

2014 C L C 60

[Balochistan]

Before Muhammad Hashim Khan Kakar, J

BIBI FERROZA and 5 others----Petitioners

Versus

ABDUL HADI and another----Respondents

Criminal Quashment No.201 of 2013, decided on 24th August, 2013.

(a) Muslim Family Laws Ordinance (VIII of 1961)---

---S. 7---West Pakistan Family Courts Act (XXXV of 1964), Ss.5 & 10, proviso---Dissolution of marriage---"Talaq" and "Khula"---Non-return of benefits---Effect---Divorce on the basis of Khula by wife is right at par with right of pronouncement of Talaq by husband, with one difference that husband can pronounce Talaq himself but wife has to file suit in that behalf---Right of Khula is not contingent upon consent of husband but is dependent upon reaching conclusion on the part of Court that spouses could no longer live within the limits of Almighty Allah---Wife is bound to return benefits which she received on account of marriage from husband but Family Court determines as to what benefits have been received by wife and also to direct their return---Return of benefits is not a condition precedent to dissolution of marriage---Decree of dissolution of marriage on the basis of Khula, even though made condition upon return of benefits, would operate to dissolve the marriage, when it is passed and effect thereof would not be postponed till the benefits were returned---Failure on the part of wife to return benefits received by her from her husband within stipulated period would not adversely affect factum of dissolution and return of benefits by wife to husband remains merely a liability of civil nature,

which can be enforced by husband through appropriate means---Similarly, dissolution of marriage effected through Khula is neither revocable nor appealable and only decision regarding dower is appealable.

(b) Criminal Procedure Code (V of 1898)---

---S. 561-A---Penal Code (XLV of 1860), Ss.494 & 493-A [as inserted by Protection of Women (Criminal Laws Amendment)] Act (VI of 2006)---Quashing of F.I.R.---Scope---Marrying again during lifetime of husband---Respondent was ex-husband of petitioner, who got F.I.R. registered against petitioner and her new husband---Plea raised by petitioner lady was that F.I.R. was based upon mala fide and she contracted second marriage after the first one had been dissolved on the basis of Khula---Validity---Investigation was right of police and should come to its natural conclusion without interference, however, proceedings under section 561-A, Cr.P.C. were competent against any criminal inquiry or investigation, if the same had encroached upon any fundamental right guaranteed by the Constitution or had violated some other law or was motivated by some mala fide reasons---Continuance of proceedings against petitioner in a case under S.494, P.P.C. read with S.493-A, P.P.C. [as added by Protection of Women (Criminal Laws Amendment) Act, 2006, would amount to unnecessary harassment---No Court on such baseless and misconceived allegation could convict petitioner---High Court in exercise of its inherent jurisdiction quashed F.I.R. registered against petitioner---Petition was allowed in circumstances.

Rizwana Bibi's case 2012 SCMR 94 rel.

Zaffar Hayat Mullazai for Petitioners.

Hamayun Tareen for Respondent No.12.

Miss Sarwat Hina, Addl. P.-G. for the State.

Date of hearing: 20th August, 2013.

ORDER

MUHAMMAD HASHIM KHAN KAKAR, J.--- This is a petition for quashment of an F.I.R. No.184 of 2012, dated 18th July, 2012, under section 494 read with sections 109 and 34 of the P.P.C. and section 493 of the Woman Protection Act, 2006 of Satellite Town Police Station, Quetta registered on the report of one Abdul Hadi son of Haji Agha Muhammad.

2. Briefly stated, the facts for disposal of the instant petition are that complainant/respondent No.1, namely, Abdul Hadi, married with petitioner No.1 Mst. Bibi Feroza but, subsequently, due to some differences, that had cropped up between the parties, petitioner No.1 filed a suit for dissolution of marriage on the basis of khula before the Additional Family Judge, Quetta, in the month of June, 2011. The Court dissolved the marriage ties between the parties on the basis of Khula due to failure of reconciliation proceedings by means of order dated 18th August, 2011. It is the case of the complainant/respondent No.1 that despite of challenging the dissolution order before this Court, the petitioner No.1 contracted second marriage with one Nasrullah alias Kausar. He further alleged that the dissolution order passed on the basis of Khula does not take effect within the purview of subsection (4) of section 10 of The West Pakistan Family Courts Act, 1964 (the "Act of 1964"), unless the wife quit/waived off all her rights and to return the benefits, which she had received on account of marriage from husband. Thus, she is guilty of Zina by contracting second marriage during subsistence of first one.

3. Mr. Zafar Mullazai, learned counsel for the petitioners, contended that very registration of F.I.R. appears to be product of mala fides, thus, the same is liable to be quashed. He further contended that, after dissolution of marriage ties between the parties by a competent Court of law, petitioner No.1 Bibi Feroza, being sui juris, with her own free-will and consent and by exercising her constitutional fundamental rights, contracted second marriage with one Nasrullah in accordance with the injunctions of Islam and she is living with him as his legally wedded wife, thus, the F.I.R., which is outcome of mala fides and dishonest intentions on the part of the complainant, is liable to be quashed.

4. On the other hand, Mr. Hamayun Tareen, Advocate, appearing on behalf of the complainant/respondent, has taken a stand that the truth or falsehood of the allegations in F.I.R. will be seen by the police authorities during the course of investigation and, thereafter, by the trial Court and the quashment thereof, at this stage, would be nothing, but tantamount to interfere in the investigation of police. He further submitted that the petitioner, while contracting second

marriage prior to waiving off all her rights and returning all the benefits, which she had received on account of marriage from husband, has committed an offence within the mischief of the offences invoked in the F.I.R.

5. I have heard the learned counsel for the parties and given my anxious consideration to the arguments advanced by them and have also gone through the material placed on file. Before entering into the controversy, it would be in order to reproduce hereinbelow the proviso added to section 10 of the Act of 1964, through Ordinance No.LV of 2002, published in the extraordinary official Gazette dated 1st October, 2002, which is not only relevant for resolving the controversy involved in the instant petition, but also furnishes a complete answer to it. The said proviso reads as follows:---

"Provided that notwithstanding any decision or judgment of any court or tribunal, the Family Court in a suit for dissolution of marriage, if conciliation fails, shall pass decree for dissolution of marriage forthwith and shall also restore to the husband the Haq Mehr received by the wife in consideration of marriage at the time of marriage."

6. The aforesaid provision of law clearly demonstrates that divorce on the basis of khula by wife is a right at par with the right of pronouncement of talaq by husband, with one difference that husband can pronounce "talaq" himself, but the wife has to file a suit in that behalf. Right of khula is not contingent upon the consent of the husband, but is dependent upon reaching a conclusion on the part of Court that the spouses could no longer live within the limits of Almighty Allah. It is true that wife would be bound to return the benefits, which she had received on account of marriage from husband, but it is equally true that the Family Court would determine as to what benefits had been received by wife and also to direct their return. Return of benefits, however, is not a condition precedent to the dissolution of marriage. The decree of dissolution of marriage, on the basis of khula, even though made conditional upon return of the benefits, would operate to dissolve the marriage, when it is passed and effect thereof would not be postponed till the benefits were returned. The failure on the part of wife to return the benefits received by her from her husband within the stipulated period would not adversely affect the factum of the dissolution, and return of benefits by wife to husband remained merely liability of a civil nature, which could be enforced by the husband through appropriate means. Similarly, dissolution of marriage effected through khula is neither revocable, nor appealable and only decision qua dower is appealable. It would also be relevant to mention here that mere filing or pendency of a constitutional petition against the judgment and decree passed by the Family Court on the basis of khula does not invalidate the divorce.

7. The record also depicts that the suit for dissolution of marriage on the basis of khula was

instituted in the month of June, 2011 and after failure of reconciliation proceedings, the marriage was dissolved on 18th August, 2011 by the learned Additional Family Judge, Quetta, on the basis of khula in the following words:---

"Efforts were made by the Court to remove the differences between the spouses, but plaintiff straightaway refused to rejoin the defendant and was adamant to have developed fixed aversion against her husband and stated that she cannot lead harmonious life with defendant within the limits ordained by Allah."

The petitioner as per nikahnama, copy whereof is annexed with the petition, contracted second marriage with one Nasrullah Khan alias Kausar on 11th February, 2012, on the expiration of period of iddat. The judgment and decree dated 18th August, 2011 clearly show that the mischief clauses of the provisions invoked in the F.I.R. are not attracted. The petitioner No.1, being a sui juris, woman was entitled to contract second marriage of her own free-will. Although Article 35 of the Constitution of the Islamic Republic of Pakistan 1973 (the "Constitution") commands that the State shall protect the marriage, the family, the mother and the child, yet it is textbook example of a case of misexercise of powers on the part of public functionaries for illegal and ill-gotten gains, while putting in motion the machinery of criminal law to destroy the matrimonial and harmonious life of a helpless lady.

8. The scope and importance of Article 35 of the Constitution as well as the question of elimination of all forms of discrimination against women, were examined by Hon'ble Supreme Court of Pakistan in Rizwana Bibi's case, 2012 SCMR 94, in which his lordship Mr. Justice Tassaduq Hussain Jilani, who spoke for the Court while construing the meaning of Article 35 of the Constitution and importance of different conventions and declarations of the United Nations, observed:---

"13. The State functionaries are duty bound to obey the law of the land and also to realize that Pakistan is a Member of United Nations and is signatory to the "Convention on the Elimination of all Forms of Discrimination Against Women" which in its Article 16 enjoins all the member states as under:--

"1. States Parties shall take all appropriate measures to eliminate, discrimination against women in all matters relating to marriage and family relations and in particular shall ensure on the basis of equality of men and women:---

(a) the same right to enter into marriage,.

(b) the same right freely to choose a spouse and to enter in marriage only with their free and full consent;

(c) the same rights and responsibilities during marriage and at its dissolution."

8-A. So far as the contention of the learned counsel regarding investigation by police authorities is concerned, it is true that the investigation is the right of police and should come to its natural conclusion without interference, however, it is equally true that there is also no dispute on the point that proceedings under section 561-A of the Cr.P.C. are competent against any criminal inquiry or investigation, if the same encroaches upon any fundamental right guaranteed by the Constitution or violates some other law or is motivated by some mala fide reasons.

9. For all that has been stated above, the continuance of the proceedings against the petitioners in a case under section 494 read with sections 109 and 34 of the P.P.C. and 493 of the Women Protection Act, 2006 will amount to unnecessary harassment. The result is obvious and no Court on such baseless and misconceived allegation can convict the petitioners. The result is that the petition is allowed; consequently, F.I.R. No.184 of 2012 registered at Satellite Town Police Station, Quetta is hereby quashed.

These are the reasons of my short order dated 20th August, 2013 announced in the open Court.

MH/89/Bal.

Petition allowed.