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Judgment Sheet
IN THE LAHORE HIGH COURT
MULTAN BENCH, MULTAN
JUDICIAL DEPARTMENT

Writ Petition No.16880/2021
(Ameer Bakhsh vs. Additional Sessions Judge, etc.)

JUDGMENT

Date of hearing:	24.12.2021
Petitioner by:	Mr. Allah Ditta Kashif, Advocate.
State by:	Haji Dilbar Khan Mahar, Assistant Advocate General.
Respondents by:	Mian Muhammad Yaseen, Advocate (for private respondents).

ALI ZIA BAJWA, J.:- The Petitioner has assailed the order of ex-officio Justice of Peace, Alipur, District Muzaffargarh, dated 10.04.2021 whereby his application under section 22-A (6) of Code of Criminal Procedure, 1898 ('Cr.P.C.') for issuance of directions to the local police for registration of a criminal case against the private respondents No.4 to 8, was dismissed.

2. Succinct facts germane to the decision of instant writ petition are that petitioner approached the learned ex-officio Justice of Peace ('JOP') with the contention that Mst. Amna Bibi, i.e. respondent No.4 was legally married to him (petitioner) and she was residing in his house being his legally wedded wife. She, with mala fide intentions, secretly filed a suit for dissolution of marriage and got the same decreed *ex-parte* against the petitioner from family court vide order dated 20.01.2021. The decree has been challenged by the petitioner by filing

an application for setting aside *ex-parte* proceedings and decree, which is still pending adjudication before the concerned family court. After obtaining the *ex-parte* decree of dissolution of marriage, Mst. Amna Bibi got married to Muhammad Ismail i.e. respondent No.5 on the very next day i.e. 21.01.2021, without observing the period of *Iddah* as ordained by ALLAH Almighty in the Holy Quran. The act of respondents No. 4 and 5 is against the teachings of Islam and amounts to committing of offence of Zina as defined under section 4 and punishable under section 5 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979, which is a cognizable offence but learned JOP dismissed the application of the petitioner without applying its judicious mind and without appraising the facts of the case in their true perspective.

3. Arguments heard. Record perused.

4. It is contended by the petitioner that he was legally married to respondent No.4 and it is an admitted fact that she obtained decree of *Khula* from the petitioner. Islam confers right upon a woman to get her marriage dissolved with her husband if she cannot live with him within the limits ordained by ALLAH the Almighty. Allah the most merciful and the most compassionate says in holy Quran[1]:

ترجمہ: اور تم کو یہ روا نہیں ہے کہ عورتوں کو دیا ہوا کچھ بھی مال اُن سے واپس لو، مگر یہ کہ جب میاں بیوی اِس بات سے ڈریں کہ اللہ کے اَحکام پر قائم نہ رہ سکیں گے۔ پس اگر تم لوگ اِس بات سے ڈرو کہ وہ دونوں اللہ کی حدود پر قائم نہ رہیں گے تو اُن دونوں پر کچھ گناہ نہیں ہے اِس میں کہ عورت بدلہ دے کر چھوٹ جائے، یہ اللہ کی باندھی ہوئی حدیں ہیں، سو اُن سے آگے نہ بڑھو، اور جو کوئی اللہ کی حدود سے آگے بڑھے گا سو وہی لوگ ظالم ہیں۔

Getting *khula* is a *Quranic* right and can be exercised by a woman if she does not want to live with her husband. August Supreme Court in *Mst.*

[1] Surah *Al Baqra* verse 229

Khurshid Bibi[2], elaborated the concept of Khula by relying upon the book "Badayat-ul-Mujtahid" by Allama Ibn-e-Rushud, as under:

> *"...Mr. Gondal also drew our attention to an Urdu translation of "Badayat-ulMujtahid" by Allama Ibn-e-Rushud, at p. 158, published by the Idara-tul-Muslimin, Rabwah. After discussing the nature of khula and the conditions, in which it would be permissible, the learned author expresses himself as follows:-*
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> > *'And the philosophy of khula is this, that khula is provided for the woman, in opposition to the right of divorce vested in the man. Thus if trouble arises from the side of the woman, the man is given the power to divorce her, and when injury is received from the man's side, the woman is given the right to obtain khula.'"*

August Court further held that:

> *The Qur'an also declares: "Women have rights against men, similar to those that, the men have against them, according to the well-known rules of equity"*
>
> *It would, therefore, be surprising if the Qur'an did not provide for the separation of the spouses, at the instance of the wife, in any circumstances. The Qur'an expressly says that the husband should either retain the wife, according to well-recognised custom (Imsak-un-bil-ma'roof) or release her with grace (Tasree-hun-bi-i/tsan). The word of God enjoined the husband not to cling to the woman, in order to cause her injury. Another hadith declares Lazarar-un-wa-la-zarar-fil-Islam) "Let no harm be done, nor harm be suffered in Islam". In certain circumstances, therefore, if the husband proves recalcitrant and does not agree to release the woman from the marital bond, the Qazi may well intervene to give redress and enforce the Qur'anic injunctions."*

Therefore, it is clearly established that a woman has a right to get Khula from her husband if she does not want to continue her wedlock with him and respondent No.4 has exercised her legal and Islamic right.

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[2] Mst. Khurshid Bibi v. Baboo Muhammad Amin, (PLD 1967 Supreme Court 97)

5. Adverting to the contention of petitioner that marriage of respondent No.4 with the respondent No.5 is *void* and being so, both are liable to be prosecuted for the offence of zina. From detailed study on the subject, it transpires that there are three types of marriages in Islam and **Fyzee** has enlisted these categories in his Book on Muhammadan Law[3], as under:

> *"**S.11. Classification of Marriage:** A marriage, according to Muhammadan Law, may be either (1) Valid (sahih), or Void (batil), or Irregular (fasid)."*

6. A *sahih* marriage is one which is free from all sorts of defects and infirmities and is in absolute conformity with requirements of Shariah. For a valid marriage, it is necessary that there should be no legal prohibition affecting the capacity of parties to marry. A marriage which is short of a valid marriage will be termed as an invalid marriage. **Bailee**[4] has defined 'Invalid marriage' as:

> *"An invalid marriage is one that is wanting in some of other conditions of validity, as, for instance, the presence of witnesses."*

There are two kinds of invalid marriage i.e. irregular (*fasid*) and void (*batil*). Irregular (*fasid*) marriage is one where impediment to the validity of such marriage is temporary while in case of void (*batil*) marriage, such impediment is permanent. **D.F. Mullah**[5] elaborates difference between a void and irregular marriage.

> *"**264. Distinction between void and irregular marriages-**(1) A marriage which is not valid may be either void or irregular.*
>
> *(2) A void marriage is one which is unlawful in itself, the prohibition against the marriage being perpetual and absolute. Thus, a marriage with a woman prohibited by reason of consanguinity, affinity, or fosterage, is void,*

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[3] Outline of Mahomedan Law by Asaf A. A. Fyzee, 3rd Edition, published by Oxford University Press, at p-106

[4] DIGEST OF MOOHUMMADAN LAW by Neil B. E. Baillie, 2nd edition, published by Premier Book House at page-150

[5] D.F. Mulla's Principles of Muhammadan Law, published by Al-qanoon publishers, at P-683

> *the prohibition against marriage with such a woman being perpetual and absolute*
>
> *(3) An irregular marriage is one which is not unlawful in itself, but unlawful "for something else", as where the prohibition is temporary or relative, or when the irregularity arises from an accidental circumstance, such as the absence of witnesses…."*

Similarly, **Bailee**[6] elaborates these two kinds of marriages in following words:

> *"When the man has no right in the woman, or having such right, she is perpetually prohibited to him, the intercourse is unlawful in itself; when the prohibition is temporary, the intercourse is unlawful for something else…"*

7. Learned counsel for the petitioner has termed the marriage between respondent No.4 and respondent No.5 as void (*batil*) being contracted without observing period of *Iddah* and accused them for the offence of *zina*. In Islam, observing the period of *Iddah* is obligatory upon every woman who obtains *Khula* from her husband, or her husband divorces her except when the *Khula* or divorce occurs before the marriage has been consummated, in which case the woman does not have to observe *'iddah'*. **D.F. Mullah** in his Book[7] interpretes the term *Iddat* as under:

> ***S.257. Marriage with a woman undergoing iddat:*** *(1) …*
>
> ***(2) Iddat.-*** *"Iddat" may be described as the period during which it is incumbent upon a woman, whose marriage has been dissolved by divorce or death to remain in seclusion, and to abstain from marrying another husband.*

8. However, as far as contention of learned counsel for the petitioner declaring marriage of respondent No.4 with respondent No.5 as void is concerned, I am not inclined to agree with this contention

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[6] DIGEST OF MOOHUMMADAN LAW by Neil B. E. Baillie, 2nd edition, published by Premier Book House at page-152

[7] Principle of Mahomedan Law by Sir Dinshaw Fardunji Mulla, 20th Edition, published by LexisNexis, at p-334

because even if version of petitioner is considered correct that respondent No.4 re-married on the very next day of dissolution of her marriage, without observing the period of *iddah* prescribed by Islam, even then the marriage between respondents No.4 and 5 will be an irregular marriage and not void as alleged by the petitioner. **Fyzee** has enlisted five kinds of irregular marriages in his book[8] and marriage during period of *Iddah* is also included in that. Relevant extract is provided below:

> *"A union between a man and a woman may be either lawful or unlawful. Unlawfulness may be either absolute or relative. If the unlawfulness is absolute, we have a void (batil) marriage. If it is relative, we have an irregular (fasid) marriage. The following marriages have been considered irregular:*
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> *(i) A marriage without witnesses.*
> *(ii) **A marriage with a woman undergoing 'idda'**.*
> *(iii) A marriage prohibited by reason of difference of religion.*
> *(iv) A marriage with two sisters, or contrary to the rules of unlawful conjunction.*
> *(v) A marriage with a fifth wife."*

Similarly, in *Muhammad Sher*[9], this Court has also treated such marriage as irregular marriage only. Relevant paragraph is provided below:

> *"9. It is settled Islamic law that the marriage entered into divorced lady before the completion of Iddat period would be irregular marriage and not void marriage as per law laid down in Mullah's Muhammadan Law. Marriage which is irregular cannot be treated as void marriage. The union of husband and wife in irregular marriage cannot be regarded against un-Islamic or Shariah…"*

9. Above discussion envisages that marriage of respondent No.4 with respondent No.5 cannot be termed as a void (*batil*) marriage rather same will be an irregular (*fasid*) marriage. Now after holding that

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[8] Outline of Mahomedan Law by Asaf A. A. Fyzee, 3rd Edition, published by Oxford University Press, at p-107

[9] Muhammad Sher v. Additional Sessions Judge/Justice of Peace, District Khushab and 6 others, (2016 CLC 717)

marriage of respondents No. 4 and 5 was an irregular marriage, next point to be considered by this Court is to see as to whether such marriage amounts to commission of cognizable offence, as alleged by the petitioner.

10. Learned counsel for the petitioner and learned law officer have relied upon the decision of Constitutional Courts in Mst. Zahida Shaheen and another v. The State (1994 S C M R 2098), Kundan Mai v. The State (PLD 1988 FSC 89), Fatima Bibi v. Station House Officer, Police Station Ichhra, Lahore and 9 others (P L D 2005 Lahore 126), Mst. Sughran v. Station House Officer and 2 others, (2004 Y L R 1229) and have contended that as per the *ratio* of these dictums, even if marriage of respondents No.4 and 5 is considered as an irregular marriage, even then they are guilty of offence of Zina as provided under section 4 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979. I do not agree with this contention because perusal of all these precedents transpires that all these decisions were rendered by the Constitutional Courts before 01.12.2006 when *Protection of Women (Criminal Laws Amendment) Act, 2006* was not in existence and language of section 4 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 was as follows:

> ***"4. Zina.*** *A man and a woman are said to commit 'zina' if they willfully have sexual intercourse without being* ***validly married*** *to each other.*
>
> ***Explanation:*** *Penetration is sufficient to constitute the sexual inter-course necessary to the offence of zina."*

11. All the precedents relied upon by the petitioner side had interpreted the word "validly married" and had held that in section 4 of the Ordinance, 1979, the word "married" qualifies by the word "validly" and a valid marriage is one which is effected abiding by all the Injunctions of Islam regarding Nikah, meaning thereby that any marriage which has been solemnized in an invalid manner, whether irregular or

void, falls out of the phrase "validly married" as used in section 4 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and such marriage cannot exclude a sexual intercourse from the definition of "Zina". But situation has altogether been changed after the promulgation of Women (Criminal Laws Amendment) Act, 2006, by which word "validly" was consciously omitted by the legislature. Now after the above-said amendment, section 4 of the Ordinance, 1979 runs as follows:

> ***"4. Zina.*** *A man and a woman are said to commit 'zina' if they willfully have sexual intercourse without being* ***married*** *to each other."*

The legislature consciously omitted the word "validly" from section 4 of the Ordinance, 1979 and now spouses of an irregular marriage cannot be held guilty of offence of zina while relying upon the above-said precedents. The principle that husband and wife of an irregular marriage contracted during the period of Iddah of wife, cannot be held guilty of *zina* has been provided by **Syed Ameer Ali**[10], in following words:

> *"The author of the Tanwir-ul-Absar has used the word maharim generally (i.e. without any qualification), and therefore the word maharim includes those women who are prohibited on account of nasab, fosterage or affinity (sahriat), and he implies that if a man were to marry the wife (mankuha) of another, or the muataddah of another (a woman observing probation for another man either on account of death or divorce)…. Or a Magian woman…..or two sisters by one contract and cohabits with them both or marries two sisters one after another and cohabits with the second; in these cases there is no had (punishment for unlawful cohabitation). And this is by concurrence, bi'l-itifiak, (i.e., Abu Hanifa and his Disciples are agreed on the doctrine) according to the most approved report."*

[10] Commentaries on Mahommedan Law by Ameer Ali (Syed), 5th edition, reprinted by Imran Law Book House at page-1244

Same principle is reiterated by **Baillie**[11] in following words;

> *"There are two kinds of unlawful intercourse between the sexes-one that is unlawful in itself, the other that is unlawful for something else. The former is zina; the latter is not zina. When the man has no right in the woman, or having such right, she is perpetually prohibited to him, the intercourse is unlawful in itself; when the prohibition is temporary, the intercourse is unlawful for something else."*

12. To sum up, irregular marriage may have its own consequences under Muslim Personal law but the same cannot be treated as void (batil) and union of respondents No.4 and 5, in consequence of Nikah cannot be regarded as a cognizable offence, as defined under section 4 and punishable under section 5 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979, entailing penal consequences. The whole gamut of above discussion is that I find no irregularity or illegality in the impugned order, hence this **Writ Petition No.16880/2021 is dismissed.**

(ALI ZIA BAJWA)
JUDGE

Approved for Reporting

JUDGE

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[11] DIGEST OF MOOHUMMADAN LAW by Neil B. E. Baillie, 2nd edition, reprinted by Premier Book House at page-152