

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

CR. MISC. APPLICATION NO.319/2020
CR. REVISION APPLICATION NO.135/2020
C.P. NO.S-445/2020

Date

Order with signature of Judge

14.01.2021

Syed Nadeem Haider Shah advocate alongwith Mst. Seema.
Mr. Muhammad Sharif Buriro advocate for Wajid Ali Shah.
Mr. Zahoor Shah, APG.

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SALAHUDDIN PANHWAR, J: By the dint of this order I decide captioned three cases. Precisely relevant facts are that Mst. Seema filed suit for khula which was decreed by judgment and decree dated 22.10.2015 and khula was granted, thereafter respondent Wajid Ali Shah (her husband) challenged that order which was set aside; case was remanded back for pre-trial. In second trial that suit, filed by Mst. Seema, was dismissed, however Wajid Ali husband of Mst. Seema filed criminal case under section 494 PPC with regard to second marriage of Mst. Seema on the plea that she is his legally wedded wife as her suit was dismissed. In criminal revision application No.315/2020 Wajid Ali Shah has challenged order of the trial court whereby cognizance was taken only against Mst. Seema with regard to second marriage however other accused persons were exonerated. Through CP No.S-445/2020 Mst. Seema has challenged order of the appellate court and trial court whereby case was remanded back and subsequently that was dismissed at the pre-trial stage when her counsel was present. Beside, these cases, learned counsel for Wajid Ali Shah has placed on record certified copy of judgment in CP No.D-2699/2020 with regard to case of alleged fraudulent visa got by Mst. Seema, that case is pending before judicial Magistrate.

2. Learned counsel for respondent has seriously objected with regard to maintainability of petition while relying upon SBLR 2018 225, however that is not pertaining to family jurisdiction. He has also relied upon 2014 SCMR 1762. Whereas learned counsel for petitioner Mst. Seema has relied upon 2014 CLC 60, PLD 2011 Lahore 37, 1992 SCMR 1273, 1986 P.Cr.L.J 2174 (Lahore), PLD 2010 Karachi 61, PLD 2011 Lahore 534, 2017 CLC 1718, 1997 CLC 142 and 1991 MLD 1419.

3. Before going into merits of the case, the back-ground of captioned case (s) compels me to reiterate that marriage is a *legal* contract through which both parties agree to live a harmonious life by honouring their respective *obligations* and *duties* towards each other. The *Islam*, too, nowhere forces the spouses to live a life devoid of harmony and happiness rather allows the parties to part, if they can't live together, as they should. Such act is not liked yet is permitted because it is never fair to compel / force two persons to live together as same, *surely*, would be against guaranteed fundamental rights of such persons. Man (husband) has a *unilateral* right to give '**Talak**' but the woman (wife) has also been provided a right to seek *separation* by way of '**Khula**'. This, *prima facie*, is a way out for woman (wife) to come out of such *bond of marriage* and for such claim, she, even is not supposed to give detail (s) for such move but her disliking is sufficient for exercise of such right. In such event, she would only be required to return / restore the benefit (s), if any, she received from husband. Allah says as:-

“And it is not lawful for you (men) to take back (from your wives) any of your Mahr (bridal-money given by the husband to his wife at the time of marriage) which you have given them, except when both parties fear that they would be unable to keep the limits ordained by Allah (e.g to deal with each other on a fair

basis). Then if you fear that they would not be able to keep the limits ordained by Allah, then there is no sin on either of them **if she gives back (the Mahr or a part of it) for her Al-Khul'** (divorce) (Baqarah 2:229)

In the case of Mst. Bilqis Fatima v. Naimul Ikram Qureshi (PLD 1959 Lahore 566) it is reaffirmed as:-

“Islam does not force on the spouses a life devoid of harmony and happiness and if the parties cannot live together as they should, it permits a separation. If the dissolution is due to some default on the part of the husband, there is no need of any restitution. If the husband is not in any way at fault, there has to be restoration of property received by the wife”.

Reverting to merits of the case, it appears from the record that marriage was solemnized in 2006, khula was granted in 2015 and since then her husband has arraigned Mst. Seema in various litigations, including two criminal cases on charge of **Zina**; alleged illegal visa as well as fraudulent CNIC. Such conduct and pending litigation (s) are, *prima facie*, sufficient to make it clear that husband's claim to effect of Mst. Seema as his legally wedded wife is only being used to keep her in court (s) or get her punished else he (husband) would have, *first*, attempted for restitution of his rights which he, *prima facie*, never did. The above back-ground, however, was / is sufficient that she not only stuck with her right of **khula** but also contracted marriage while believing such '**khula**' as sufficient to exercise her right of **re-marry**. I would, *respectfully*, add that *bona fide* be attached with her act of second marriage as same is, *undeniably*, after resort to her available course i.e approaching honourable Court for '**khula**' and obtaining thereof; technical remand order as well dismissal of her suit (challenged by her) should not be allowed to *undo* a legal and rightful act i.e '**remarrying after**

khula' because such act (remarriage) can be nothing but a **seal** on door of her **first-marriage** and that she is happy with decision of **'khula'**. Any *technical* defect, in such *peculiar* circumstances, needs to be ignored because law favours the *rights* over procedure. The husband's right to seek restoration of any *monetary* benefit, she obtained, only remains and not that of making life of *lady* miserable by arraigning her in criminal litigations. Accordingly, I am of the clear view that judgments of both courts below, in *peculiar circumstances*, are liable to be set-aside and are set-aside, as such. Earlier judgment passed by trial court on 22.10.2015 is maintained.

Since cognizance regarding second marriage is without declaration of family jurisdiction, as such same is ab-initio void.

In view of above discussion, I am of the clear view that order, passed by the Magistrate regarding allegation of commission of zina, also *legally* can't stand. Accordingly Criminal Miscellaneous Application No.319/2020 is allowed whereas Criminal Revision Application No.135/2020 is dismissed.

J U D G E