

JUDGEMENT SHEET
IN THE PESHAWAR HIGH COURT, D.I.KHAN BENCH
(Judicial Department)

W.P No. 1075-D/2019 with
C.M No.1194-D/2019

Asif Raza Masih

Vs

Mst. Sofia alias Pinky etc

For petitioner Muhammad Taqqi Jan Sappal, Advocate

For respondent Muhammad Abdullah Baloch, Advocate

Date of hearing: 14.9.2020

JUDGMENT

Sahibzada Asadullah, J.- Through the instant petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner Asif Raza Masih has called in question the order dated 29.7.2019, rendered by learned Judge Family Court-I, D.I.Khan, whereby marriage between the spouses was dissolved by invoking the provision of West Pakistan Family Courts Act, 1964.

2. The following statement of facts will assist in the disposal of this writ petition that the respondent No.1 filed a suit against petitioner for dissolution of marriage under Christian Personal Law, detail whereof fully described in the headnote of the plaint. The petitioner appeared before learned Family Court and contested the suit by filing his written statement wherein he prayed for restitution of conjugal rights. After failure of Pre-trial reconciliation, learned Family Court-I, D.I.Khan passed the following order:-

Keeping in view the present fact and circumstances, coupled with statement of the parties, as reconciliation is not possible between the parties, therefore, marriage between the parties dissolved.

Feeling disgruntled from the said order, the petitioner filed the present constitutional petition.

3. Heard. Record perused.

4. At commencing stage of the arguments, learned counsel for the petitioner, took a preliminary objection regarding jurisdiction before the Family Court and stated 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. Whereas on the question of jurisdiction under Section 5 of the “Act”, learned counsel for the respondent submitted that it extends to non-Muslims also and that the said provision is religion neutral.

5. After hearing the submissions of the learned counsel for the parties and after going through the case law cited, this Court found that two important questions of public importance arise in the case.

The meaning and scope of “subject to the provisions of Muslim Family Law Ordinance, 1961” in Section 5 of the Family Courts Act, 1964. Does it, therefore, restrict jurisdiction to matters covered under the

Muslim Family Law 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.

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

From the plain reading of above, it is crystal clear that on the question of jurisdiction of the Family Court being “subject to” “MFLO” 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.

6. The 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:-.

“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.”

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

8. 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 vs. Mehr Khan (PLD 1982 FSC 48)*.

9. Reverting to the instant case, it is discernable from order dated 29.7.2019 passed by learned Judge Family Court-I, D.I.Khan that she was influenced by the provisions of Muslims Family Laws Ordinance, 1961 while deciding the case of the respondent/plaintiff. There is no provision in the nature of the 'Khula' in the divorce Act, 1869 and as such the mere statement of the petitioner that she was not willing to live as a wife with petitioner, is not sufficient for the purpose of dissolution of Christian marriage. In this regard reference is made to section 10 of the Divorce Act, 1869, which relates to the grounds when wife may ask for the dissolution of marriage and further reference is also made to section 22 of the same Act, which lays down the grounds when judicial separation is obtainable by wife.

10. The bond of marriage between Christian husband and wife is of a permanent nature and as such the wife has to prove her case on the concrete facts after leading reliable and cogent evidence to the facts on which the claim of dissolution of marriage is based. Only then the Court can grant a decree for a judicial, separation within the meaning of section 22 of the Divorce Act, 1869 or to dissolve the marriage under section 10 of the same Act. Therefore, mere assertion of the wife that she is not ready to live with the husband is not sufficient for dissolving the marriage between the petitioner and respondent No. 1 under Christian laws.

11. In view of what has been discussed above, the instant petition is allowed, consequently, the order impugned herein passed by learned Judge Family Court-I, D.I.Khan is set aside and

the case shall stand remanded to the learned Judge Family Court-I, D.I.Khan who shall proceed with the case from the stage on which the respondent/wife made her statement and after framing of issues and recording evidence regarding those issues, shall decide the matter, after issuing notice to the parties. The case be decided preferably within a period of four months from the date of receipt of this order.

Announced.
Dt:14.9.2020
Hasnain/*

JUDGE

JUDGE

(D.B)

Hon'ble Mr. Justice Abdul Shakoor
Hon'ble Mr. Justice Sahibzada Asadullah