

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

C.R.No.307/2017

Sofia Ashfaq

Versus

Haseeb Ashfaq Bhatti and others

Dates of Hearing:	20.04.2018 and 28.11.2018
Petitioner by:	Mr. Sher Afzal Khan, Advocate,
Respondents by:	Barrister Talha Ilyas Sheikh for respondents No.1 to 3. Mr. Shajjar Abbas Hamdani, Advocate for respondent No.4, Ms. Hadiya Aziz, Advocate, learned <i>Amicus Curiae</i> .

MIANGUL HASSAN AURANGZEB, J:- Through the instant civil revision petition, the petitioner, Sofia Ashfaq, impugns the judgment dated 27.07.2017, passed by the Court of the learned Additional District Judge, Islamabad, allowing respondents No.1 to 3's appeal against the order dated 17.05.2017, passed by the Court of the learned Civil Judge, Islamabad. Vide the said order dated 17.05.2017, the learned Civil Court allowed the petitioner's application for the issuance of a succession certificate regarding the legacy of her deceased husband, Muhammad Ashfaq Bhatti ("Mr. Bhatti"), and dismissed the said respondents' objections to the inclusion of the petitioner's name in the succession certificate.

2. The facts essential for the disposal of the instant petition are that on 27.07.1997, the petitioner got married to one Shahzad Gul. The petitioner asserts that Shahzad Gul had pronounced oral divorce upon her on 14.04.2010. On 19.12.2012, Shahzad Gul is said to have obtained a stamp paper on which the divorce deed was scribed. On 07.01.2014, the petitioner applied to the Chairman, Arbitration Council, Islamabad, for the issuance of a certificate for the effectiveness of divorce. This certificate was issued on 17.04.2014.

3. On 26.01.2013, the petitioner married with Mr. Bhatti. Mr. Bhatti had been married earlier and had two sons, namely, Haseeb Ashfaq Bhatti (respondent No.1) and Hassan Ashfaq Bhatti

(respondent No.4), and two daughters namely, Javeria Haroon (respondent No.2) and Maria (respondent No.3). Mr. Bhatti breathed his last on 03.02.2016. His first wife had predeceased him.

4. In order that the petitioner could get her share in her late husband's estate, she, on 18.03.2016, applied to the Court of the learned Civil Judge, Islamabad, for the issuance of a succession certificate under section 372 of the Succession Act, 1925. On 20.09.2016, respondents No.1 to 3 filed objections to the petitioner's said application. The essential ground on which the said respondents objected to the petitioner's application was that her marriage with their late father on 26.01.2013 was not valid on the ground that her earlier marriage with Shahzad Gul had not come to an end until 17.04.2014 when the certificate of effectiveness of the divorce had been issued. It was asserted that in terms of Section 7 (3) of the Muslim Family Laws Ordinance, 1961 ("M.F.L.O."), a divorce does not become effective until the expiry of ninety days from the day on which notice of divorce is delivered to the Chairman, Union Council. Furthermore, respondents No.1 to 3 had pleaded that although the divorce deed produced by the petitioner showed that Shahzad Gul had pronounced divorce on 14.04.2010 but the stamp paper on which the divorce deed was executed was issued on 19.12.2012. This, according to the said respondents, showed that the divorce deed was a forgery. The petitioner's right to inherit from the legacy of the late Mr. Bhatti was questioned essentially on the ground that she had contracted the second marriage one year and three months before her first marriage ended with the issuance of the certificate of effectiveness of divorce.

5. The petitioner appeared before the learned Civil Court as AW-1 and recorded her evidence. One of Mr. Bhatti's sons, respondent No.4 appeared as AW-2 and gave evidence in the petitioner's support. Shahzad Gul gave evidence as AW-3 and Muhammad Asif as AW-4. Respondent No.2 appeared as RW-1 and had her evidence recorded.

6. Vide order dated 17.05.2017, the learned Civil Court accepted the petitioner's application for the issuance of succession

certificate. It was ordered that a succession certificate be issued in favour of the petitioner and respondents No.1 to 4 subject to the filing of local surety bonds. The persons in whose favour the said certificate was issued were held to be entitled to withdraw their respective shares from the legacy of the late Mr. Bhatti.

7. The said order dated 17.05.2017 was assailed by respondents No.1 to 3 in an appeal before the Court of the learned Additional District Judge, Islamabad. Vide judgment dated 27.07.2017, the said appeal was allowed and the order dated 17.05.2017, passed by the learned Civil Court was set-aside. In the said appellate judgment, it was observed that since the petitioner's disputed status as Mr. Bhatti's widow could not be adjudicated upon in the summary proceedings for the issuance of a succession certificate, the learned Civil Court should have directed that the petitioner's share be kept in reserve until she got a decree from a Court of plenary jurisdiction about her status as Mr. Bhatti's widow. Furthermore, it was held that if she was unable to get a decree in her favour and the suit was decided against her, the share kept in reserve would be distributed amongst Mr. Bhatti's other legal heirs. In holding so, the learned Appellate Court placed reliance on the law laid down in the case of "Mst. Jamila Akhtar Vs. Public at Large" (2002 SCMR 1544). The said judgment dated 27.07.2017 has been assailed by the petitioner in the instant civil revision petition.

8. It may be mentioned that on 17.03.2016, the petitioner filed a suit for *"declaration (legal heirship certificate) and mandatory injunction"* against *the respondents* before the learned Civil Court, Islamabad. In the said suit, the petitioner had prayed for *inter-alia* a decree for declaration to the effect that she along with respondents No.1 to 4 are Mr. Bhatti's legal heirs. Respondents No.1 to 3 contested the said suit. On 12.11.2016, the learned Civil Court framed the issues. The petitioner did not produce evidence despite having been granted several opportunities by the learned Civil Court. Vide order and decree dated 27.02.2018, the learned Civil Court dismissed the said suit after closing the petitioner's right to produce evidence under Order XVII, Rule 3 of the Code of Civil

Procedure, 1908 ("C.P.C."). The petitioner's appeal against the said order and decree has been allowed by the Court of the learned District Judge, Islamabad. Consequently, the petitioner's suit is presently pending before the learned Civil Court.

9. It may also be mentioned that on 20.01.2018, respondents No.1 to 3 filed a suit for "*declaration, partition through separate possession and permanent injunction*" against the petitioner and respondent No.4 before the Court of the learned Civil Court, Islamabad. In the said suit, respondents No.1 to 3 (i.e., the plaintiffs therein) prayed for *inter-alia* a declaration to the effect that respondents No.1 to 3 and respondent No.4 are the only legal heirs of Mr. Bhatti; and that the petitioner is not his legal heir. This suit is still pending adjudication.

CONTENTIONS OF THE LEARNED COUNSEL FOR THE PETITIONER:-

10. Mr. Sher Afzal Khan Marwat, learned counsel for the petitioner, after narrating the facts leading to the filing of the instant revision petition, submitted that the orders/judgments passed by the learned Courts below were at variance; that the petitioner had been divorced by her former husband in the year 2010; that the petitioner's former husband had given evidence and had confirmed that he had divorced the petitioner in the year 2010; that during the subsistence of the petitioner's marriage with Mr. Bhatti, no question was raised as to the validity of the divorce pronounced by her former husband; that the reliance placed by the learned Appellate Court on the case of "Mst. Jamila Akhtar Vs. Public at Large" (*supra*), is misplaced since the said case related to a forged *Nikkahnama*, whereas in the instant case, the petitioner's *Nikkah* with Mr. Bhatti is an acknowledged fact; that the civil suit instituted by the petitioner was with respect to the distribution of immovable properties left by the petitioner's late husband, Mr. Bhatti; and that the order dated 17.05.2017, passed by the learned Civil Court is strictly in accordance with the law and the evidence on the record, whereas the judgment dated 27.07.2017, passed by the learned Appellate Court suffers from non-application of judicious mind and based on non-reading and misreading of the evidence on the record.

Learned counsel for the petitioner prayed for the revision petition to be allowed by setting-aside the impugned appellate judgment dated 27.07.2017 and by restoring the original order dated 17.05.2017.

CONTENTIONS OF THE LEARNED COUNSEL FOR RESPONDENTS NO.1 TO 3:-

11. Barrister Talha Ilyas Sheikh, learned counsel for respondents No.1 to 3, submitted that the petitioner's services as a housemaid were engaged by their father in the year 2012; that over the time, Mr. Bhatti became increasingly dependent on the petitioner who had represented herself to be a divorcee; that on 26.01.2013, Mr. Bhatti and the petitioner got married; that at the time of the marriage, the petitioner was 34 whereas Mr. Bhatti was 61 years of age; that respondents No.1 to 3 had accepted the marriage for the sake of their father's happiness; that in December 2015, Mr. Bhatti came to know that the petitioner's first marriage was still subsisting; that the petitioner's CNIC dated 09.06.2013 shows her husband's name as "Shahzad Gul"; that the petitioner was a married woman when she contracted marriage with Mr. Bhatti; that although the *talaqnama* produced by the petitioner shows that her former husband pronounced *talaq* on 14.04.2010, but the stamp paper on which the said *talaqnama* was executed was issued on 19.12.2012; that this clearly shows that the *talaqnama* is a forgery and, therefore, has no sanctity in the eyes of law; that the said *talaqnama* was prepared one month and seven days prior to the petitioner's marriage with Mr. Bhatti; that the petitioner's marriage with Mr. Bhatti cannot be termed as valid; that on 07.01.2014, the petitioner applied to the Chairman, Arbitration Council, for the certificate of effectiveness of divorce; that the said certificate was issued on 17.04.2014 (i.e., one year and three months after the petitioner's marriage with Mr. Bhatti); that in terms of section 7 of M.F.L.O., the petitioner's marriage with Shahzad Gul had not ended when she married Mr. Bhatti; that it was mandatory for the petitioner to have obtained a certificate of effectiveness of divorce prior to marrying Mr. Bhatti; that the petitioner is liable to be punished for violating section 7 of M.F.L.O.; that the learned Appellate Court has not committed any jurisdictional irregularity in allowing respondents No.1 to 3's appeal;

and that in the event, the petitioner is able to prove that her marriage with Mr. Bhatti was not irregular or invalid, her secured share would be given to her. Learned counsel for respondents No.1 to 3 prayed for the revision petition to be dismissed.

CONTENTIONS OF THE LEARNED COUNSEL FOR RESPONDENT NO.4:-

12. Mr. Shajjar Abbas Hamdani, learned counsel for respondent No.4, submitted that respondent No.4 would have no objection if the instant revision petition was allowed and the impugned appellate judgment was set-aside. He further submitted that the petitioner had devoted herself to Mr. Bhatti's care; the petitioner's marriage with Mr. Bhatti did not suffer from any invalidity or irregularity; and that the petitioner's former husband had divorced her prior to her marriage with Mr. Bhatti; and that respondent No.4's siblings were trying to deprive the petitioner of her due share of inheritance in Mr. Bhatti's estate. Learned counsel for respondent No.4 prayed for the instant revision petition to be allowed.

SUBMISSIONS OF THE LEARNED *AMICUS CURIAE*:-

13. Ms. Hadiya Aziz, the learned *Amicus Curiae* submitted that the three essential ingredients of *talaq* were; (i) pronouncement of *talaq*, (ii) notice of the *talaq* to the wife, and (iii) notice of the *talaq* to the Chairman, Arbitration Council; that there is no provision in the M.F.L.O. clearly setting out the pre-requisites of a valid *Nikkah*; that although Section 5 of M.F.L.O. provides for the registration of the *Nikkah* but does not specify the manner in which it is to be performed; that if a marriage is declared to be void, penal consequences will ensue; that marriage during the *iddat* period was irregular but not void; that in the instant case, the irregularity in the petitioner's marriage with Mr. Bhatti stood cured, because the certificate of effectiveness of divorce was issued after the petitioner's *Nikkah* with Mr. Bhatti but before his demise; that by the time, Mr. Bhatti's succession opened, the petitioner's divorce with Shahzad Gul had come through; that proceedings for the issuance of a succession certificate are summary in nature, and in such proceedings, questions of title cannot be determined; that the

learned Civil Court correctly called upon the petitioner to furnish surety bonds; that strict compliance with the requirements of Section 7(3) of M.F.L.O. could be dispensed with in the instant case since both the petitioner and Shahzad Gul are in unison that the divorce took place in the year 2010; that the learned Civil Court had passed a just order by allowing the petition for the grant of a succession certificate subject to furnishing of surety bonds; and that the petitioner could not be deprived of her inheritance rights until respondents No.1 to 3's suit for declaration, etc., is not decreed. In support of her submission, the learned *amicus curiae* referred to a catena of case law.

14. I have heard the contentions of the learned counsel for the contesting parties and learned *amicus curiae* and have perused the record with their able assistance.

15. The facts leading to the filing of the instant writ petition are set out in sufficient detail in paragraphs 2 to 9 above and need not be recapitulated.

16. The vital question that needs to be determined in these proceedings is whether the petitioner's marriage with Mr. Bhatti on 26.01.2013 was invalid given the fact that although the petitioner's former husband had pronounced *talaq* on her on 14.04.2010, the stamp paper on which the *talaqnama* dated 14.04.2010 was executed was issued on 19.12.2012, and the certificate of effectiveness of divorce was issued by the Chairman, Arbitration Council on 17.04.2014.

17. Section 7(1) of the M.F.L.O. provides that any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of *talaq* in any form whatsoever, give the Chairman of the Union Council a notice in writing of him having done so, and shall supply a copy thereof to the wife. Section 7(3) of the M.F.L.O. provides that unless a *talaq* is revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from the day on which notice under Section 7(1) is delivered to the Chairman of the Union Council.

18. Even if it is assumed that Shahzad Gul pronounced oral *talaq* on the petitioner on 14.04.2010, it is an admitted position that he had not given any notice to the Chairman of the Union Council as required by Section 7(1) of the M.F.L.O. It was the petitioner who on 07.01.2014, applied to the Chairman, Arbitration Council, Islamabad, to issue a certificate of effectiveness of divorce. This certificate was issued by the Chairman, Arbitration Council on 17.04.2014. Since the petitioner and Mr. Bhatti had got married on 26.01.2013 (i.e., prior to the issuance of the certificate of effectiveness of divorce) it would be safe to hold that said marriage had taken place prior to the divorce having become effective in terms of strict and literal interpretation of Section 7(3) of the M.F.L.O. As mentioned above, the question that needs to be determined is that whether the petitioner's marriage with Mr. Bhatti would be rendered void on account of the said lapse.

19. In the order dated 17.05.2017, the learned Civil Court referred to the case of Muhammad Hanif Vs. Mukarram Khan (PLD 1996 Lahore 58), wherein reference was made to judgments holding that since notice of a divorce to the Chairman, Local Council is not mandatory under the injunctions of Islam, the failure to send such a notice to the Chairman, Local Council, does not make the divorce ineffective in *Shariah*. Furthermore, it was held that a second marriage of such a divorced woman to another person after the expiry of the *iddat* period is not invalid. On the basis of the law laid down in the said case, the learned Civil Court held that the petitioner's marriage with Mr. Bhatti prior to the issuance of the certificate of effectiveness of divorce was valid. Additionally, it was held that even if it was conceded that the petitioner's marriage with Shahzad Gul was dissolved with effect from the date of the execution of the divorce deed, even then the petitioner's second marriage with Mr. Bhatti could not be considered as void.

20. The learned Appellate Court differed with the findings of the learned Civil Court. The view taken by the learned Appellate Court was that since the petitioner's status as Mr. Bhatti's wife was a disputed question of fact which cannot be resolved in summary

proceedings for the issuance of a succession certificate, the learned Trial Court should have directed that the petitioner's share in Mr. Bhatti's legacy be kept in reserve in the Court account until she gets a decree from a Civil Court regarding her status as Mr. Bhatti's widow. Furthermore, it was observed by the learned Appellate Court that after the petitioner is successful in getting a decree in her favour, she would be entitled to receive her share from the learned Civil Court, and in the event, she is not able to get a decree in her favour, the said share would be distributed amongst Mr. Bhatti's remaining legal heirs. In holding so, the learned Appellate Court placed reliance on the judgment of Hon'ble Supreme Court in the case of Mst. Jameela Akhtar Vs. Public at large (2002 SCMR 1544).

21. The instant case is not the first one in which a woman had contracted a second marriage prior to the issuance of the certificate of effectiveness of divorce with respect to her first marriage. The facts in the case of Allah Dad Vs. Mukhtar (1992 SCMR 1273) were that Mst. Rashida Akhtar was initially divorced orally by her husband and later through a divorce deed dated 17.05.1981. Mst. Rashida Akhtar took the plea that she contracted a second marriage with Mukhtar after she had been divorced by her first husband. This marriage had taken place prior to the issuance of a notice to the Chairman, Arbitration Council, or the issuance of a certificate for effectiveness of divorce. The Hon'ble Shariat Appellate Bench of the Supreme Court of Pakistan held that Mst. Rashida Akhtar's second marriage was not invalid. In paragraphs-19 and 20 of the said report, it was held as follows:-

"19. Therefore, even if it is assumed that section 7 of the Family Laws Ordinance is a good law, the same cannot affect the validity of a marriage contracted according to Shariah at least to the extent of the criminal liability envisaged in the Ordinance.

20. It is now evident that a notice of Talaq to the Chairman is not mandatory under the Injunctions of Islam and any divorce pronounced or written by a husband cannot be ineffective or invalid in Shariah merely because its notice has not been given to the Chairman, therefore, if a woman after obtaining a divorce from her husband and after the necessary period of 'Iddat' contracts a marriage with a third person, their marriage cannot be held as

invalid marriage, at least for the purpose of the Ordinance. In the instant case, the respondents have contracted Nikah after the petitioner had divorced Mst. Rashida Akhtar (respondent No.2), so even though the petitioner had not given a notice to the Chairman, the divorce became effective in Shariah and the marriage contracted thereafter is a valid marriage, especially for the purpose of the Ordinance and the cohabitation of the respondents cannot be held as 'Zina'."

22. Additionally, in the case of Mst. Zahida Shaheen Vs. The State (1994 SCMR 2098), it was observed that it had been generally found that people do not send a notice of *talaq* to the Chairman, Arbitration Council, as required under the M.F.L.O. Furthermore, it was held that failure to send a notice of *talaq* to the Chairman, Arbitration Council, does not render the divorce ineffective in *Shariah*.

23. Now the *dicta* in the case of Allah Dad Vs. Mukhtar (supra) and Mst. Zahida Shaheen Vs. The State (supra) came to be considered by the Hon'ble Supreme Court in the case of Kaneez Fatima Vs. Wali Muhammad (PLD 1993 S.C. 901), wherein it was observed that in the fields not occupied by statutory dispensation, principles of Islamic common law or principles in conformity with injunctions of Islam can be pressed into service. Furthermore, it was held that Courts were not vested with the jurisdiction to declare a law void on the touchstone of Article 2-A as distinguished from Article 8 of the Constitution.

24. Article 8(2) of the Constitution provides that the State shall not make any law which takes away or abridges the rights conferred by Chapter-I of the Constitution and any law made in contravention of the said clause shall, to the extent of such contravention, would be void. Article 8(3)(b) of the Constitution provides that the provisions of Article 8 shall not apply to laws specified in the First Schedule to the Constitution. The M.F.L.O. is one of the laws which finds mention in Part-II of the First Schedule to the Constitution. Accordingly, in the case of Kaneez Fatima Vs. Wali Muhammad (supra), it was held that "*under Article 8(3)(b) the provisions of Article 8 will not apply to the Muslim Family Laws Ordinance, 1961 and cannot be declared void in so far as it is inconsistent with the fundamental rights.*" It is pertinent to bear in mind that the *dicta* in the cases of Allah Dad Vs. Mukhtar (supra) and Zahida Shaheen Vs The State (supra) have to

be understood in the light to subsequent judgment in the case of Kaneez Fatima Vs. Wali Muhammad (*supra*), wherein it has been unambiguously held that the M.F.L.O. was an existing law which had not been declared by the Federal Shariat Court or the Shariat Appellate Bench of the Supreme Court to be in conflict with the injunctions of Islam. It was also pointed out that the judgment in the case of Mirza Qamar Raza Vs. Mst. Tahira Begum (PLD 1988 Karachi 169), declaring Section 7 of M.F.L.O. to be void on account of being against the injunctions of Islam, had been set-aside by the Hon'ble Supreme Court. After a read of the judgment in Kaneez Fatima's case (*supra*), it is safe to conclude that Section 7 of the M.F.L.O. is very much an existing law, and is to be interpreted in the light of the law laid down by the Hon'ble Supreme Court in the said case.

25. The petitioner's first husband, Shahzad Gul, gave evidence before the learned Civil Court as AW-3. In his evidence, Shahzad Gul had deposed that he had divorced the petitioner on 14.04.2010, and that the divorce deed was prepared on 19.12.2012. The petitioner's testimony before the learned Civil Court was consistent with that of Shahzad Gul's. Now if 14.04.2010 is taken to be date of the divorce, the *iddat* period had clearly expired prior to the petitioner's marriage with Mr. Bhatti. This Court cannot ignore the consistent evidence given by Shahzad Gul as AW-3 and the petitioner as AW-1 that they had got divorced on 14.04.2010. The petitioner's marriage with Mr. Bhatti was clearly after the expiry of the *iddat* period if the same is to be counted from 14.04.2010. In the case of Kaneez Fatima Vs. Wali Muhammad (*supra*), it was held as follows:-

"In a case where with the consent of both the parties divorce effected and confirmed in writing under their undisputed signatures, Section 7 should not be strictly construed particularly in cases where penal provision of Section 7(2) is to be enforced because in such cases the parties do not willfully commit breach and bonafide believe that they had been divorced with the consent of each other and sending of notice to the Chairman, Union Council, is a mere formality. The notice can be sent at any time thereafter to comply with the provisions of Section 7."

26. Now in allowing respondents No.1 to 3's appeal, the learned Appellate Court placed reliance on the law laid down in the case of Mst. Jameela Akhtar Vs. Public at Large (2002 SCMR 1544). In the

said case, the deceased's sister had filed a petition for the issuance of a succession certificate regarding the amount lying in the deceased's bank accounts. In the said petition, the deceased's two widows namely, Mst. Jameela Akhtar and Mst. Umat-ul-Hameed, were also impleaded as parties. Mst. Jameela Akhtar objected to Mst. Umat-ul-Hameed's status as the deceased's widow. The *Nikkahnama* produced by Mst. Umat-ul-Hameed had contained a name different to hers. Nevertheless, the learned Civil Court issued the succession certificate which included Mst. Umat-ul-Hameed's name. The order passed by the learned Civil Court was maintained by the learned Appellate Court as well as the learned Revisional Court. Against the said concurrent orders, the Hon'ble Supreme Court partly allowed Mst. Jameela Akhtar's appeal. An option was given to Mst. Umat-ul-Hameed to file a civil suit to establish her status as the deceased's widow. Furthermore, it was observed that if Mst. Umat-ul-Hameed succeeded in getting a decree, the amount already received by her under the succession certificate may be retained by her, and in case the suit is decided against her, she would have to refund the amount so that it is distributed amongst the deceased's legal heirs. The Hon'ble Supreme Court had passed the said order after holding that the *Nikkahnama* on which Mst. Umat-ul-Hameed placed reliance *prima-facie* appeared to be a mutilated document. Furthermore, it was held as follows:-

"4. We find that the trial Court while granting succession certificate to respondent No.2, should have directed that no share of the said amount should be paid to Mst. Umat-ul-Hameed unless she gets a decree from the Civil Court about her status as widow of Muhammad Zafarullah Khan, deceased, for such a question could not be decided in summary proceedings."

27. The facts in the instant case cannot be equated with the ones in Mst. Jameela Akhtar's case. In the instant case, it is an admitted position that the petitioner had got married to Mr. Bhatti on 26.01.2013, whereas in Mst. Jameela Akhtar's case, the very *Nikkah* between Mst. Umat-ul-Hameed and the deceased was in doubt. Additionally, in Mst. Jameela Akhtar's case, the Hon'ble Supreme Court had observed that the *Nikkahnama* produced by Mst. Umat-ul-Hameed *prima-facie* appeared to be a mutilated document. In the

instant case, respondents No.1 to 3 do not question the factum of the *Nikkah* between the petitioner and Mr. Bhatti but they take the position that the said *Nikkah* was void on account of having taken place prior to the issuance of the certificate of effectiveness of divorce.

28. Even if it is assumed that petitioner's marriage with Mr. Bhatti took place prior to the expiry of the *iddat* period, at best, it could be said that the marriage was irregular but certainly not void. In the case of Muhammad Sher Vs. Additional Sessions Judge/Justice of Peace, District Khushab (2016 CLC 717), one Mujahid Iqbal was accused of committing *zina* by contracting marriage with a divorced lady before the completion of the *Iddat* period. The Hon'ble Lahore High Court, after referring to Verse No.228 in Surah Al-Baqarah, held as follows:-

"It is settled Islamic law that the marriage entered into divorced lady before the completion of Iddat period would be irregular marriage and not void marriage as per law laid down in Mullah's Muhammadan Law. Marriage which is irregular cannot be treated as void marriage. The union of husband and wife in [an] irregular marriage cannot be regarded against un-Islamic or Shariah. Alleged female accused having been divorced by previous husband if produced divorce-deed, would be valid when previous husband has not come forward to deny or dispute the validity of "Talaq-nama."

29. Since the certificate of effectiveness of divorce was issued by the Chairman, Arbitration Council, Islamabad, prior to Mr. Bhatti's demise, I am of the view that the irregularity (if at all any) in petitioner's marriage with Mr. Bhatti, stood cured.

30. It ought to be borne in mind that in the case of Mst. Jameela Akhtar Vs. Public at Large (supra), it is only after a *prima-facie* view was taken by the Hon'ble Supreme Court that the *Nikkahnama* in question in that case was a "*mutilated document*" that it was observed that the Trial Court should not have released Mst. Umat-ul-Hameed's share until she got a decree as to her status being a widow of the deceased from a Civil Court. The peculiar facts of the instant case read with the law laid down in the case of Mst. Kaneez Fatima Vs. Wali Muhammad (supra), does not lead me to form a *prima-facie* view that the petitioner's marriage with Mr. Bhatti was

invalid so as to deny the issuance of a succession certificate in her favour.

31. It is an admitted position that the petition for the grant of succession certificate was filed by the petitioner under Section 373 of the Succession Act, 1925, and that the proceedings before the learned Civil Court were summary in nature. Intricate questions could not be resolved in such proceedings. Questions of title to property have to be left to be decided in a suit before a Court of plenary jurisdiction. Reference in this regard may be made to the following case law:-

- (i) In the case of Malik Muhammad Rafique Vs. Mst. Tanveer Jahan (PLD 2015 Islamabad 30), it was held that the proceedings under the Succession Act, 1925, were of a summary nature and intricate questions could not be resolved in such proceedings.
- (ii) In the case of Mst. Samina Sikandar Vs. Public-at-Large (PLD 2011 Lahore 192), it has been held that summary proceedings under section 373 of the Succession Act, 1925, are to determine whether the petitioner had a right to a succession certificate. Furthermore, it was held that a succession certificate is not a final adjudication of the question as to who is the next heir, and the grant of such a certificate merely clothes its holder with an authority to realize the debts of the deceased and to give an authority of discharge. The Hon'ble Lahore High Court also quoted with approval the following passage from the judgment in the case of Banarasi Dass Vs. Tekka Dutta ((2005) 4 SCC 4491).

“8. Succession Certificate neither gives any general power of administration on the estate of the deceased nor establishes title of the grantee as the heir of the deceased. It only furnishes the grantee with authority to collect debts due to the deceased and allows the debtors to make payments to him without incurring loss. Thus the object of the said certificate is to facilitate the collection of the debts, to regulate the administration of Succession and to protect person who deals with the alleged representatives.”

- (iii) In the case of Allah Nawaz Khan Vs. Fareda Fatima Khanum (PLJ 1999 Lahore 662), it was observed that the procedure for

dealing with the disposal of the petition for the grant of a succession certificate was given in section 373 of the Succession Act, 1925. The said section was interpreted in the following terms:-

“...Court has to follow the summary procedure and if it cannot resolve any intricate question of law and facts, it may nevertheless grant a certificate to the applicant if he appears to be a person having prima facie the best title thereto. However, while granting certificate to the person who has prima facie title, would leave the other person to establish his right by a regular suit. This means that the Court has to deal with the matter summarily leaving aside the intricate question of law and facts and only issue certificate to such party who has a prima facie case of entitlement to such certificate.”

32. The learned Civil Court, vide order dated 17.05.2017, had allowed the petitioner's application for the issuance of a succession certificate in favour of Mr. Bhatti's legal heirs, including the petitioner, subject to the *“filing of local surety bonds in the equal amount to the satisfaction of [Civil] Court.”* All the legal heirs were held to be entitled to withdraw their respective shares from Mr. Bhatti's legacy separately and independently. The requirement to furnish surety bonds is in conformity with Section 375 of the Succession Act, 1925, which empowers the Court to requisition security from the grantee of the succession certificate. The said Section provides *inter alia* that the Court may require, as a condition precedent to the granting of a succession certificate, that the person to whom the Court proposes to make the grant shall give a bond with one or more sureties, or other sufficient security, for rendering an account of debts and securities received by him and for indemnity of persons who may be entitled to the whole or any part of those debts and securities. In the case of Muhammad Javed Akhtar Vs. Public-in-Large (1987 CLC 262), the Hon'ble Mr. Justice Saeeduzzaman Siddiqui (as he then was) explained the circumstances in which the person applying for the issuance of a succession certificate is required to furnish a surety in the following terms:-

“A careful examination of the provisions of section 373 will show that, under subsection (2) of section 373, where the Judge, dealing with an applicant for grant of Succession Certificate, reaches the conclusion that the right belongs to the applicant, he is bound to

make an order for grant of Certificate to him. However, in cases, which are covered under subsection (3) or subsection (4) of section 373, if the Judge is of the view that the right claimed by the applicant cannot be decided without determining intricate and difficult questions of law and fact, or, where there are more applicants than one and it appears to the Judge that more than one of such applicants are interested in the estate of the deceased, the Judge may nevertheless grant the Certificate in both such cases to such of the applicants who appear to be having a prima facie best title and fitness to the grant of such certificate. However, in respect of these two classes of cases, which are covered under subsection (3) or subsection (4) of section 373, the power of the Judge to grant the Succession Certificate is circumscribed to the condition that, before granting such Certificate, he must require the person in whose favour he grants the Certificate to give sufficient security as a condition precedent for rendering the account of debts and securities received by him and for indemnity of the person, who may be entitled to the whole or any part of those debts and securities.”
(Emphasis added)

33. The learned Appellate Court, by directing that the petitioner’s share in Mr. Bhatti’s legacy be kept in reserve until she gets a decree about her status as Mr. Bhatti’s widow appears to have been ignorant of the mandate in Section 373(3) of the Succession Act, 1925, which provides that if a Judge cannot decide the right to the certificate without determining questions of law or fact which seem to be too intricate and difficult for determination in a summary proceeding, he may nevertheless grant a certificate to the applicant if he appears to be the person having *prima-facie* the best title thereto. Now as mentioned above, respondents No.1 to 3 have filed a civil suit praying for a declaration to the effect that the petitioner is not Mr. Bhatti’s legal heir. The basis on which respondents No.1 to 3 seek the said declaration is that the petitioner had contracted marriage with Mr. Bhatti, while her first marriage with Shahzad Gul was still subsisting. It remains to be seen whether or not the said suit would be decreed. It would be for respondents No.1 to 3 to prove before the learned Civil Court that the petitioner’s marriage with Mr. Bhatti was not valid, or that she was not one of Mr. Bhatti’s legal heirs. Until the said suit is decreed, the petitioner cannot be deprived of her share in Mr. Bhatti’s legacy. The learned Civil Court has been cautious by allowing the petitioner’s application for the issuance of the succession certificate subject to filing of local surety bonds in equal amounts to the satisfaction of the Court. By ordering

so, the interests of respondents No.1 to 3 have been secured by the learned Civil Court. Furthermore, the said order is also in consonance with Section 373(3) of the Succession Act, 1925.

34. Recently, in the case of Liaqat Zaman Khan Vs. Mst. Tazeem Akhtar (2017 YLR 150), Mst. Tazeem Akhtar, claiming to be the widow of the late Ahmed Zaman Khan, filed an application before the learned Civil Court for the issuance of a succession certificate regarding the deceased's legacy. The deceased's siblings contested the said petition by taking the plea that the deceased had divorced Mst. Tazeem Akhtar during his lifetime. They had also filed a civil suit praying for a declaration to the effect that the deceased had divorced Mst. Tazeem Akhtar during his lifetime. After the recording of evidence, the learned Civil Court allowed the petition for the issuance of the succession certificate subject to the furnishing of surety bonds in the sum of Rs.50,00,000/- with two local and reliable sureties each in the like amount to the effect that in case, the learned Civil Court declared Mst. Tazeem Akhtar as the divorcee of the deceased, she would be bound to return the share collected by her from the deceased's movable legacy. An appeal against the order of the learned Civil Court was filed on the ground that the deceased's siblings had filed the said civil suit for declaration. The Hon'ble Peshawar High Court did not interfere with the order allowing Mst. Tazeem Akhtar's petition for the issuance of a succession certificate. Furthermore, it was held as follows:-

"It may not be out of place to also refer to the provision of section 383 of the Succession Act, 1925 whereby a certificate may be revoked for any of the reasons enumerated in the section including a decree or order made by a competent Court in a suit or other proceeding with respect to effects comprising debts or securities specified in the certificate rendering it proper to revoke the certificate. In addition to the above, there is a safeguard to the rightful claimant(s) and liability of holder of succession certificate to the former under section 387 of the Succession Act, 1925.

4. In any case, when the law allowed the Judge to grant the certificate to the applicant who appeared to be a person having prima facie the best title thereto, notwithstanding a rival claim appearing to Judge too intricate and difficult to determine in a summary proceedings, there was nothing wrong with the impugned order of learned Senior Civil Judge, Haripur, after 'Nikah' between the deceased and respondent No.1 was proved and the so-called divorce, the onus of which was admittedly on the appellants who

claimed the same, could not be proved on record in the summary proceedings for issuance of succession certificate. Needless to say that the appellants have already lodged a civil suit for declaration with regard to the factum of divorce which has been adjourned sine-die on the application of the appellants; therefore, the proper course for the appellants would be to get proceedings in the said suit restored/revived for the desired purpose. It may not be out of place to point out here that in accordance with the letter and spirit of relevant provisions of law, the learned Senior Civil Judge has clearly held that respondent No.1 shall be considered as widow of the deceased unless and until her alleged divorce, which is disputed, is established by the decree of a competent civil Court."

35. In the case at hand, the mere fact that the learned Civil Court allowed the petitioner's application for the issuance of the succession certificate would not, in any manner, prejudice or have any adverse effect on the abovementioned suit for declaration, etc., instituted by respondents No.1 to 3. At this stage, it would be pertinent to reproduce herein below Section 387 of the Succession Act, 1925:-

"387. Effect of decisions under this Act, and liability of holder of certificate thereunder. No decision under this Part upon any question of right between any parties shall be held to bar the trial of the same question in any suit or in any other proceeding between the same parties, and nothing in this Part shall be construed to affect the liability of any person who may receive the whole or any part of any debt or security, or any interest or dividend on any security to account therefor to the person lawfully entitled thereto."

36. In the event respondents No.1 to 3 succeed in their suit, they would then be in a position to apply for the revocation of the order dated 17.05.2017 to the extent of granting a succession certificate to the petitioner and, upon such revocation, the petitioner will have to return the amount received by her pursuant to the order dated 17.05.2017, passed by the learned Civil Court. In this regard, Section 383(e) of the Succession Act, 1925, provides that a succession certificate granted may be revoked where a decree or order made by a competent Court in a suit or other proceeding with respect to effects comprising debts or securities specified in the certificate renders it proper that the certificate should be revoked.

37. As mentioned above, the petitioner's suit for declaration etc., is also pending before the learned Civil Court. The ultimate result of the said suit would also have a bearing on the question whether the

succession certificate granted to the petitioner would be liable to be revoked.

38. In view of the above, the instant petition is allowed, and the impugned judgment dated 27.07.2017, passed by the learned Appellate Court is set-aside, and the order dated 17.05.2017, passed by the learned Civil Court is restored. The learned Civil Courts shall decide the petitioner's and respondents No.1 to 3's suits for declaration etc., independently and shall not be influenced by any observations herein. There shall be no order as to costs.

39. Before parting with this judgment, I deem it appropriate to record my appreciation for the invaluable assistance rendered by the learned *amicus curiae* as well as the learned counsel for the contesting parties.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2018.

(JUDGE)

APPROVED FOR REPORTING

*Qamar Khan**

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