

**P L D 2005 Lahore 316**

**Before Abdul Shakoor Paracha, J**

**Mst. HAJRA KHATOON and another---Petitioners**

**Versus**

**STATION HOUSE OFFICER, POLICE STATION FATEH JANG, DISTRICT ATTOCK and 2 others---Respondents.**

Writ Petition No.3410 of 2004, decided on 10th February, 2005.

**(a) Islamic Law---**

---Marriage---Validity---Sui juris Muslim female can enter into valid Nikah/Marriage of her own free-will without the consent of "Wali".

Hafiz Abdul Wahid v. Mst. Asma Jahangir PLD 2004 SC 219 and Hafiz Abdul Wahid v. Mst. Asma Jahangir PLD 1997 Lah. 301 ref.

**(b) Offence of Zina (Enforcement of Hudood) Ordinance (VII of 1979)---**

---S. 2(a)---Marriage by a woman on attaining puberty is valid---Nikah/Marriage contracted by a woman not having attained the age of majority, as defined in law, but having attained puberty as defined in Offence of Zina (Enforcement of Hudood) Ordinance, 1979 is valid and not void.

Hafiz Abdul Wahid v. Mst. Asma Jahangir PLD 2004 SC 219 ref.

**(c) Offence of Zina (Enforcement of Hudood) Ordinance (VII of 1979)---**

---Ss. 11 & 2(a)---Constitution of Pakistan (1973), Art. 199---  
Constitutional petition---Quashing of F.I.R.---Marriage contracted  
by a woman and not having attained the age of majority as defined  
in law, but having attained puberty as defined in Offence of Zina  
(Enforcement of Hudood) Ordinance, 1979 is valid and not  
void---female accuses, though not having attained the age of 16  
years, had attained puberty and she, therefore, could not be  
compelled to live with her parents till attaining the age of 16 years  
---F.I.R. registered against the accused was quashed in  
circumstances and the Constitutional petition was accepted  
accordingly.

Hafiz Abdul Wahid v. Mst. Asma Jahangir PLD 2004 SC 219;  
Ayesha Ijaz v. S.H.O. 1997 MLD 641; Mst. Sughran Mai v. The  
State PLD 1980 Lah. 386; Mst. Bakhshi v. Bashir Ahmad and  
another PLD 1970 SC 323; Hafiz Abdul Wahid v. Mst. Asma  
Jahangir PLD 1997 Lah. 301; Muhammad Imtiaz and another v.  
The State PLD 1981 FSC 308; Muhammad Ramzan and others v.  
The State PLD 1984 SC 184; Muhammad Yaqoob and another v.  
The State and 3 others 1985 PCr.LJ 1064; Tuhfatul Ahawazi, Book  
p.233; Fathul Bari Shaarh Sahih Bukhari by Ibne-e-Hajar Asqalani,  
Vol. IX, p.182; Nailul Autar by Shokani, Vol. V, p.136;  
Fihussumah by Syed Sabiq Vol., II, p.113; Misqatual Mafatih  
Sharh Mishkatul Masabih by Mulla Ali Qari, Vol. VI, p.204;  
Subulussam by Kahlani Al-amir Vol. III, p.117; Badayatul  
Mujtahid by Ibne-e-Rushad, Vol. II, pp.6 and 7; Al-Mughni by  
Ibne-Qudama, Vol. VI, p.487; Sharh Sahih Muslim by Imam  
Naawi, Vol. IX, p.203; Ahkamul Qur'an by Abu Bakar Jassas, Vol.  
I, p.401 and Kitabul Fiqh Alal Mazahibil Arbaa (Urdu) by Allama  
Jaziri, Vol. IV, p.97 ref.

Muhammad Saeed Khan for Petitioners.

Laiq Khan Sawati for Respondents.

Tanvir iqbal, A.A.-G. for the State.

## **ORDER**

Through this petition under Article 199 of the Constitution of  
Islamic Republic of Pakistan, 1973 read with section 561-A,  
Cr.P.C., Mst. Hajra Khatoon and Muhammad Naseer, who

contracted marriage, on the basis of registered Nikahnama dated 20-11-2004 seek quashment of case F.I.R. No.315 of 2004 dated 2-12-2004, recorded at Police Station Fateh Jang, District Attock, for an offence under section 11, Offence of Zina (Enforcement of Hudood) Ordinance, 1979, on the complaint .of father of Mst. Hajra Khatoon, namely, Amir Afzal, respondent No. 2 herein.

2. Both the petitioners appeared before this Court on 31-1-2005. Petitioner Mst. Hajira Khatoon stated that she being sui juris contracted marriage with petitioner No.2 Muhammad Naseer with her free consent and will. Learned counsel for the complainant-Amir Afzal, who was present with the complainant, produced registered Nikahnama dated 20-11-2004 and birth certificate issued by the Union. Council, Gali Jagir, Tehsil Fateh Jang, District Attock, according to which the lady was born on 16-12-1990; she was approximately aged 13 years and 11 months therefore it was argued that the statement of Mst. Hajra Khatoon regarding her Nikah being minor has no legal value and her marriage being a social contract was void. The learned counsel for the petitioners contended that the girl had attained puberty therefore the Nikah/marriage was valid. For the time being, without entering into controversy of valid Nikah, Mst. Hajra Khatoon was sent to Darul Amman for two days. Her father and mother, namely, Amir Afzal and Mst. Gohar Sultan were allowed to meet her in Darul Aman directing the Incharge to arrange meeting of the said parents with her for two hours each of the two days in between 9 a.m. to 2 p.m. A direction was issued to produce her in Court on 2-2-2005. On 2-2-2005, the Court appointed Sh. Zamir Hussain, Advocate, as amicus curiae to assist the Court on the following questions:-

(i) What would be the effect of Nikah/marriage contracted by a minor not having the age of majority as defined in law but attains the puberty as defined in Enforcement of Hudood Ordinance, 1979?

(ii) If the majority age is considered as 16 years under the Pakistan Penal Code then whether the marriage being contracted by the girl below the age of 16 years but having the puberty is void?

(iii) If the marriage-Nikah of the girl who has attained puberty is valid in accordance with law, whether she can be compelled to live with her parents till attaining the age of 16 years?

3. The learned counsel for the petitioners by relying on the definition of `adult' appearing in section 2 (a) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 contends that

petitioner Mst. Hajra Khatoon has attained puberty therefore she was adult at the time of marriage and on the strength of case reported as Hafiz Abdul Wahid v. Mst. Asma Jehangir (PLD 2004 SC 219) the consent of 'Wali' is not required and a sui juris Muslim female can enter into a valid Nikahmarriage of her own free-will. Further contends that under section 251 of the Mahomedan Law by D.F Mulla, every Mahomedan of sound mind, who has attained puberty, may enter into a contract of marriage.

4. On the other hand, the learned Assistant Advocate General assisted by the learned counsel for the complainant as well as the amicus curiae, contends that the petitioner had not attained the age of majority in accordance with the provisions of Majority Act, 1875 (Act No.IX of 1875); the petitioner is a child within the meaning of section 2(a) of the Child Marriage Restraint Act, 1929, which says that, "child' means a person who, if a male, is under eighteen years of age, and if a female, is under sixteen years of age" and the marriage by a, child is punishable under section 6 of the Act *ibid*. He relies on the definition of 'minor' appearing in section 4 (1) of the Guardians and Wards Act, 1890, according to which 'Minor' means a person who, under the provisions of the Majority Act, 1975, is to be deemed not to have attained his majority. Further contends that according to the Majority Act age of majority is 18 years. On the strength of case reported as Ayesha Ijaz vs. S.H.O (1997 MLD 641), learned counsel contends that no marriage, except marriages of Holy Prophet (peace and blessing of Allah be upon him), is valid without permission of Wali of woman proposed to be married and this is obvious from 33:50 dictum of Holy Qur'an.

5. I have heard the learned counsel for, the parties and perused the record with their assistance. On 2-12-2004, on the complaint of Amir Afzal son of Sikandar Khan, respondent No.2 herein, case under section 11 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 was registered against Muhammad Naseer and Mst. Hajra Khatoon, petitioners at 'Police Station Fateh Jan9, District Attock, alleging that Naseer along with his father Muhammad Sadiq, mother Mst. Jahan Begum and complainant's brother Muhammad Farooq had abducted Mst. Hajra Khatoon on 21-11-2004. The case of the petitioner Mst. Hajra Khatoon is that she being sui juris has contracted marriage with petitioner Muhammad Naseer with her free consent and that nobody had abducted her. She has placed the registered Nikahnama on the file. From the very beginning she is consistent with her statement that she is not willing to go with her parents in spite of the fact that twice she was sent to Darul Amaan for a considerable period. Section 251 of Mahomedan Law says that "Every Mahomedan of sound mind, who has attained puberty, may enter into a contract of marriage." The term 'adult' has been defined in section 2 (a) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, according to which 'adult' means a person who has attained, being a male the age of eighteen years or, being a female the age of sixteen years, or has attained puberty. In section 4 of the Guardians and Wards Act, 1890, 'minor' means a person who, under the provisions of Majority Act, 1875, is to be deemed not to have

attained his majority. According to the Majority Act, 1875, petitioner Mst. Hajra Khatoon is minor. Under section 6 of the Child Marriage Restraint Act, 1929, punishment has been provided for parents or guardian who contracted the marriage of child. Section 2 (a) of the Child Marriage Restraint. Act says that, "child' means a person who, if a male is under eighteen years of age, and if a female, is under sixteen years of age."

6. In the case reported as Mst. Sughran Mai v. The State (PLD 1980, Lahore 386), while interpreting section 2 (a), Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and provisions of Muhammadan Law it was held that, "woman having attained puberty contracted marriage of her own choice cannot be void due to is being not liked by her guardian." In the case reported as Mst. Bakhshi v. Bashir Ahmad and another (PLD 1970 SC 323), wherein the appeal against the order of the High Court arising out of a petition under section 491 Cr.P.C. was dismissed, the High Court, on the statement of N that she had contracted marriage and was living with B of her own free-will setting him at liberty to reside with B, it was observed by the Hon'ble Supreme Court and held that "High Court's order was proper inasmuch as N having attained age of 15 had reached puberty under Muhammadan Law and additionally her mother having contracted second marriage with stranger had lost right to her custody." In the case of Ayesha Ijaz v. The S.H.O (1997 MLD 641), supra, in para.27 Mr. Justice Abdul Hafeez Cheema, as his Lordship he then was, observed that, "The jurists mentioned a number of conditions for a valid marriage but there is a consensus about the following conditions that if either of them does not exist, no proper marriage takes place and in the absence of the first two conditions, namely, the consent of Wali and the consent of the parties to Nikah, a marriage if contracted, would be Batil i.e. wholly void. Principal conditions are as follows:-

(i) Consent of the Wali or Guardian.

(ii) Consent of the proposed husband and wife if they have attained puberty and subsequent Ejab-o-Qabool by them.

(iii) Payment of dower, and

(iv) Presence of two male witnesses or one male or two female witnesses.

In para-28 his Lordship took up for discussion these conditions seriatim and observed that, "As for the consent of the Wali, no marriage except the marriages of Holy Prophet (peace and blessing

of Allah be upon him) is valid without the permission of Wali of the woman proposed to be married and this is obvious from the following dictum of Holy Qur'an:-

(And any believing woman who disbelieves her soul to the Prophet if Prophet wishes to wed her that only for thee not for the rest of believers). (33.50).

7. In the cases reported as Hafiz Abdul Waheed v. Miss Asma Jehangir and another (PLD 1997 Lahore 301) Full Bench of this Court by majority of two-one held that, "Marriage contracted by a female without the consent of the Wali, in circumstances, was not invalid." However, the learned Judges individually proceeded to record their own views and the manner in which the marriages should be contracted.

8. In the cases reported as Muhammad Imtiaz and another v. The State (PLD 1981 FSC 308), Muhammad Ramzan and others v. The State (PLD 1984 SC 184-Shariat Bench) and Muhammad Yaqoob and another v. The State and 3 others (1985 PCr.L.J 1064-FSC), the Federal Shariat Court has consistently been taking view that a sui juris Muslim girl can contract marriage of her own accord and the consent of Wali and other relations is not required to the validity of marriage.

9. In the case reported as Muhammad Imtiaz and another v. The State (PLD 1981 FSC 308) (supra), sufficiency of consent of a woman to her Nikah was discussed and it was ruled that:-

"The sufficiency of the consent of a woman to her Nikah is

evident from the word ( ) in verse 230 of Surah Al Baqarah (2:231). The verse is about the result of divorce that 'And if he hath divorced her (the third time), she is not lawful unto him thereafter until she

marries another husband'. The word ( ) denotes marriage by the woman herself. Similarly in verse 232 of the same verse is the order 'not to place difficulties in the

way of their marrying their husband's

( ) The word

( ) also refers to their sweet will in matters of marriage. This is also clear from verse 229 of the same Chapter (2:229) which is translated below:--

"And if he hath divorced her (the third time) then is not lawful into him thereafter until she hath wedded another husband. Then if he (the other husband) divorce her it is not sin for both of them that they come together again-----"

13. In Miskhat there are several traditions which show that the consent of an adult virgin for her Nikah validates the marriage and that such consent may be given by a girl remaining silent. These traditions are as follows;-

"33. Abu Hurairah reported that the Messenger of Allah said: A previously married woman shall not be married till she gives consent, nor a virgin be married till her consent is sought -----

34. Ibn Abbas reported that the Messenger of Allah said: A previously married woman is more a guardian for herself than her guardian, and a virgin should be asked permission about herself; and her permission is her silence. In a narration he said: `A previously, married woman having consummation has got greater right to herself than her guardian, and a virgin shall be asked of her consent; and her permission is her silence (Muslim).

35. Abu Hurairah reported that the Prophet said: A Grown-up girl shall be asked permission about herself. If she is silent, it is her permission and if she declines there shall be no compulsion on her. (Tirmizi, Abu Daud, Nisai)."

10. Imam Abu Hanifa opined that the marriage of a woman is subject to her personal consent. This is clear from page 233 of the book "Tuhfatul Ahawazi". This opinion of Imam Abu Hanifa is to be found in all other books too, which are detailed below:--

"(1) Fathul Bari Sharh Sahib Bukhari by Ibn-e-Hajar Asqalani, Volume IX, page 182, printed by Darul Fikar, Beirut.

(2) Nailul Autar by Shokani, Volume V, page 136, printed by Mustafa Albaby & Sons; Cairo.

(3) Fiqhussumah by Syed Sabiq Volume II, page 113, printed by Darul Fikar, Beirut.

(4) Misqatul Mafatih Sharh Mishkatual Masabih by Mulla Ali Qari, Volume VI, page 204, printed by Maktaba Imdadiyya, Multan.

(5) Subulusslam by Kahlani Al-amir, Volume III, P. 117, printed by Darul Fikar, Beirut.

(6) Badayatul Mujtahid by Ibn-e-Rushad, Volume 11, Pages 6 and 7, printed by Maktabatul Ilmiyya, Lahore.

(7) Al-Mughni by Ibn-e-Qudama, Volume VI, page 487, printed by Maktaba Jumburiyya, Cairo.

(8) Sharh Sahih, Muslim by Imam Naawi, Volume IX, page 203, printed by Darul Fikar, Beirut.

(9) Ahkamul Qur'an by Abu Bakar Jassas, Volume I, page 401, printed by Darul Fikar, Beirut.

(10) Kitabul Fiqh Alal Mazahibil Arbaa (Urdu) by Allama Jaziri, Volume IV, page 97, printed by Auqaf Department, Punjab, Lahore.

In Hidayah, the principal of Hanafi Law is stated as under:-

"An adult female may engage in the contract without her guardian's consent----A Woman who is an adult, and of

sound mind, may be married by virtue of her own consent although the contract may not have been made or acceded to by her guardian."

11. The Hon'ble Supreme Court in the case of-Hafiz Abdul Waheed v. Mrs. Asma Jhangir and another (PLD 2004 SC 219 maintained the majority decision of the High Court, passed in Hafiz Abdul Waheed's case (PLD 1997 Lahore 301) and observed that, "as per judgments of the' Federal Shariat Court, noted in para-6 of this judgment, consent of `Wali' is not required and a sui juris Muslim female can enter into valid `Nikah'/marriage of her own free-'will."

12. Following the dictum laid down in the above judgment of the Federal Shariat Court and the Honourable Supreme Court in Hafiz Abdul Waheed's case (supra), I have to observe that the Nikah/marriage contracted by a woman, not having attained the age of majority as defined in law, but attains puberty as defined in Offence of Zina (Enforcement of Hudood) Ordinance, 1979, is valid and not void. Therefore, the girl/petitioner who had contracted Nikah/Marriage when she had attained puberty and not the age of 16 years, cannot be compelled to live with her parents till attaining the age of 16 years.

For what has been discussed above, this writ petition is accepted and case F.I.R No.315 of 2004 dated 2-12-2004, registered for an offence under section 11 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, is quashed.

N.H.Q/H-64/L  
F.I.R. quashed.

