Stereo.HCJDA 38.

Judgment Sheet

IN THE LAHORE HIGH COURT, LAHORE.

JUDICIAL DEPARTMENT

….

Writ Petition No.22286 of 2023.

Sakhawat Hussain.

Versus

Addl. District Judge, etc.

J U D G M E N T.

Date of hearing: **27.11.2024.**

Petitioner by: Muhammad Ashraf Azad, Advocate.

Respondent No.3 by: Mr. Sohail Akhtar, Advocate. (*Proxy*)

AHMAD NADEEM ARSHAD, J. Through this constitutional petition filed under Article 199 of the *Constitution of Islamic Republic of Pakistan, 1973*, the petitioner has called in question the validity and legality of judgments/orders of the Courts below whereby his application for DNA examination was dismissed concurrently.

2. Facts in brevity are that respondent No.3 instituted a suit for recovery of her maintenance allowance as well as for her minor son namely Sadaqat Hussain. The petitioner appeared before the Court and contested the suit by filing written statement in contrast wherein he denied the paternity of minor Sadaqat Hussain. He also filed an application for DNA examination of the minor by submitting that he is not his son. Learned Trial Court, after taking its reply, dismissed the same vide order dated 15.03.2023. Feeling aggrieved, the

petitioner filed an appeal which also met the same fate and dismissed by the learned Appellate Court vide judgment dated 29.03.2023. Hence, this petition.

3. I have heard learned counsel for the petitioner at length and perused the record with his able assistance.

4. It is matter of record that the petitioner contracted marriage with the respondent No.3 on 11.01.2018, however, he divorced her on 17.08.2018. After the divorce, minor Sadaqat Hussain was born on 01.03.2019 i.e. almost 06 ½ months of the dissolution of marriage.

5. The petitioner has not denied the marriage with respondent No.3, however, he denied the paternity of minor Sadaqat Hussain. He moved the application whereby he prayed for conducting Deoxyribonucleic acid (DNA) Test. Each human being has a unique DNA pattern, which is acquired by inheriting it from the biological parents. DNA can be found in the human body and samples can be taken from sliva, skin tissues, blood, hair and semen for establishing the DNA matching with the DNA of another human being. By using DNA technology, the Courts were in a better position to reach at a just conclusion but the question is that whether the petitioner can be allowed to get conduct DNA test of the minor and produce the said report as evidence in order to challenge the paternity of Sadaqat Hussain.

6. As per Article 128 of the Qanun-e-Shahadat Order, 1984, a child born to a woman during the subsistence of valid marriage or within two years after its dissolution is conclusive proof of his legitimacy, provided that the woman remains unmarried after the

divorce. Said fact was regarded as a ‘conclusive proof’ and no evidence could be admitted to refute the same. For ease of reference, Article 128 of the Qanun-e-Shahadat Order, 1984, is reproduced as under:

> ***Birth during marriage conclusive proof of legitimacy:***
> *(1) The fact that any person was born during the continuance of a valid marriage between his mother and any man and not earlier than the expiration of six lunar months from the date of the marriage, or within two years after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate child of that man, unless—*
> *(a) the husband had refused, or refuses, to own the child ; or*
> *(b) the child was born after the expiration of six lunar months from the date on which the woman had accepted that the period of iddat had come to an end.*
> *(2) Nothing contained in clause (1) shall apply to a non-Muslim if it is inconsistent with his faith.*

7. Said article has been explained by the Hon’ble Supreme Court of Pakistan in a case titled *“Ghazala Tehsin Zohra V. Mehr Ghulam Dastagir Khan and another”* **(PLD 2015 Supreme Court 327),** as under:

> ***“****10. We are cognizant of the ramifications and serious consequences which will follow if the impugned judgment remains a part of our case law as precedent. We, first of all, take up for comment the provisions of Article 128 ibid. The Article is couched in language which is protective of societal cohesion and the values of the community. This appears to be the rationale for stipulating affirmatively that a child who is born within two years after the dissolution of the marriage between his parents (the mother remaining un-married) shall constitute conclusive proof of his legitimacy. Otherwise, neither the classical Islamic jurists nor the framers of the Qanun-e-Shahadat Order could have been oblivious of the scientific fact that the normal period of gestation of the human foetus is*

> *around nine months. That they then extended the presumption of legitimacy to two years, in spite of this knowledge, directly points towards the legislative intent as well as the societal imperative of avoiding controversy in matters of paternity. It is in this context that at first glance, clause 1(a) of Article 128 appears to pose a difficulty. It may be noted that classical Islamic Law, which is the inspiration behind the Qanun-e-Shahadat Order (though not incorporated fully) and was referred to by learned counsel for the appellant also adheres to the same rationale and is driven by the same societal imperative. In this regard, it is also worth taking time to reflect on the belief in our tradition that on the Day of Judgment, the children of Adam will be called out by their mother's name. It shows that the Divine Being has, in His infinite wisdom and mercy, taken care to ensure that even on a day when all personal secrets shall be laid bare the secrets about paternity shall not be delved into or divulged.***"**

8. Article 2(f)(9) of the Qanun-e-Shahadat Order, 1984, provides that "when one fact is declared by this order to be conclusive proof of another, the Court was, on proof of the one fact, regard the other as proved and shall not allow evidence to be given for the purpose of disproving it". The stipulation in Article 128 of the Qanun-e-Shahadat Order, 1984 is that the birth of a child within the period specified in said Article is conclusive proof that he is a legitimate child. Once the relevant facts as to commencement of dissolution of marriage and the date of birth of a child within a period envisioned in Article 128 are proved and the date of birth is within the period specified in Article 128(1), then the Court cannot allow evidence to be given for disproving the legitimacy of a child born within the aforesaid period.

Article 128 (1)(a) provides that although birth during continuance of a valid marriage or within two years after its

dissolution is a conclusive proof of legitimacy but under certain circumstances the husband can disown the paternity of a child. Now, the question is when the husband can deny the parentage. Stage of such denial is of paramount consideration. Section 02 of the West Pakistan Muslim Personal Law (*Shariah*) Application Act, 1962 (*Act V of 1962*) stipulates that "*notwithstanding any custom or usage, in all questions regarding ... legitimacy or bastardy ... the rule of decision, subject to the provisions of any enactment for the time being in force shall be the Muslim Personal Law (Shariat) in cases where the parties are Muslims*". Since both parties are Muslims and section 2 aforesaid specifically refers to legitimacy or bastardy, resort must be made to the Muslim Personal Law (*Shariat*) for the purpose of reconciling what may appear to be conflicting provision of Article 128 of the QSO. For this purpose, it is necessary to ascertain the rules of Muslim Personal Law when a person denies that he is the natural/biological father of children born within the period stipulated in Article 128 ibid. The Muslim Personal Law (*Shariat*) is clear and well-settled on the subject. Firstly, it provides that legitimacy/paternity must be denied by the father immediately after birth of the child as per *Imam Abu Hanifa* and within the post natal period (*maximum of 40 days*) after birth of the child as per *Imam Muhammad* and *Imam Yousaf*. There can be no lawful denial of paternity after this stipulated period. The *Hedaya, Fatawa-e-Alamgiri* and other texts are all agreed on this principle of *Shariat*.

9. In the present case, the petitioner contracted marriage with the respondent No.3 on 11.01.2018, however, later on divorced her on

17.08.2018. Minor Sadaqat Hussain was born on 01.03.2019 i.e. almost after 6 ½ months of the dissolution of marriage. Hence, the first denial of paternity appearing from the record in the instant case is in the written statement furnished by the petitioner on 28.05.2022. Therefore, while applying the above referred principles of Muslim Personal Law (*Shariat*) as mandated by the Act V of 1962 the petitioner cannot be allowed to deny the legitimacy/paternity of Sadaqat Hussain.

10. In *Ghazala Tehsin Zohra's case* (*referred supra*), the appellant Mst. Ghazala Tehsin Zahra who contracted marriage with Mehr Ghulam Dastagir Khan (respondent) on 09.08.1997 and from the said wedlock a daughter namely Hina Fatima was born on 21.02.2000 and a son namely Hassan Mujtaba was born on 09.02.2001; she filed a suit for recovery of maintenance for herself and for her two children, the respondent instituted a declaratory suit denying the paternity of the said children and filed an application for conducting DNA test to establish his denial of paternity which was dismissed by the learned Trial Court, however, Revisional Court allowed the same and the said order was also maintained by High Court. The Hon'ble Supreme Court of Pakistan, while allowing the appeal, set aside the verdict of High Court as well as Revisional Court, and dismissed the respondent's suit while observing as under:

> *"13. The rationale of the law set out in Article 128 of the QSO read with section 2 of Act V of 1962 is quite clear. Both statutes ensure (in specified circumstances) an unquestioned and unchallengeable legitimacy on the child born within the aforementioned period notwithstanding the existence or possibility of a fact through scientific evidence. The framers of*

> *the law or jurists in the Islamic tradition were not unaware simpletons lacking in knowledge. The conclusiveness of proof in respect of legitimacy of a child was properly thought out and quite deliberate. There is a much greater societal objective which is served by adhering to the said rules of evidence than any purpose confined to the interests of litigating individuals. There are many legal provisions in the statute book and rules of equity or public policy in our jurisprudence where the interests of individuals are subordinated to the larger public interest. In our opinion the law does not give a free license to individuals and particularly unscrupulous fathers, to make unlawful assertions and thus to cause harm to children as well as their mothers."*

11. August Supreme Court of Pakistan in another case titled "*Mst. Laila Qayyum V. Fawad Qayum and others*" **(PLD 2019 Supreme Court 449)** wherein Fawad Qayyum instituted the suit against Mst. Laila Qayyum by alleging that she was "*an abandoned infant in a local hospital*" and was adopted by his father and during the pendency of said suit he filed an application seeking DNA test to be conducted and compared with his DNA. Said application was allowed by the Trial Court, however, Appellate Court set-aside the judgment of Trial Court; Hon'ble Peshawar High Court while setting aside judgment of the Appellate Court restored the order of Trial Court but august Supreme Court of Pakistan allowed the appeal and dismissed the suit while observing as under:

> *"Learned Mr. Awan is also right in referring to the case of Salman Akram Raja wherein it was held that a free lady cannot be compelled to give a sample for DNA testing as it would violate her liberty. If a sample is forcibly taken from Laila to determine her paternity it would violate her liberty, dignity and privacy which Article 14 of the Constitution of the Islamic Republic of Pakistan ("the Constitution") guarantees to a free person. The cases of Muhammad Shahid Sahil and B. P. Jena referred to by learned Mr. Faisal Khan, who represents Fawad, are distinguishable and are also not*

> *applicable to the present case. In the case of Muhammad Shahid Sahil the DNA of a rapist was sought by the victim to compare it with the DNA of the child born as a consequence of the rape. And in the case of B. P. Jena the Indian Supreme Court considered section 112 of the Evidence Act. Section 112 of the Evidence Act was the precursor of Article 128 of the Qanun-e-Shahadat Order, however, the wording of the two provisions is materially different. In any case, the Supreme Court of India observed that, "In a matter where paternity of a child is in issue before the court, the use of DNA is an extremely delicate and sensitive aspect and that:*
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> > *DNA in a matter relating to paternity of a child should not be directed by the court as a matter of course or in routine manner, whenever such a request is made. The court has to consider diverse aspects including presumption under Section 112 of the Evidence Act; pros and cons of such order and the test of 'eminent need' whether it is not possible for the court to reach the truth without use of such test."*
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> > *(B. P. Jena V. Convenor Secretary, Orissa State Commission for Women AIR 2010 Supreme Court 2851)"*

12. It is for the honour and dignity of women and innocent children as also the value placed on the institution of the family, that women and blameless children have been granted legal protection and a defence against scurrilous stigmatization. It is becoming a common practice in our society that whenever a suit for recovery of maintenance allowance is filed against a person he comes forward to the Court and challenges the legitimacy of the child by moving an application requesting for conducting DNA analysis of the child. Ethically, questioning the paternity of a child during a maintenance suit can be seen as a tactic to evade responsibility rather than a legitimate claim based on evidence. It often reflects a desire to avoid financial obligations and may be motivated by personal animosity or financial concerns. Such practice should be discouraged and dealt with an iron hand because encouraging such practices would only serve to erode trust in the

family unit and the legal system that is designed to protect the interests of vulnerable children. When a parent questions the legitimacy of the child, it creates an atmosphere of doubt and insecurity. This practice undermines the child's sense of identity, dignity, and belonging, which can have long-lasting psychological effects. It is crucial that courts focus on the child's needs and emotional welfare, rather than allowing a parent to challenge paternity without valid justification. The use of DNA tests to challenge paternity, while scientifically valid, should not be viewed as a tool for harassment or delay in matters of child maintenance.

13. In view of the above, learned Courts below have rightly dismissed the application of the petitioner. Learned counsel for the petitioner, despite hectic efforts and lengthy arguments, remained unable to persuade this Court to interfere in the verdicts of lower *foras*.

14. Upshot of above discussion is that instant petition has no force/substance, hence, the same is ***dismissed*** with no order as to costs.

(AHMAD NADEEM ARSHAD)
JUDGE.

Approved for Reporting.

JUDGE.

*M. Arsalan**