and the Family Courts Act, 1964, the provisions of the Muslim Family Laws Ordinance will prevail and shall be given effect to in their pristine form and no more. They do not have any other effect and the provisions of other laws are not affected thereby. Accordingly, suits of this nature filed by the parties other than Muslim citizens of Pakistan if otherwise competent under any other law can be entertained but will be heard and tried not in accordance with the provisions of the Muslim Family Laws Ordinance but by the proper law applicable to them. Thus, under the Civil Procedure Code, 1908 a Civil Court has jurisdiction to entertain and try a suit if the parties, at the commencement of the B suit, are residing within its local limits (section 20, C.P.C.). Accordingly any party irrespective of the question whether he is a Muslim citizen of Pakistan or not can institute a suit, including a suit for jactitation of marriage, before a Court within whose local limits the defendant is; for the time being residing. If the parties are Muslim citizens of Pakistan, the suit will be tried and determined in accordance with the provisions of the Muslim Family Laws Ordinance, 1961. But if they are not Muslim Citizens of Pakistan the suit can still be entertained but it will be tried and determined by the proper law of the parties; in the former case by the Family' Court while in the later case by the ordinary Civil Court of competent jurisdiction."***

18. In the case of <u>Anil Mussarat Hussain Vs. Muhammad Anwar Naseem (1996 CLC 1406)</u>, a suit for dissolution of marriage was filed by a Muslim national of Pakistan against a national of England. The defendant filed an application under Order VII,

Rule 11 C.P.C., for rejection of plaint on the ground that he being not a citizen of Pakistan, the West Pakistan Family Courts Act, 1964 had no applicability on him and that the suit for dissolution of marriage brought by the plaintiff could not be tried by the Family Court in Pakistan. One of the grounds on which the Trial Court rejected the said application was that the plaintiff was a citizen of Pakistan, and that the marriage had been solemnized at Lahore.

19. In the above mentioned cases (reported as 1991 SCMR 681 and 1996 CLC 1406) causes of action had clearly accrued in the jurisdiction of the Courts where the suits were instituted. In the case at hand respondent No.1, in her plaint has not disclosed as to what cause of action accrued to her within the jurisdiction of the Family Court at Islamabad. Respondent No.1's sole reliance seems to be on the proviso to Rule 6 of the West Pakistan Family Courts Rules, 1965, for instituting a suit for dissolution of marriage before the Courts at Islamabad. Respondent No.1 in her plaint claims to be presently residing at village Mera Akoo, Post Office Golra Sharif, Tehsil and District, Islamabad. She feels that her residence at Islamabad give her the right to institute the said suit against her husband (who is admittedly a permanent resident of AJ&K) at Islamabad.

20. In the case of Rehmat Ullah Vs. Shamim Akhtar (1997 CLC 16), the spouses, who were said to be subjects of the State of AJ&K, had submitted to the jurisdiction of the Courts at AJ&K in a suit for dissolution of marriage. That litigation had gone right up to the Supreme Court of AJ&K, where the wife had not succeeded in dissolving her marriage. Thereafter, a fresh suit for dissolution of marriage was filed by the plaintiff/wife before the Family Court at Mansehra, where she claimed to have taken temporary residence. The Family Court after framing issues and recording evidence, decreed the suit for dissolution of marriage. A writ petition against the decree passed by the family Court was allowed by the Division Bench of the Hon'ble Peshawar High Court. In paragraph 8 of the judgment, it was held as follows:-

> ***"8. The spouses of this case are subject of Azad Jammu & Kashmir State. They are admittedly not citizens of Pakistan***

either by birth or by descent or by migration within the scope of sections 4, 5 and 6 of the Pakistan Citizenship Act, 1951. They cannot also hold dual citizenship or nationality under section 14 of the Act ibid or being a subject of the State of Jammu and Kashmir and having 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 their status as such subject, be a citizen of Pakistan as section 14-B envisages. The Pakistan Citizenship Act, 1951 does not as such apply in case of the present parties and they cannot be deemed to be citizens of Pakistan at the commencement of this Act as section 3 provides. ...”

21. The Family Court at Mansehra was held not to have jurisdiction to the suit for dissolution of marriage or make a decision on the dissolution of marriage between the parties. Perusal of the judgment of the Hon'ble Peshawar High Court shows that the primary reason that prevailed with the Hon'ble Court in allowing the petition was that the contesting parties had already litigation on the same subject matter in the Courts in AJ&K.

22. In the case of Mohammad Zaman Vs. Uzma Bibi (2012 CLC 24), the plaintiff/wife had instituted a suit for the dissolution of her marriage before the learned Judge, Family Court, Gujrat. The defendant/husband filed an application for the dismissal of the suit on the ground that as both the plaintiff and the defendant were citizens of AJ&K, the Family Court at Gujrat had no jurisdiction to adjudicate upon the suit. The said application was dismissed by the Family Court, and so was the plaintiff's appeal. The plaintiff challenged the said orders of the trial Court and the appellate Court in writ petition before the Hon'ble Lahore High Court in its constitutional jurisdiction under Article 199 of the Constitution. The Hon'ble High Court dismissed the writ petition and held that the Family Court at Gujrat had correctly dismissed the defendant's application for the dismissal of the suit. One of the reasons which prevailed with the Hon'ble High Court in holding so were as follows:-

“6. ... the record shows that the respondent No.1 along with respondents Nos.2 and 3 have since long been residing in village Kalra Punwan, Tehsil and District Gujrat. Respondent No.1 is also a holder of national identity card which proves that she is a citizen of Pakistan along with her children who also appear to be registered as citizens of Pakistan. The stand of respondents Nos.1 to 3 of being citizens of Pakistan

> ***is also supported by section 14(b) of the Pakistan Citizenship Act, 1951, which allows a permanent resident of State of Azad Jammu and Kashmir, who has migrated to Pakistan to be regarded as a citizen of Pakistan. Section 14(b) of the Pakistan Citizenship Act, 1951 is reproduced hereunder:---***
>
> > ***"A person who being a subject of State of Jammu and Kashmir, 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".***

23. With utmost respect for the Hon'ble Lahore High Court, I cannot bring myself to share the above mentioned view taken in the said judgment. A subject of AJ&K, who had acquired a national identity card was treated by the Hon'ble Lahore High Court as a subject of the 'State of Jammu and Kashmir' who had migrated to Pakistan. In this way protection under Section 14B of the Pakistan Citizenship Act, 1951, was afforded to the respondent. As explained above, subjects or citizens of AJ&K are not 'subjects of the State of Jammu and Kashmir' and cannot be treated as citizens of Pakistan under Section 14B of the Pakistan Citizenship Act, 1951.

24. The learned Trial Court could not dismiss the petitioner's application for the return of plaint by placing reliance on the case of Mohammad Zaman Vs. Uzma Bibi (*supra*), because in that case the respondent/wife held to be a citizen of Pakistan on account of obtaining a national identity card of Pakistan. In the case at hand, however, respondent No.1 does not claim to be a citizen of Pakistan. In the case of Mohammad Zaman Vs. Uzma Bibi (*supra*), the Hon'ble Lahore High Court held that the Family Court at Gujrat had the jurisdiction to try a suit even if the marriage had been solemnized abroad and the parties were not citizens of Pakistan. In this regard, it was held as follows:-

> ***"7. Section 1(2) of the West Pakistan Family Courts Act, 1964, provides that the Act applies to the whole of Pakistan and there is no bar contained therein as would exclude the jurisdiction of the Family Court where the parties are not citizens of Pakistan or one of them is not a citizen of Pakistan. The residence of one party gives the Family Court in Pakistan jurisdiction especially in the case of a family suit filed by the wife for the dissolution of the marriage or for recovery of maintenance, even if the marriage was solemnized outside Pakistan."***

25. Now, if any one or both the parties to a suit under the provisions of the West Pakistan Family Courts Act, 1964, are not citizens of Pakistan, that may not be reason enough to return the plaint or to dismiss the suit if a part of the cause of action accrued to the plaintiff within the jurisdiction of the Family Court where the suit has been instituted, or the defendant resides within the jurisdiction of such a Court. This, in my view is the ratio in the cases of Masood Ahmad Malik Vs. Fouzia Farhana Quddus (*supra*) and Anil Mussarat Hussain Vs. Muhammad Anwar Naseem (*supra*). If we are to proceed on hypothesis and imagine a foreign Muslim couple getting married abroad under the laws of a foreign country and then the wife coming to Pakistan and filing a suit for dissolution of marriage before a Family Court in Pakistan – would the Family Court assume jurisdiction simply because wife happens to be here. In my opinion not, unless a cause of action recognized by law accrues within the jurisdiction of the local courts or the husband submits to the jurisdiction of such local courts.

26. In the forgoing circumstances, I am inclined to set aside the impugned order dated 31.03.2016, and remand the matter back to the learned Judge, Family Court with the direction to decide the petitioner's application afresh in the light of the observations made hereinabove. In the circumstances of the case, there shall be no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2016

(JUDGE)

APPROVED FOR REPORTING

Qamar Khan*