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Court
SINDH HIGH COURT

Date
1990-07-19

Appeal No.
ACCUSED CRIMINAL REVISION APPLICATION NO. 4 OF 1990

Judge
WAJIHUDDIN AHMED

Parties
ABDUL S ATTAR—PETITIONER/COMPLAINANTVERSUS MST. ZAHIDA PAR VEEN AND 10 OTHERS—RESPONDENTS

Lawyers
S. RIAZ AHMED FOR PETITIONER. NEMO FOR RESPONDENTS.

Statutes
MUSLIM FAMILY LAWS ORDINANCE (VIII OF 1961) - S.7 WEST PAKISTAN FAMILY COURTS ACT (XXXV OF 1964) - S.21 MUSLIM FAMILY LAWS ORDINANCE (VIII OF 1961) - SS. 7 AND 8 QANUN-E-SHAHADAT (10 OF 1984) - ARTICLE 129, ILLUS, (E) OFFENCE OF ZINA (ENFORCEMENT HUDOOD) ORDINANCE (VII OF 1979) - S.10(2) PENAL CODE (XLV OF 1860) - SS. 494 AND 109

Judgment

Petitioner and the respondent No.l were married in the year 1981. Having since lived together as husband and wife respectively, the respondent No. 1 in the year 1988 filed a suit for dissolution of marriage before the Family Court and Civil Judge, Sanghar. Such suit came to be numbered as Family Suit No. 57 of 1988 and was dismissed on 12-3-1988. An appeal preferred before the District Judge, Sanghar, met the same fate on 4-12-1988. In a Constitutional petition, which was brought to this Court, the matter was remanded to the Family Court Sanghar for decision on the issue of Khula. In turn through judgment dated 30-4 1989 respondent's suit for dissolution of marriage was decreed. Decree itself is claimed to have been prepared on 2-5-1989. The petitioner also maintains that he challenged the decree for dissolution of marriage in a constitutional petition but is silent as to its outcome. Presumably, such would have been dismissed. It must, therefore, follow that the dissolution decree, which even otherwise is not appealable under section 14(2) of the Family Courts Act (W.P. Act XXXV of 1964), except where it proceeds on the limited ground specified in clause (d) of item (vii) of Section 2 of the Dissolution of Muslim Marriages Act, 1939, became final. However, the petitioner herein claiming that the respondent No.l.

Mst. Zahida Parveen, before the expiry of the Iddat period and posing herself to be a divorcee, contracted a fresh marriage on 24-5-1989, lodged a direct complaint before the Sessions Judge Sanghar in August, 1989. In such complaint, purported to be under section 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, read with section 494/109 P.P.C. the respondent No.l, her present husband, the Nikah Registrar, Vakils of the parties and witnesses were cited as accused. Sessions Judge Sanghar on 18-8-1989 ordered a preliminary enquiry by the Civil Judge and F.C.M. Sanghar. On submission of the report the matter was taken up and the complaint was dismissed through order dated 23-11-1989. Such order is challenged in this Criminal Revision application.

At the outset, pre-admission notices were ordered to the respondents but, for causes reflected in the diary sheet, service of the same was not effected. As such, the matter was heard and, per short order recorded on 7-2-1990, for reasons to be discussed separately, this criminal revision application was dismissed. '

Contention raised by Mr. Riaz Ahmed is that since dissolution of the marriage between the petitioner and the respondent No. 1 had not become "effective" in terms of section 7 of the Muslim Family Laws Ordinance, (VIII of 1961), read with section 21 of the Family Courts Act, 1964, the latter section making the provisions of sections 7, 8, 9 and 10 of the Ordinance to be applicable to any decree for dissolution of marriage solemized under the Muslim Law,

maintenance or dower passed by a Family Court, the respondents are guilty of the offences charged. Section 7(1) in the Ordinance requires a written notice to be given to the Chairman (as defined) by a husband wishing to divorce his wife together with a copy thereof to the wife whereas section 7(3) of the Ordinance postulates that "Talaq unless,revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from the day on which notice under subsection (1) is delivered to the Chairman". Subsection (5) of seciton 7, which, in effect, is a proviso to section 7(3) further

provides that if the wife be pregnant at the time Talaq is pronounced such would not be effective until the period mentioned in subsection (3) of section 7 or the pregnancy, whichever be later, ends. As regards effectiveness of the decree for dissolution, by way of parallel to pronouncement of Talaq, reliance is placed on the following observations of the Supreme Court of Pakistan in the case of Syed Ali Nawaz Gardezi v. Lt.-Col. Muhammad Yousuf PLD 1963 SC 51:--

"If the husband himself thinks better of the pronouncment of Talaq and abstains from giving a notice to the Chairman, he should perhaps be

deemed, in view of section 7, to have revoked the pronouncement and that would be to the advantage of the wife. Subsection (3) of this section precludes the Talaq from being effective as such, for a certain period and within that period, consequently, it could not be said that the marital status of the parties had in any way been changed. They would still in law continue to be husband and wife."

Similar views have been expressed by the Supreme Court in Abdul Manan v, Safuran Neesa 1970 SCMR 845, Muhammad Salahuddin Khan v. Muhammad Nazeer Siddique and others 1984 SCMR 583 and Ghulam Nabi v. Farrukh Lateef 1986 SCMR 1350. Even in cases where the right to divorce has been delegated or where any of the parties to a marriage wishes to dissolve the marriage otherwise than by Talaq the provisions of section 7 of the Ordinance, "mutatis Mutandis and so far as applicable", have been applied in virtue of section

8 of the Ordinance.

Adverting to the above dicta it is clear that a Talaq brought about in terms of section 7 of the Mulsim Family Laws Ordinance, 1961, does not even begin the course of effectiveness till such time as due notice in compliance with section 7(1) of the Muslim Family Laws Ordinance, 1961, is given. It is only on service of such notice on the Chairman and the expiry of a period of 90 days from the point of time when the notice is delivered that the TALAQ, subject to section 7(5) of the Ordinance, becomes effective, similar incidents are invocable where TALAQ is pronounced, as contemplated in section 8, in exercise of delegated authority or when a party to the marriage wishes to dissolve the marriage otherwise than by TALAQ. In the Punjab section 21 of the Family Courts, Act, 1964, has been substituted following upon the promulgation of Punjab Ordinance XXIV of 1971 and the substituted provision makes the Family Courts Act subordinate to the Muslim Family Laws Ordinance by enacting that nothing in such Act shall be deemed to affect the postulates in the Ordinance or the Rules made thereunder. As a result, a decree of dissolution of marriage passed by a Family Court would also require to be served on the Chairman in accordance with section 8 of the Ordinance and the effectiveness of the dissolution would Mutatis Mutandis be conditioned by section 7 of the Ordinance. These distinctions vis-a-vis the dispensation in the rest of Pakistan were first noticed by Muhammad Afzal Zullah, J., as he then was, in Muhammad Ishaque v. Ahsan Ahmad PLD 1975 Lah. 1118.

More of this later. In so far as the rest of Pakistan is concerned, notice of a decree of dissolution is required to be given under section 21 the Family Courts Act of 1964 (as that section has always stood) by the Court itself within seven days of the passing of such

decree to the appropriate Chairman whereupon the Chairman is to proceed as if he had received an intimation of Talaq required to be given under the Muslim Family Laws Ordinance. Section 21 ibid. also provides that a decree for dissolution of marriage solemnized under the Muslim Law shall not be effective until the expiration of 90 days from the day on which a copy thereof has* been sent to the Chairman and shall be rendered of no effect if within the period specified ,

reconciliation has been effected between the parties in accordance with the provisions of the Muslim Family Laws Ordinance, 1961.

Muhammad Haleem, J., as he then was, in the case of Farida Parveen v. Qadeeruddin Ahmed PLD 1971 Kar. 118 has expressed an opinion, to which I respectfully subscribe, that a decree for dissolution does not become ineffective, merely because a copy thereof is not sent to the Chairman within the prescribed period of seven days and its effetiveness would be reckoned as from the date of due service and eflux of the requisite period, as be relevant in a given case. Even in the Punjab where in virtue of the substituted section 21 of the Act section 8 of the Ordinance would be attracted in such matters no different position would emerge due to delayed service of the applicable notice.

Reverting now to the main controversy, the first question to be considered is as to in what manner relations between the parties would be.

governed if the husband, respectfully borrowing words from Hon'ble SA. Rehman, J., in Re Syed Ali Nawaz Gardezi, not thinking better of the matter, does not revoke or can be deemed not to have revoked the pronouncement of Talaq before delivering the required notice to the Chairman and such notice is actually delivered. Can he, after service of such notice, revoke the Talaq and require the wife to resume the marital relationship ? It will be seen that the object behind the statutory discipline under section 7 of the Family Laws Ordinance is to preclude hasty and thoughtless renunciation of the marital bond unilaterally by the husband (Talak-ul-Bidaat) and, instead, erisuring conformity to the pristine concepts of Talaq Hasan and Talaq Ahsan (cumulatively Talaq-us-Sunnat in the social fabric of Muslim marital life, though such legislative intention may have been translated in a somewhat inartistic and ready manner prompting Dr. Tanzil-ul-Rehman, J., of this Court in Mirza Qamar Reza v. Tahira Begum PLD 1988 Kar. 169 to hold that section 7 of the Ordinance is contrary to the Injunctions of Islam and the Federal Shariat Court in Muhammad Sarwar v. The State PLD 1988 FSC 42 not taking a different view, inter alia, because the provisions of the Muslim Personal Law are beyond the pale of their jurisdiction. Still, respectfully adhering to the pre-Article 2-A (Constitution) era enunciation of the Hob'ble Supreme Court in the case of Ali Nawaz v. Muhammad Yusuf PLD 1963 SC 51, I am, in all humbleness, of the view that the legislative object is substantially served and the promulgation is, by and large, in accord with the generally approved ideas of Islamic jurisprudence, the legislative device introduced, through section 7 of the Muslim Family Laws Ordinance, having successfully forestalled and pre-empted emotional, fitful and hasty renunciations of the marital tie and having, simultaneously, provided the much needed breathing space for the unilateral act of Talaq under section 7 ibid. or for the matter of that as to any other exercise of such power in terms of section 8 of the Ordinance or even under section 21 of the Family Courts Act, 1964.

Now so far as revocation of Talaq pronounced and communicated under section 7 of the Muslim Family Laws Ordinance is concerned or similar exercises of power by way of Tafweez (delegation) or Khayar-ul-Balooch (option of puberty) under section 8 of the said Ordinance go, the power of revocation, even after due service of notice, is inherent and the revocation, as recognised in section 7 (3) of the Ordinance, can either be express or otherwise. This is so as such matters, covered by sections 7 and 8 of the Ordinance, involve unilateral acts from either side and need no intervention from Court. Regarding Khayar-ul-Baloogh falling within this genus reference may be made to the dictum of S.A.

Rehman, J., as the Hon'ble Chief Justice then was, in Muhammad Bakhsh v. Crown PLD 1950 Lah. 203. As to revocability itself note may be taken of the opinion of Sardar Muhammad Iqbal, J., in the case of Fahmida Bibi v. Mukhtar Ahmed PLD 1972 Lah. 694. Amongst others in the referred circumstances and situations, therefore, marital relationship can be resumed even following upon the service of notice falling under or covered by section 7 of the Ordinance.

Law, however, again in accord with the tenets of Islam, does not seem to relent or provide for any further unilateral or discretionary acts of commission or omission once the decisive step of serving due notice in terms of sections 7 and/or 8 of the Family Laws Ordinance, 1961, or section 21 of the Family Courts Act, 1964, is taken and matures in effectiveness. Henceforth if the parties are to resume the marital relationship such has to be on mutuality alone and not otherwise. The resultant dissolution cannot be retraced except upon reconciliatin between the spouses or on the basis of a bilateral resolution between them to return to each other. Even this can only be and the severance or breach can be undone subject to a re-marriage without another intervening marriage on the basis of section 7(6) of the Ordinance.

The contingency of revocation, irrespective of mutuality as, inter alia, envisaged in section 7(3) of the Ordinance, has no application whatever to a dissolution in the way of Mubara'at i.e. a termination of marriage by agreement, both sides desiring and subscribing to dissolution, Like result will follow where Khula is brought about on a mutual out of Court agreement, the aversion in such case proceeding from the side of the wife alone. In support may be cited the observation of Muhammad Afzal Zullah, J., then in the High Court, in Aiysha Abbasi v. Maqbool Qureshi PLD 1979 Lah. 241:

"I agree with the learned counsel that dissolution of marriage by way of

Khula or Mubaraat is irrevocable in so far the authority of the husband to revoke the same is concerned....."

The spouses in these situations, within the subsistence of notice period can, therefore, re-unite only upon bilateral revocation and not otherwise.

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Taking up dissolutions of marriages under the Family Courts Act, 1964, subsection (3) of section 21 thereof expressly provides that, notwithstanding anything to the contrary contained in any other law, a decree for dissolution of marriage solemnized under the

Muslim Law shall not be effective11 until the expiration of 90 days from the date on which a copy thereof has been sent under section 21 (2) to the Chairman and be of no effect if within the period specified a reconciliation has been effected between the parties in accordance with the provisions of the Muslim Family Laws Ordinance, 1961. While room for reconciliation is left open in the foregoing provisions manifestly, the express or

implied revocation of TALAQ, as envisioned in section 7 (3) of the Ordinance, is a provision applicable to TALAQS, as such, alone and not to dissolutions of marriages by a Family Court and one of the parties to the marriage, by resorting to a one-sided act, cannot nullify a lawful decree of dissolution. Such, however, much the same way as above adverted, can be overtaken on the basis of a mutual or bilateral arrangement between the spouses. All reference to "Mutuality" in this

i discourse, may it be noted, have been made deliberately, for even where the dissolution has emanated from or initiated by a wife, she also cannot by herself w

decide to return, the husband always having and retaining the power of TALAQ. Reverting back, once, therefore, a marriage is dissolved by a Court of law competently and due notice is "sent" or "delivered", unless and only when the spouses make up and reconcile the dissolution would become irrevocably effective on the expiry of 90 days from the date the requisite notice under section 7 (3) of the Ordinance is "delivered" or under section 21 of the Act is "sent". The efforts towards conciliation have always been held to be persuasive and not compulsive. Besides, while a good deal of solemnity attaches to these efforts, the same have yet been' found to be directory rather than mandatory. The Punjab amendment, through Ordinance XXIV of 1971, whereby section 21 of the Family Courts Act, 1964, has been substituted also makes no difference to this outcome because all that the substituted section in that province provides is that nothing in the Act of 1964 shall be deemed to affect any of the provisions of the Muslim Family Laws Ordinance, 1961, or the rules made thereunder. As a result, in the Punjab section 8 of the Ordinance would be attracted to such dissolutions and the provisions of section 7 ibid. would "Mutatis Mutandis and so far as applicable, apply". These legislative changes have been construed by Muhammad Afzal Zullah, J., as noticed above, in Muhammad Ishaque v. Ahsan Ahmad (PLD 1975 Lah. 1118) to require only notice of the Family Court decree and no more. Thereafter, within the time stipulated, parties may, if they can, conciliate but the decree cannot be put to' nought by the husband alone. *

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The emphasis in these legislations (the Ordinance of 1961 and the Act of 1964) for conciliation between the spouses, at every possible step, elaborately pinpointed in Mohammad Ishaque v. Ahsan Ahmed PLD 1975 Lah. 118 is directed, by adoption of all lawful means, to save a marriage already on the course of break up. The exhaustive enunciation on dissolution of marriage of the Supreme Court of Pakistan in Khursheed Bibi v. Mohammad Ameen PLD 1967 SC 97 is itself based on the well-known saying of the Holy Prophet (P.B.U.H) to the effect that "the most detestable of lawful things in Allah's view is divorce."

On examination of the foregoing legal framework and having come to the conclusion that a dissolution of marriage under the Family Courts Act, 1964, once having attained

finality, cannot be revoked except upon reconciliation of the spouses and that, following the dictum of Muhammad Haleem, J. in Fareeda

Parveen v. Qadeeruddin Ahmed PLD 1971 Karachi 118 non-service of notice of such a decree does not make it ineffective, the question that is to be addressed is as to what would be the effect of a woman remarrying before the expiry of the statutory period of notice, prescribed as a condition for the conclusiveness of a dissolution decree. It would appear that revocation of such a decree, being dependent on mutuality of the parties, service of notice of the decree, in terms of section 21 of the Family Courts Act or section 7 and 8 of the Muslim Family Laws Ordinance, as applicable, would essentially be in the nature of a procedural or technical requirement and once that notice is shown to have been "sent"/"delivered" or presumed to have been "sent"/"delivered", as relevant, the wife, for all practical purposes, may, at her option, be considered to be virtually in the state of Iddat. The situation can logically be compared and even equated with the co-extensiveness of the period requisite for divorce in the way of Talaq Ahsan and Talaq Hasan and that of Iddat, each, substantially, involving three lunar months and running concurrently. Contingencies in the nature of pregnancy are not likely to be confronted in these situations but if that be so at all the period involved would stand extended PRO TANTO though that too may be limited to the Punjab for section 21 of the Family Courts Act, as it stands in other parts of Pakistan, does not envisage such a development. On this premises and this analogy, a woman, holding a decree of dissolution and upon service of the applicable notice, re-marrying, can aptly be described as a woman re-marrying during her Iddat. Inter alia, no different incidents should follow upon service of the required notice in cases of dissolution by way of Tafweez, Khayar-ul-Baloogh, Mubara'at and Khula (with consent and out of Court); in the first two modes the wife alone having the option to revoke and in the last two revocation being dependent on mutuality. Re-marriage during Iddat, it has consistently been held, is only irregular and not void and becomes valid (Sahih) or regularized upon the expiry of the Iddat period. The off springs of such marriage are legitimate. Still, the English word "iregular" applied to such marriages is not properly reflective of the connotations carried in the idea for which the Arabic version of Tasid" alone is apposite, which can only be a degree short of "void" or MBatil". As a note of caution, I would, also, hasten to clarify here that the foregoing deductions would apply only to cases where the husband does not have reserved in himself the power to revoke the severance of the marital tie. Further, even in the events above covered, it is not only to be hoped but expected that the spouse concerned would revile the sanctity of Iddat, if at all, only in compelling circumstances, as a last resort and never otherwise.

No allegation whatever has been made in this revision application that the requisite notice of the decree of dissolution was not sent to the Chairman concerned and all that is said is that the respondent No. 1 re-married the respondent No.2 during the subsistence of her "Iddat period". In the absence of pleadings or proof to the contrary, the inference and presumption at law is that all judicial and official acts have been performed regularly. This presumption, arising on the basis of Article 129, Illustration (e) of the Qanun-e-Shahadat,

1984, has not been rebutted and should be deemed to apply to the instant case. It should, therefore, follow that the Family Court duly forwarded the decree of dissolution of marriage to the Chairman concerned, where it attained conclusiveness by eflux of the

time prescribed.

Lastly but equally importantly, criminal intent, guilty mind or mens rea is of essence in a prosecution of this character under section 10(2) of the offence of Zina (Enforcement of Huddod). Ordinance (VII of 1979), and where that is missing penal provisions of statute law cannot be applied and the accused is either not guilty or, at least, is entitled to benefit of doubt. In point are two decisions from the Supreme Court jurisdiction in the Cases of Javid Ali v. Abdul Qadir 1987 SCMR 518 and Bashiran v. Muhammad Hussain PLD 1988 SC 186. Thus in the first of these cases the Supreme Court accorded benefit of doubt to the accused husband of a second marriage, found to be illegal and void. This is how Shafiur Rahman, J., who spoke for the Court, approached the issue:—

"The last contention of the learned counsel for the appellants appears to have some substance. From the evidence brought on record it does not appear that Javid Ali was close to and aware of all the happenings of the family of Abdul Qadir or Rehana Khanum. He had contracted a marriage when Rehana Khanum claimed to have been divorced and this was explicity mentioned in the Nikahnama which was got registered.

Unless there was clear and convincing evidence to establish that he had the requisite knowledge of the subsistence of her marriage with Abdul Qadir it could not be held that he abetted the commission of the offence of bigamy by Rehana Khanum or was a party to it. The benefit of doubt must, therefore, be extended to him."

The case of Mst. Bashiran ibid pertains to the Shariat Appellate jurisdiction of the Hon'ble Supreme Court. In the facts and circumstances of that decision the lady in the case was allegedly divorced orally and then through a deed. She subsequently re-married. On a complaint and resultant finding that the alleged talaqnama did not bear the signature of the husband, the earlier marriage subsisted and marriage contracted by Mst. Bashiran with Abdur Rehman was void, the appellants were convicted under section 494, P.P.C. and section 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, and such conviction was upheld in the Federal Shariat Court. On grant of leave by the Supreme Court and irrespective of the quesiton whether the talaqnama was or was not forged, the Court concluded that the lady was no party to the forgery, if any, and that the second marriage was contracted upon the belief that the previous marriage stood lawfully terminated. In such behalf the condition and word "wilfully" occurring in the definition of "Zina" in section 4 of the Offence of Zina (Enforcement of Hudood) Ordinance was extensively examined by Dr. Nasim Hasan Shah, J., and the following rule was laid down:—

"Thus an act is done "wilfully" if it is done intentionally or deliberately to disobey or disregard a law but of it is not done with an evil purpose or criminal intent but inadvertently it will not have been done wilfully."

Proceeding on this reasoning the Court concluded that the offence of Zina under section 10(2) was not committed as "appellants had entered into a marriage believing that they could validly do In consonancc with the

above dicta it cannot be said that after obtaining a final decree from the Court of competent jurisdiction, the respondents in this case may not have assumed that the

dissolution of marriage was final, complete and irrevocable and on that assumption fashioned their conduct. As such, in the manifest absence of culpable intent and the rule as to benefit of doubt as well, the alleged offence never came to subsist.

Something may now be expressly said about section 494, P.P.C. which is another provision whereunder conviction was sought. The operative part of that section runs as follows:—

"494, whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished....."

Obviously this section applies only to void marriages. Where, however, an allegedly offending marriage is, on settled principles, merely irregular, as in the instant case, and not void no offcnce under section 494, or abetment thereof

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under section 109, P.P.C. arises.

The conclusions, therefore, of the learned Sessions Judge, were perfectly lawful. Accordingly, this Criminal Revision application, having been found to be without merit, stands dismissed.

Revision dismissed.

Case Result :