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IN THE FEDERAL SHARIAT COURT, ISLAMABAD
(Original Jurisdiction)

PRESENT

MR. JUSTICE AFTAB HUSSAIN	CHAIRMAN
MR. JUSTICE ZAHOOR-UL-HAQ	MEMBER-I
MR. JUSTICE KARIMULLAH DURRANI	MEMBER-II
MR. JUSTICE CH. MOHAMMAD SIDDIQ	MEMBER-III
MR. JUSTICE MALIK GHULAM ALI	MEMBER-IV
MR. JUSTICE MAULANA MOHAMMAD TAQI USMANI	MEMBER-VI

SHARIAT PETITION NO. 12/ I OF 1981

Sultan Ahmed.....Petitioner

Versus

Mst, Mehr Bhari and another Respondents

For the Petitioner

Syed Mahammad Ayyool
Bukhari, Advocate

For the Respondant

Hafiz S.A. Rehman

Date of Hearing

11-11-1981

Summi

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AFTAB HUSSAIN, CHAIRMAN

The West Pakistan Family Courts Act No.35 of 1964 provides for the establishment of Family Courts for the expeditious settlement and disposal of disputes relating to marriage and family affairs. Section 5 thereof confers exclusive jurisdiction on the Family Courts, subject to the provisions of the Muslim Family Law Ordinance, 1961, and the Conciliation Courts Ordinance, 1961, to entertain, hear and adjudicate upon matters specified in the schedule i.e. Dissolution of Marriage, Dower, maintenance, restitution of conjugal rights, custody of children, Guardianship and Jactitation of marriage. Section 14 of the Act makes provisions for appeal against the decisions given or decree passed by a Family Court but its sub-Section 2(a) provides as follow:

Section 14(2) No appeal shall lie from a decree by a Family Court.

- a) "for dissolution of marriage, except in the case of dissolution for reasons specified in clause (d) of item (viii) of section 2 of the Dissolution of Muslim Marriages Act, 1939.
- b)
- c)

The significance of this embargo is that while a decree of dissolution of marriage passed by a Family Court is not appealable except in one case and that too of the misappropriation of wife's property by the husband, a decree dismissing the wife's suit for dissolution of marriages is appealable.

Aftab Hussain

This petition has been filed to challenge the provision of sub-Section 2 Clause (a) of Section 14 on the grounds of its repugnancy with the Quran and the Sunnah.

It was urged that Allah has given predominant position to a male over a female as is clear from Verse 34 of Surah Nissa.

4:34 "Men are in charge of women, because Allah hath made the one of them to excel the other, and because they spend of their property (For the support of women). So good women are the obedient guarding in secret that which Allah hath guarded. As for those from whom ye fear rebellion admonish them and banish them to beds apart, and scourge them. Then if they obey you, seek not a way against them. Lo! Allah is ever High, Exalted, Great".

This is further proved by the facts that in inheritance male is entitled to a share double to that of a female, a female is incapacitated from being a witness in Hudood matters and while two male witnesses can prove a case, the evidence of at least two females is considered at par with the evidence of one male and the evidence of two females and at least one male is required to prove a similar case. It was submitted that the provision of Section 14 places the male in an inferior position in so far as he is deprived of the right to appeal against the decree of dissolution of marriage but a female on the other hand is conferred the right to file an appeal in case of dismissal of her suit filed for the same purpose.

Amn

It was pointed out to the learned Counsel that this raises a question of equality before law and equal protection of law as envisaged in the Chapter relating to fundamental rights which is not within the jurisdiction of this Court to determine. He however, argued that this case is not based upon equality of male and female but is based on the principle of predominance of the male over the female.

The learned Counsel argued at length on the question of jurisdiction of this Court, in view of a two fold objection that firstly the provision in clause (a) of sub-Section(2) of Section 14 is a provision which is applicable to Muslims only and as such is a matter of personal law which is not included in the category of Laws to which this Court's jurisdiction extends and secondly that in any case it is a provision of procedural Law which is also saved from the jurisdiction of this Court.

The learned Counsel argued that the West Pakistan Family Courts Act is not applicable to Muslims only; it is applicable to non-Muslims too. He argued that the law of dissolution of marriage is not a law limited to Muslims only but even non-Muslims' marriages can be dissolved by the Family Courts.

We have been taken through various laws pertaining to marriage, divorce and dissolution of marriages prevalent in Pakistan. They are the Divorce Act, 1869, Christian Marriage Act, 1872, Parsi Marriages and Divorce Act, 1936, Native Converts Marriage Dissolution Act, 1866 and Anand Marriage Act, 1909. We agree with the learned Counsel that generally the provision of the Family Court Act may be applicable to non-Muslims also but the whole question is whether clause (a) of

sub-Section (2) which makes specific reference to Dissolution of Muslim Marriages Act is limited to Muslims or also caters to the dissolution of marriages of any non-Muslims community living in Pakistan. From the perusal of all the laws and the subject it transpires that the forum in the Special Marriages Act is determined by Section 14 of Divorce Act which is a forum different from the Family Court. The Parsi Marriage and Divorce Act provides for the forum of a special Court (Section 18). Under the ^{Nation Courts'} Marriage Dissolution Act 1866 the forum is either the High Court or a Civil Court (Section 6). These Acts are central statutes and a Provincial Act like the West Pakistan Family Courts Act cannot override them. See Mrs. Daphne Joseph versus Malik Eric Roshan Khan PLD 1978 Karachi 336. The dissolution of marriage under none of these Acts is a subject falling within the jurisdiction of the Family Courts.

Ultimately the learned Counsel relied upon Ordinance 3(b) of Anand Marriage Act, 1909 but none of the provision of this Act deals with the subject of dissolution of marriages, ² but only says in Section 3(b) that the Act shall not apply to any marriage which has been judicially declared to be null and void.

The learned Counsel argued that since it is a marriage which requires to be declared null and void, it must be considered to be a provision for dissolution of marriage. We do not agree with this interpretation. It only means that if a 'party' considers a relationship to be that of marriage the other party can get a declaration about the marriage, if any, as being ab initio void, which means

that it was never a marriage. The expression dissolution of marriage on the other hand presupposes the existence of a valid marriage.

In the case of Federation of Pakistan versus Mst. Farishta PLD 1981 Supreme Court 120 the word Muslim Personal Law in Article 203-B of the Constitution has been interpreted to include all statutory laws which are enforced for Muslims only. This Court's jurisdiction is excluded in matters of Muslim Personal Law. Since it is clear to us that Clause (a) deals only with dissolution of marriage of Muslims it will have to be held that notwithstanding the fact that some or most of the provisions of the West Pakistan Family Courts Act may be applicable to Muslims and non-Muslims alike, the applicability of S.14(2)(a) is confined to Muslims only and as such it falls within the category of Muslim Personal Law.

It is excluded from our jurisdiction for another reason also. Section 14 deals with matters of procedure which are beyond the jurisdiction of this Court. The learned Counsel argued that appeal is a matter of right but this principle will not apply to cases in which appeal is not provided for. Moreover a provision of appeal is also procedural in character. For this reason also this matter is beyond the jurisdiction of this Court.

Even on merits the petitioner has not been able to refer to any provision in the Quran, Hadith or even Fiqah, which confers right of appeal on both the spouses or any one of them or again provides for maintenance of equality in such cases. The learned Counsel conceded that he could not find any such principle either in the Quran or the Sunnah. We are also not aware of any

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such principle.

The learned Counsel however, relied upon Ein-ul-Hadaya Chapter ^{about} Adabe Qazi Vol.3 page 310-311. The relevant portion is to the effect that once the Judgment of another Qazi is produced before a Qazi the latter is bound to execute it unless the order be repugnant to the Quran, the Sunnah or Ijma.

This sentence only deals with either a question of review or a right to raise a question before the executing Court of a decision being illegal. In either case it is held that the Qazi is bound to execute the decree and cannot interfere with the decision of another Qazi except where the order is contrary to Quran, the Sunnah and Ijma. An order which is contrary to the injunctions of the Quran or the Sunnah should obviously be treated to be without jurisdiction and void ab initio. This is the same principle ~~as~~ which is envisaged in Section 47 of the Code of Civil Procedure which has been interpreted as permitting the executing Court to go behind the decree only in a case where the decree suffers from inherent lack of jurisdiction. The principle that another Qazi cannot review a judgment is analogous partly to the principles governing

Order 47 R.2 of the same Code, since the same Qazi can correct his mistakes. Almughni by Ibn Qudama Vol.9, P.194.

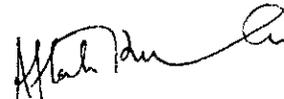
The same principle is to be found in Al-Mughni by Ibn Qudama Vol.9 (printed in Riaz) pages 56 and 57. This principle however, does not deter a Qazi from changing his Judgment in another case since the Qazi is not bound by his precedents (Ibid page 57). He is also not bound by precedents of other Qazis in different matters (Ibid page 57)

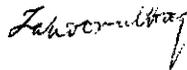
There is another point also. While the male has been given a pre-dominant position in cases of divorce

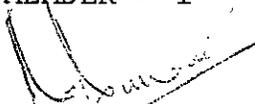
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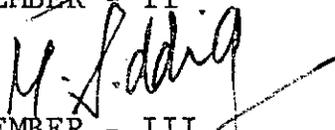
in so far as he can terminate the relationship of husband and wife by his unilateral act, the wife is bound to approach the Qazi if she wants her marriage to be dissolved and her husband is unwilling to dissolve it. In view of her inability to divorce herself unilaterally except in cases where such a right is conferred upon her specifically by the husband, the Shariah provides for Khulla by the intervention of the Qazi. If no right is provided to the wife to enable her to file any appeal any where against the Unilateral Act of divorce by her husband, it would amount to equalising the parties to some extent, if the husband is also not given a similar rights in case the Qazi, after hearing the parties and after taking appropriate proceeding to bring about reconciliation between them considers the case as fit for dissolving the marriage or arranging for Khulla.

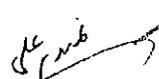
The petition fails and is hereby dismissed.


CHAIRMAN


MEMBER - I


MEMBER - II


MEMBER - III


MEMBER - IV


MEMBER - V

FIT FOR REPORTING.

Islamabad the 11th Nov. 1981.

مجھ اس بات سے اتفاق ہے کہ اس درخواست کی حمایت عدالت
ہذا کے حدود اختیار سے باہر ہے، اسے اس میں اہل مسئلے
کا تشفیہات میں نہ لے کر اس کے اخراج سے اتفاق کرنا
(مقررہ مقام)


21/82