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JUDGMENT SHEET

LAHORE HIGH COURT
MULTAN BENCH MULTAN

JUDICIAL DEPARTMENT

Writ Petition No.13290 of 2024

Shahzad Akbar *Vs.* Additional District Judge, etc.

J U D G M E N T

Date of Hearing:	17.10.2024
Petitioner by:	Syed Riaz-ul-Hassan Gillani, Advocate.
Respondent No.3 by:	Mr. Ahmad Raza, Advocate.
Respondents No.4 and 5 by:	Mr. Khalid Masood Ghani, Assistant Advocate General.

Anwaar Hussain, J. Respondent No.3, namely, Dr. Maria Khan ("**the respondent**") instituted a suit for declaration against the petitioner and respondents No.4 and 5, *inter alia*, on the ground that after delegating right of divorce to the respondent, the petitioner has no right to pronounce *talaq* and therefore, respondents No.4 and 5 who are Administrator, Union Council No.3, MDA Chowk, Multan and Secretary, Union Council No.3, Shadab Colony, Multan, respectively, be restrained from issuing certificate of effectiveness of divorce. *Ad-interim* injunction was granted by the learned Trial Court, *vide* impugned order dated 05.08.2024, which has been further extended, *vide* orders dated 11.09.2024 as well as 28.09.2024. Feeling aggrieved, the petitioner filed appeal, alongwith application for condonation of delay, before the learned Addl. District Judge, Multan, which has been dismissed, *vide* impugned order dated 07.10.2024. Hence, the present constitutional petition.

2. Learned counsel for the petitioner submits that the declaratory suit instituted by the respondent was not maintainable from its inception and entertaining the same, alongwith application under Order XXXIX, Rules 1 and 2 of the Code of Civil Procedure, 1908, and granting *ad-interim* injunction, restraining the Union Council to issue certificate of effectiveness of divorce, pronounced by the petitioner (as husband), is erroneous exercise of jurisdiction. Adds that the impugned order dated 05.08.2024 is unlawful and when appeal was preferred against the said order, the same has been dismissed on the ground of limitation and both the findings are against the injunctions of Islam.

3. Conversely, learned counsel for the respondent submits that the petition is not maintainable as challenge has been laid to the interlocutory order of the learned Trial Court. Adds that the petitioner contracted second marriage with the respondent and concealed factum of his earlier marriage and thereafter is eschewing away from his obligation of incorporating the factum of his marriage with the respondent in the record of NADRA, which not only amounts to denying the respondent with her due legal status but also entails social repercussions for her. Further adds that it is only at the behest of the first wife of the petitioner that reconciliation proceedings are not successful for which intervention of the Trial Court was sought. Contends that once the right to pronounce *talaq* is delegated, the petitioner has lost the authority to pronounce *talaq* and therefore, notice of *talaq* issued by the petitioner is liable to be set aside.

4. Arguments heard. Record perused.

5. The case involves following questions of law for the determination by this Court:

i. Whether the present petition is maintainable as the impugned orders are interlocutory in nature?
ii. Whether the learned Civil Court is vested with the jurisdiction to try the declaratory suit, *inter alia*, regarding the reconciliation proceedings, issuance of certificate of effectiveness of divorce in the light of Section 5 of the West Pakistan Family Courts Act, 1964 ("**Act, 1964**")?
iii. Whether a husband loses the right to pronounce *talaq*, once such right is delegated to the wife?
iv. Whether an order can be passed by the learned Civil Court restraining the officials of the Union Council concerned from performing their duties *qua* reconciliation and issue certificate of effectiveness of divorce, after pronouncement of *talaq* by the petitioner?

6. Before rendering the decision on the above quoted legal questions, it will be imperative to observe that in Islam, great emphasis is laid on the marital union. Islam directs its believers to lead a life not only participative with the worldly affairs but also dedicative in striving for excellence in the religion, however, despite acknowledging sacrosanct nature of the marriage, Quran gave its followers the option of divorce/*khula*, which indeed is the most disapproved activity. At the same time, once the divorce is pronounced, it becomes automatically effective after lapse of ninety days and it is only between the said period that efforts of reconciliation shall be made.

7. As regards the first question, there is no cavil to the legal proposition that a constitutional petition is not maintainable against the interim orders passed by the Family Courts. However, in present case the impugned orders have been passed by the Civil Court and not by the Family Court. Moreover, if interlocutory orders are arbitrary, capricious and without jurisdiction, this Court

in constitutional jurisdiction, can interfere by issuing a writ of certiorari in terms of Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 for correcting gross errors of jurisdiction. In this regard, case reported as *"Inaam-ul-Haq vs. Muhammad Ali Shaheen and another"* (**2013 CLC 904**) is referred.

8. As regards the second question, it is noted that Section 5 (1) of the Act, 1964 reads as under:

> "5. **Jurisdiction**.– [1] Subject to the provisions of the Muslim Family Laws Ordinance, 1961, and the Conciliation Courts Ordinance, 1961, the Family Courts shall have exclusive jurisdiction to entertain, hear and adjudicate upon matters specified in the Part I of the Schedule."

Entry 1 of the Part I of the Schedule reads as under:

> "1. Dissolution of marriage including Khula."

Similarly, entry 10 of the said Schedule reads a sunder:

> "10. Any other matter arising out of the Nikahnama"

The Supreme Court of Pakistan, in case reported as "*Major Muhammad Khalid Karim v. Mst. Saadia Yaqub and others*" (**PLD 2012 SC 66**) observed as under:

> "5……Prior to the enforcement of Family Courts Act, 1964, the disputes, relating to and concerning the family affairs (except guardianship etc.) such as the dissolution of marriage, recovery of dower, dowery, maintenance, enforcement of conjugal rights and jactitation etc. (subject to the amendment of the schedule to the Act 1964 from time to time) were within the jurisdiction of ordinary civil court. Whereas, the issues about the guardianship and custody of the minors were the subject matter of the Guardian Courts

constituted under Guardians and Wards Act,1890. It seems that on account of delays, in the adjudication of this class of cases, which possibly was due to the complexity of procedure and the rush of work in such courts, but undoubtedly was adversely affecting the family union and comity, the legislature in order to prevent the above enforced the Act, 1964. It is so clear from the preamble of the Act that this law was enforced with a vivid object to takeout the matters falling within the ambit thereof from the ordinary regime qua dispensation of justice, and for the expeditious disposal of such matters, special forum was created in which the rigors of procedural implications and the requirements of the Evidence Law (Qanun-e-Shahadat Order, 1984) were either dispensed with or were simplified; with an addition of a statutory mechanism, enabling the parties for an amicable settlement of their disputes, through the courtesy of the Court was provided. Therefore, to achieve the aforesaid object, section 5 of the Act, 1964 conferred exclusive jurisdiction to the Family Court to entertain, hear and adjudicate upon matters specified in Part-I of the schedule to the Act. It may be pertinent to refer here, that if the original Act, 1964 is examined there were six entries/items to the schedule, relating to the matters about dissolution of marriage, dower, maintenance, restitution of conjugal rights, custody of the children and guardianship. However, these items have been increased from time to time e.g. khula' is added to the dissolution cases; the custody issues also involve visitation rights of the parents to meet the minors; jactitation of marriage, dowery, personal property and personal belongings of the wife have also been made part thereof and subjected to the jurisdiction of the Family Court."

It is clear from the above quoted legal provisions as also *dicta* laid down in case of *Major Muhammad Khalid Karim* *supra* that exclusive jurisdiction has been conferred on the Family Court, established under Section 3 of the Act, 1964 to deal with matrimonial issues and the jurisdiction of other Courts including Civil Courts has been excluded and ousted. Thus, dissolution of marriage in all its modes and manners including khula and *talaq-e-tafweez* falls within the purview and jurisdiction of the Family Court.

9. In addition, it is also to be noted that Section 5 of the Act, 1964 has been subjected to the provisions of the Muslim Family Laws Ordinance, 1961 ("**Ordinance, 1961**"). Section 3 of the Ordinance, 1961 also confers overriding effect to the Ordinance, 1961 and Section 7 provides for the mechanism and procedure to be adopted for pronouncing divorce and issuance of certificate of effectiveness of divorce. In terms of Section 7(1) of the Ordinance, 1961 it has been contemplated as under:

> "S. 7 'Talaq'. (1) 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 notice in writing of his having done so, and shall supply a copy thereof to the wife.
>
> (2) Whoever, contravenes the provisions of sub-section (1) shall be punishable with simple imprisonment for a term which may extend to one year, or with fine which may extend to five thousand rupees, or with both."

Sub-section (1) of Section 7 obligates any person who wishes to pronounce divorce to serve notice thereof to the chairman and also supply a copy thereof to the wife and sub-section (2) of the same provision makes non-adherence to the provision of preceding sub-section an offence punishable with imprisonment of fine. Thus, the impugned restraining order/*ad-interim* injunction by the learned Civil Court would amount to aiding the non-adherence to the

statutory provision, which has been made an offence by the legislature. Thus, the second question is answered in the terms that the impugned orders passed by the learned Civil Court are without jurisdiction.

10. As regards the third question, it is pertinent to note that the respondent in her plaint stated as under:

> "18. That the Nikah of plaintiff and defendant no.3 has been solemnized on 22-08-2016, at the time of Nikah defendant no.3 has surrender his rights of divorce as per column-18 and 19 of Nikah Nama, only plaintiff has right to announced divorce, so called divorce notice issued by the defendant No.3 is illegal, against fact, only use for blackmailing purpose, against the column no.18 and 19 of Nikah Nama and against the right of "Tafeez-e-Talaq" hence liable to be cancelled and set-aside."

11. Admittedly, the petitioner has delegated the right to pronounce *talaq* in favour of the respondent in terms of entry recorded against Column No.18 of the *nikahnama*. The said act of the petitioner does not mean that the petitioner has denounced his own right to pronounce the *talaq* and intimate factum of pronouncement of *talaq* to the Union Council concerned, for further proceedings leading to the issuance of certificate of effectiveness of divorce in terms of provisions of the Ordinance, 1961. In terms of *Ayat* No.227 of *Surah Al-Baqarah* as also *Ayat* No.1 of *Surah at-Talaq*, the husband has been conferred an absolute right to divorce his wife and even if said right is delegated to the wife, under the law of land, his own right of pronouncing divorce cannot be considered to be denounced. In terms of Para 101, Chapter XII of the Code of Muslim Personal Law, authored by Dr. Tanzil-ur-Rehman, the delegation of right of divorce (*Tafwid at-Talaq*) has been dealt with in the following manner:

"تفویض طلاق 101-شوھر کے لیے جائز ھے کہ وہ اپنی زوجہ کو حق طلاق تفویض کر دے مگر اس صورت میں خود اس کا حق طلاق ساقط نہ ھو گا۔"

Moreover, it is an accepted position of law that to delegate to another is not to denude oneself as held by Indian Supreme Court in case reported as "*Ishwar Singh v. State of Rajasthan and others*" **(AIR 2005 Supreme Court 773)**.

> "8. It is an accepted position in law that to 'delegate' to another is not to denude yourself. As was observed by Wills, J. in Huth v. Clarke (25 Q.B.D. 391, "In my opinion the word, in its general sense and as generally used, does not imply, or point to, a giving up of authority, but rather the conferring of authority upon someone else". As observed by Lord Coleridge, C.J. in 25 Q.B.D. 304, the word 'delegation' implies that powers are committed to another person or body which are as a rule, always subject to resumption by the power delegating. The person delegating does not denude himself. (Per Wharton's Law Lexicon, 1976 Reprint Ed. at page 316). Delegation implies also the power to withdraw delegation. As indicated in Wharton's Law Lexicon, delegation is a sending away; a putting into commission; the assignment of a debt to another; the entrusting another with a general power to act for the good of those who depute him. The word 'delegate' means little more than an agent. An agent exercises no power of his own but only the powers of his principal. The observation in Huth's case (supra) was referred to in Roop Chand's case (supra). In general, a delegation of power does not imply parting with authority. The delegating body will retain not only power to revoke the grant, but also power to act concurrently on matters within the area of delegated authority except in so far as it may already have become bound by an act of its delegate. (See Battelley v. Finsbury Borough Council (1958 LGR 165)."

In view of the above discussion, this Court is of the opinion that upon delegation of right of divorce (*talaq-e-tafweez)*, the petitioner did not denounce his right to pronounce *talaq*, and, he was obligated to intimate factum of the said pronouncement to the Union Council concerned.

12. As regards the fourth question, this Court cannot lose sight of the fact that in terms of Section 56 of the Specific Relief Act, 1887, an injunction cannot be granted to interfere with the public duties of any department of the Federal Government or any Provincial Government; or with the sovereign acts of Foreign Government. In present case official respondents No.4 and 5 i.e., Administrator Union Council and Secretary, Union Council are under obligation in terms of the provision of the Ordinance, 1961 that upon receipt of a notice from husband regarding the pronouncement of *talaq*, necessary reconciliation proceedings should be initiated and in case of failure, certificate of effectiveness of divorce is issued to avoid any legal complication (for the parties *qua* their marital status). The said legal position gets further traction from Section 22 of the Act, 1964 in terms whereof even the Family Court, which is vested with exclusive jurisdiction in respect of all the matters relating to marriages, enforcement of rights under the *nikahnama* etc., cannot issue an injunctive order. Section 22 reads as under:

> "**22. Bar on the issue of injunctions by Family Court**.- A Family Court shall not have the power to issue an injunction to, or stay any proceedings pending before, a Chairman or an Arbitration Council."

In view of the above discussion, this Court is of the opinion that the impugned orders are not sustainable.

13. Much emphasis has been laid on the fact that the respondent wants to reconcile the matter and it is first wife of the petitioner, who is adamant to ruin the marriage of the petitioner with the respondent and is not allowing the reconciliation process. In this regard, Ayat No.35 of Sura Nisa contemplates as under:

> "If ye fear a breach between them twain, appoint (two) arbiters, one from his family and the other from hers; if they wish for peace, Allah will

> cause their reconciliation: For Allah hath full knowledge, and is acquainted with all things."

It is for the purpose of initiating and effecting reconciliation that in terms of Section 7 of the Ordinance, the husband is obligated to intimate the Union Council concerned about the pronouncement of *talaq* in any form whatsoever, which the petitioner has done. The parties, through elders of the families can always participate in the said reconciliation proceedings. It is the respondent herself who, instead of appointing an arbiter, is seeking a restraining order against the Union Council concerned from a Court of law that has no jurisdiction. Her *bonafides* to have reconciliation with the petitioner is casted with doubt when it has been brought to the notice of this Court that after filing of suit for declaration alongwith permanent injunction, from which the present proceedings have emanated, the respondent, on 15.10.2024, has instituted another suit on the same subject and substantially with the same prayer, without disclosing filing of the earlier suit. Copy of certified copy of the second suit has been submitted to this Court with the permission and is taken on record as **Mark-A**. When confronted, learned counsel for the respondent had no clue and could not refute the judicial record produced before this Court.

14. In view of above discussion, the present petition is **allowed**, and the impugned orders of the learned Courts below are set aside.

(ANWAAR HUSSAIN)
JUDGE

Approved for reporting

Judge

Maqsood