

Journal

1994 PLD 46

Court

SINDH HIGH COURT

Date

1993-06-28

Appeal No.

CONSTITUTION. PETITIONS. NOS246 AND 247 OF 1990

Judge

AHMED YAR KHAN

Parties

MST. NIG HAT AIJAZ (PETITIONER) VERSUS MUHAMMAD JAMEEL (RESPONDENT)

Lawyers

MAQBOOL AHMED AWAN FOR PETITIONER. ABDUL NAEEM FOR RESPONDENT.

StatutesWEST PAKISTAN FAMILY COURTS ACT (XXXV OF 1964) - SS.5, 23 AND SCHEDULE WEST
PAKISTAN FAMILY COURTS ACT (XXXV OF 1964) - S3 AND SCHEDULE

Judgment

Briefly stated the facts are that respondent Muhammad Jameel claims that petitioner Mst. Nighat Aijaz is his legally-wedded wife. According to respondent Muhammad Jamil, he had married petitioner Mst. Nighat Aijaz on 10-7-1987 against the wishes of the parents of the petitioner. It is further alleged by the respondent that the marriage was solemnized by Haji Muhammad Shah Nawaz and was duly registered as required by law. It appears that the petitioner never resided as wife in the house of the respondent.

Subsequently, respondent Muhammad Jamil filed Suit No.32 of 1988 against present petitioner Mst. Nighat Aijaz for restitution of conjugal rights, so also petitioner Nighat Aijaz filed Suit No.41 of 1988 against Muhammad Jamil for jactitation of marriage. Both the suits were filed in the Court of Joint Civil Judge and Family Judge, Sukkur. By separate judgments, dated 1-10-1989, the learned Joint Civil Judge, Sukkur, dismissed the suit filed by the respondent for restitution of conjugal rights while suit filed by petitioner Mst. Nighat Aijaz for jactitation of marriage was decreed. Respondent Muhammad Jamil filed separate Appeals bearing No. 12 of 1989 and 13 of 1989 against the judgments of the Joint Civil Judge, Sukkur. By his separate judgments the learned Vth Additional District Judge, Sukkur allowed both the appeals and set aside the judgments of Joint Civil Judge, Sukkur. The suit for restitution of conjugal rights was decreed, while the suit for jactitation of marriage was dismissed.

Being aggrieved by the aforesaid judgments of the learned Vth Additional District Judge, Sukkur, petitioner Mst. Nighat Aijaz filed the present Constitution petitions.

Preliminary objection has been raised by the learned counsel for the respondent to the effect that under section 23 of the West Pakistan Family Courts Act, 1964, validity of marriages registered under Muslim Family Laws Ordinance, 1961 could not be questioned by the Family Courts.

As such according to the learned counsel for the respondent, the learned Joint Civil Judge, while acting in the capacity of Family Judge had no jurisdiction to entertain the suit for jactitation of marriage, filed by petitioner Mst. Nighat Aijaz as such the judgment of Family Judge was rightly set aside by the learned Vth Additional District Judge, Sukkur. The operative paragraph of the judgment passed by the learned Vth Additional District Judge, Sukkur reads as follows:- '

"Even otherwise section 23 of the West Pakistan Family Courts

Act, 1964 says that a Family Court shall not question the validity of any marriage registered in accordance with the provisions, of the

Muslim Family Laws Ordinance, 1961, nor shall any evidence in . regard thereto be admissible before the said Courts. The learned trial Court not only considered the evidence against the Nikahnama, but have also declared the Nikahnama false, forged and fabricated document and on the basis of this finding, the learned trial Court held

- that there existed no relationship of husband and wife between the parties, which is

against the law, and impugned judgment is liable to

be set aside.",

On the other hand Mr. Maqbool Ahmed Awan, learned counsel for the petitioner submitted that now it is almost settled law that declaration as to the status, where marriage was alleged by one party and denied by another, would be covered under the decree of jactitation of marriage.

The jurisdiction of the Civil Courts in such matters has been held to be barred. Reliance is placed on Mst. Amina Begum v. Ghulam Nabi and 2 others (PLD 1974 Lahore 78), which lays down as under:-

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"The West Pakistan Family Courts Act, as it dearly shows, has been enforced to make provisions for the establishment of Family Courts for the expeditious settlement and disposal of disputes relating to marriage and family affairs. Section S of the Act provides that subject to the provisions of the Muslim Family Laws Ordinance, 1961 and the Conciliation Courts Ordinance, 1961 the Family Court shall have exclusive jurisdiction to entertain, hear and adjudicate upon matters specified in the Schedule. These matters are (1) Dissolution of marriage, (2) Dower, (3) Maintenance, (4) Restitution of Conjugal rights, (5) Custody of Children, (6) Guardianship, and (7) Jactitation of Marriage.

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The object of the Act is to give exclusive jurisdiction to the Family Courts in all matters relating to marriage. A suit for affirmative declaration about existence or subsistence of marriage is as much a suit relating to marriage as a suit for the negative declaration. The wider meanings of the expression 'Jactitation of Marriage', therefore, advance the object of the Act. On principle also there appears to be no difference between a case where the party aggrieved against the fakp. claim comes to the Court first or the other party invokes the jurisdiction of the Court. I do not see any reason why a suit for jactitation of marriage mil not include a suit for declaration by a person falsely posing that he is the spouse of the defendant. In my view any declaration as to the status where one party alleges marriage and the other denies, it will amount to decree for jactitation of marriage.¹¹

Same view has been expressed in 1981 CLC 1097, Malla v. Mst. Jawai etc., which lays down as under:-

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"It would be frustrating the object of the Family Courts Act, 1964 in case the Judge Family Court is not given the power to examine the validity of marriage on which the defendant relies as in the present case. In almost all such suits based on the denial of marriage the Family Court can only decide the question after examining the validity of the marriage

set up by the defendant. In the present case the petitioner had led evidence to show that the marriage of respondent No.I was not duly registered and the Nikahnama Exh.D.I relied by the respondents was forged document. According to my humble view this allegation could be examined in a suit for jactitation of marriage and section 23 was not a bar thereto. My finding is based on two reasons. Firstly because the bar under section 23 only relates to questioning the validity of any marriage registered in accordance with the provisions of Muslim Family Laws Ordinance and secondly, for the reason that by making provisions for jactitation of marriage to be taken cognizance only by a Family Court the Legislature intended that the validity of a false marriage should be exclusively enquired into by a Family Court. Section 23 shall only apply where in a suit covered under any of the items Nos. (1) to (6) of the Schedule the defendant may not raise a frivolous plea of the validity of the marriage in case, it was registered in accordance with the provisions of Muslim Family Laws Ordinance. Usually in case falling under jactitation of marriage the defendant relies on disputed marriage and as such the Family Court shall be competent to enquire into the validity of such marriage. The plaintiff may show that the marriage relied upon was the result of forgery, false preparation of documents and otherwise not being validly registered under the provisions of Muslim Family Laws Ordinance. In all the cases falling under Items Nos. (1) to (6) a valid marriage is relied upon by the plaintiff and not in a suit for jactitation of marriage. I am supported in my view by a Karachi judgment reported as Nazar Qasim v. Shaista Parveen 1979 CLC 462. In this case a suit had been filed for declaration that relationship of wife and husband never existed between the parties and the Nikahnama, dated 17th Februray, 1978 pertaining to the alleged marriage of the plaintiff was a forged document and void against her. Earlier to this suit the defendant had filed a suit for restitution of conjugal rights on the basis of the said Nikahnama. In this case the defendant made an application under Order VII, rule 11, C.P.C. and the plaint was ordered to be rejected directing the plaintiff to have a recourse to the Family Court. This order was set aside on appeal and a revision was filed vrv the High Court by the plaintiff. The High Court relied on Mst. Amina Begum v. Ghulam Nabi etc. PLD 1974 Lah. 78 for determining the scope of suit for jactitation of marriage and also dealt with the contention whether section 23 of the Family Courts Act debarred the jurisdiction of the Family Court to question the validity of a disputed marriage. This contention was raised by the plaintiff to show that she could not have recourse to the Family Court on account of the bar contained in section 23. This contention was repelled on precisely the same lines indicated by me above and the plaint was returned for presentation to the Family Court." . %v> Same view has been expressed by a Single-Judge of this Court, in a case reported as 1979 CLC 462 Nazar Qasim v. Mst. Shaista Parveen.

The learned Judge observed as under:-

"It is contended by Mr. Turab Ali learned counsel for respondent that under section 23 of the Family Courts Act, a Family Court is not competent to question the validity of the marriage registered in accordance with the provisions of Muslim Family Laws Ordinance, 1961 or to admit any evidence in regard' thereto. The disputed Nikahnama bears the seal of the Nikah Registrar who registered it in accordance with the provisions of the said Ordinance. Therefore, counsel's contention is that as the Family Court is debarred from questioning its validity, the respondent was compelled to resort to the Civil Court for relief of cancellation of the disputed Nikahnama,

This submission prevailed with the Appellate Court.

Section 23 of the Family Courts Act' debars the Family Court from questioning the validity of any marriage on the ground that the provisions of the Muslim Family Laws Ordinance, 1961 providing for its solemnization and registration in the prescribed manner have not been complied with. It assumes that in all other respects, the marriage ' is otherwise valid under the Muslim Law. The said section cannot,

therefore,-prevent a party to the marriage from leading evidence to show that a marriage did not in fact take place or alleged or that fraud had been perpetrated against party or that his/her signature on the alleged Nikahnama was also forged. Fraud vitiates even the most solemn transaction. A marriage which is otherwise void for example, because it was solemnized between persons within the prohibited degrees, cannot be beyond challenge in a Family Court, merely because it was registered by Nikah Registrar in accordance with the provisions of section 5 of the Muslim Family Laws Ordinance, 1961.

Mr. Abbas Farooqui learned counsel for the applicant relied on a decision of the Lahore High Court in Mst. Fehmida Bibi v. Mukhtar Ahmed and others PLD 1972 Lahore 694 in support of the submission that even conceding a Family Court may not have jurisdiction to entertain a suit for cancellation of the alleged false Nikahnama, it may yet be competent to entertain a plea based on that defence. It was, therefore, open to the respondent to raise the plea of the falsity of the

Nikahnama as a defence to the suit for restitution of conjugal rights filed by the applicant against her, however, it is not necessary for me to rule on this submission for this revision is being decided on another ground that the suit of the respondent is a suit for jactitation of marriage which is exclusively triable by the Family Court."

Furthermore, Supreme Court in a case reported as PLD 1984 Supreme Court 95, Muhammad Azam v. Muhammad Iqbal and another expressed the view that section 23 of the Family Courts Act, 1964, has no applicability where fraud, forgery, etc., are alleged in connection of a marriage although registered under the relevant law. The Honourable Supreme Court observed as under:-

The case of Nazar Qasim v. Mst. Shaista Parveen (1979 CLC 462) can also be noticed in connection with another important aspect namely the true import of section 23 of the West Pakistan Family Courts Act which lays down that a Family Court would not be able to question validity of a marriage which is registered under the provisions of the Family Laws Ordinance. It was held that this section assumes the validity of marriage only if it satisfies certain conditions but would not prevent a party from showing either that the marriage had not taken place at all or that fraud had been committed in connection therewith or for that matter a Nikahnama was a forgery and/or that the signatures thereon were forgery. Accordingly it was found that such a marriage or otherwise invalid marriage, might not be held to be beyond challenge before a Family Court merely because it was solemnized in accordance with the provisions of the Family Laws Ordinance. Moreover, it might be added such a marriage and its registration even if purported to be under the Family Laws Ordinance could not truly in law be treated as in accordance with the provisions thereof if the same was the result of fraud,

misrepresentation, forgery and the like infirmities."

In view of the above-cited case-law, I have come to the considered view that Family Court has jurisdiction to entertain and adjudicate upon a suit filed for jactitation of marriage. Section 23 of the West Pakistan Family Courts Acts, 1964 places embargo on the jurisdiction of Family Courts only in cases where there is no dispute about the existence of marriage and it is assumed that marriage is otherwise valid under the Muslim Law. It, therefore, follows that section 23 of Family Courts Act is not applicable in those cases where the marriage is challenged on the basis of fraud, forgery; misrepresentation etc. and suit for jactitation of marriage is filed by either party in a Family Court.

I have carefully examined the evidence produced by the parties in both the suits i.e., suit for restitution of conjugal rights filed by Muhammad Jameel and suit for jactitation of marriage filed by Mst. Nighat Aijaz. Apparently the alleged marriage, if any, was performed against the wishes of the parents of

Mst. Nighat Aijaz. As such neither the parents nor any close relative of Mst. Nighat Aijaz was expected to be present at the time of the Nikah.

As far as the alleged Nikah is concerned, Muhammad Jameel has placed reliance on the evidence of Moulvi Shah Nawaz, alleged Nikah Khawan and one Muhammad Siddique alleged witness of Nikah. The evidence of both of them has totally failed to establish Nikah between both the parties. Moulvi Shah Nawaz admitted in the lower Court that Mst. Nighat Aijaz was not the same girl, who had signed affidavit in his presence. Furthermore, Moulvi Shah Nawaz did not state that he was registered "Nikah Khawan" and that the Nikahnama was registered in accordance with the prevalent provisions of Muslim Family Laws. The trial Court , has observed that the alleged Nikahnama did not bear the signatures similar to the signatures of Mst. Nighat Aijaz. Furthermore, witnesses of Nikah i.e. Aijaz and Iftikhar were not produced by Muhammad Jameel. I find myself in agreement with the observations of the Family Judge that Muhammad Jameel could not prove that Mst.

Nighat Aijaz was his legally-wedded wife.

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In view of the above discussion both of the present appeals are allowed. The impugned judgments delivered by learned Vth Additional District Judge, Sukkur are hereby set aside, and the judgments delivered by the Family Court are hereby restored. Parties to bear their own costs.

Appeals allowed.

