

HCJD/C-121
JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD

Writ Petition No.1856 of 2023

Sardar Ali Zia Khan

Versus

The Arbitration Council through its Chairman etc.

Petitioner by : Mr. Zaafir Khan, Adv.

**Respondents by : M/s Jamila Jehan Noor Aslam and Mustafa Munir Ahmed, Advocates for Respondent No.2.
Mr. Abid Hussain Chaudhry, Advocate for Respondent No.1.**

Date of Hearing : 26.02.2024

Babar Sattar, J:- The petitioner is aggrieved by order dated 12.04.2023 passed by the Chairman, Arbitration Council (Respondent No.1) wherein it has been held that the petitioner and respondent No.2 are residents of Azad Jammu & Kashmir (AJK) who were presently resident in the United States where divorce proceedings are underway and consequently no divorce certificate can be issued to them under provisions of the Muslim Family Laws Ordinance, 1961 ("**MFL Ordinance**").

2. The learned counsel for the petitioner submitted that the Arbitration Council had refused to proceed with the issuance of the divorce deed on the basis that the petitioner and respondent No.2 were residing in California. He submitted that the Arbitration Council had not taken into account the fact that the marriage was solemnized in Islamabad and the *Nikah Nama* was registered with the Arbitration Council and it was only this

Arbitration Council having registered the *Nikah Nama* that could issue a divorce certificate for purposes of Pakistan as well as AJK, to the extent that the spouses were based in the United States, given that the Arbitration Council had extra territorial jurisdiction over the matter, notwithstanding divorce proceedings pending in California. He relied on **Mst. Asma Bibi Vs. Chairman Reconciliation Committee and others (PLD 2020 Lahore 679)** and **Muhammad Akram Nadeem Vs. Chairman, Arbitration Council/ADLG, Islamabad and 2 others (2021 CLC 1947)** for such purpose.

3. During the pendency of the petition, the petitioner filed additional documents through Civil Miscellaneous Application No.565/2024 establishing that the Superior Court of California had ordered the dissolution of marriage between the petitioner and respondent No.2. Learned counsel for the petitioner submitted that the Court in California had ordered the dissolution of marriage, the divorce between petitioner and respondent No.2 stood finalized for purposes of the State of California and the United States. And it only remained for purposes of Pakistan that the Arbitration Council ought to issue a divorce certificate. Learned counsel for the petitioner submitted that as the marriage had been registered in Islamabad it was the Arbitration Council in Islamabad that was the repository of the record of the marriage and it was the same Arbitration Council that was to issue the divorce certificate. He emphasized that in **Mst. Asma Bibi**, the Lahore High Court had held that even where the husband and wife were not Pakistani Nationals they could get a divorce in Pakistan provided that the

marriage was registered in Pakistan and prescribed the procedure for such purpose. He relied on judgment of this Court in **Muhammad Akram Nadeem** to emphasize that in view of section 1(3) of the MFL Ordinance the provisions of the law applied to all Muslim citizens of Pakistan notwithstanding their place of residence.

4. Learned counsel for respondent No.1 submitted that this Court had held in **Mohammad Akram Nadeem** that the Arbitration Council had extra territorial jurisdiction in relation to citizens of Pakistan. He submitted that the question before the Court was whether the Arbitration Council could issue a divorce certificate in relation to citizens of Pakistan when divorce proceedings between such citizens who were resident of a foreign country were pending adjudication in such foreign country. He submitted that the adjudication of such question would clarify the law and the scope of authority of the Arbitration Council.

5. Learned counsel for respondent No.2 did not contest the fact that the divorce of the petitioner and respondent No.2 had been finalized by the Court of competent jurisdiction in the State of California in the United States. She, however, submitted that the law relied on by the learned counsel for the petitioner was distinguishable. She submitted that in **Mst. Sadia Malik Vs. Chairman, Arbitration Council and another (2017 CLC Note 166)** the spouses were citizens of Pakistan and while they were residing in the United States at the time of pronouncement of *talaq*, before issuance of the notice of *talaq*

they were residing in Pakistan. In the instant matter the petitioner and respondent No.2 had not lived in Islamabad after their marriage and had not established their marital home in Islamabad. Relying on **Dr. Masood Khan Vs. Chairman, Arbitration Council, Wah and 2 others (PLD 1982 Lahore 532)** she submitted that relevant Arbitration Council that had jurisdiction over the question of divorce was the Arbitration Council within the territorial jurisdiction of which the wife was residing at the time of pronouncement of divorce. She submitted that the Arbitration Council in Islamabad had no jurisdiction in relation to respondent No.2 or the petitioner as spouses residing in California, at the time of pronouncement of *talaq* or divorce they were outside the territorial jurisdiction of respondent No.1 and at the time of filing of the petition the divorce proceedings were pending before the Court of competent jurisdiction in California.

6. The questions that arise for adjudication of the present petition are the following:

- i. Does the Arbitration Council established under provisions of the MFL Ordinance have extra territorial jurisdiction in relation to citizens of Pakistan as well as Azad Jammu & Kashmir whose Nikah (marriage contract) has been registered within the territorial jurisdiction of such Arbitration Council when the spouses are residing in a foreign country, and whether any other Arbitration Council within Pakistan can claim to have territorial jurisdiction in relation to such citizens?*
- ii. Does an Arbitration Council established under the MFL Ordinance have competence to initiate*

reconciliation proceedings and subsequently issue a divorce certificate where the Pakistani citizens are residing outside Pakistan and the matter of their divorce is pending adjudication before the Court of competent jurisdiction in such foreign country?

iii. In relation to citizens of Pakistan or Azad Jammu & Kashmir whose marriage contract is registered in Pakistan and whose divorce has been ordered and or recognized by the Courts of a foreign country in which they are residing at the time of the divorce, does the relevant Arbitration Council in Pakistan have the competence to issue a divorce deed by recognizing the dissolution of marriage certificate issued by the foreign court?

7. The answer to the first question is in the affirmative. The question of extra territorial jurisdiction of the Arbitration Council was the subject matter in **Muhammad Akram Nadeem**. The relevant question there was whether the Arbitration Council in Pakistan would have extra-territorial jurisdiction or whether such jurisdiction was ousted in view of SRO No.1086 dated 08.11.1961, and officials to be appointed by Director General (Administration), Ministry of External Affairs, were to be treated as Chairman, Arbitration Council in Pakistan Foreign Missions. This Court had declared SRO No.1086 dated 08.11.1961 ultra vires section 2(b) of the MFL Ordinance. The Court had further held that the relevant Union Council would have extra territorial jurisdiction in relation to the MFL Ordinance in the following terms:

"Section 1(3) of the MFL Ordinance clearly states that, "[i]t extends to whole of Pakistan, and applies to all Muslim citizens of Pakistan, wherever they may be". Rule 3 addresses the question of jurisdiction of the relevant Union

Council in the event that a party to proceedings under the MFL Ordinance is not residing in Pakistan at the relevant time and the proviso to section 6(1) and (2) also provides for service upon a party through a Consular Officer of the relevant Foreign Mission. There is no explicit provision in the MFL Ordinance ousting jurisdiction of the Chairman of the relevant Union Council in case proceedings under the MFL Ordinance involve a spouse residing outside Pakistan nor is there anything in the provisions of the MFL Ordinance or the Rules by virtue of which such ouster can be implied."

The question of competence of the Arbitration Council to administer proceedings in relation to spouses who were not Pakistani citizens came before the Lahore High Court in **Mst. Asma Bibi**. In the said case the husband was residing in United States and took a wife who was based in Pakistan, and the question was whether the Union Council in Pakistan was competent to assume jurisdiction. While in the said case the Lahore High Court had relied on SRO No.1086 dated 08.11.1961 to determine that the Union Council in Rahim Yar Khan had no territorial jurisdiction, it found that the proceedings had been carried out in Pakistan by the brother of the husband who was not an authorized person. The Court observed while concluding the judgment that, *"even if a husband is not a Pakistani national or even if both husband and wife are not Pakistani nationals they can get divorce in Pakistan provided that the marriage is registered in Pakistan..."*. The question of whether the Courts in Pakistan had jurisdiction in relation to citizens of AJK came before the Lahore High Court in **Muhammad Zaman Vs. Uzma Bibi and 4 others (2012 CLC 24)**. Lahore High Court relied on Office Memorandum dated 24.06.1970 issued by the Federal Government which stated that, *"although Azad Kashmir 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.” It also relied on **Mst. Naseem Akhtar Vs. Director General Immigration and Passport (PLD 2006 Lahore 465)** where it was held that subjects of Azad Kashmir holding Pakistani passports were to be deemed to be citizens of Pakistan.*

8. This Court agrees with the dicta of Lahore High Court re recognition of citizens of Azad Jammu and Kashmir as Nationals of Pakistan for purposes of establishing the jurisdictional fact that such individuals are subject to the laws of Pakistan as much as such laws bind other citizens of Pakistan on the basis of extra-territorial application of such laws. The Nikah-Nama is a contract between two parties who are husband and wife. Section 5 of MFL Ordinance declares that registration of marriage is mandatory and not reporting a marriage to the relevant Nikah Registrar is punishable by up to three-month imprisonment. This is so even though registration of marriage is not a prerequisite for its validity under Islamic Law (see for example **Arif Hussain and another Vs. The State (PLD 1982 FSC 42)** and **Mirza Allah Ditta alias Mirza Javed Akhtar Vs. Mst. Amna Bibi and another (2004 YLR 239)**). The Nikah Registrar is the repository of information and data with regard to the status of two individuals as husband and wife and whether the marriage is subsisting.

9. In the event that the married couple is residing in Pakistan, their residence would determine which Union Council would exercise jurisdiction for purposes of initiating

reconciliation proceedings. This makes sense in the interest of convenience of the parties. However, even if the married couple (or one of them) is residing outside Pakistan at the time that a divorce notice is issued, the Union Council in the jurisdiction of which they were last residing, or if they established residence in Pakistan after marriage, the Union Council where their Nikah Nama was registered would have jurisdiction for purposes of undertaking reconciliation proceedings and recording the event of divorce, if reconciliation fails. This is because (i) the married couple submitted to the jurisdiction of such Union Council by registering their Nikah Nama with the Nikah Registrar of such Union Council, (ii) there would be no other Union Council with jurisdiction to initiate and undertake reconciliation proceedings that are mandatory under provisions of the MFL Ordinance, and (iii) the fact of the dissolution of the marriage (and termination of the marriage contract enacted under Pakistan Law) would need to be recorded in Pakistan, as otherwise the Nikah Register, which forms public record, would continue to reflect that the marriage was subsisting even though the marriage would have stood dissolved. This could also affect matters related to inheritance etc. in relation to the property of the erstwhile spouses in the event that they died abroad leaving property behind in Pakistan.

10. With the realm of Private International Law, a judgment or decree issued in a foreign jurisdiction is recognized as a matter of comity and public policy. The recognition of foreign judgments in Pakistan is dealt with under section 13 of the Code of Civil Procedure, 1908 ("**CPC**"), which provides the following:

13. When foreign judgment not conclusive. A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except__

- (a) Where it has not been pronounced by a Court of competent jurisdiction;*
- (b) Where it has not been given on the merits of the case;*
- (c) Where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of Pakistan in cases in which such law is applicable;*
- (d) Where the proceedings in which the judgment was obtained are opposed to natural justice;*
- (e) Where it has been obtained by fraud;*
- (f) Where it sustains a claim founded on a breach of any law in force in Pakistan.*

In the context of a judgment ordering the dissolution of a marriage, a foreign judgment can be contested in terms of section 13, by arguing, *inter alia*, that the court issuing the judgment was devoid of jurisdiction, or was issued in breach of provisions of natural justice, or was obtained by fraud to defeat the rights and interests of one of the spouses. However, where both spouses submit to the jurisdiction of the court issuing the judgment and do not contest the validity of the judgment within the terms of section 13 of CPC, the judgment is to be deemed conclusive with regard to the status of the marriage in Pakistan as well. And the competent Arbitration Council in Pakistan is to treat such foreign judgment ordering and recognizing the dissolution of marriage no different from a judgment issued by a competent family court in Pakistan for purposes of recognizing

the effectivity of Talaq in terms of section 7 of the MFL Ordinance.

11. Due to ease of travel and migration, the municipal laws of one state need to speak with the municipal laws of another state more frequently, especially in the realm of Private International Law. In terms of recognizing marriage and divorce, public policy of each state still has a significant role to play. Pakistan, for example, recognizes polygamy and polygamous marriages, which some other states may not recognize. Likewise, Pakistan does not recognize same-sex marriages, which some other states do. In this broader context, the legality and validity of a marriage contract within the territorial jurisdiction of Pakistan is to be determined in view of the law and considerations of public policy as applicable in Pakistan. Similarly, a foreign state may require a marriage to be registered in accordance with the requirements of its own municipal laws for the marriage to be recognized within its territory. This may create a situation where a marriage contract is recognized and registered under the laws of Pakistan, and also independently registered under the laws of such foreign state. While it is not conceivable that two individuals can be divorced in a foreign country but remain married in Pakistan, or vice versa, in practice such a thorny situation can arise, both due to difference between state laws re recognition of marriages as well as different procedural pre-requisites for recognizing the dissolution of marriage. There are states that have legislated on the matter to reconcile the status of marriages and divorces, where, due to dual-nationality and/or residence, the marriage is

independently recognized under two sets of municipal laws. Pakistan is yet to enact a law for such purpose. Consequently, it falls upon the courts to determine the status of marriage under Pakistani law, where the matter is also sub judice before the courts of a foreign state and/or has been decided by a foreign court. Such determination is to be made in terms of section 13 of CPC.

12. This issue of conflict of laws within the domain of Private International Law is not unique to Pakistan. The issue was dealt with at length by the Indian Supreme Court in **Smt. Satya vs. Teja Singh (AIR 1975 SC 105)** and the circumstances in which a divorce decree issued by a US court is to be recognized were discussed. The issue was again addressed in **Y. Narasimha Rao vs. Y. Venkata Lakshmi ((1991) 3 SCC 451)**, where the following was observed:

"The rules of Private International Law in this country are not codified and are scattered in different enactments such as the Civil Procedure Code, the Contract Act, the Indian Succession Act, the Indian Divorce Act, the Special Marriage Act etc. In addition, some rules have also been evolved by judicial decisions. In matters of status or legal capacity of natural persons, matrimonial disputes, custody of children, adoption, testamentary and intestate succession etc. the problem in this country is complicated by the fact that there exist different personal laws and no uniform rule can be laid down for all citizens. The distinction between matters which concern personal and family affairs and those which concern commercial relationships, civil wrongs etc. is well-recognized in other countries and legal systems. The law in the former area tends to be primarily determined and influenced by social, moral and religious considerations, and public policy plays special and important role in shaping it. Hence, in almost all the countries, the jurisdictional, procedural and

substantive rules which are applied to disputes arising in this area are significantly different from those applied to claims in other areas...The marriages which take place in this country can only be under either the customary or the statutory law in force in this country. Hence, the only law that can be applied to the matrimonial disputes is the law under which the parties are married, and no other law. When, therefore, a foreign judgment is founded on a jurisdiction or on a ground not recognized by such law, it is a judgment which is in defiance of the law. Hence, it is not conclusive of the matters adjudicated therein and, therefore, unenforceable in this country.”

13. The opinion of the Indian Supreme Court is a good enunciation of the principles that are attracted in case of recognition of a marriage and/or divorce in Pakistan, when the question of marriage and/or divorce is interjurisdictional due to one or both spouses also being subject to the jurisdiction of a foreign court. While flagging the issue, we need not delve into it any further. As in the facts of the present case it is not denied that (i) the petitioner and respondent No. 2 had their marriage registered in accordance with requirements of the MFL Ordinance in Pakistan and also in accordance with the laws of the United States, (ii) the said parties were residing in California when divorce were pronounced, and (iii) after an adjudicatory process, the marriage was dissolved by the court of competent jurisdiction in California, which order has not been challenged by either party, and (iv) it is not the contention of either party that the judicial order of the court in California ordering the dissolution of marriage not be recognized in Pakistan in terms of section 13 of CPC.

14. The provisions of MFL Ordinance make it evident that the legislature has vested no adjudicatory power or discretion in the Arbitration Council or its Chairman to refuse the recognition of a marriage or divorce. The registration of the Nikah Nama is a legal obligation, to be discharged in accordance with the procedural requirements prescribed by the MFL Ordinance and the rules framed thereunder. Likewise, the recognition of divorce also vests no discretionary power in the Arbitration Council or its Chairman. Section 7 of the MFL Ordinance merely regulates the process of recognition by requiring the parties to abide by a mandatory process, involving a 90-day reconciliation period, before the divorce is recognized as being effective. The role of the Arbitration Council or its Chairman came into focus in relation to decree of dissolution of marriage issued by a Family Court in **Muhammad Ishaque vs. Judge Family Court (PLD 1975 Lahore 1118)**. The Lahore High Court held that, *"it needs to be re-emphasized...the Chairman and the Arbitration Council would have no jurisdiction to nullify the decree passed by a court of law. What they can do is to make efforts at reconciliation between the parties and ultimately certify only whether it (reconciliation) has succeeded or failed. They have no jurisdiction to decide upon the questions of validity or otherwise of a decree of dissolution of marriage passed by a court of law. In other words, they are only to provide a further cushion period of ninety days for the decree of dissolution of marriage to become operative and effective."*

15. The role and scope of authority of the Arbitration Council or its Chairman is no different in relation to a foreign

decree or judgment ordering the dissolution of marriage that has been registered with the Arbitration Council in Pakistan. Where a Chairman Arbitration Council receives a notice of pronouncement of divorce from a party residing outside Pakistan in terms of section 7(1) of the MFL Ordinance, it will issue a notice to the other spouse for purposes of reconciliation under section 7(4) of the MFL Ordinance. If, after issuance of notice for initiation of reconciliation proceedings, it is brought to the attention of the Arbitration Council that the question of dissolution of marriage is sub judice before a foreign court, where one or both of the parties to the marriage contract reside, the Arbitration Council must stay its hand, just as it would stay its hand if the matter is sub judice before a Family Court in Pakistan. The reason is that the Arbitration Council or its Chairman is not vested with authority in terms of section 13 of CPC to determine if the foreign court's jurisdiction and pronouncements are to be recognized or not.

16. The party seeking the issuance of the divorce certificate by the Arbitration Council would need to bring an action before a court of competent jurisdiction in Pakistan to claim that the foreign court is not vested with jurisdiction in the matter or that its pronouncements are not to be accepted by virtue of any of the exceptions provided under section 13 of CPC. Unless the court of competent jurisdiction in Pakistan rules that the question of dissolution of marriage falls beyond the jurisdiction of the foreign court, or the pronouncements of the foreign court are not to be recognized for falling within exceptions provided in section 13 of CPC, the Arbitration Council must wait for the

issuance of a declaration of dissolution of marriage by the foreign court before issuing a certificate of effectiveness of divorce effective in Pakistan.

17. In the instant matter, the petitioner and respondent No. 1 were married in Pakistan and their marriage was registered in accordance with provisions of the MFL Ordinance in Islamabad. The fact that the petitioner was domiciled in Azad Jammu and Kashmir would not wrest away the jurisdiction of the Chairman Arbitration Council Islamabad, who registered the Nikahnama of the petitioner and respondent No. 2 as the marriage was solemnized in Islamabad. The reasons for this finding have been explained in paras 7 and 8 above. To the extent that the impugned order issued by Chairman Arbitration Council Islamabad refusing to proceed with the divorce recognition proceedings in the instant case due to the petitioner being domiciled in Azad Jammu and Kashmir, such decision was not sustainable in the eyes of law.

18. That the petitioner and respondent No. 2 never established a marital home in Islamabad and proceeded to the United States immediately after their marriage would also not exclude the jurisdiction of Chairman Arbitration Council Islamabad, who remained the repository of the record of marriage registration of the parties, and no other Arbitration Council in Pakistan was vested with jurisdiction in the matter as the parties had not been residing in Pakistan since their marriage, but in the United States instead. Thus, the only Arbitration Council that can issue a divorce certificate effective

in Pakistan, where the dissolution of marriage had been ordered by a court of competent jurisdiction in California, is the Arbitration Council in Islamabad.

19. The petitioner and respondent No. 2 traveled to the United States and were permanently residing there after their marriage. Their marriage was also registered in the United States under the laws of that country. As residents of California, the question of the dissolution of their marriage fell within the jurisdiction of the courts of California. When the petitioner issued a notice to Chairman Arbitration Council Islamabad, after pronouncement of divorce, in terms of section 7(1) of the MFL Ordinance, the question of dissolution of his marriage with respondent No. 2 was pending adjudication before a court in California and the petitioner had submitted to the jurisdiction of such court. In such circumstances, the Chairman Arbitration Council Islamabad, correctly stayed his hand and refused to issue a divorce certificate due to the matter being sub judice before a court in California.

20. Notwithstanding the marital history and details of residence of the contesting parties noted above, it has been acknowledged by the petitioner and respondent No. 2 that the court in California has issued a proclamation with regard to the dissolution of the marriage of the parties during the pendency of the instant petition. Neither party has contested the jurisdiction of the foreign court to do so. It has also not been argued by any party that such pronouncement ought not be given effect in terms of section 13 of the CPC. In these circumstances, there is nothing preventing the Chairman Arbitration Council Islamabad

from issuing a certificate of effectiveness of divorce in terms of section 7(3) of MFL Ordinance, in view of the judgment of dissolution of marriage already issued by a competent foreign court.

21. The petition is therefore **allowed** in the above terms. The parties shall bear their own costs.

(BABAR SATTAR)
JUDGE

Announced in the open Court on **27.09.2024**.

JUDGE

Approved for reporting.

M.A. Raza