

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT: Mr. Justice Dost Muhammad Khan
Mr. Justice Qazi Faez Isa
Mr. Justice Maqbool Baqar

Criminal Petition No. 1252 of 2016

(On appeal against the order dated 20.06.2016 passed by the Lahore High Court, Multan Bench, Multan, in Crl. Rev. No. 484/2016)

Ishtiaq Ahmad. Petitioner(s)

Versus

The State, etc. Respondent(s)

For the Petitioner(s): Mr. Aftab Alam Yasir, ASC
a/w petitioner in-person
Syed Rifaqat Hussain Shah, AOR

For the Respondent(s): N.R.

Date of hearing: February 17, 2017

JUDGMENT

Qazi Faez Isa, J: The petitioner seeks leave to appeal against his conviction by the Magistrate, Taunsa Sharif which was upheld by the Additional Sessions Judge, Taunsa Sharif, and the Multan Bench of the Lahore High Court dismissed the petitioner's revision petition. The petitioner was convicted under section 6(5)(b) of the Muslim Family Laws Ordinance, 1961 ("**the Ordinance**") for contracting another marriage without permission and was sentenced to imprisonment for one month and to pay a fine of five thousand rupees and in default of payment of fine to further undergo simple imprisonment for twenty days.

2. The petitioner did not dispute that during the subsistence of his marriage with Mst. Ruqia Hameed he had entered into a marriage with Mst. Tehmeena. The petitioner took two stands,

firstly, that under Muslim personal law which governed the parties, “the petitioner has every right to accord with four marriages and no limitation can be imposed”, and, secondly, that his first wife had given him permission to contract a second marriage. The learned counsel for the petitioner further contended that there was no reason to seek permission for contracting a second marriage, from the Arbitration Council under section 6(2) of the Ordinance, since the term for which the councilors were elected had expired, however, the local government elections were still not held, therefore, there was no Chairman of the Arbitration Council nor was there a Union Council which alone could submit a complaint as per rule 21 of the rules made under the Muslim Family Laws Ordinance, 1961 (“**the Rules**”). Reliance was also placed upon the cases of Muhammad Yousaf v Chairman, Union Committee (1977 PCrLJ 107) and Ejaz Mahmood v Humaira (PLD 1983 Lahore 615).

3. The first issue raised by the petitioner is with regard to the *vires* of section 6 of the Ordinance and whether permission of the wife/wives and/or of the Arbitration Council stipulated therein contravenes the injunctions of Islam. Before we proceed to consider this issue it would be appropriate to reproduce section 6 of the Ordinance:

“6. Polygamy.

(1) No man, during the subsistence of an existing marriage, shall, except with the previous permission in writing of the Arbitration Council, contract another marriage, nor shall any such marriage contracted without such permission be registered under this Ordinance.

(2) An application for permission under sub-section (1) shall be submitted to the Chairman in the prescribed manner, together with the prescribed fee and shall state the reasons for the proposed marriage, and whether the consent of existing wife or wives has been obtained thereto.

(3) On receipt of application under sub-section (2) the Chairman shall ask the applicant and his existing wife or

wives each to nominate a representative, and the Arbitration Council so constituted may, if satisfied that the proposed marriage is necessary and just, grant subject to such conditions, if any, as may be deemed fit, the permission applied for.

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

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

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

4. The aforesaid issue was considered in the case Allah Rakha v Federation of Pakistan (PLD 2000 Federal Shariat Court 1); the Federal Shariat Court held that the provisions of section 6 of the Ordinance did not violate any of the injunctions of Islam (see paragraphs 88 to 94, pages 56 & 57). The Federal Shariat Court observed that the third verse of *surah an-nisa* (wherein reference is made to polygamy) itself prescribes the precondition of *adal* (justice):

"...the very Ayat which gives this permission also prescribes a condition of " " and the Holy Qur'an has laid emphasis in the same verse on the gravity and hardship of the condition which Allah Himself says is very difficult to be fulfilled.

89. Now section 6 of the Ordinance as framed, in no manner places any prohibition in having more than one wife. It only requires that the condition of " " prescribed by Holy Qur'an itself should be satisfied by the male who wants to have more than one wife. The provision for constituting an Arbitration Council, therefore, cannot in itself be said to be violative of Injunctions of Qur'an as only a procedure has been prescribed how the Qura'nic Verse will be observed in its totality with reference to the condition of " " placed in the Verse itself." (page 56)

The Federal Shariat Court also considered the components of a *nikah* (marriage in Islam), the rights and obligations of a husband and wife, the love and affection between them and how disputes could arise if the husband were to take another wife:

"...[*nikah*] is a social contract of very high status and conjoins a couple and the spouses in a sacred association, with mutual rights and obligations, to be performed in a spirit of love and affection that should last life long, as envisaged by Ayah No. 21 of Sura No. 30, Ayah No. 228 of Sura Baqara and Ayah No. 19 of Sura-e-Nisa. Therefore, anything, big or small, that may provide a cause for a breach in mutual love and trust is viewed seriously by Islamic Injunctions. In such situations the Holy Qur'an enjoins upon all Muslims to take appropriate measures to save this sacred union from disruption. Reference in this connection may be made to Verse No. 35 of Sura Al-Nisa, already reproduced hereinabove. Since one of the reasons for such disputes may be intention of the husband to contract subsequent marriage of his choice... ." (page 56-7)

5. In the case of Faheemuddin v Sabeeha Begum (PLD 1991 Supreme Court 1074) the second wife filed a complaint against her husband who had concealed from her his earlier subsisting marriage. The husband urged that the second wife had no *locus standi* to file a complaint under section 6 of the Ordinance and only an existing wife could do so as the said section intended to protect existing wife/wives. This Court disagreed. The importance of marriage, misrepresenting ones marital status, the unhappiness that may result as a cause thereof, the concept of a harmonious married life, the mandate of doing justice between wives and how the confidence of a wife may be shattered by the deception practiced upon her were considered (page 1079). It may also be difficult, if not impossible, to sustain a relationship on a lie.

6. The Federal Shariat Court in the case of Allah Rakha (above) referred to verse 21 of *surah* 30 *ar-rum* of the Holy Quran, in which

verse Almighty Allah reveals that the love, tranquility and mercy are concomitant to marriage:

“And among His Signs is this, that
He created for you mates from amongst yourselves,
That ye may dwell in tranquility with them, and
He has put love and mercy between your (hearts):
Verily, in that are Signs for those who reflect.”

Concealment by a husband of his previous marriage/s or contracting another marriage with callous disregard of his wife may disrupt the love, tranquility and mercy ordained by Allah Almighty; “affection” is amongst the favours bestowed by the Almighty for which we need to “give thanks” (verse 78 of *surah 16 an-nah*). The magnitude of this affection is immeasurable; “He hath put affection between their hearts: not if thou hadst spent all that is in the earth, couldst thou have produced that affection, but Allah hath done it” (verse 63 of *surah 8 an-anfal*). Words of Almighty Allah constitute the verses of the Holy Quran and as such are of immense importance to believers; every effort must be made to adhere to them. Almighty Allah directs believers “to study” the Quran and those that do “are the ones that believe therein” (verse 121 of *surah 2 al-baqarah*). The Almighty states that to dwell with one’s spouse in tranquility, love and mercy is amongst His “Signs (*ayah*) for those who reflect (*tafakkur*)” (verse 21 of *surah 30 ar-rum*), and, “do not treat Allah’s Signs as a jest” (verse 231 of *surah 2 al-baqarah*).

7. Husbands are also required to “deal justly” with their wives and to, “live with them [wives] on a footing of kindness and equity” (verses 3 and 19 respectively of *surah 4 an-nisa*). If a husband, without his wife’s permission or in secret, takes another wife can his dealing with the first wife be categorized *just* or is he

maintaining the *footing of kindness and equity*? After issuing the warning that wives must be dealt *justly* Almighty Allah wants, “to prevent you [husbands] from doing injustice” by prescribing that in such cases “then only one [wife]” (verse 3 of *surah 4 an-nisa*). Since section 6 of the Ordinance seeks to prevent injustice being done, then it conforms to Islamic injunctions.

8. We now proceed to consider the merits of this particular case. The learned counsel’s contention that, at the relevant time there was no Chairman of the Arbitration Council since local government elections had not been held, is not sustainable because in the absence of elected representatives the Administrator or another designated officer acts as the Chairman. As regards the contention that, the court could not take cognizance of the offence since the Union Council had not itself complained to the court is not correct because in the Province of Punjab rule 21 of the Rules was substituted (in 1976) and the new substituted rule requires the submission of complaint by an “aggrieved party”. The wife clearly was an *aggrieved party* and sent a written complaint, which was forwarded to the Magistrate by the Administrator Union Council. Since the rule does not stipulate whether the complaint is to be submitted to the Court by the *aggrieved party* herself or it may be routed through the office of the Chairman or the Union Council it would not be appropriate to impose any particular mode of submission of complaints in this regard.

9. The petitioner was required by law to submit an application to the Chairman and seek permission to enter into the proposed

marriage. In such an application he was required to, "state the reasons for the proposed marriage and whether the consent of existing wife or wives had been obtained thereto". The Chairman on receipt of such an application is to call upon the petitioner and his wife to nominate their respective representatives, and the Arbitration Council so constituted, after satisfying itself that the proposed marriage was "necessary and just" may grant permission with or without any conditions. In considering whether the proposed marriage is *necessary and just* the Arbitration Council considers the following, amongst other, grounds: "sterility, physical infirmity, physical unfitness for the conjugal relation, willful avoidance of a decree for restitution of conjugal rights, or insanity on the part of an existing wife" (rule 14 of the Rules).

10. Admittedly, the petitioner did not submit an application seeking permission to enter into another marriage, as required by sub-section (2) of section 6 of the Ordinance read with rule 6(2) of the Rules, therefore, the Arbitration Council was not constituted, let alone one that could have granted him the requisite permission. The petitioner disregarded the law and must suffer its consequences. It was contended that the first wife had given her consent, but this bare statement is contradicted by the fact that the wife had herself submitted a complaint against her husband, testified in court and was subjected to cross-examination, but maintained her stance. The petitioner did not testify on oath under section 340(2) of the Code of Criminal Procedure ("**CrPC**") to aver that his wife gave her consent for him to contract another marriage. The learned counsel sought to rely on the petitioner's

statement under section 342 of CrPC, but such statement is not in itself sufficient to establish that permission had been granted.

11. The petitioner concedes that he was already married and he also had a child from his first wife when he contracted a second marriage without obtaining permission from the Arbitration Council. The ingredients of the offence under section 6(5)(b) of the Ordinance thus stood established. The petitioner was lucky as the trial court had treated him very leniently in the matter of punishment by sentencing him to imprisonment for only one month as he could have been imprisoned for up to a year. Consequently, this petition for leave to appeal is dismissed and leave is refused.

Judge

Judge

Judge

ISLAMABAD
February 21, 2017
(Farrukh)

Approved for Reporting