

IN THE HIGH COURT OF SINDH AT KARACHI

CR. MISC. APPLICATION NO.273/2021

Applicant : Mst. Seema,
through Syed Nadeem Hyder advocate.

Respondents : Wajid Ali Shah and others,
through Mr. Muhammad Sharif Buriro advocate for
respondent No.1.

Mr. Nadeem Ahmed Khan, Assistant Attorney
General.

Mr. Faheem Hussain Panhwar, DPG.

Date of hearing : 28.06.2021

Date of order : 28.06.2021

JUDGMENT

SALAHUDDIN PANHWAR, J. Applicant has impugned order dated 06.04.2021 passed by learned 6th A.D.J Karachi South whereby her Cr. Rev. Application No.23/2021 filed against order dated 09.02.2021 of 7th Judicial Magistrate Karachi South in Cr. Case No.1794/2017, was dismissed.

2. Brief facts of case are that complainant Wajid Ali got registered an FIR No.173/2016 at PS F.I.A, AHT Circle, Karachi, under section 6(1)(a)(c) Passport Act r/w section 420, 468, 471, 109 PPC, stating that his wife Seema (present applicant) has committed fraud and cheating and obtained Pakistani Passport and Australian Visa.; that she is having date of birth viz. 1st July 1983 as per birth certificate issued by the Health Department bearing registration No. 11007 and in the certificate of Board of Secondary Education Karachi, her date of birth is 1st July 1980 and in her CNIC No.42301-1444076-8 issued on 21.04.2014, her date of birth has been given as 01.07.1989; that she committed such fraud to prove herself as unmarried whereas she is a married woman; that since the actual DOB of Seema Noor is 01.07.1980 as is appearing on the educational certificate, therefore, the declaration of DOB as

01.07.1989 in her passport is a fraud. Verisys image of aforesaid CNIC obtained by FIA showed date of birth of Seema as 01.07.1989 as well she was marked by NADRA in suspect category as “fake particulars”. I/O opined that it has been established that as per letter No. BSE/M.S./290/2016 dated 08.04.2016 received from the Deputy Controller of Examination, Board of Secondary Education, Karachi the actual DOB of Seema d/o Noor Muhammad in her Matric Certificate is 01.07.1980 whereas she obtained (i) CBRC bearing CRMS No. B42206013-0941 Form No. K04107328, (ii) Smart CNIC No. 42301-1444076-8, and (iii) Passport No. HE-9990761 dated 08.05.2014, by showing different DOB 01.07.1989.

3. I have heard the respective parties and have also perused the available record.

4. The perusal of the record shows that it is the respondent No.1, who has lodged the instant complaint/FIR against none but his own *ex-wife* (petitioner). I would not dispute the legal position that a report regarding commission of cognizable offence *may* well be lodged by ‘*anybody*’ but conduct of the *informant* always matters so as to determine whether complaint/information was/is aimed for cause of justice or for personal gain or advantage. Here, it is material to add that respondent no.1 (complainant) lodged instant complaint *only* when the relations between the parties i.e petitioner and respondent no.1 became strained. Here, referral to an earlier order passed in *Cr.Misc. Appln. No.319/2020; Cr.Rev. No.135/2020* and *CP No.S-445/2020* was passed by me so as to show the conduct of the respondent no.1 towards the present petitioner. Being conducive relevant paragraph of that order is reproduced hereunder:-

“.....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 background, 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."

05. Referral to above is sufficient to prove the conduct of the respondent no.1 that he (respondent no.1) was/is not interested in honouring his *past* relation towards the petitioner but was/is interested in dragging the petitioner in Criminal *litigation* though morally and religiously the '*spouses are described as dress (es) of each other*'. The *dress* needless to add was/is to hid the *AIBS* (imperfection).

06. Now, I would revert to merits of the instant case. Though, the instant matter relates to an order, passed on application U/s 540 Cr.PC, however, this Court was/is always competent to examine the merits of the case towards sustainability of the complaint *itself*.

07. The record shows that the allegation against the petitioner was/is that her date of birth, per educational certificate, was **01.07.1980** hence showing date of birth in her passport as 01.07.1989 is a fraud so she (petitioner) was/is charged for offence U/s 6(1)(a)(c) Passport Act r/w section 420, 468, 471, 109 PPC. The section 6(1)(a) & (c) reads as:-

Section-6(1). A person shall be punishable with imprisonment which may extend to three years, or with fine, or with both, if the:

- a) make or makes use of any statement which he knows or believes to be false in any document for obtaining passport; or
- b) ..
- c) willfully conceals any fact which under the circumstances he ought to disclose for the purpose of obtaining a passport for himself or another person; or
- d) ..

08. Bare perusal of the above *two* provisions, *prima facie*, shows that same could only come into play, if any *false* statement or deliberate concealment of some fact, is made while applying (obtaining) passport. The mentioning of '*incorrect date of birth*' which, too, with reference to CNIC, in my view, can't be declared as '*fraud*' because the term '*fraud's*' ordinary definition is:-

“wrongful or criminal deception intended to result in financial or personal gain”

09. In the instant case the complainant (respondent no.1) has not alleged as to what harm or prejudice was/is likely to be received by him if the petitioner continues with such date of birth?. Even, the respondent has not claimed as to what benefit/undue advantage the petitioner was/is likely to receive with such changed date of birth, therefore, such incorrect date of birth, at the most, could be a '*civil wrong*' so is defined by Black's law dictionary as:-

“*fraud. 1.* A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. Fraud is usu. a tort, but in some cases (esp. when the conduct is willful) it may be a crime...”

10. In the instant matter, it is worth reminding that, date of birth in her passport was/is with reference to her CNIC which, *normally*, is the most authentic document for showing/proving the '*identity*'.

11. Further, such act of the petitioner, *prima facie*, also does not satisfy the term '*cheating*' so as to attract section 419 and 420 PPC because the term '*cheating*', per Penal Code, is defined as:-

“**Section 415. Cheating.** Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property any person, or to consent that any person shall retain any property or intentionally induce the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person (or any other person) in body, mind, reputation or property, is said to '**cheat**'”.

Further, I would also add that there is no legal *bar* in getting date of birth of change/altered because a mistake/error can always be corrected at any time/stage unless the same was/is shown to be attempted for some undue advantage or gain. The present petitioner was/is not said to be a '*civil servant*' or '*employed*' in some institution where the '**date of birth**' was/is material for some advantage or gains. I am conscious that for such a civil servant/employee the alteration/change in the date of birth has been discouraged but for *ordinary* person the same was/is not *strictly* prohibited because an '*ordinary person*' normally was/is not likely to take any

advantage/benefit with change of such date of birth unless, otherwise, so is proved/established. In the case of Federal Board of Intermediate & Secondary Education, Islamabad v. Abeer Masood 2020 SCMR 316 it is held as:-

“The respondent herself stated before us that she is not an employee of any government or public institution. We would not have allowed the correction had the respondent been in the employment of any public, private or government service and **would have taken undue advantage of change in her date of birth, which might prejudice any right of others. No such situation arises in this case.** In the circumstances, the date of birth on her birth certificate, CNIC as well as in Family Registration Certificate issued by NADRA which is 17.08.1994 cannot be ignored. Therefore, only in exceptional case that the record must not reflect that the respondent’s elder brother was born four months after her birth and to prevent any future dispute amongst her siblings with regard to inheritance and parentage, we are not inclined to interfere with the concurrent findings of all the three courts below.”

Thus, change of date of birth of petitioner from that mentioned in her education certificate and ‘CNIC’ without proving *least* alleging as to what benefit or deception she obtained/caused, can’t be termed as *fraud* or *cheating* requiring penal action.

12. As regard mentioning of the date of birth in passport or while applying for passport, it would suffice to add that the same was/is with reference to her CNIC therefore, the same also can’t be alleged as ‘**concealment of a fact**’ or knowingly ‘*false*’ because the same, again reiterated, was/is with reference to a believable document i.e CNIC. At this juncture, learned DAG, DPG and I.O contend that proceedings may be quashed in above circumstances.

13. In consequence to what has been discussed above, I am of the clear view that instant complaint was not *bona fide* nor satisfying the required ingredients so as to prove a changed date of birth as with *mense rea*; needless to add that absence of *mens rea* was/is always sufficient to take away chances of *criminal liabilities*. The pending proceedings, *prima facie*, have become groundless, therefore, continuity thereof was/is not likely to advance any cause of justice rather would be nothing but an abuse to process of law, hence the same warrants to meet its fate i.e quashment.

14. These are the reasons of short order dated 28.06.2021 whereby instant criminal miscellaneous application was allowed and proceedings of

FIR No.173/2016, PS F.I.A, AHT Circle, Karachi, under section 6(1)(a)(c) Passport Act r/w section 420, 468, 471, 109 PPC pending before 7th Civil Judge and Judicial Magistrate, Karachi South in Case No.1794/2017 (State versus Mst. Seema) were quashed.

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