

Before Mrs. Syeda Tahira Safdar, J

MUHAMMAD ISHAQ and another---Petitioners

Versus

Mst. ANIQA BATOOL---Respondent

Civil Revision No.105 of 2005, decided on 28th December, 2011.

Specific Relief Act (I of 1877)---

---Ss. 39, 42 & 54---West Pakistan Family Courts Act (XXXV of 1964), S.5, Sched & S.20--
-Muslim Family Laws Ordinance (VIII of 1961), S.5---Civil Procedure Code (V of 1908), S.
9---Suit for declaration, cancellation of alleged marriage deed and permanent injunction---
Deed and its affidavit bearing signatures of plaintiff regarding performance of her marriage
with defendant were alleged by her to have been got executed by him fraudulently on pretext
of publishing same in a Urdu Magazine while she was being tutored by him; and that
defendant later on with ulterior motive converted such documents into a marriage deed in
order to claim her to be his legally wedded wife---Defendant's objection was that jurisdiction
to cancel such documents and grant declaration as prayed for vested only in Family Court and
not civil court--Validity---Existence of marriage between Muslim spouses could be
established only by "Nikahnama" showing performance of "Nikah" between them---Provision
of S. 5 of Muslim Family Laws Ordinance, 1961 required registration of "Nikahnama"---
Documents in question were in respect of an agreement for performance of marriage and had
no bearing on fact of existence of a valid marriage between the parties, thus, same would not
be deemed to be a "Nikahnama"---Only civil court had jurisdiction to entertain such suit and
grant decree prayed for---Objection of defendant was overruled in circumstances.

Messrs Burewala Textile Mills Ltd. v. Messrs Abdullah Industries 1987 MLD 19; Mst Bibi
Feroz v. Abdul Malik and another 2005 YLR 976; Muhammad Iqbal v. Mst. Siani and
another 2004 PCr.LJ 193; Rasool Bibi v. Waryam 1992 SCMR 1520; Rao Muhammad

Akhtar Ali v. Faiz Ahmed 1980 SCMR 568; Dr. A.L.M. Abdullah v. Rokeya Khatoon PLD 1969 Dacca 47; Muhammad Azam v. Muhammad Iqbal PLD 1984 SC 95; Shah Din v. The State PLD 1984 Lah. 137; Abdus Sattar v. The State 1968 PCr.LJ 290; Farmanullah v. Qadeem Khan 2001 SCMR 1474 and Muhammad Gul v. Anwar Gul 2005 SCMR 1914 ref.

Nemo for Petitioners.

Ch. Mumtaz Yousaf for Respondent.

Date of hearing. 5th October, 2011.

JUDGMENT

MRS. SYEDA TAHIRA SAFDAR, J.---Through instant petition the petitioners have assailed judgment dated 27th March 2003 of Civil Judge-IV, Quetta, whereby the suit filed by the respondent was decreed, and judgment dated 30th December, 2004 of Additional District Judge-III, Quetta, whereby the appeal filed against the order was also dismissed. The petitioners questioned the judgments on the grounds that the courts below failed to consider relevant facts, and adopted an approach, which is contrary to facts and law. Further, both the courts below failed to apply judicial mind, therefore, assumed jurisdiction, which does not vested in them. Further, the trial court though take cognizance of the matter, but denied to decide issue No.4, and take a contradictory view, which in itself is an illegality. It is contended that both the courts below made mistake while making decision on the issue pertaining to the jurisdiction. It is further contended that both the courts below ignored the evidence, thereby misinterpreted and misstating the facts arrived to the conclusion, which is not in consonance with the evidence on record. Further, the contradictions appearing in the statement of the plaintiff respondent were misread by the courts below. It is further contention of the petitioners that the original documents, cancellation whereof was prayed were never produced before the courts below, therefore, in the circumstances, there was no option left with the trial court to reject the suit. In addition the photocopy, that too uncertified produced in the court, was totally manipulated and altered, and despite their persistent stand, the courts below failed to take into consideration the plea raised in this respect. Therefore, the uncertified copies of the documents, so produced, were inadmissible in evidence as per Articles 86, 87 and 88 of the Qanun-e-Shahadat Order, 1984, despite the same the courts below assumed that both the parties have admitted execution of the documents, which was a wrong presumption, and also contrary to law. Coupled with the fact that the application for production of the document was given, but the respondent failed to produce the same, but this fact was not given due consideration. It has been prayed that both the judgments be set aside and the suit filed by respondent be dismissed with cost.

2. The brief facts of the case are that the respondent Anika Batool filed a suit seeking declaration, permanent injunction and cancellation of the documents. It was her contention that defendant No.1/petitioner No.1 being tutor of the respondent/ plaintiff visited her house for the purpose, and taught her along with her younger brothers and sisters. But, in year 1998, petitioner No.1 approached her parents with demand of sending her with him being his legal wedded wife. The petitioner No.1/defendant No.1 also produced a marriage deed along with an affidavit bearing date 14th August, 1998 purported to be executed by the respondent/ plaintiff. Further, on inquiry made by her parents she denied existence of any relationship between her and petitioner No.1. She further strongly denied execution of any such documents, which were claimed to be forged one and prepared by petitioner No.1 for his ulterior motive. It was further her plea that in the year 1998 defendant No.1/ petitioner No.1 asked her (respondent) to sign certain documents, which were necessary for publication of Urdu Weekly Magazine titled as "Wahdat" and she in good faith and under bona fide impression signed the documents and also put her thumb impression on some documents at the stance of petitioner No.1. But he (petitioner No.1) later on through fraud, and forgery got converted the same into marriage deed. It was further contended that the alleged document was prepared by the petitioner No.1 in connivance with petitioner No.2, who also attested the documents in order to facilitate him. It was further contended that during inquiry of the matter her father obtained extract from the Register maintained by petitioner No.2, which revealed that on said date i.e. 14th August 1998 no document of such a nature was attested, nor entered in the register. Furthermore, petitioner No.1 with active connivance of petitioner No.2 fraudulently prepared marriage deed, and other documents in order to blackmail her and to use them to extract money from her parents. It as prayed that:--

(A) Declaring that the marriage deed dated 14-8-1998 and the affidavit i.e. annexure A+B are forged documents and are of no legal effect or consequences as such the defendants particularly defendant No.2 is not competent to use the same against the plaintiff or claim any lawful right on the basis thereof.

(B) As a consequential relief the defendants may be permanently restrained from using the documents in question against the plaintiff or to claim any right on the basis thereof permanently from blackmailing and threatening the plaintiff as well as her parents.

(C) Ordering the cancellation of the so-called marriage deed dated 14-8-1998 along with the affidavit of even date be ordered to be cancelled.

(D) Any other relief in addition to the above or in place thereof which this Hon'ble court may deem fit and appropriate in the circumstances of the case.

3. Both the petitioners being the defendants in the suit strongly contested the plea taken by the respondent. Certain legal objections were taken on maintainability of the suit. The objection pertaining to jurisdiction of the court was strongly raised. It was their objection that the suit is not maintainable, which is for cancellation of certain documents, which pertains to matrimonial affairs, therefore, the matters exclusively rests with the jurisdiction of the Family court. On merits it was contention of petitioner No.1 that respondent is his legal wedded wife, and the suit has been filed on stance of father of the respondent, who pressurizing him to divorce his first wife, then he would allow the respondent to join him, and on his refusal filed instant suit against the consent of the respondent. As far as execution of the documents are concerned, it was his contention that the documents were executed with consent of the respondent, and same were handed over to the respondent, which are still in her possession. He prayed for dismissal of the suit. While in his separate written statement the petitioner No.2 also raised same objections, and objected to the jurisdiction of the court. On merits it was his reply that he attested the documents executed in respect of marriage between petitioner No.1 and the respondent on 14th August, 1998, while both the parties were identified by the Members of the Balochistan Bar Council. Apart from the same he (petitioner No.2) was also familiar with petitioner No.1 being member of the same profession, and from the respondent being resident of the same locality. As far as plea of non-entering of the document in the register is concerned, it was his reply that entries made in the register based on will of the parties, while in present case both the parties were not agreed for the same. Further, he was only witness of the occasion, but had been impleaded in the proceedings with mala fide intention. He also prayed for dismissal of the suit.

4. Issues were framed on 26th November, 1999. While both the parties produced their respective evidence. The trial court after completion of the evidence, through judgment dated 27th March 2003 allowed the suit in terms that "the plaintiff has succeeded to establish her case to the extent of only cancellation of the document; the suit is hereby decreed in favour of the plaintiff against the defendants". The judgment was challenged in the appeal, while the appellate court dismissed the appeal through judgment dated 30th December 2004, thereby allowed the suit as prayed for. Still feeling aggrieved the instant petition has been filed.

5. The learned counsel for the parties argued the matter at length. The learned counsel for the petitioners referred to the evidence, and tried to point out the instances of variations and contradictions. He slightly touched the objections pertaining to the jurisdiction. In reply the learned counsel for the respondent was of the view that a decree for cancellation of document can only be obtained from a civil court, and in the suit only cancellation of document was sought. The counsel for the parties were called for the second time to advance arguments on legal points, but there was complete failure on part of the petitioners. Rather, they only made efforts to linger on the matter, which cannot be allowed. Therefore, only counsel for the respondent was again heard. The learned counsel for the petitioners placed reliance on:--

Mst Bibi Feroz v. Abdul Malik and another 2005 YLR 976

Muhammad Iqbal v. Mst. Siani and another 2004 PCr.LJ 193

Rasool Bibi v. Waryam 1992 SCMR 1520

Rao Muhammad Akhtar Ali v. Faiz Ahmed 1980 SCMR 568

Dr. A.L.M. Abdullah v. Rokeya Khatoon PLD 1969 Dacca 47

Muhammad Azam v. Muhammad Iqbal PLD 1984 SC 95

Shah Din v. The State PLD 1984 Lahore 137

Abdus Sattar v. The State 1968 PCr.LJ 290

The learned counsel for the respondent made reliance on:--

Farmanullah Qadeem Khan 2001 SCMR 1474

Muhammad Gul v. Anwar Gul 2005 SCMR 1914

6. Before going into merits of the case the legal objection pertaining to jurisdiction of the court has to be considered, because on merits there are concurrent findings of the courts below. Until and unless any illegality is pointed no findings are required to be made on facts. It was the first objection of the petitioners that as the matter pertains to matrimonial issue, therefore, the jurisdiction vests with the Family Court. Both the courts below while deciding issue No.1 pertaining to jurisdiction of the court, held that Family Court has no jurisdiction to

cancel any document, and cannot give any declaration as prayed for. Therefore, a Civil Court has the jurisdiction to order for cancellation of a document. In instant case the respondent filed a suit seeking cancellation of documents along with declaration, and permanent injunction in respect of the documents being product of fraud and misrepresentation. The documents in question are a marriage deed alleged to be executed between petitioner No.1 and the respondent, and an affidavit of the respondent about performing of marriage with petitioner No.1 with her free will. Both the documents are attested on 4th August 1998. Though both these documents are in respect of an agreement for performance of marriage, but it does not deemed to be a Nikah Nama, which is an essential document to establish existence of marriage between the spouses belonging to Muslim religion. As in Islam "Nikah" is the basic act, which is to be performed between man and woman, and "Nikah Nama" is executed on basis of it, which is required to be registered under provisions of Section 5 of the Muslim Family Laws Ordinance, 1961. In view of the same any deed of marriage, or an affidavit to the effect will have no bearing on the fact of existence of a valid marriage between the spouses. The validity of the marriage, or its non existence are to be determined on the basis of Nikah performed between the parties, and this fact can only be raised before and determined by a Family Court working under the provisions of Family Courts Act, 1964. The Schedule annexed with the Act, 1964, and sections 5 and 20 of the Act 1964 are to be read together, which clearly describe the jurisdiction of a Family Court. But, as far as the matter in issue, in present suit, is concerned, it is about cancellation of two documents, allegedly executed by the petitioner No.1 in connivance with petitioner No.2 with fraud, and misrepresentation. Therefore, keeping in view the pleadings of the parties, only a court of general jurisdiction can grant a decree for cancellation of a document, and declaration and permanent injunction to same effect. The courts below rightly assessed the legal proposition, and arrived to a correct decision that civil court has the jurisdiction in the matter. There is no illegality in the findings of the courts below, who rightly assumed the jurisdiction, therefore, to this extent no interference of this court is required.

7. The second objection which was raised with force that as the original documents, cancellation whereof has been sought, have not been produced before the court, therefore, no decree can be passed to said extent. In present case the respondent sought cancellation of the deed of marriage, and an affidavit, bearing no date, except date of attestation as 4th August 1998, on grounds that both the documents are product of fraud. It was her plea that due to trust, and faith in petitioner No.1, being her tutor, she (respondent) signed certain documents, which were shown to her by petitioner No.1 as necessary for publication of an Urdu Weekly Magazine titled as "Wahdat". In reply the petitioner No.1 asserted that the documents had been legally executed, while the plaintiff/ respondent put her thumb impression with her free will, and without any coercion. With further assertion that the documents were handed over to the respondent, which are in her possession/custody. It is apparent from the record that during course of the proceedings before the trial court the original documents were never produced before the court. Both the parties asserted that the original documents are in possession of the other one. According to the respondent's evidence photocopies of both the documents were handed over to her father Dr. Muhammad Juma, who appeared as P.W.6. While on the other hand the petitioner No.1 tried to establish that the original of both the documents were handed over to the father of the respondent by his (petitioner No.1) father. But the evidence produced to this extent is not confidence inspiring. Because, the witnesses to the effect are interested witnesses, therefore, less reliance can be made on their statements. The petitioners though challenged the documents so produced being not the genuine one, as

various alterations are made therein. But despite the fact that the petitioner No.1 had full opportunity to establish the contents, and execution of the documents through primary, and secondary evidence, but he failed. Even during course of cross-examination no such question was put to the respondent, or her father P.W.6. Furthermore, the most primary evidence in the matter was of petitioner No.2, but amazingly he only appeared as D.W.7, but failed to record his own statement as defendant No.2, nor even tried to produce any evidence on his own behalf. Even otherwise, the statements of D.W.3 Ghulam Abbas, D.W.4 Ghulam Raza and D.W.5 Khudai Nazar are contrary to the stand taken by petitioner No.1 in his written statement, and also to his own statement before the court. Furthermore, the defendant No.2 while appearing as D.W.7 failed to produce the relevant entries in the register, maintained by him in respect of the documents attested by him as Notary Public. The reason assigned by him in his written statement that the entries are made as per wishes of the parties, does not seem to be plausible. On the same date he entered several entries in his register, but particularly the documents in question were not entered, which seems to be a bit strange. Even otherwise, there were no attesting witnesses of the deed of marriage or the affidavit. D.W.8 Mehdi Hassan being brother of petitioner No.1 though asserted his presence at the time of execution of these documents, but his signatures were not obtained on both the papers, rather signature of one Muhammad Baqir was obtained. It is further to be noted that presence of this witness was not affirmed by both the petitioners at the relevant time. The discrepancies as pointed out create serious doubts in genuineness of both the documents, which are to be addressed by the petitioners, but they have failed.

8. As far as producing of photocopies of the documents is concerned, though the instant case only photocopies were filed by the respondent at time of filing of the suit. But, thereafter, the original were neither produced by the petitioners, nor by the respondent. But as execution of both these documents between the parties were an admitted fact, therefore, keeping in view Article 113 of Qanun-e-Shahadat Order, 1984 the facts admitted need not to be proved. Therefore, in the circumstances, non-production of the original documents will not destroy the case of the respondent. Even otherwise, the petitioner relied on judgment reported in 1987 MLD page 19, which in fact supported the claim of the respondent. While rest of the judgments relied by both the learned counsel are not helpful in present case, as they are not relevant to the issue in hand.

9. In view of the above discussion, as there are concurrent findings of the courts below, while no legal defect, and stances of misreading, and non-reading of the evidence by the courts below are established, therefore, no interference by this court is required in the matter. The petitioners have failed to make out a case for exercise of revisional jurisdiction by this court. The petition is dismissed with costs throughout.