Date of hearing: 28.1.2021.

Judgment

The above titled writ petition has been filed under Article 44 of Azad Jammu and Kashmir Interim Constitution, 1974 to quash F.I.R number 98/20, dated 26.08.2020, registered at police Station Kahori in the offence of 10, ZA and 494, APC against petitioner and other co-accused, and petitioner also sought direction against competent authority to initiate proceedings against Respondents No. 1, 3, and 4 according to prescribed procedure regarding illegal, unlawful and baseless impugned FIR.

2. Brief facts of the case are that complainant Nisar Ahmed filed an application before Police Station Kahori alleging therein that he contracted marriage on 22.12.2006 with Saiqa Bibi. He alleged that accused Muhammad Tasveer developed illicit relations with her wife, against which a criminal case is subjudice before Tehsil Criminal Court Patika. Due to said case, Saiqa Bibi instituted a suit for dissolution of marriage against complainant before Family Court Naseerabad, which was dismissed on 24.09.2019. An appeal was filed before this court against the judgment of Family Court, which was accepted and decree for dissolution of marriage on basis of 'khula' was granted in favour of Saiqa Bibi in consideration of dower amounting Rs. 100,000/-. It is further alleged that without payment of 'Khula' amount to the complainant, accused Saiqa Bibi married with Mohammad Tasveer accused and accused Saiqa Bibi and Mohammad Tasveer are committing Zina, hence craved that a criminal case may be registered against accused Tasveer, Saiqa, Muhammad Nazir, Muhammad Tanvir, Muhammad Tariq, Zakir Feroz, Abdul Majeed, Shoukat Hussain, Naseer Ahmed and Ghulam Sarwar. Upon which a case under Section 10,ZA and 494, APC was registered against the aforementioned accused at Police Station Kahori on 26.08.2020.

3. The petitioner has challenged the validity and legality of aforesaid FIR through the instant writ petition.

4. This petition was admitted for regular hearing on 20.10.2020. Written statement has been filed on behalf of respondents wherein it is contended that in light of Nikah-nama dated 22.12.2006 as well as judgment of Shariat Appellate Bench of this Court and Fatwa issued by Tehsil Mufti, the proforma-Respondent No. 7 is still wife of the answering-respondent. In presence of previous Nikah she has no right to enter another marriage tie which is not only against sharia but also against the law of land. Therefore, preparation of another Nikah Nama and the resulting relationship are defined as a cognizable offence, when such a case arises, the investigation of the case is the requirement of law, therefore, writ petition is liable to be dismissed under the circumstances.

5. Raja Muhammad Altaf Khan, the learned counsel for the petitioner reiterated the facts narrated in the petition and argued that decree for dissolution of marriage has been granted in favour of Saiqa Bibi proforma-Respondent No. 7 on 30.01.2020 and she contracted her subsequent Nikah on 18.05.2020, hence, no offence whatsoever is made out. He contended that two notable person of locality namely Nisar S/o Abdul Majeed and Muhammad Ikhlaq Abbasi S/o Abdul Raheem went to the home of Respondent No. 3 and discussed about the 'Khula' amount as well as dowry articles after discussing this matter both the parties decided to restrain from receiving any sort of amount, whereas, 1 lac rupees amount regarding dowry articles was payable by Respondent No. 3. He further contended that Nikahnama of proforma-Respondents No. 6 and 7 is still intact which is duly registered by the competent authority and Respondent No. 3 never challenged the Nikah-nama of proforma Respondents No. 6 and 7, therefore in the presence of Nikah-Nama, Respondent No. 1 was not competent to register impugned FIR. The learned counsel zealously contended that the non-petitioners completely failed to deny ground B of the petition, which is evasive denial and amount to admission of the averment, in this context the learned counsel referred 2014 SCR 1549 and 2000 SCR 404 and also referred Order VIII Rule 3. The learned counsel prayed for acceptance of the writ petition.

6. Syed Sharafat Hussain Naqvi, the learned counsel for complainant-Respondent No. 3 while controverting the arguments of the learned counsel for the petitioner contended that impugned FIR has been lodged in accordance with law. He contended that the decree for dissolution of marriage on basis of 'Khula' cannot be effected upon until the khula amount is not paid to husband and in absence of same, the Nikah of Respondent No. 3 is still intact, whereas in presence of 1st Nikah, subsequent Nikah is against the sharia law and FIR is correct under the circumstances. He argued that this is the matter of fact which cannot be resolved through this constitutional petition. He further (sic) law is shown but each case has to be judged on its own peculiar facts and circumstances. High Court has power to quash the criminal proceedings if satisfied that a false complaint has been brought on record as it is necessary to prevent abuse of process of the Court.

9. From perusal of record revels that real-Respondent No. 3 and proforma Respondent No. 7 contracted marriage on 22.12.2006 in lieu of dower Rs. 1,00,000/- (one lac rupees). Later on the petitioner alleged the proforma Respondent No. 6 for having illicit relations with proforma-Respondent No. 7 due to which relations between spouses became strained. The proforma-Respondent No. 7 namely Saiqa Bib filed a suit for dissolution of marriage before Judge Family Court, Naseerabad, against Respondent No. 3 which was dismissed while Respondent No. 3 also filed suit for restitution of conjugal rights which was decreed in his favour, however, being aggrieved from the judgment proforma Respondent No. 7 filed an appeal before this Court. This Court *vide* judgment dated 30.01.2020 set aside the decree of restitution of conjugal rights and passed the decree of dissolution of marriage on the ground of 'Khula' in consideration of dower Rs. 1,00,000/-, however, same has not been challenged before upper forum, therefore, the same has attained finality. After completion of Iddat period and attaining finality of judgment and decree proforma Respondents Nos. 6 & 7 contracted Nikah. Respondent No. 3 moved an application before SHO Police Station, Kahori, against proforma Respondents No.

dismissed the application *vide* order dated 23.07.2020. Later on Respondent No. 3 got a Shari Fatwa from Tehsil Mufti and got register the FIR No. 98/2020 at Police Station, Kahori in offences under Sections 10 of the Offences of Zina (Enforcement of Hadd) Act, 1985 and 494, PC. Moreover, from perusal of record reveals that two notable person of locality namely Nisar s/o Abdul Majeed and Mohammad Akhlaq Abbasi s/o Abdul Raheem went to the home of Respondent No. 3/complainant to discuss about the 'Khula' amount as well as dowry articles and after discussing about this matter both parties decided to restrain from receiving any sort of amount, whereas one lac amount regarding dowry articles was outstanding against Respondent No. 3 which fact was supported from the affidavits executed by Shoukat Hussian s/o Ghulam Hussain, Mohammad Akhlaq Abbasi s/o Abdur Rahim Abbasi and Nisar Ahmed s/o Abdul Majeed Abbasi.

10. I am aware of the fact that exercise of powers under extraordinary writ jurisdiction are very limited and can be exercised only in extraordinary circumstances where there is violation of law or principle of law are found.

11. However, as impugned F.I.R has been registered in offence under Sections 10,Z.A and 494, PC on the Fatwa of Tehsil Mufti, Muzaffarabad. Fatwa of Tehsil Mufti is reproduced as under:

از دفتر تحصیل مفتی مظفر آباد
نمبر ت م م/356 مورخہ 13 اگست 2020ء
عنوان:- شرعی فتویٰ۔
السلام علیکم۔
معاملہ عنوان الصدر میں زیر نمبر ض م م/496 مورخہ 16.7.2020 کو ارسال کردہ مکتوبات کے مطابق شرعی حکم تحریر ہے کہ :
1- مجاز عدالت نے خلع کی جورقم مقرر کی گئی ہے جب تک ملزمہ صائقہ ادا نہیں کرے گے تب تک نثار احمد کی بیوی ہے۔
2- خلع کی رقم جو مجاز عدالت نے متعین کی ہے جب صائقہ ادا کرے گی تو اس کے بعد وہ شوہر اول نثار احمد کی عدت پوری کرے گی۔
3- نثار احمد کی عدت پوری کرنے کے بعد عورت جہاں چاہے گی عقد ثانی کر سکتی ہے۔
4- از عدالت کے سامنے اگر یہ بات ثابت ہو جاتی ہے کہ ملزمہ صائقہ نے خلع کی رقم ادا کئے بغیر یا عدت پوری کئے بغیر تصویر حسین نےنکاح کیا ہے تو یہ نکاح درست نہیں ہے۔ مجاز عدالت بعد از ثبوت زناء ایکٹ کے ملزمان کو سزا دے سکتی ہے۔
1- بحوالہ سورۃ البقرہ آیت نمبر 229 "الطلاق مرتن فامساک بمعروف او تسریخ باخسان۔
2- سورۃ البقرۃ آیت نمبر 228 "والمطلقت یتربصن بالنفسھن تلثتہ قروء۔
3- سورۃ النورآیت نمبر 02 "الزانیتہ والزانی فاجلدوا کل واخد منہما ماءۃ جلدۃ۔

The aforesaid Fatwa reveals that it was issued on the proposed question of some interested party and on the basis of this Fatwa, FIR was registered. Fatwa was issued conditionally in which it was mentioned that if it is found proved before a competent Court that Mst. Saiqa has not paid amount of 'Khula' and without payment of 'Khula' or without completion of Iddat period contracted Nikah with Tasweer Hussain, the said Nikah is not correct and competent Court can punish the accused under the Zina Act after proving the offence. The word Zina has been defined in Section 4 of the Offence of Zina (Enforcement of Hudood) Act, 1985 which is as under:

"A man and woman are said to commit Zina if they willfully have sexual intercourse without being validly married to each other."

12. It may be mentioned here that Fatwa was issued on the specific question of complainant and the learned Tehsil Mufti answered the question. A Shari Fatwa should always be based upon Quran, Hadiths, and Fiqa or any other relevant source but in the above mentioned Fatwa the learned Tehsil Mufti mentioned verse No. 229 of Sura-e-Baqarah which provides the base for 'Khula' as under:

"بحوالہ سورۃ البقرہ آیت نمبر 229 ترجمہ: "یہ طلاق دوبار تک ہے پھر بھلائی کے سات روک لینا ہے یا انکو (بھلائی، عمدگی) کے ساتھ چھوڑ دینا ہے۔"

Whereas verse No. 228 of the same Sura has been mentioned as reference which relates to the question of Iddat which is as under:

سورۃ البقرہ آیت نمبر 228 ترجمہ: اور طلاق ولیاں اپنی جانوں کو روکے رہیں تین حیض تک۔

The basic question on which the learned Tehsil Mufti should give Fatwa was regarding non-payment of 'Khula' and its effects on decree of 'Khula' issued by the Court. The learned Tehsil Mufti without mentioning any Shari or legal backing gave his opinion and directed the Court to convict/punish the accused. It is pertinent to mention here that such like direction for conviction or acquittal of a person cannot be issued even by the Apex Court. In the AJK, Islamic Tazeerati Laws are enforced and the Courts are established consisting of two members, *i.e*. a Judge and Qazi. From the record it reveals that registration of FIR was refused by the SHO and later on the application under Section 22-A,Cr.P.C for registration of case was also rejected by Justice of Peace. It was enjoined upon the SHO concerned to bring into the notice of the learned Tehsil Mufti about the whole proceedings previously done before registration of FIR. In presence of judicial system no parallel system can be allowed under any umbrella. Fatwa on which the FIR got registered, was issued unilaterally and the issuing authority also recommended for the conviction of accused which is also against the golden principle of Islam regarding criminal justice. The Fatwa should always be based upon general principle of Shariah and Fiqa on special issue and when a question was raised regarding specific person, opinion should be avoided without hearing the other party and the parties should be directed to approach the Court and such Fatwa should be issued by considering the sect of the party because in Family matters different schools of thought have different opinions. It is necessary to mention here that according to schedule II of Rules of Busness 1985, department of Ammer Bil Mroof-wa-Nahi-Anil-Mankar, is competent to issue Fatwas and at the same time it is the duty of the department to regularize the matters of Nikkah Kanwani. In the light of Rules of Business 1985, it was the duty of the learned Tehsil Mufti to cancel the registration of Nikah if it was against the injunction of Islam but the learned Tehsil Mufti issue Fatwa only upto the question of a party. It is further recommended that the rules shall be framed regarding issuance of Fatwa by the department.

13. It is also worthwhile to mention here that question of non-payment of 'Khula' was brought before the Apex Court of Pakistan and Hon'ble Supreme Court of Pakistan in plethora of cases declared it as civil right of the husband. In case reported as *"Aurngzeb v. Mst. Gulnaz and another"* [PLD 2006 Karachi 563] It observed as under:

"The contention of the petitioner that 'Khula' cannot be granted without restitution of dower is not tenable in law. The view taken by the Family Court is not only consistent with the view taken in the cases of *Mst. Saiqa v. Additional District Judge, Rawalpindi* PLD 2003 Lahore 70 and *Manawar Iqbal Satti v. Mst. Uzma Satti and others* 2003 YLR 599 Lahore, referred to in its judgment, but is also in accord with the judicial opinion expressed in many other judgments of the Superior Courts.

In his landmark judgment in *Mst. Balqis's case* PLD 1959 (W.P) Lahore 566, which was first of its kind in the field of family laws in Pakistan, B.Z.Kaikaus, J. speaking for the full Bench observed in paragraph 24 at page 582 of the report:

"Islam does not enforce on the spouses a life devoid of harmony and happiness and if the parties cannot live together as they should, it permits a separation. If the dissolution is due to some default on the part of the husband, there is no need of any restoration. If the husband is not any way at fault, there has to be restitution of property received by the wife and ordinarily it will be of the whole of the property but the judge may take into consideration reciprocal benefits received by the husband and continuous living together also may be a benefit received."

In the case of *Mst. Shamshad Begum v. Abdul Haque alias Nawaz and 2 others* PLD 1977 Karachi 855 a Division Bench of this Court, referring to verse 20 of Sura-ul-Nisa and opinion expressed in "Radd-ul-Mukhar" observed that it was not lawful for a husband to take back anything from his wife particularly when 'Khula' was due to some fault on his part. In the case of *Mst. Razia Begum v. Saghir* NLR 1982 SC 104 Karachi, Saleem Akhtar,J. (as his Lordship then was) held that after dissolution of marriage on the ground of 'Khula' a decree for unpaid dower could validly be passed as it was not necessary to forgo dower in lieu of 'Khula'. In the case of *Dr. Akhlaq Ahmed v. Mst. Kishwar Sultana and others* PLD 1983 SC 169, the Hon'ble Supreme Court, was pleased to hold that non-restoration of consideration for 'Khula' did not invalidate the dissolution of marriage by 'Khula' and once the Family Court came to the conclusion that the parties could not remain within the limits of God, the dissolution must take place and the inquiry and finding with regard to the benefits to be returned by the wife to the husband would only create civil liabilities upon the wife and

would not have any effect upon the dissolution itself.

Thus, the consensus of judicial opinion is that restitution of dower is not an indispensable condition for the grant of 'Khula' and non-restoration of dower and other benefits will not have any effect upon validity of the decree. Once the Family Court comes to the conclusion that a wife was entitled for 'Khula' it must pass such decree in her favour. The decision regarding the restoration mutual benefits will have to be taken in the light of facts of each case and it will have the effect of only creating civil liability. If the conclusion of the petitioner that 'Khula' cannot be granted without restitution of dower and other benefits is accepted, then a destitute wife, who is found otherwise entitled to "Khula", will stand deprived of the right simply because of her incapacity to return the benefits, which will be highly unfair and against the spirit of law and justice. (Underlining is mine)

The same proposition has been resolved by the Hon'ble [Supreme Court (AJ&K] in a case reported as 2000 YLR 2519, wherein it has been held that:

"Non-compliance of wife to return benefits received by her to her husband within the stipulated time would not adversely affect the factum of the dissolution of marriage on the basis of "Khula". In view of the findings of the Courts that spouses could no more live within the limits ordained by the God, the marriage stood dissolved and return of benefits by wife to husband remained merely liability of civil natures which could be enforced by the husband through appropriate means."

(Underlining is mine)

14. In the instant case, it was also alleged that the payment of 'Khula' amount was adjusted by the dowry articles in the Court of Family Judge and the affidavits of the witnesses are also annexed with the petition.

15. The petitioner as well as complainant has affirmed the Nikah-nama dated 18.05.2020 and after this Nikah pro forma Respondents No. 6 & 7 are living as husband and wife which is sufficient proof of valid marriage. According to principle of Muhammadan Law the presumption of valid marriage can be ascertained from the fact of acknowledgment by a man or woman as husband and wife. The marriage has been protected by the Interim Constitution, 1974. In this regard Article 3(G) of the Constitution is relevant which is as undser:

3-G Protection of family, etc.--The State shall protect the marriage, the family, the mother and the child.

16. Keeping in view the circumstances of the case Courts are bound to protect the Family life of State subjects. While resolving the similar proposition Hon'ble Apex Court in a case titled *"Qamar Pervaiz and another vs. State"* (PLJ 2017 SC (AJ&K) 84), has held that:

"It is the duty of the court to protect the family life in genuine cases. We are conscious of the fact that Police cannot be

restrained from performing its statutory duty of investigation of the cases registered in cognizable offences but the fact remains that when the parties are husband and wife, their version is supported by duly registered Nikahnama and there is no counter version regarding Nikah, then in such circumstances, the offences of Zina cannot be said to have been committed and registration of the case as well as continuation of investigation in such circumstances can safely be termed as *mala fide* and without lawful authorities."

In the light of facts stated above, the criminal proceedings cannot be initiated against the proforma Respondents Nos. 6 & 7. In these circumstances the offences as alleged in the FIR are not made out and continuance of further proceedings against the spouses may amount to unnecessary harassment, hence continuation of proceeding in the FIR in question is a futile exercise and the same is liable to be quashed, therefore, the instant writ petition is hereby accepted and impugned F.I.R. No. 98/2020 registered at Police Station, Kahori on 26.08.2020, in offences under Sections 10 of the Offence of Zina (Enforcement of Hadd) Act, 1985 and 494, PC is hereby quashed.

(Y.A.) Petition accepted