

2017 C L C 1170

[Balochistan]

Before Mrs. Syeda Tahira Safdar and Syed Anwar Aftab, JJ

NAEEM SHER TAREEN----Petitioner

Versus

BEENISH ALI and 4 others----Respondents

C.P. No.951 of 2016, decided on 14th March, 2017.

Family Courts Act (XXXV of 1964)---

---S. 10(4) & Schd. S.5---Constitution of Pakistan, Arts.199, 203-D & 203-G---Constitutional petition---Repugnancy to Injunctions of Islam---Scope---Dissolution of marriage---Petitioner challenged the validity of S.10(4) of the Family Courts Act, 1964 and impleaded the Parliament--
-Validity---Government, through Secretary concerned, was relevant if some legislation was in question---Vires of legislation could be subject to judicial review by Superior Courts, but such power was subject to jurisdiction as conferred by the Constitution---In the present case, petitioner had questioned S.10(4) of the Family Courts Act, 1964 alleging the same to be contrary to the Injunctions of Islam---Petitioner missed relevant provisions of the Constitution which specifically placed bar on the jurisdiction of High Court in such matter---Article 203G of the Constitution placed a bar on jurisdiction of any court, including Supreme Court or High Court, to entertain any proceedings or exercise any power or jurisdiction in respect of any matter lying within the power or jurisdiction of the Federal Shariat Court---Article 203D of the Constitution dealt with the powers and jurisdiction vested with the Federal Shariat Court---Power to examine and decide the question whether or not any law or provision of law was repugnant to Injunctions of Islam or Holy Quran or Sunnah were included in Art.203-D of the Constitution---High Court lacked jurisdiction in the matter---Constitutional petition was dismissed accordingly.

Surat Khan Khethran for Petitioner.

Nemo for Respondents.

Date of hearing: 21st November, 2016.

ORDER

MRS. SYEDA TAHIRA SAFDAR, J.--- The petition was filed with the facts that the respondent No.1, his wife, without his permission and in exercise of her free will left his house along with their minor daughter leaving behind two sons, and proceeded to Islamabad, where she approached the Family Court for an order to dissolve her marriage on the basis of Khula. The petitioner sought transfer of the case from the files of Family Judge, Islamabad to Quetta. In

addition questioned Section 10(4) of the Family Courts Act, 1964. The petition was with the prayer:

"that this Hon'ble Court may kindly be pleased to declare the impugned amendment dated 01.10.2002 added through Ordinance LV of 2002 in the section 10(4) of West Pakistan Family Courts Act, 1964, as illegal, ultra vires, contrary to the requirement of Constitution as well as beyond from the scope of Sharia and Islam.

Further respectfully prayed, that this Hon'ble Court may kindly be pleased to restrain the Family Courts from application of proviso provided in section 10(4) of West Pakistan Family Courts Act, being ultra vires.

Further, this Hon'ble Court may kindly be pleased to issue direction to respondents Nos.2 to 4 to make enactments of laws in accordance with Constitution, Sharia and Islam.

Further, this Hon'ble court may kindly be pleased to direct all the Family Courts, to consider cases of dissolution of marriage only within scope of Dissolution of Muslim Marriages Act, 1939 and grounds there under.

Further, this Hon'ble Court may kindly be pleased to direct transfer of Family case pending before the Family Judge, Islamabad titled "Beenish Ali v. Naeem Sher Tareen" here at Quetta, with any other relief which this Hon'ble court deems fit and proper may also be granted, in the interest of justice."

2. There was an objection on maintainability of the instant petition by the office, but the learned counsel before addressing the objection, filed an application (CMA No.2374 of 2016) with a prayer to implead the Law and Justice Division Islamabad as respondent No.6.

3. The learned counsel for the petitioner pressed maintainability of the instant petition while contending that the referred to provision of the Family Courts Act, 1964, was against the mandate of Islam, thus to be amended as required by the Constitution that there shall be no law against the injunctions of Islam.

4. The plain reading of the instant petition reveals that the petitioner in fact aggrieved of filing of a family suit by respondent No.1 for the purpose to dissolve the marriage tie between her and the petitioner by pressing her right of Khula. The case was pending before the Family Court at Islamabad and the petitioner sought transfer of the case from Islamabad to Quetta through the instant petition. Instead of seeking the relief he challenged the validity of the law, thus apart from his wife Beenish Ali, President of Pakistan, National Assembly and Senate of Pakistan were placed in the list of respondents. The learned counsel was asked that whether the President of Pakistan was a proper party in presence of Article 248 of the Constitution, and whether National Assembly and Senate of Pakistan are the legal persons and could be placed into list of respondents? He was further asked to address whether a writ could be issued against them in terms as prayed? It was his reply that the power to make law and to amend it surely lies with the ambit of National Assembly and Senate of Pakistan and promulgated with the assent of the President, thus they were the necessary parties and were impleaded properly.

5. The learned counsel was under some misconception. It might be the relevant Government through Secretary concerned if some legislation is in question. In addition it is a settled law that the vires of legislation are subject to judicial review by Superior Courts, but this power is subject to the jurisdiction as conferred by the Constitution. In the case in hand the petitioner basically questioned Section 10 subsection (4) of the Family Courts Act, 1964 while holding it contrary to the injunctions of Islam. The remaining reliefs are dependent on result thereof. The learned counsel missed the relevant provisions of the Constitution which specifically placed a bar on jurisdiction of a High Court in the matter. Article 203G of the Constitution placed a bar on jurisdiction of any court, including Supreme Court or High Court, to entertain any proceedings or exercise any power or jurisdiction in respect of any matter lies within the power or jurisdiction of the Federal Shariat Court. While Article 203D of the Constitution deals with the powers and the jurisdiction vests with the Federal Shariat Court. The power to examine and decide the question whether or not any law or provision of law is repugnant to injunction of Islam or Holy Quran or Sunnah included in the referred to Article. In view of this specific provision this court lacks jurisdiction in the matter.

As far the request for transfer of suit from Islamabad to Quetta, the only object behind filing of the instant petition, is concerned, the court concerned working beyond the territorial jurisdiction of this Court, thus there could be no order to this extent also.

The petition is dismissed for the reasons.

MQ/42/Bal.

Petition dismissed.