

**Journal**

2010 CLC 1925

**Court**

LAHORE HIGH COURT

**Date**

2010-08-13

**Appeal No.**

WRIT PETITION NO. 49 OF 2010,

**Judge**

SYED MANSOOR ALI SHAH

**Parties**

RIAZ JAVAID (PETITIONER) \*H \* FTVERSUS !SHERAZ AHMED AND 4 OTHERS RESPONDENTS

**Lawyers**

AURANGZEB CHAUDHRY FOR PETITIONER. PRANA TARIQ JAVAID, MIRZA MEHMOOD AHMED AND SALMAN AKRAMRAJA FOR RESPONDENTS.

**Statutes**

WEST PAKISTAN FAMILY COURTS ACT (XXJLV OF 1964) – S. 5 AND SC/TED CONSTITUTION OF PAKISTAN (1973) – ARTICLE 199

## Judgment

SYED MANSOOR ALI SHAH, J.-Brief facts are that respondents Nos.1 to 4 filed a suit for maintenance, dower, dowry articles, dissolution of marriage and visitation before the Judge Family Court, Sialkot. The petitioner took a preliminary, objection regarding jurisdiction before the said court in his written statement. The precise preliminary objection is that the learned Family Court under section 5 of the West Pakistan Family Courts Act, 1964 ("Act") has no jurisdiction to entertain the matters of non-Muslims.

2. On 19-1-2010 Mirza Adeel Ahmed, Advocate was invited as amicus curiae. He submitted that Muslim Family Laws Ordinance, 1961 ("MFLO") is not applicable to non-Muslims and reference was made to Article 260(3)(b) of the Constitution of Islamic Republic of Pakistan\* 1973, wherein non-Muslims are defined which includes Ahmadies. For this he placed reliance on Mst. Farida Malik and others v. Dr. Khalida Malik and others (1998 SCMR 816), Farah Chaudhry v. Shahid Mahmood Malik (2005 YLR 29), Muhammad Rasheed Ahmed v. Nusrat

Jehan Begum (1986 MLD 1010) and Amjad Khan Yousufzai and another v. Arshad Khan and others (2009 CLC 1057).

3. On the question of jurisdiction under section 5 of the "Act", he 1 '

submitted that it extends to non-Muslims also and that the said provision f

is religion-neutral. He placed reliance on Naeem Ahmed v. Mst. Nuzhat Almas and 2 others (1981 CLC 195) and Mubbasher Ahmed v. Talat Khurshid and others (1996 CLC 1963)., 4. Counsel for the petitioner submitted that in the cases of Ahmadies they have an option to approach "Dar-ul-Qaza" under the Fiqa Ahmadia and submits that\* the respondents should have opted for the said procedure. He relied on Ahmed v. Mehr Khan (PLD 1982 FSC 48) and

Mubbasher Ahmed v. Talat Khurshid (1996 CLC 1963).

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5. After hearing the submissions of -the petitioners as well as amicus curiae and after going through the case-law cited, this Court found that two important questions of public importance arise in the case:-

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(i) The meaning and scope of "subject to the provisions of Muslim Family Laws Ordinance, 1961" in section 5 of the Family Courts Act, 1964.

Does it, therefore, restrict jurisdiction to

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matters cover under the Muslim Family Laws Ordinance, 1961 or does it allow matters belonging to other religions/personal . laws to be entertained by the Family Court which is a Court of special jurisdiction. .

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(ii): If the personal law of the parties is not codified as in the case of Ahmadies (instant case), can the matter be heard by the Family

Court? ' , \*

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6. For this purpose the Court appointed Mirza Mahmood Ahmed,

Advocate and Salman Akram Raja, Advocate as amicus curiae.

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7. Mirza Mahmood Ahmed, amicus curiae, submits that the "Act"

r \* i h is religion-neutral and is open to all the faiths and this matter has already been resolved in the earlier judgments and referred to Mubbasher Ahmed v. Talat Khurshid (1996 CLC 1963), Mst. Farida Malik and others v. Dr. Khalida Malik and others (1998 SCftLR 816), Naeem Ahmed v. Mst. Nuzhat Almas and 2 others (1981 CLC 195), Jagsi v. Shr. Marwan and another (PLD 2005 Karachi 334), Mulchand v. Smt.

Indr a and others (PLD 1985 Karachi 362), Ramdas v. Mst. Bernadat (PLD 1998 Karachi 42), Safdar Bhatti v. Mst. Rozi Jan (PLD 1977 Lahore 836) and Mrs. Daphne Joseph v. Malik Eric Roshan Khan (PLD 1971 Karachi

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8. On the question of jurisdiction of the Family Court being

"subject to" "MFLO" he submits that the jurisdiction of the Court only in cases of Muslims is subject to "MFLO" but not for non-Muslims and therefore, the jurisdiction of the Family Court is not affected by the subsection clause mentioned above. .

9. Mr. Salman Akram Raja, Advocate, the learned amicus curiae, submitted that generically the statutes have three broad linkages between other statutes. The said

categories are non obstante clause, subjection clause or. where the statutes are silent and the principle of special law versus general law applies. In the present case, the "Act" and "MFLO" are linked through a "subjection clause". He submitted that the subjection clause is in contradistinction to the non obstante clause. The purpose of a "subjection clause" is that in case of conflict between the two laws, the law which is made subject to the other law will yield to the primary law. Therefore, "subjection clause" is only to resolve conflicts, if any, and in no manner abridges the jurisdiction of the Court unless there is conflict relating to jurisdiction between the two statutes. He placed reliance on Kerala State Electricity Board v. Messrs Midland Rubber and Produce Co. Ltd. and another (1976) 1 SCC 468), Chandavarkar Sita Ratna Rao v. Ashalata S. Guram (1986) 4 SCC 447), South India Corporation (P) Ltd. v. Secretary, Board of Revenue, Trivandrum and another (AIR 1964 SC 207), C & J Clark Ltd v. Inland Revenue Comrs. (1973 ) 2 All ER 513 and Masood Ahmad Malik v. Mst. Fouzia Farhana Quddus (1991 SCMR 681).

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10. On the second question the learned amicus Submits that absence of codification of law is not relevant. Even under Islamic Sharia certain areas have not been codified but the same have been enforced through the Family Court and he referred to Haji Nizam Khan v. Additional District Judge, Lyallpur and others (PLD 1976 Lahore 930) to reinforce this contention. . .

11. Counsel for respondents Nos. 1 to 4 adopted the arguments of the learned amici curiae. .

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12. Arguments heard. Record perused.

13. The first question is to determine the meaning of the term "subject to" employed in section 5(1) of the Act. For ready reference, section 5(1) is reproduced hereunder:- \*

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"5. JURISDICTION.- (1) Subject to provisions of the Muslim Family Laws Ordinance, 1961, and the Conciliation Courts Ordinance, 1961, the Family Courts shall have exclusive jurisdiction to entertain, hear and adjudicate upon matters specified in Part of the Schedule."

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14. The august Supreme Court of Pakistan in Masood Ahmad Malik v. Mst. Fouzia Farhana Quddus (1991 SCMR 681) has held that in case of inconsistency between "MFLO" and the "Act", the provisions of "MFLO" will prevail and shall be given effect to Nasim Hasan Shah, J speaking for the Bench in the above precedent held:-- . p \*

"The High Court, as stated already, has taken the view that the m

Family Court was precluded from exercising jurisdiction in the matter because even though it had the exclusive jurisdiction to entertain suits relating, inter alia, to jactitation

of marriage under section 5 of the Act, this jurisdiction was subject to the provisions of the Muslim Family Laws Ordinance, 1961. But since the provisions of this Ordinance were applicable only to all Muslim –citizens of Pakistan and because this condition was not satisfied in the instant case (the parties not being citizens of

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Pakistan) the Family Court could not entertain the suit. The view taken by the High Court, therefore, seems to have been , formed on account~of the words "subject to the provisions of the

Family Laws Ordinance, 1961" employed in section 5 of the Family Courts Act, 1964 and it is these words that have led the High Court TQ think that jurisdiction under the said Act can be exercised only, in a case where the parties are "Muslim citizens of Pakistan" and in no other case. This view does not appear to be correct. .

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A.close examination of the provisions of the Family Courts Act,

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1964 and those of the Muslim Family Laws Ordinance, 1961 shows that they do not operate exactly in the same field and that the scope of the Family Courts Act, 1964 is wider than that of the Muslim Family Laws Ordinance, 1961. In our view, the effect of the words in section 5 that the Family Courts shall have the jurisdiction to entertain suits relating to dissolution of marriage, jactitation of marriage etc. but subject to the provisions of the Muslim Family Laws Ordinance, 1961 imply only that where there is an inconsistency between Muslim Family Laws Ordinance, 1961 and the Family Courts Act, 1964, the provisions of the Muslim Family Laws (Ordinance will prevail and shall be given effect to in their pristine form and no more. They do not have any other effect and the provisions of other laws are not affected thereby; Accordingly, suits of this nature filed by the parties other than Muslim citizens of Pakistan if otherwise competent under any other law can be entertained but will be heard and tried not in accordance with the provisions of the Muslim Family Laws Ordinance but by the proper law . applicable to them. " 15. "Subject to" clause simply means that in case of conflict between the two laws, one law would prevail over the other. In the present case, in case of conflict between "MFLO" and the "Act", "MFLO" will CLC .

prevail. Reliance is placed on Kerala State Electricity Board v. Messrs Midland Rubber & Produce Co. Ltd. and another (1976) 1 SCC 468), Masood Ahmed. Malik v. Mst. Fouzia Farhana Quddus (1991 SCMR 681), Chandavarkar Sita Ratna Rao v. Ashalata S. Guram (1986) 4 SCC 447, South India Corporation (P) Ltd. v. Secretary, Board of Revenue, Trivandrum and another (AIR 1964 SC 207). In C&J Clark Ltd v. Inland

Revenue Comrs [1973] 2 All ER 513,

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Megarry, J. held:--

"In my judgment, the phrase "subject to" is a simple provision which merely subjects the provisions of the subject subsections to the provisions of the master subsections. Where there is no clash, the phrase does nothing: if there is collusion, the phrase shows what is to prevail."

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Therefore, it is clear that the "subject to" clause appearing in section 5 of the "Act" is only operative when conflict arises between "MFLO" and the "Act".

16. It is settled position that "MFLO" applies only to\* Muslims as has been clearly provided in section 1, subsection (2) of the said Ordinance which provides that the said Ordinance extends to the whole of Pakistan and applies to Muslim citizens of Pakistan. Reliance is placed on "Ahmed v. Mehr Khan (PLD 1982 FSC 48).

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17. Therefore, for cases pertaining to non-Muslims, the "subject to" clause in section, 5 has no relevance whatsoever because "MFLO" does not apply to non-Muslims and, therefore, there can be no possible conflict between "MFLO" and the "Act" in the cases of non-Muslims.

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section 5 can, therefore, be read in the following manner for the non-Muslims:-- ' P 1

"Section the Family Courts shall have exclusive jurisdiction to entertain, hear and adjudicate upon matters specified in Part I of the Schedule."

IS. ii has been the settled position that Ahmadies have been agitating their matters pertaining to their Personal Law before the Family Courts.

Reliance is placed on Mubbasher Ahmed v. Talat Khurshid (1996 CLC 1963), Mst. Farida Malik and others v. Dr. Khalida Malik and others (1998 SCMR 816), Naeem Ahmed v. Mst.-Nuzhat Almas and

2 others (1981 CLC 195), Jagsi v. Shr. Marwan and another (PLD 2005 Karachi 334), Mulchand v. Smt. Indra and others (PLD 1985 Karachi 362), Ramdas v. Mst. Bernadat (PLD 1998 Karachi 42), Safdar Bhatti v. Mst. Rozi Jan (PLD 1977 Lahore 836) and Mrs. Daphne Joseph v. Malik Eric Roshan Khan (PLD 1971 Karachi 887). '

19. In addition to Ahmadies, cases pertaining to other non-Muslims ' have been brought before the Family Courts under various Personal Laws, namely, Special Marriage Act 1872,

Divorce Act 1869, Christian Marriages Act, 1872, Parsi Marriages and Divorce Act, 1936, Native

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Converts Marriage Dissolution Act, 1866 and Anand Marriage Act, 1909. Reliance is placed on Mubbasher Ahmed v. Talat Khurshid (1996 CLC 1963), Farah Chaudhry v.. Shahid Mahmood Malik. (2005 YLR 29), Muhammad Rasheed Ahmed v. Nusrat Jehan Begum (1986 MLD 1010) and Naeem Ahmed v. Mst. Nuzhat Almas and 2 others (1981. CLC 195).

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20. Even in matters of non-codified Personal Law, matters pertaining to Part I of the Schedule have been, taken up by the Family Courts. In case', of Hindu Personal Law, reliance is placed on Jagsi v. Shr. Marwan and another (PLD 2005 Karachi 334), Mulchand v. Smt. Indra and others (PLD 1985 Karachi 362). In case of Christian Personal Law, reliance is placed on Masood Sadiq v. Mst. Shazia (PLD 2008 Lahore 398), Ramdas v. Mst. Bernadat (PLD 1998 Karachi 42) and Mst.

Noreen Iqbal v. Sohail Iyqbal (2005 CLC 1472).

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21. From the above, it is abundantly clear that the Family Courts established under the Act, 1964 embraces personal laws of all religions and can entertain causes relating to matters mentioned in Para I of the

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Schedule to the said Act which include matters pertaining to non-Muslims (including Ahmadies) as well as matter which arise out of noncodified Personal Law. . '

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22. For the above reasons, the suit will proceed before Judge Family Court, Sialkot. Impugned order dated 19-12-2009 of the learned Judge \* i Family Court, Sialkot is, therefore, maintained and the instant petition is dismissed. \*

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M.H./R-58/L Petition dismissed.

