

Form No: HCJD/C-121.
JUDGEMENT SHEET
IN THE ISLAMABADHIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

WRIT PETITION NO. 21 OF 2021

Muhammad Akram Nadeem
Vs
Chairman, Arbitration Council/ADLG Islamabad, etc.

PETITIONER BY: Rana Shahid Hussain Khan, Advocate
RESPONDENTS BY: Syed Asad Ali Saeed, Advocate for
respondent No.3.
Mr. Abid Hussain Chaudhry, Advocate for
respondent No.1.
Syed Faraz Raza, Assistant Legal
Advisor, Ministry of Foreign Affairs.
DATE OF HEARING: 24.02.2021.

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BABAR SATTAR, J.- The petitioner is aggrieved by divorce certificate dated 03.12.2020 issued by respondent No.1 under section 7(3) of the Muslim Family Laws Ordinance, 1961 ("**Ordinance**") pursuant to proclamation of talaq issued by respondent No.3 on 08.05.2017.

2. Learned counsel for the petitioner submitted that the petitioner's daughter and respondent No.3 reside in United Kingdom, that they are separated but are not divorced and proceedings regarding custody and maintenance of their children are pending in the Family Court of Watford, U.K; that the divorce certificate has been issued after a delay of three and a half year from initiation of proceedings before respondent No.1 and in breach of section 7(1) of the Ordinance as the petitioner who resides in U.K. never received any notice section 7(1); that non-

compliance with mandatory conditions prescribed in the Ordinance is a fraud on the statute and in breach of fundamental rights of the petitioner; that the impugned certificate issued without compliance of mandatory conditions prescribed under the Ordinance is void ab-initio and of no legal effect; that the petitioner is unable to travel to Pakistan due to Covid-19 and is also unable to issue a power of attorney certified by the Pakistan High Commission due to lockdown currently enforced in U.K. and that the petition has been filed in her behalf by her father; given that the impugned certificate can be abused by respondent No.3 to undermine valuable rights of the petitioner's daughter this Court ought to exercise its equitable jurisdiction to hear this matter, especially as the petition has been filed by the petitioner's father who neither has any monetary interest in the matter nor any interest adverse to the petitioner i.e. his daughter. Learned counsel for the petitioner submitted that the fact that the petitioner has authorized her father to file the instant petition can be verified by the Court through its video-conferencing facility in view of the extraordinary situation created due to Covid-19.

3. The learned counsel for the petitioner relied on Mubarik Ali Shah and 4 others vs. Chief Administrative Auqaf [1988 CLC 348] and Mrs. Ambreen Naseem Khawaja vs. Federation of Pakistan and others [2015 P.Cr.L.J 506] in support of maintainability. The learned counsel relied on Syed Wajiha Haris vs. Chairman Union Council No.7, Lahore [2010 MLD 989], Mst. Sana Asim Hafeez vs. Administrator/Chairman, Arbitration and Conciliation Court [2016 MLD 1061] and Mst. Asma Bibi vs.

Chairman Reconciliation Committee and others [PLD 2020 Lahore 679] wherein the learned Lahore High Court held that under SRO 1086(K)61 dated 09.11.1961 ("**SRO**"), officers of Pakistan Mission abroad were authorized to discharge functions of Chairman under the Ordinance, 1961 and that reconciliation proceedings must be undertaken at the place of residence of nonresident Pakistanis. The learned counsel for the petitioner submitted that the controversy in the instant petition involves a legal question: whether in case of divorce between Pakistani citizens who are residing outside of Pakistan at the time of divorce, would Chairman of the relevant Union Council in Pakistan have jurisdiction in view of provisions of the Ordinance read together with the SRO.

4. In pursuance of this Court's order dated 08.01.2021 learned counsel for the petitioner placed on record unattested special power of attorney signed by the daughter of the petitioner along with cover email stating that she is unable to have the said power of attorney certified as the High Commission is shut down due to lockdown in the United Kingdom due to COVID-19. This Court verified through video link that the petitioner had been authorized by her daughter as due to Covid-19 and lockdown in U.K certification of power of attorney was temporarily suspended by the High Commission.

5. Learned counsel for respondent No.1 submitted that no officer had been appointed in various Consulates and High Commissions of Pakistan to perform functions of Chairman under

the Ordinance in exercise of powers conferred on the Federal Government by the SRO. He further submitted that in the interest of justice, it would be appropriate that the Foreign Office be impleaded as party to seek information on whether or not the SRO had been given effect and if Chairman for purposes of section 2(b) of the Ordinance has been appointed in Pakistan's Foreign Missions. He further submitted that there is utter confusion regarding jurisdiction of respondent No.1 in relation to divorce proceedings involving spouses who get married in Pakistan but later become dual nationals or expatriate Pakistanis or are temporarily out of country at the time of pronouncement of divorce. He submitted that no proceedings for purposes of section 7 are conducted in foreign missions.

6. The Foreign Office was issued notice and report was sought from it on whether any officers at Pakistan's Foreign Missions had been notified to discharge the functions of Chairman under the Ordinance pursuant to the SRO.

7. Learned counsel for respondent No.3 submitted that on 08.05.2017 an application for purposes of section 7(1) of the Ordinance was filed before respondent No.1 along with divorce deed and that such divorce deed was executed in Pakistan on 08.05.2017. That Respondent No.3 appeared in person before respondent No.1 on 10.05.2017 and recorded his statement and the proper procedure to summon the petitioner was adopted by issuing notice to her at her given address as House. No. 79/4-D, Street No. 32, F-6/1, Islamabad. That on 31.05.2017 the representative of respondent No.3 appeared before respondent

No.1 but the petitioner was not in attendance and another notice was issued for her appearance on 21.06.2017. That the same situation existed on 12.07.2017 when no one appeared on behalf of respondent No.1. On 19.07.2015 respondent received a summon from the learned Civil Judge Islamabad in a suit filed by the petitioner's father on her behalf wherein order for maintenance of status quo had been passed. The learned counsel for Respondent No. 3 provided details of the litigation that continued before the learned Civil Court and proceedings in relation to an application filed on behalf of the petitioner before the Deputy Commissioner, ICT., Islamabad.

8. The learned counsel for respondent No. 3 submitted that after rejection of the plaint filed on behalf of the petitioner under Order VII Rule 11 CPC, the proceeding before respondent No.1 recommenced and the impugned divorce certificate was issued. The learned counsel submitted that in the instant case provisions of the Ordinance are applicable as the petitioner and respondent No.2 are both Pakistani Nationals and their marriage is registered at Islamabad and respondent No.1 is vested with jurisdiction under section 7 of the Ordinance. That notice under section 7(1) of the Ordinance was duly issued to the petitioner, as the address mentioned in the instant petition is the same on which the notice was served. And that it was after receipt of such notice and after acquiring knowledge of the proceedings under section 7 of the Ordinance that the petitioner filed a suit before the learned Civil Court which proceedings continued till the rejection of the suit in November, 2020. That there is no Arbitration Council functional in Pakistan's High Commission in

U.K. and that even under the U.K Law no divorce of Pakistani nationals living in U.K. is recognized unless a divorce certificate has been issued under the Ordinance. Learned counsel for the respondent No.3 produced before the Court a copy of instructions published by Government of U.K on its website (www.gov.uk) for guidance of recognition of overseas divorces, which in relevant part state the following:

4. SET13.4 Recognition of overseas divorces which took place on or after 4 April 1988.

Under the Family Law Act 1986 an overseas divorce obtained by means of judicial or other proceedings is recognized in the UK only if:

- *it is effective under the law of the country in which it was obtained; and*
- *at the relevant date (that is, the date on which proceedings were begun), either party was either habitually resident or domiciled in that country or was a national of that country.*

The term 'judicial or other proceedings' requires that there should have been some formal proceedings, either before a court or some other formal body recognized by the state for that purpose (for example, in Pakistan the Union Council). It is an important aspect that the judicial or other body should be impartial as to the outcome of the proceedings.

An overseas divorce obtained otherwise than by means of proceedings is recognised in the UK if:

- *it is effective under the law of the country in which it was obtained; and*
- *at the relevant date (that is, the date on which the divorce was obtained), both parties were domiciled in that country or one was domiciled there and the other was domiciled in a country which recognized the divorce; and*
- *neither party had been habitually resident in the UK throughout the period of one year immediately preceding that date.*

The term 'otherwise than by means of proceedings' covers, for example, a meeting of family members convened to dissolve a West African customary marriage or to hear the pronouncement of talaq.

5. SET13.5 The Talaq divorce

Under traditional Islamic law a bare talaq divorce is deemed to have taken place when the husband pronounces three times 'I

divorce thee'. This pronouncement dissolves the marriage instantly.

However, the Muslim Family Law Ordinance 1961 (MFLO) sets out formal requirements for the recognition of full talaq divorces in all parts of Bangladesh and Pakistan except Azad Kashmir:

- the husband must give notice in writing of the pronouncement of a talaq divorce to the Chairman of the Union Council of the Ward,*
- the husband must also give a copy of this notice to his wife.*

At the end of 90 days (or at the end of the wife's pregnancy if she is pregnant at this time) the divorce will take effect. There is provision for attempts at conciliation between the two parties during this 90 day period.

Only a talaq under the MFLO is considered to have been obtained by means of proceedings as defined under UK Acts.

If a full talaq divorce takes place in Bangladesh or Pakistan it will be recognised in the UK if the procedures laid down under the Muslim Family Laws Ordinance 1961 were complied with, and:

- the husband or the wife is a Bangladeshi or Pakistani citizen;*
- or*
- he or she is habitually resident in Bangladesh or Pakistan;*
- he or she is domiciled in Bangladesh or Pakistan.*

6. SET13.6 Talaq divorce in the UK

If a husband pronounces talaq divorce in the UK alone, the divorce will not be recognized.

If a husband pronounces talaq divorce in the UK and then notifies his wife and the Union Council Chairman in Pakistan or Bangladesh, the divorce will not be recognised. The UK courts have held that an overseas divorce is capable of recognition in the UK only if the divorce has been instituted and obtained in the same country outside the UK.

9. Learned counsel for the Foreign Office, which was impleaded as Respondent No. 4 by this Court by order dated 18.01.2021, submitted a report which stated the following;

"That in accordance with the Muslim Family Laws Ordinance, 1961 and SRO No. 1086(K)61 dated 09.11.1961, all Pakistan Missions abroad are periodically

directed to appoint/update focal persons to discharge the functions of the Chairman, Arbitration Council.”

The report provided a list of focal persons appointed in Pakistan's Foreign Missions to discharge the functions of Chairman for purposes of section 2(b) of the Ordinance.

10. It is not denied that a notice for purposes of section 7(1) was issued by Respondent no.1 on behalf of Respondent No. 3 and sent to the Petitioner along with the divorce deed executed by Respondent No.3 at the address listed in the instant petition, which is the permanent resident of the Petitioner's father. The petitioner's case is that she never received a notice in physical form as she lives in U.K. and that respondent No.1 has no jurisdiction to discharge functions under section 7 of the Ordinance as the Petitioner and Respondent No. 3 were both residents of U.K. at the time of pronouncement of divorce.

11. The questions that arise before this Court for adjudication of the subject-matter of this petition are the following:

1. Does the Federal Government have the authority under section 2(b) of the Ordinance to authorize Director General (Administration) Ministry of External Affairs to appoint officers to Pakistan's Foreign Missions to discharge functions of Chairman as defined under section 2(b) of the Ordinance?

2. Do provisions of Ordinance have extra-territorial application and apply to divorce proceedings in relation to Pakistani spouses not physically present in Pakistan at the time of pronouncement of divorce?

3. Where divorce is pronounced between spouses who are Pakistani nationals at a time when they are outside

the territorial jurisdiction of Pakistan, whether due to being dual nationals or expatriate Pakistanis or temporary residents, are they obliged to pursue divorce proceedings before an officer appointed as Chairman for proposes of section 2(b) of the Ordinance in Pakistan's Foreign Mission and in such case is the Chairman of the relevant Union Council in Pakistan devoid of jurisdiction in relation to such divorce proceedings?

12. Before we engage with these questions, let us consider the relevant provisions of the Ordinance:

Section 1(2)

It extends to whole of Pakistan, and applies to all Muslim citizens of Pakistan, wherever they may be.

Section 2(a)

"Arbitration Council" means a body consisting of the Chairman and a representative of each of the parties to a matter dealt with this Ordinance:

Provided that where any party fails to nominate a representative within the prescribed time, the body formed without such representative shall be the Arbitration Council.

Section 2(b)

(b) "Chairman" means the Chairman of the Union Council or a person appointed by the Federal Government in the Cantonment areas or by the Provincial Government in other areas or by an Officer authorized in that behalf by any such Government to discharge the functions of chairman under Ordinance:

Provided that where the Chairman of the Union Council is a non-Muslim, or he himself wishes to make an application to the Arbitration Council, or is, owing to illness or any other reason, unable to discharge the functions of Chairman, the Council shall elect one of its Muslim members as Chairman for the purposes of this Ordinance.

Section 7

(1) Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of talaq in any form whatsoever, give the chairman a notice in writing of his having done so, and shall supply a copy thereof to the wife.

(2) Whoever, contravenes the provisions of sub-section (1) shall be punishable with simple imprisonment for a term which may extend to one year, or with fine which may extend to five thousand rupees, or with both.

(3) Save as provided in sub-section (5) talaq, unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from day on which notice under sub-section (1) is delivered to the Chairman.

(4) Within thirty days of the receipt of notice under Sub-section (1), the Chairman shall constitute an Arbitration Council for the purpose of bringing about a reconciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation.

(5) If the wife be pregnant at the time talaq is pronounced, talaq shall not be effective until the period mentioned in Sub-section (3) or the pregnancy, whichever later, ends.

(6) Nothing shall debar a wife whose marriage has been terminated by talaq effective under his section from remarrying the same husband, without an intervening marriage with a third person, unless such termination is for the third time so effective.

13. In exercise of powers under section 11 of the Ordinance, the Government of West Pakistan promulgated West Pakistan Rules under the Muslim Family Law Ordinance, 1961 on 10.07.1961. Rule 3 is germane to the question of jurisdiction of Chairman Union Council. And the proviso to Rule 6(1) and (2) is instrumental in considering the role envisaged for Consular Officers in Pakistan in the event that a notice is to be served on a person not in Pakistan at the relevant time. The text of Rules 3 and 6 is reproduced below:

Rule-3

3. The Union Council which shall have jurisdiction in the matter for purpose of clause (d) of section 2, shall be as follows namely: –

(a) in the case of an application to contract another marriage under subsection (2) of section 6, it shall be the Union Council of the Union or Town in which the existing wife of the applicant, or where the husband has more wives than one, the wife with whom the applicant was married last, is residing at the time of his making the application;

Provided that if at the time of making the application, such wife is not residing in any part of West Pakistan, the union council that shall have jurisdiction shall be:—

i) in case such wife was at any time residing with the applicant in any part of West Pakistan, the union Council of the Union or Town where such wife so last resided with the applicant; and

ii) in any other case, the Union Council of the union or Town where the applicant is permanently residing in West Pakistan;

(b) in the case of a notice of talaq under sub-section (1) of section 7, it shall be the Union Council of the Union or Town in which the wife in relation to whom talaq has been pronounced was residing at the time of the pronouncement to talaq;

Provided that if at the time of pronouncement of talaq such wife was not residing in any part of West Pakistan, the union Council that shall have jurisdiction shall be:–

i) in case such wife was at any time residing with the person pronouncing the talaq in any part of West Pakistan, Union Council or the Union or Town where such wife so last resided with such person; and

ii) in any other case, the Union Council of the union or Town where the person pronouncing the talaq is permanently residing in West Pakistan; and

(c) in the case of an application for maintenance under section 9, it shall be the Union Council of the Union or Town in which the wife is residing at the time of her making the application,

and where application under, that section is made by more than one wife, it shall be the Union Council of the Union or Town in which the wife who makes the application first, is residing at the time of her making the application.

Rule-6

6(1) Within seven days of receiving an application under sub-section (4) of section 6 or under sub-section (1) of section 9, or a notice under sub-section (1) of section 7, the Chairman shall, by order in writing, call upon each of the parties to nominate his or her representative, and each such party shall, within seven days of receiving the order, nominate in writing a representative and deliver the nomination to the Chairman or send it to him by registered post.

(2) Where a representative nominated by a party is, by reasons of illness or otherwise, unable to attend the meetings of the Arbitration Council, or willfully absents himself from such meeting, or has lost the confidence of the party, the party, may, with the previous permission in writing of the Chairman, revoke the nomination and make, within such time as the Chairman may allow, a fresh nomination.

Provided that where a party on whom the order is to be served is residing outside Pakistan, the order may be served on such party through the Consular Officer of Pakistan in or for the country where such party is residing.

14. The text of the SRO on the basis of which it has been argued by the Petitioner that Respondent No. 1 (i.e. the relevant Chairman Union Council) is devoid of authority for purposes of section 7 of the Ordinance, is as follows:

"In exercise of the powers conferred by clause (b) of section 2 of the Muslim Family Laws Ordinance, 1961 (VIII of 1961), the Central Government is pleased to authorize the Director General (Administration), Ministry of External Affairs to appoint officers of Pakistan missions abroad to discharge the functions of Chairman under the aforesaid Ordinance."

15. The first question before this Court is whether the SRO was validly issued in exercise of power duly vested in the Federal Government under section 2(b) of the Ordinance. The ordinary meaning of the text of section 2(b) seems to identify five categories of persons who fall within the definition of Chairman: (1) Chairman Union Council; (2) a person appointed by the Federal Government in the Cantonment Areas to discharge the functions of Chairman; (3) a person appointed by the Provincial Government in areas other than Cantonment Areas to discharge the functions of Chairman; (4) an officer appointed by the Federal Government in the Cantonment Areas to discharge the functions of Chairman; and (5) an officer appointed by the Provincial Government in areas other than Cantonment Areas to discharge the functions of Chairman.

16. The text of section 2(b) could alternatively be read as identifying four categories of persons who fall within the definition of Chairman as opposed to five i.e. (1) Chairman Union Council; (2) a person appointed by the Federal Government in the Cantonment Areas to discharge the functions of Chairman; (3) a person appointed by the Provincial Government in areas other than Cantonment Areas to discharge the functions of Chairman; (4) an officer appointed by the Federal Government or the Provincial Government to discharge the functions of Chairman devoid of territorial restrictions. Such reading of section 2(b) would not limit the power of the Federal Government to appoint an officer to discharge the functions of Chairman only within Cantonment Areas.

17. This second reading, however, raises two issues. One, the words in section 2(b) where governments are authorized to appoints 'officers' to discharge functions of Chairman uses the words "in that behalf" while identifying the fourth and fifth category of persons falling within the definition of Chairman. To read the provision as empowering the Federal Government to appoint an officer to discharge the functions of Chairman not just within a Cantonment Area but anywhere across Pakistan and also within Pakistan's Foreign Missions, would require attributing redundancy to the words "in that behalf". It is a settled principle of interpretation that each and every word used in a statute is to be given meaning and redundancy is not to be attributed to words used by the legislature.

18. The second issue is that of territorial and subject-matter jurisdiction of respective governments within our federation. The functions of Chairman belong to the third-tier of government i.e. local bodies, which in turn falls within the domain of the provinces and not the centre. The second reading of section 2(b) could fall foul of the principle of federalism and could possibly conceive setting up of parallel offices of Chairman for discharge of functions under the Ordinance in the event that the power of the Federal Government to appoint officers to discharge functions as Chairman is read disjunctively from the initial part of section 2(b) that limits the authority of the Federal Government to appoint persons for discharge of such functions only in Cantonment Areas. In such case, both the Federal Government and the relevant Provincial Government would have

authority to simultaneously appoint Chairmen for purposes of the Ordinance, resulting in a conflict.

19. In view of the Ordinance and the Rules, it is inconceivable that the legislature had envisaged establishment of Arbitration Councils headed by Chairmen in each Foreign Mission at the discretion of Director General (Administration) of the Ministry of External Affairs, that would then also oust the jurisdiction of the Chairman of the relevant Union Council for purposes of the Ordinance. Rule 3 of the Rules reproduced above addresses the question of jurisdiction of the relevant Union Council at length to prevent conflict of jurisdiction in case the spouses do not reside within the same Union Council. The proviso to Rule 6(1) and (2) provides for service of notice on a party to proceedings before the Arbitration Council through Consular Officers in Foreign Missions. Given that the Rules were promulgated on 10.07.1961 and the SRO was issued a few months later on 08.11.1961, the Government could easily have addressed the matter of establishment of office of Chairman in Foreign Missions in Rule 3, instead of providing that notices can be served on parties through Consular Officers while proceedings are continuing before Arbitration Council in the relevant Union Council in Pakistan.

20. In view of the above it cannot be implied from a plain reading of the Ordinance and the Rules, that Arbitration Councils headed by Consular Officers as its Chairman are to be established in Foreign Missions of Pakistan, which once

established would oust the jurisdiction of Chairmen Union Councils in Pakistan in relation to expatriate Pakistanis.

21. The SRO also suffers from a further infirmity. It purports to vest authority in Director General (Administration) Ministry of External Affairs to appoint officers as Chairman for purposes of section 2(b), even though the power to appoint an officer as Chairman (even if it is assumed that the Federal Government has the power to make such appointment across Pakistan and in Foreign Missions abroad) has been vested in the Federal Government, without any authority vested in the Federal Government to sub-delegate the power further.

22. In Karachi Cooperative Housing Societies Union Ltd. vs. Government of Sindh (1990 MLD 389), a division bench of the learned Sindh High Court held the following:

19. We are inclined to hold that if a judicial power or even executive power is conferred by the relevant statute upon a particular named Government functionary, the same cannot be delegated in the absence of express words or necessary implication, as the maxim "delegatus non potest delegare", a statutory power must be exercised only by the body or officer in whom it has been vested, will be applicable.

The learned Sindh High Court relied on and reproduced para 32 from the Halsbury's Laws of England (Fourth Edition) Volume I, which, in relevant part, reads as follows:

"32-SUB-DELEGATION OF POWERS.--*In accordance with the maxim delegatus non potest delegare, a statutory power must be exercised only by the body or officer in whom it has been confided, unless sub delegation of the power is authorised by express words or necessary implication. There is*

a strong presumption against construing a grant of legislative, judicial or disciplinary power as impliedly authorising sub-delegation; and the same may be said of any power to the exercise of which the designated body should address its own mind. Even where a power to make decisions is exercisable only by the delegate itself, however, considerations of practical convenience may justify the entrustment to a committee or officers of powers to conduct an investigation and to make recommendations as to the decision to be taken.

23. In Muhammad Ashraf Tiwana vs. Pakistan (2013 SCMR 1159) the august Supreme Court held that statutory powers conferred on the Securities and Exchange Commission of Pakistan by the legislature could not be delegated further, while explaining the underlying principles as follows:

"It is well settled in our jurisprudence that a discretionary authorization conferred on a person or body by statute, cannot be delegated. It has repeatedly been held by our Constitutional Courts that the exercise of such discretionary function is in the nature of entrustment and the statutory functionary who is entrusted with exercising his judgment, acts as a fiduciary. Apart from the fact that such fiduciary is obliged to exercise discretionary decision-making functions himself, it is also a necessary concomitant of such fiduciary performance of duties, that the same are exercised in good faith for furtherance of the objectives of the statute."

24. This court in Oil and Gas Development Company vs Federal Board of Revenue (2016 PTD 1675) set aside a show-cause notice issued by for want of jurisdiction and explained the principle underlying delegation of statutory powers and functions as follows:

"18. It is settled law that a delegate cannot further delegate its powers unless expressly authorized under the law. It is also settled law that in order to enable a person to

delegate the powers or functions, there must be an authority, expressed or implied, to delegate. When power is conferred on a particular person, then that person alone has to exercise the powers and cannot transfer its exercise to another person. The august Supreme Court in the case titled 'Muhammad Ashraf Tiwana and others v. Pakistan and others' [2013 SCMR 1159] while examining the power of appointment of Commissioners vested in the Federal Government under the Securities and Exchange Commission of Pakistan Act 1997, observed and held that it was well settled law that a statutory delegate could not sub-delegate his or her powers. It would also be pertinent to quote relevant paragraph from the celebrated treatise titled 'De Smith's Judicial Review' Seventh Edition as follows.-

"A discretionary power must, in general, be exercised only by the public authority to which it has been committed. It is a well-known principle of law that when a power has been conferred to a person in circumstances indicating that trust is being placed in his individual judgment and discretion, he must exercise that power personally unless he has been expressly empowered to delegate it to another."

The Indian Supreme Court in the case titled 'Sahni Silk Mills (P) Ltd. and another v. Employee's State Insurance Corporation' [(1994 5 Supreme Court Cases 346] has held as follows.-

"By now it is almost settled that the legislature can permit any statutory authority to delegate its power to any other authority, of course, after the policy has been indicated in the statute itself within the framework of which such delegatee is to exercise the power. The real problem or the controversy arises when there is a sub-delegation. It is said that when Parliament has specifically appointed authority to discharge a function, it cannot be readily presumed that it had intended that its delegate should be free to empower another person or body to act in its place."

24. The principle underlying the maxim "delegates non potest delegare" (i.e. when power is conferred by statute on a

particular person it must be exercised by such person and not be delegated further unless the statute also confers authority upon such person to further delegate, either expressly or by necessary implication), was applied by the learned Sindh High Court in Fareed Ahmad A Dayo vs. Chief Minister Sindh (P L D 2017 Sindh 214) and the learned Peshawar High Court in Saleem Wazir Professor Community Medicine vs Government of Khyber Pakhtunkhwa (2019 P L C (C.S.) 224).

25. Thus, in view of settled understanding regarding the principle of "delegates non potest delegare" alone, the SRO is *ultra vires* section 2(b) of the Ordinance. As the SRO is without jurisdiction, any appointment of Chairman made by Director General (Administration) Ministry of Foreign Affairs in a foreign mission would be devoid of legal authority. And as no Chairman or Arbitration Council exists in any Foreign Mission of Pakistan, including Pakistan's High Commission in United Kingdom, the question of ouster of jurisdiction of the relevant Chairman Union Council in Pakistan in the instant case does not even arise.

26. The second question for this court identified in para. 11 above is whether provisions of Muslim Family Laws Ordinance, 1961 have extra-territorial application and apply to divorce proceedings in relation to Pakistani spouses not physically present in Pakistan at the time of pronouncement of divorce.

27. The question was considered and addressed by the learned Lahore High Court in In Muhammad Talat Iqbal Khan through General Attorney v. Tanvir Batool through Wasim Iqbal and 2 others (2005 CLC 481), wherein it held the following:

13. The submission made upon the basis of rule 3(b) by the learned counsel for respondents when placed in juxtaposition

with the provisions of Rule 3(A) leads to the inescapable conclusion that Rule 3(b) only relates to a specific situation where the wife to whom divorce has been pronounced was actually residing within the territorial jurisdiction of one or the other Union Councils. It is in this context alone that it has been prescribed that a Union Council where the wife was residing at the time of pronouncement of Talaq shall have exclusive jurisdiction. This provision is not exhaustive. An exception to the same has been expressly provided in Rule 3-A which provides for a situation where the whereabouts of the wife or her relatives is not known at all. The service of notice of divorce can be effected through proclamation in the press.

14. For a parity of reasons, it is held that both the Ordinance of 1961 as well as the Rules framed have extra territorial applicability and apply to all Muslim Citizens of Pakistan wherever they may be.

15. The rule of construction which the learned counsel for the respondents wants to be placed upon Rule 3(b) of the Rules of 1961 would lead to very serious, nay absurd consequences. It would imply that despite the pronouncement of divorce by a Muslim husband, the wife would continue to remain clothed with the status of his wife for simple reason that spouses were presently residing in a Foreign Country beyond the jurisdiction of respondent No.2 the construction would defeat the Injunctions of Islam and would lead to anomalous results. Indeed such an interpretation must be avoided.

28. Section 1(3) of the Ordinance clearly states that, “[i]t extends to whole of Pakistan, and applies to all Muslim citizens of Pakistan, wherever they may be”. Rule 3 addresses the question of jurisdiction of the relevant Union Council in the event that a party to proceedings under the Ordinance is not residing in Pakistan at the relevant time and the proviso to section 6(1) and (2) also provides for service upon a party through a Consular Officer of the relevant Foreign Mission. There is no

explicit provision in the Ordinance ousting jurisdiction of the Chairman of the relevant Union Council in case proceedings under the Ordinance involve a spouse residing outside Pakistan nor is there anything in the provisions of the Ordinance or the Rules by virtue of which such ouster can be implied.

29. In Pakistan a marriage can be terminated without the need to establish fault on part of a spouse who is being divorced or from whom divorce is being sought. It was held in *Khurshid Bibi v. Muhammad Amin*, PLD 1967 SC 97, that it is sufficient for a wife to state that she would be unable to live with the husband, without establishing fault on part of the husband and the principle of no-fault divorce has been established ever since. The question of whether or not the conduct of the husband is unconscionable and has caused the wife to seek divorce is only relevant for purposes of her entitlement to dower.

30. The learned Lahore High Court held in *Mst. Khurshid Mai v. The Additional District Judge* (1994 MLD 1255) that, "a lady cannot be pinned down to live with a man, against whom she has developed utmost aversion, and with whom she is finding it increasingly difficult to live a normal life as wife. In *Shakila Bibi v. Muhammad Farooq* (1994 CLC 230) the Lahore High Court was even more unequivocal: "It is also well-established in law that a wife is not supposed to justify the reasons, on account of which she had developed hatred for her husband. It is sufficient, if it is shown that the wife has fixed aversion and hatred towards her husband and there was no possibility of any reconciliation between them." The same principle was reiterated by the

learned Peshawar High Court in Muhammad Faisal Khan v. Mst. Sadia (PLD 2013 Peshawar 12) and by the learned Baluchistan High Court in Bibi Feroza and 5 others v. Abdul Hadi (2014 CLC 60).

31. Whether it is a husband pronouncing divorce while following the procedure prescribed under the Ordinance, a wife dissolving her marriage pursuant to section 8 of the Ordinance in exercise of power to divorce delegated to her in the Nikah Nama, or a wife seeking dissolution of marriage under West Pakistan Family Courts Act, 1964, the principle of no-fault divorce applies.

32. The principle of no-fault divorce in Pakistan also helps construe the scheme of the Ordinance. The relevant case law for purposes of considering the third question listed under para 11 above (i.e. the jurisdiction of Chairman Union Council in Pakistan in relation to proceedings under the Ordinance involving expatriate Pakistanis) is summarized below:

(i). In Muhammad Salahuddin Khan v. Muhammad Nazir Siddiqui and others (1984 SCMR 583) it was held that if the divorce is pronounced in accordance with the Islamic Law and the notice is sent to Chairman, Arbitration Council the divorce would be effective after ninety days of receipt of such notice.

(ii). In Ahmed Nadeem v. Chairman, Arbitration Council (1991 MLD 1187) it was held that no form of notice has been prescribed by law and that any intelligible method can be used for such purpose.

(iii). In Mst. Zahida Shaheen and another v. The State and another (1994 SCMR 2098) it was held that even failure to send notice of divorce to the Chairman Arbitration Council does not render the divorce ineffective in Shariah.

(iv). In Muhammad Asad v. Humera Naz (2000 CLC 1725) where the Muslim divorce fulfills the requirement of injunction of Islam, it is complete by itself and notice of divorce to the Chairman is merely operative as a proof thereof.

(v). In Syeda Wajiha Haris v. Chairman, Union Council No. 7, Lahore (2010 MLD 989) the couple was in Romania and the learned Lahore High Court relied in view of SRO No. 1086(K)61 dated 08.11.1961 that it created a remedy and a forum for reconciliation between the spouses under Muslim Family Laws Ordinance, 1961 would be Pakistani Mission in the countries of their residence.

(vi). In Mst. Sana Asim Hafeez v. Administrator/ Chairman, Arbitration Council and Conciliation Court (2016 MLD 1061) the learned Lahore High Court held that both the parties were permanent residents of UK and Arbitration Council in Pakistan had no jurisdiction to proceed in the matter. In this case the husband was pursuing his divorce in Pakistan as the marriage was solemnized in Lahore, Pakistan.

(vii). In Mst. Gul Zameeran v. Mst. Aasia (2017 CLC 1431) it was held that after reconciliation proceedings fails the Arbitration Council must issue certificate for effectiveness of talaq after expiry of ninety days.

(viii). In Muhammad Afzal Khan v. Chairman Arbitration Council and another (2018 CLC 1125) the learned Lahore High Court held the following:

16. The purpose of Arbitration Council is to hold reconciliation proceedings between the spouses and if the matter is not reconciled, the Chairman Arbitration Council has to issue certificate of effectiveness of Talaq after expiry of 90 days, whereas it is prerogative and authority of the person, who files the application along with notices of Talaq for issuance of certificate of effectiveness of Talaq to withdraw the same before expiry of the 90 days and if the said application is not withdrawn by the applicant (whether the applicant is husband or wife), the Chairman Arbitration Council cannot refuse to issue certificate of effectiveness of Talaq, especially in those cases, when the other side does not appear for reconciliation proceedings. Similarly, if wife (in case of delegated right of

divorce) has approached the Chairman Arbitration Council for issuance of certificate of effectiveness of Talaq and notices have been issued to other side, whereas the other side fails to appear before the Chairman Arbitration Council and in the meanwhile the applicant (wife) or the person, who applied, dies then it can only be presumed that the executor of the notices of Talaq had intention to pronounce Talaq as the same can be gathered from the documents of Talaq. Reliance is placed upon Malik Khalid Riaz v. The Administrator, Arbitration Council, Hafizabad and another (2016 CLC 1522).

(ix). In Mst. Asma Bibi v. Chairman, Reconciliation Committee and others (PLD 2020 Lahore 679) the spouses were living in USA and the learned Lahore High Court held that at the time of pronouncement of talaq wife was living in U.S and in view of the SRO No. 1086(K)61 dated 09.11.1961 officers of Pakistan Mission abroad were authorized to discharge the functions of Chairman under the Ordinance and the Chairman Union Council had no authority to issue divorce certificate.

33. In view of the reasoning in relation to the first two questions mentioned in para. 11 as discussed and addressed above and having found that the SRO is ultra vires the Ordinance, this court is not inclined to follow the judgments cited as Syeda Wajiha Haris v. Chairman, Union Council No. 7, Lahore (2010 MLD 989), Mst. Sana Asim Hafeez v. Administrator/ Chairman, Arbitration Council and Conciliation Court (2016 MLD 1061), Mst. Asma Bibi v. Chairman, Reconciliation Committee and others (PLD 2020 Lahore 679).

33. The legislative intent behind promulgating the Ordinance seems to include, inter alia, that (i) details of all marriages are to be recorded in a register that is available for public scrutiny, (ii) that in case of a second or third or fourth marriage, the marriage is subject to grant of prior permission granted pursuant

to provisions of the Ordinance, (iii) the issuance of a certificate declaring that a divorce is effective is preceded by an effort on part of Chairman aided by representatives of the two spouses to attempt a reconciliation within a period of 90 days from the pronouncement of divorce. Given that in Pakistan the principle of no-fault divorce applies, the dissolution of marriage is not contingent upon compliance with procedural requirements of Section 7.

34. Section 7 of the Ordinance is meant to put the spouse to whom a proclamation of divorce has been addressed by the other spouse on notice and further to put in place a mechanism for attempting reconciliation between the parties within the 90-days prescribed period, failing which the divorce attains finality. Section 7(1) is mandatory in a sense that not abiding by it invites penal consequences prescribed under section 7(2). However, the fate of a marriage does not hang on following the prescribed procedure. Section 7(3) itself provides that the divorce, unless revoked by the party issuing it, will become effective upon the expiry of the 90-days period prescribed for purposes of reconciliation. Thus, while not following mandatory requirements of section 7(1) can produce penal consequences for the person acting in breach thereof, such non-obedience doesn't affect the validity of the divorce that automatically goes into effect after expiry of the 90-days period from the date of proclamation of divorce.

35. The intent of the Ordinance is to regulate the recording of the particulars of marriages as well as their dissolution and

making such particulars a part of verifiable public record. It is such public record that is then relied upon for purposes of municipal law in Pakistan to determine the status of a marriage (and ancillary purposes such as for example the right to inheritance etc. upon the demise of a person). In view of the scheme and purpose of the Ordinance, it would make no sense to assume that a parallel marriage dissolution process is to be established under an SRO purportedly vesting power in an officer to the Ministry of External Affairs to appoint Chairmen across the world in Pakistan's Foreign Missions, without creating a mechanism for sharing the information regarding dissolution of marriages with the Union Council or another central registry in Pakistan.

36. Without such sharing of information and data, the information regarding dissolution of marriages pursuant to proceedings conducted within Foreign Missions abroad would remain in silos, defeating the underlying purpose of the Ordinance to make such information available publicly for access and verification. In view of the pith and substance of the Ordinance, it cannot be implied that the mere appointment of Consular Officers in Pakistan's Foreign Missions to act as Chairman for purposes of section 2(b) of the Ordinance, would oust the jurisdiction of the Chairman of the relevant Union Council by implication.

37. In order to appoint Chairmen and Arbitration Councils within Pakistan's Foreign Missions, there is need to bring about appropriate changes in the law. In order to give effect to the

object and purpose of the Ordinance, such amendment in law would no doubt provide a mechanism to record the proceedings conducted in relation to Pakistani nationals (even if dual nationals or expatriate Pakistanis) by the Chairmen and Arbitration Councils in Foreign Missions in such manner that such record can be inspected through a public registry accessible in Pakistan.

38. It was for the aforesaid reasons that the following short order was passed on 24.02.2021:

*i. S.R.O. No.1086-K/61 dated 08.11.1961 is ultra vires Section 2(b) of the Muslim Family Laws Ordinance, 1961 ("**Ordinance**").*

ii. There is no Arbitration Council presently functional in Pakistan's High Commission in UK that is able to conduct reconciliation proceedings for purposes of Section 7 of the Ordinance and issue a Divorce Certificate.

iii. The petitioner has been unable to point out any illegality in the issuance of the Divorce Certificate issued pursuant to proceedings undertaken by the Arbitration Council in Islamabad.

*The instant writ petition is accordingly **Dismissed**.*

(BABAR SATTAR)
JUDGE

Approved for reporting.