

JUDGMENT SHEET
ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT

W.P.No.4032/2021

Mohsin Ali Khan

vs.

Federal Ombudsman Secretariat for Protection against Harassment of
Women at Workplace, Islamabad & another

Petitioner by: Ms. Mehak Ali, Advocate.

Respondent No.2 by: Mr. Shehryar Gondal, Advocate.

Date of Hearing: 25.04.2022.

MOHSIN AKHTAR KAYANI, J: Through this writ petition, the petitioner has called in question order of the Federal Ombudsman Secretariat for Protection against Harassment of Women at Workplace, Islamabad, dated 10.11.2021, whereby respondent No.2 has been allowed to file amended complaint to make things more elaborate with respect to her claim regarding ownership and possession of both immovable and moveable property based on her Nikahnama, dated 24.11.2019.

2. Learned counsel for petitioner contends that Mohsin Ali Khan (*petitioner*) and Syeda Sidra Shah (*respondent No.2*) got married on 24.11.2019, but sooner differences arose between the spouses, which compelled respondent No.2 to file a complaint under the Khyber Pakhtunkhwa Enforcement of Women's Property Right Act, 2019, as such, the said complaint was transferred to Federal Ombudsman Secretariat for Protection against Harassment of Women at Workplace, Islamabad (respondent No.1) for further proceedings, as a result whereof notices were

issued to both the parties, whereby the petitioner appeared before respondent No.1 and disputed its territorial jurisdiction as well as the subject matter, but to no avail, rather respondent No.1 passed the impugned order giving undue favour to respondent No.2.

3. Conversely, learned counsel for respondent No.2 stressed that respondent No.2 tried her best to build a happy home, but the petitioner remained adamant in subjecting respondent No.2 to mental torture, physical abuse and demeaning treatment, as a result whereof, respondent No.2 decided to enforce her lawfully delegated right concerning Talaq-e-Tafweez under clause No.18 of Nikahnama and announced divorce upon the petitioner via a written deed, dated 16.02.2021; that clause No.14 of Nikahnama clarifies that respondent No.2 would be immediately put in possession of the dower as mentioned in Clauses 15 and 16, regarding which respondent No.2 made endless efforts to secure her rights, but to no avail, compelling respondent No.2 to file a complaint under the Khyber Pakhtunkhwa Enforcement of Women's Property Right Act, 2019, which was finally adjudicated upon by respondent No.1 vide the impugned order.

4. Arguments heard, record perused.

5. Perusal of record reveals that petitioner has assailed the jurisdiction of respondent No.1 i.e. Federal Ombudsman Secretariat for protection against harassment of women at workplace for entertaining complaint filed by respondent No.2/Syeda Sidra Shah, which was initially filed before the Ombudsperson, Khyber Pakhtunkhwa, Peshawar in terms of

Section 4 of the Khyber Pakhtunkhwa Enforcement of Women's Property Right Act, 2019, which has been transmitted to Islamabad on the question of jurisdiction, where-after respondent No.1/Federal Ombudsman has proceeded in terms of Enforcement of Women's Property Rights Act, 2020. The background of this case reveals that both petitioner and respondent No.2 were married to each other on 30.11.2019 at Peshawar against dower/Haq Mahar of Rs.500,000/- which is prompt referred in column No.13 with 32 tola gold ornaments referred in column No.15 and property measuring 10 marla house which will be constructed by petitioner in Islamabad or in alternate constructed house will be provided as referred in column No.16.

6. In addition to above, delegated right of divorce (talaq-e-tafweez) referred in column No.18 was also given to respondent No.2, who later on exercised the said right due to acute disparity among the parties wide written deed dated 16.02.2021 in presence of witnesses and served the notice of talaq to the petitioner at District Peshawar, even application before the Arbitration Council has been filed within the said jurisdiction at neighborhood council Marvi where arbitration took place between the parties on different dates but no certificate for effectiveness of divorce was issued by the respective council within prescribed period of ninety (90) days, which persuaded respondent No.2 to file suit titled Syeda Sidra Shah vs. Mohsin Ali Khan and others before Family Court at Peshawar for seeking declaration, decree of divorce by exercising delegated right of divorce with

further direction to the Arbitration Council for issuance of certificate on 28.07.2021.

7. On the other hand, petitioner has also filed suit titled Mohsin Ali Khan vs. Syeda Sidra Shah and others for cancellation of clauses of nikahnama, especially clause 18 of nikahnama pertaining to talaq-e-tafweez before the Civil Court at Peshawar on 31.01.2022. As such both suits are pending before Courts at Peshawar. However, respondent No.2 filed complaint before Ombudsperson, Peshawar which was returned due to lack of jurisdiction vide order dated 14.07.2021, where-after matter has been taken up by respondent No.1/Federal Ombudsman at Islamabad in terms of Section 4 of the Enforcement of Women's Property Rights Act, 2020, which has been assailed in the instant writ petition.

8. Learned Federal Ombudsman at Islamabad has exercised its jurisdiction while considering column No.16 of nikahnama in which it has specifically been written that after nikah petitioner will provide 10 marla house or manage constructed house, otherwise this aspect has been placed in juxtaposition with the concept of property defined in Section 2(e) of the Enforcement of Women's Property Rights Act, 2020 and notices have been issued to the petitioner.

9. The above background persuaded this court to decide the question of legal and territorial jurisdiction at the first instance. No doubt Family Courts Act, 1964 explicitly provided the jurisdiction in terms of Section 5 to the Family Court to adjudicate upon the matters specified in Part 1 of the Schedule including personal property and belongings of a wife at S.No.9.

10. The above referred special subject has to be considered within the exclusive domain of Family Courts Act, 1964, which was promulgated with the object to achieve expeditious settlement and disposal of disputes with regard to marriage and family affairs as held in 2003 CLC 1339 Lahore (Ahmad Din vs. Shama Bibi). The Family Courts Act is silent qua any special procedure and even to exclude the applicability of CPC 1908 and *Qanun-e-Shahadat* Order, 1984 to avoid the lengthy cumbersome procedural intricacy normally provided in civil trial and as such Family Courts Act empowers the Judge Family Court to adopt the procedure as of his choice, in order to meet the situation not visualized in the act applicable as held in PLD 2007 Lahore 425 (Muhammad Din vs. Mst. Aliya Bibi). Even there is no cavil to the proposition that every procedure is permissible unless clear prohibition is found in the law.

11. The legislature has also considerate of the fact that Almighty Allah in *Surah An-Nisa (Ayat No.35)* in Holy Quran prescribed the efforts to be made by induction of one Hakam from the family of husband and one from the family of wife for ultimate reconciliation or compromise, so the family ties between the husband and wife remains intact and this spirit has properly been given effect in terms of Section 10 (pre-trial proceedings) and Section 12 conclusion of trial where compromise or consultation if not possible, the Family Court shall announce its judgment and decree but at the same time Family Court Act has amended through Amending Ordinance LV of 2002, where-after Section 12-A has been incorporated whereby Family Court shall dispose of a case, including a suit for

dissolution of marriage, within a period of six months from the date of institution, this aspect put a heavy responsibility upon the Family Courts to settle the family and matrimonial disputes within shortest possible time but despite that majority of cases relating to women have not been addressed within the prescribed time especially the matter relating to property rights of women which persuaded the legislature in the provinces as well as in Islamabad to enact new law *"to provide for the protection of the rights of ownership and possession of properties owned by women, ensuring that such rights are not violated by means of harassment, coercion, force or fraud"* by way of Enforcement of Women's Property Rights Act, 2020, this new law is the subject matter of instant writ petition, whereby complaint has been filed by respondent No.2 before Federal Ombudsman/respondent No.1 seeking dower mentioned in clauses 15 & 16 of nikahnama. The said terms of nikahnama only provides actionable claim in shape of property rights which has not yet been conclusively identifiable in shape of plot number, street number, sector, area, town, society, etc. rather vague description has been provided in notional way where husband i.e. petitioner undertook to provide such property within marriage contract or after the marriage contract if divorce took place, as such there is no denial that parties have already been locked in litigation at Peshawar on the same subject matter.

12. Now question arises as to whether when property is not identifiable, Federal Ombudsman at Islamabad can exercise its jurisdiction on complaint filed by respondent No.2 in terms of *the Enforcement of Women's*

Property Rights Act, 2020. In order to understand the proposition, provision of Section 4 is reproduced as under:-

4. *Complaint to the Ombudsman in case no proceedings in a court of law are pending.* (1) *Any woman deprived of ownership or possession of her property, by any means, may file a complaint to the Ombudsman if no proceedings in a court of law are pending regarding the property:*

Provided that the Ombudsman, on its own motion or on a complaint filed by any person including a non-governmental organization, may also initiate action under sub-section (1) in relation to the ownership or possession of a woman's property, if no proceedings are pending in a court in respect of that property.

(2) *The Ombudsman shall make a preliminary assessment of the complaint filed under sub-section (1) whereafter he may, if the matter requires further probe or investigation, refer the matter to the concerned Deputy Commissioner, who, after calling the record, if necessary, and issuing notices to the complainant or her adversaries, conduct a summary enquiry and submit a report within fifteen days to the Ombudsman.*

(3) *If the matter does not require any detailed probe, investigation or recording of evidence, the Ombudsman may, after calling any record, if deemed necessary, pass orders under section 5.*

(4) *The Ombudsman upon receiving the report under sub-section (2), may further conduct such summary enquiry and call for such record as he may deem fit.*

(5) *The Ombudsman after confronting the report of the concerned Deputy Commissioner and the conclusion and findings of his own enquiry, shall call upon the complainant and her adversaries to submit objections, whereafter he may conduct a hearing and pass orders under section 5, preferably within sixty days of receipt of the complaint under sub-section (1).*

13. From the plain reading of above referred provision, it appears that firstly a woman who is deprived of the ownership or possession of her property, this aspect highlights the unconditional, clear right to property

but such aspect is not available in column No.16 of nikahnama rather it is unconditional right to seek a property, therefore, there is a mark difference between these two. When the property is not identifiable then party i.e. in this case respondent No.2, who has filed suit before Family Court on the basis of nikahnama to exercise her right on the basis of dower which has duly been protected though the terms of nikahnama are already subject matter before Civil Court, therefore, this court is not in position to further highlight or interfere in that part of nikahnama, which has yet to be adjudicated by the court of competent jurisdiction.

14. Primarily *the Act of 2020* has been enacted for the protection of property rights of a woman so that she may not be harassed, coerced, forced or fraud may not be played with her but this Act is silent qua the actionable claim. In such scenario, the procedure provided in Section 4 of the Act reveals that Federal Ombudsman shall make a preliminary assessment of the complaint and if Ombudsman come to conclusion to further probe or investigation is required, the matter be referred to Deputy Commissioner concerned after calling the record including the adversaries to conduct summary enquiry. However, if everything is admitted and conclusively available on record the Ombudsman may pass an order but in this case when property description is not available, there is no tangible property available in ICT, the Deputy Commissioner or Federal Ombudsman, as the case may be, are not in position to compel the petitioner to handover any property of 10 marla within ICT.

15. No doubt the law in this case has been promulgated with intent to protect the rights of a woman, however, Section 6 provides reference to court concerned if the Ombudsman comes to the conclusion that the matter requires in-depth enquiry, investigation or detailed recording of evidence or intricate adjudication, a reference be filed. Similarly, Section 7 deals with the cases which are pending before competent court of law in relation to ownership or possession of any property claimed to be owned by a woman, this aspect highlights the concurrent and simultaneous proceedings of the Family Court alongwith Ombudsman. As such there is no restriction or bar available to proceed further under this Act though Section 11 of the Act further extends the jurisdiction to the Ombudsman by restricting the jurisdiction of court or other authority to question the validity of any action taken, or intended to be taken, or order made, or anything or purporting to have been taken, made or done under this Act. The cumulative interpretation of the Enforcement of Women's Property Rights Act, 2020 if read in conjunction with Family Courts Act, 1964, it appears that both are special legislation having overlapping jurisdiction on the subject of property belonging to a woman. In such scenario, the rule of interpretation of statute lays down the principles to deal with such delicate issues on the basis of principle of harmonization.

16. It is the rule that incorporated law in existence viz. a viz. the new law on the subject has to be given harmonious and consistent meaning though primary rule is that statute which is complete in nature is to be construed according to its own terms and not with reference to another

statute to whittle down beneficial provision of the former. Similarly, the statute later in time ordinarily prevails as held in PLD 2021 ICT 378 (Sui Southern Gas Company Ltd. vs. Oil and Gas Regulatory Authority).

17. This court is mindful of the fact that it is duty of this court while interpreting these two special laws, have to see other factors including object, purpose and policy of both statutes as well as intention of legislature in order to determine which of the two special laws prevail and is applicable as held in PLD 2018 ICT 372 (Shifa International Hospital Ltd. vs. Mst. Hajira Bibi), 2017 CLD 1198 (Syed Mushahid Shah vs. Federal Investment Agency).

18. There is another principle that in case of conflict between two laws, generally the statute later in time would prevail over the statute prior in time, said presumption, however, was not automatic, instead a host of other factors including the object, purpose and policy of both statutes and the legislature's intention, as expressed by the language employed therein, needed to be considered in order to determine which of the two special laws was to prevail as held in Syed Mushahid Shah case supra. Similarly, non obstante clause was also not to be given overriding effect in a mechanical fashion as underlying object of interpretative project undertaken by court was to discover meaning of words used by Legislature and a non-obstante clause was usually employed to suggest that a provision referred to in such clause was to prevail over other provisions of a statute, but repugnancy between non-obstante clause and other clause was not to be presumed and overriding effect was to be

accorded only in case of irreconcilable conflict as held in 2021 PTD 1203 (Messer Federal Bank for Cooperatives, Islamabad vs. Commissioner of Income Tax, Companies Zone, Islamabad).

19. This court while comparing the two special laws meant to protect the women comes to conclusion that Section 5 of the Family Court Act, 1964 has conferred the exclusive jurisdiction upon family court to entertain, hear and adjudicate upon the matters specified in Part 1, Schedule of the Act if read with the Family Court Rules 1965. The question of territorial jurisdiction has also been settled under Rule 6 on the basis of cause of action wholly or in part has arisen or where the parties reside or last resided together. Provided that in suits for dissolution of marriage or dower the courts within the local limits of which the wife ordinarily resides shall also have jurisdiction. This aspect extend complete protection to the woman even if she shifts from one place to other the jurisdiction must flow with her rather it is a choice based concept. The proviso by very nature of its language is an enabling provision and is for benefit of wife. Similarly the term ordinarily resides in the above mentioned rules has also been explained in PLD 1976 Karachi 978 (Mahbub Ahmad vs. First Additional District Judge) and even the word ordinarily means more than mere temporary residence, hence, the suit for maintenance, personal property, belongings of wife, custody of children can also be instituted in Family Court where wife resides as held in PLD 2005 SC 22 (Muhammad Iqbal vs. Parveen Iqbal). And the Apex court has conferred the exclusive territorial jurisdiction to the Family Court where wife resides in all such matters

under the Family Court Act as settled in PLD 2016 SC 613 (Mst. Yasmeen Bibi vs. Muhammad Ghazanfar Khan), PLD 2012 SC 66 (Major Muhammad Khalid Karim vs. Mst. Saadia Yaqub). This complete code known as Family Court Act, 1964 read with its rules and the interpretation given by the Apex Court covers each and every aspect to protect the rights of a woman therefore, the new law i.e. the Enforcement of Women's Property Rights Act, 2020 in ICT could not be equalized and applied to the property situated outside the territorial jurisdiction of ICT, nor it is applicable to those women/complainants who are residing outside the ICT and claiming their property rights beyond ICT. However, as of today the rules have not been prescribed in terms of Section 2(b) of the Act, therefore, the gray areas have not yet been settled by the Federal Government having exclusive authority to make the rules to carry out the purpose of this Act in terms of Section 12 of the Act but primarily this special law of Act of 2020 is not in derogation with the Family Court Act, 1964 rather considered to be in addition to as the very purpose is to ensure and to protect the rights of ownership and possession of properties owned by women through a different mechanism.

20. By applying the above referred principles, this Court comes to the conclusion that the Enforcement of Women's Property Rights Act, 2020, though has no overriding clause, except that jurisdiction of other courts and authorities are barred to the extent of questioning the validity of action taken, or intended to be taken or to grant an injunction or stay or to make any interim order in relation to any proceedings before, or anything done

or intended to be done, or under the orders or at the instance of the Ombudsman. In such scenario, the comprehensive law is Family Courts Act, 1964, which not only provides the complete mechanism rather bars the jurisdiction of all other courts by providing exclusive jurisdiction on ten (10) subjects referred in Part 1 of the Schedule of the Act, therefore, this Court comes to the following view for the purpose of elucidating the issue:-

- (a) When any matter specified in Part 1 of the Schedule of Family Court Act, 1964 is pending with competent Family Court among spouses or ex-spouses on a property issue, which is claimed by either party on the basis of terms referred in nikahnama or otherwise, territorial jurisdiction has to be settled under the Family Court Act, 1964, however, if any complaint has been filed by a woman for protection of her rights of ownership and possession of property (moveable or immovable) within ICT under the Enforcement of Women's Property Rights Act, 2020, she must demonstrate that she owns or possess any property within the territorial jurisdiction of ICT, otherwise complaint is not entertain-able.
- (b) No complaint is entertain-able if the parties are married to each other in some other district, living outside the territorial jurisdiction of ICT and litigation is also pending in other district, the complaint should have been filed within that district only under the provincial laws, if enacted.

- (c) The Enforcement of Women's Property Rights Act, 2020 only covers those properties which are agreed to be given with clear terms within ICT, however, mere mentioning of a property within nikahnama without its clear description in terms of clause 16 will not extend the jurisdiction to Federal Ombudsman at ICT to exercise its jurisdiction as well as when the subject *lis* is pending with the court in any other district unless the Family Court in that district grants permission to proceed with the complaint through a speaking order.
- (d) Any woman can file a complaint under Enforcement of Women's Property Rights Act, 2020 who owns any property in Islamabad Capital Territory by way of registered sale deed, mutation, allotment letter, provisional allotment letter or through any other legal instrument, through which a property rights are conveyed to her with specific details and description, which has been taken over by force or by way of fraud or through any other mode and mean against the legal rights of a woman, the Ombudsman shall have the jurisdiction to restore the rights of such a complainant/woman by exercising her authority in joint collaboration with Deputy Commissioner of Islamabad Capital Territory and other state agencies by treating the same as a complaint.

21. For what has been discussed above, the instant writ petition is ALLOWED as the Federal Ombudsman at Islamabad has no jurisdiction to

entertain the complaint of respondent No.2 Syed Sidra Shah qua the property referred in her Nikahnama, which is yet to be conferred through the judgment of the Family Court at Peshawar. Consequently, the complaint filed by respondent No.2 before the Federal Ombudsman Secretariat for Protection against Harassment of Women at Workplace, Islamabad is not *maintainable*.

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on: 20.05.2022.

JUDGE

APPROVED FOR REPORTING

Zahid.