

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Present

Ahmed Ali M. Shaikh, CJ
Yousuf Ali Sayeed, J

CP No.D-2903 of 2021

Fresh Case

1. For orders on office objection No.3, 9, 14, 25, 26 and 27
2. For orders on Misc. No.12537/2021 (stay)
3. For hearing of main case

07.10.2021

Mr. M. Nizar Tanoli, Advocate for the petitioner

AHMED ALI M. SHAIKH, CJ.- Petitioner, Ali Azhar, has invoked the Constitutional Jurisdiction of this Court and sought following relief(s):-

a. To Declare that the Vires of the Sindh Child Marriage Restraining Act, 2013 are against the injunction of Islam and against the Constitution as such not applicable to the Muslims.

b. To declare that the definition of Child given in the Sindh Child marriage Restraining Act 2013 Section 2(a) would be governed/Changed/Applied with the sign of Puberty for Muslims.

c. To direct the Respondent No.4 & 5 to persue (sic) the said Sindh Child Marriage restraining act 2013 and formulate the same in conjunction of the islam and made necessary amendments which are not in confliction of islam.

d. To direct the Respondent No.6 to depute any officer not below the rank of DSP/SP to investigate the Criminal prosecution/FIRs registered under Sindh Child Marriage Restraining Act 2013 and also produce the record of FIRs registered under that act 2013.

e. To call for the record and proceeding of Family Appeal No.18/2021 from Respondent No.3/VIIth ADJ South Karachi and Family Suit No.2117/2020 from the court of XXIst Family Judge South at Karachi and after perusal the same set-aside the Orders dated 14.04.2021 & 13.01.2021.

f. To pass the Judgment & Decree in favour of Petitioner by directing the Respondent No.1 to join the Petitioner as legally wedded wife.

g. To declare that Nikah and marriage of Petitioner and Respondent No.1 is legal Lawful and executable under Muslim Family Law.

h. To grant costs of the appeal.

- i. Any other relief(s), which this Honourable Court may deem fit & proper in the circumstances of the case.”

2. Briefly stated facts of the case are that on 13.10.2020 the Petitioner, a Muslim by faith, married with Mst. Arzoo, the Respondent No.1, a Christian by faith, against a dower amount of Rs.50,000.00. Later, the Respondent No.1 embraced the Islam. However, on 13.10.2020 at 1645 hours father of the Respondent No.1 lodged FIR No.302/2020 at Frere Police Station, Karachi, (the “**FIR**”) alleging abduction of his daughter/Respondent No.1, aged about 13 years. On 27.10.2020 Respondent No.1, the alleged abductee, filed CP No.D-5364 of 2020 (the “**Said Petition**”), inter alia, seeking quashment of the FIR and protection. This Court vide order dated 23.11.2020 while disposing of the of the Said Petition left open the fate of the FIR and proceedings culminated therefrom to the trial Court and referred the Respondent No.1 to Pannah Shelter Home.

3. Learned counsel for the Petitioner contended that the Vires of the Sindh Child Marriage Restraint Act, 2013 (the “**Act of 2013**”) are against the injunction of Islam, Holy Qur’an and Sunnah. He submitted that the definition of child provided in Section 2(a) of the Act of 2013 being against the Islamic Injunctions is nothing but nullity in the eyes of law.

4. We have heard the learned counsel and perused the material available on record. To a query posed as to the maintainability of the instant Petition whereby Petitioner, inter alia, seeks declaration that the Vires of the Act of 2013 are against the Injunctions of Islam, Holy Qur’an and Sunnah in view of Article 203-D of the Constitution of the Islamic Republic of the Pakistan, 1973 (the “**Constitution**”) he replied that as the Act has been passed by the Provincial Assembly the same can be challenged under the Constitutional Jurisdiction of this Court. He even submitted that this Court under Article 199 of the Constitution has inherent powers to declare the Vires of any Act, Ordinance or legislation repugnant to the Injunction of Islam, Holy Qur’an and Sunnah.

5. A plain reading of Article 203-D, Chapter 3A “**Federal Shariat Court**” (the “**Shariat Court**”) of the Constitution reveals that it is the exclusive domain of the Shariat Court to examine and declare any provision of any statute as repugnant to the Injunction of Islam, the Holy

Qur'an and or Sunnah of the Holy Prophet (PBUH). Additionally, sub-clause (1A) to Article 203-D provides that after examination of any law or provision of law under clause (1), if such law or provision of law appears to it to be repugnant to the Injunctions of Islam, the Court shall cause to be given to the **Federal Government** in the case of a law with respect to a matter in the Legislative List or to the **Provincial Government** in the case of a law with respect to a matter not enumerated in the said List, a notice specifying the particular provisions that appear to it to be so repugnant, and afford to such Government adequate opportunity to have its points of view placed before the Court. Sub-clause (2) to the Article 203-D specifies that if the Court decides that any law or provision of law is repugnant to the Injunctions of Islam it shall set out in its decision the reasons for its holding that opinion and the extent to which such law or provision is so repugnant and specify the date on which the decision shall take effect.

6. The Honourable Supreme Court of Pakistan has already defined the parameters and jurisdiction of this Court in the case of Dossani Travels (Pvt.) Ltd. Versus Messrs Travels Shop (Pvt.) Ltd (PLD 2014 SC 1). The Honourable Apex Court observed that:-

“14. We Judges are mere mortals but the functions we perform have divine attributes. By the nature of our calling, we dispense justice under the law and provide relief. However, “justice” in its generic sense is a relative concept and unless regulated by law, the dispensation, notwithstanding the noble intent would be rather subjective. While exercising powers under Article 199(1) of the Constitution, Courts should always keep in view the following three parameters of their jurisdiction:-

- (i) A High Court is the apex court in the province or in the case of Islamabad, of the capital territory, but they are the creatures of the Constitution and they have only that jurisdiction which has been conferred by the Constitution or under any law for the time being in force. Article 175(2) specifically mandates, “no court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law.”
- (ii) The power of the High Court under Article 199 is “subject to the Constitution” and it can make any of the following orders, “if it is satisfied that no other adequate remedy is available,”
 - (i) “directing a person performing, within the territorial jurisdiction of the Court, functions in connection with the affairs of

the Federation, a Province or a local authority, to refrain from doing anything he is not permitted by law to do, or to do anything he is required by law to do; or

- (ii) declaring that any act done or proceeding taken within the territorial jurisdiction of the Court by a person performing functions in connection with the affairs of the Federation, a Province or a local authority has been done or taken without lawful authority and is of no legal effect; or

(b) on the application of any person, make an order---

- (i) directing that a person in custody within the territorial jurisdiction of the Court be brought before it so that the Court may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; or

- (iii) requiring a person within the territorial jurisdiction of the Court holding or purporting to hold a public office to show under what authority of law he claims to hold that office; or

- (c) on the application of any aggrieved person, make an order giving such directions to any person or authority, including any Government exercising any power or performing any function in, or in relation to, any territory within the jurisdiction of that Court as may be appropriate for the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II." (Fundamental rights as interpreted by the Supreme Court of Pakistan).

- (iii) The ambit and scope of the power of High Court under Article 199 of the Constitution is not as wide, as of the Supreme Court under Article 187 of the Constitution to pass any order or issue any direction or decrees for doing "complete justice".

7. Additionally, Article 203-G of the Constitution provides bar of jurisdiction that no Court or tribunal, including the Supreme Court and a High Court, shall entertain any proceedings or exercise any power or jurisdiction in respect of any matter within the power or jurisdiction of the Court. In the case of *Pakistan Lawyers Forum versus Federation of Pakistan and others* (PLD 2004 Lahore 145) the learned Full Bench of the Lahore High Court observed that:-

"It has already been observed by us above that all such so-called "privileges and perks" are based upon some laws, rules, or instructions, etc. and for getting a declaration regarding their repugnancy to the Injunctions of Islam the applicants have to approach the Hon'able Federal Shariat Court under Article 203-D

of the Constitution. By virtue of the provisions of Article 203-G of the Constitution this Court's jurisdiction has clearly been ousted in that regard.

8. In the case of Majmua-tun-Noor "Hajj" and "Umrah" service versus Federation of Pakistan (2019 CLC 1206), a Division Bench of this Court while deciding a Petition challenging the Hajj Policy, 2018, has observed that:-

"10. As such, we are of the view that it is not within the purview of this Court to make any determination in these proceedings as to whether law, provision of law or indeed a policy for that matter is repugnant to Islamic Injunctions, and we are confined in our scope to the specific parameters delineated in Article 199, resting on a violation of a fundamental rights, which is evidently not a ground of challenge in this case. Accordingly, we find that the Petition is not maintainable."

For the foregoing reasons, we are clear in our mind that the Petition in hand is not maintainable as prayers (a) to (c) are hit by the bar contained under Article 203-G of the Constitution whereas the remaining prayers, being consequential and flowing from those aforesaid prayers, also cannot be entertained. As such, the Petition alongwith pending misc. application stand dismissed.

Chief Justice

Judge