

B/R

**JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
BANNU BENCH
(Judicial Department)**

Cr.Misc:BA No.12-B/2024

**Azam Shah
Vs
The State etc**

ORDER

Date of hearing 26.01.2024

For petitioner: Muhammad Shafqat Murad
Advocate.

For respondent: Mr. Masood Adnan Advocate.

For State: Mr. Habib Ullah Khan, A.A.G.

Dr. Khurshid Iqbal, J.-

1. The petitioner Azam Shah seeks his release on bail in case FIR No.365, dated 24.10.2023, registered under section 4 of the Khyber Pakhtunkhwa Elimination of Custom of Ghag Act, 2013 at Police Station Ghazni Khel, District Lakki Marwat.

2. On 10.07.2023, the complainant Mst. Bakht Bibi filed an application under section 22-A(6) Cr.P.C before the Justice of Peace. She asserted that despite being about 52/53 years old, she remains unmarried due to the persistent act of Ghag by the present petitioner. She alleged that whenever someone proposes marriage to her, the accused creates hurdles by enforcing a prohibited custom known as Ghag, claiming her hand in marriage without her consent by making open declarations. She claimed that neither the petitioner has contracted marriage with her, nor allows her to contract marriage with anyone else. Consequently, she reached the age of 52/53 years while residing in her parents' house, but the accused still does not mend his ways. After hearing the

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arguments, the Justice of Peace allowed the application and the case was registered against the petitioner under the aforementioned section of the law.

3. Arguments heard and record gone through.

4. Record shows that on 10.10.2023, the complainant Mst. Bakht Bibi filed an application under section 22-A(6) Cr.P.C before the Justice of Peace, seeking the registration of an FIR against the petitioner for engaging in the prohibited custom of Ghag and discouraging her marriage proposals. The Justice of Peace sought a report from the local police on 14.07.2023, which was duly submitted. Upon perusal, the report reveals a dispute over landed property between the parties. It also mentions the petitioner's claim that the hand of Mst. Bakht Bibi was given in nikah to him in exchange for the property—although, the revenue record tentatively shows the nature of the transaction in respect of the property as of sale. The report further states that when ruksati was denied, the petitioner sought the return of the land.

5. Notably, on 10.10.2023, the petitioner filed a suit for the restitution of conjugal rights against Mst. Bakht Bibi, where he claims that his nikah was solemnized with the complainant in 1991. The learned counsel for the petitioner also argued that if such a nikah had been solemnized, then, seeking her hand in marriage would not constitute the offence of Ghag. However, there is no documentary proof of the alleged nikah, and the petitioner is yet to establish it through overwhelming evidence.

6. Based on the afore-noted facts and circumstances, it appears that the petitioner has been claiming the hand of the complainant in marriage without her will and consent by making open declarations since 1991. In this way, he effectively barred her from marrying anyone else, reaching the age of 52/53 years. Furthermore, the petitioner has been

directly charged for the offence, which is one of moral turpitude.

7. *Ghag* (Pashto: literally, a voice; a pronouncement, a declaration; a warning)—an abhorrent social practice—is a public declaration by a young male (usually unmarried) of a preferential claim to get the hand of a young unmarried woman in marriage. In other words, it is a warning both to the targeted woman and her family as well as to the public at large to hold back from getting her married to anybody else. The act of ‘Ghag’ is an offence defined u/s 2(1)(b), punishable u/s 4 of the Khyber Pakhtunkhwa Elimination of Custom of Ghag Act, 2013. For reference both the provisions are reproduced below:

(b) “Ghag” means a custom, usage, tradition or practice whereby a person forcibly demands or claims the hand of a woman, without her own or her parents' or wali's will and free consent, by making an open declaration either by words spoken or written or by visible representation or by an imputation, innuendo, or insinuation, directly or indirectly, in a locality or before public in general that the woman shall stand engaged to him or any other particular man and that no other man shall make a marriage proposal to her or marry her, threatening her parents and other relatives to refrain from giving her hand in marriage to any other person, and shall also include obstructing the marriage of such woman in any other manner pursuant to such declaration; and

Explanation.—For the purpose of this definition, ghag shall also include “awaz”, “noom” or any word or phrase, denoting such declaration.

4. **Punishment.**—Whoever, violates or abets in the violation of the provisions of section 3, shall be punishable with imprisonment of either description for a term which may extend to seven years but shall not be less than three years and shall also be liable to fine up to five hundred thousand rupees or both.

Indeed, Ghag is an un-Islamic and unconstitutional act. It violates fundamental/human rights and has devastating consequences for women in this male dominated society. It

strips a woman of her fundamental right to marry as per her choice. This egregious violation of human rights leaves lasting scars, perpetuating cycles of trauma and oppression. Given these potential impacts, this practice has been widely condemned, and now criminalized under the afore-mentioned law. It is, therefore, high time to combat this issue with a robust judicial response in confluence with the legislative efforts.

8. The learned counsel for the petitioner argued that the offence does not fall under the prohibition contained in section 497 Cr.P.C. According to him, the grant of bail in such cases is a rule, while refusal is an exception. He asserts that there are no exceptional circumstances, such as apprehensions of absconcion, repetition of the offence, or tampering with the prosecution evidence after the release of the petitioner on bail. This limb of his arguments is devoid of any force. This Court is of the view that the offence is non-bailable and carries punishment for either description for a term that may extend to seven years, but shall not be less than three years, and it also imposes a fine of upto five hundred thousand rupees or both. It is a well established principle of criminal jurisprudence that bail cannot be claimed as of right in non-bailable offences. Moreover, the court, even in cases not falling within the prohibitory clause, can refuse bail if, after making a tentative assessment of the evidence, it finds a prima facie case against the accused. As noted above, the tentative assessment of the record prima facie links the petitioner with the alleged offence. Therefore, the mere fact that the offence does not fall within the prohibitory clause of section 497 Cr.P.C is not ground to entitle him to bail. The precedents of Liaqat Ali v. State (2022 YLR 1662 Karachi), Mahendar Kumar v. State (2022 YLR 846 Karachi), and Muhammad Siddique v. Imtiaz Begum (2022 SCMR 442 Supreme Court) are few to refer in this regard.



9. In light of these facts and circumstances, this petition merits no acceptance. It is, therefore, dismissed. However, the observations made hereinabove are purely tentative in nature. These shall not influence the mind of the trial judge at the trial.

Announced
26.01.2024
(Ghafoor Zaman)

Khurshid Iqbal
JUDGE

Office
Ghafoor Zaman
20 FEB 2024
Khurshid Iqbal

(S.B) Hon'ble Mr. Justice Dr. Khurshid Iqbal