IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:
Mr. Justice Jawwad S. Khawaja,
Mr. Justice Sarmad Jalal Osmany

Civil Appeal No. 90 of 2011
(Against the judgment dated 18.5.2010 passed by the Lahore High Court in WP.4729 of 2010)

Ghazala Tehsin Zohra. … Appellant(s)

Versus

Mehr Ghulam Dastagir Khan and another. … Respondent(s)

For the appellant(s): Mr. Saif ul Maluk, ASC with appellant and her daughter (Hania Fatima)

For the Respondent-1: Sardar Muhammad Aslam, ASC

Respondent-2: Proforma respondent.

Date of hearing: 02.02.2015

Judgment

Jawwad S. Khawaja, J.- The appellant in this case is Mst. Ghazala Tehsin Zohra. Undeniably she was married to the respondent Mehr Ghulam Dastagir Khan on 9.8.1997. On 21.03.2000 a daughter Hania Fatima was born from this wedlock and on 9.2.2001 a son Hasan Mujtaba was also born. The respondent took a second wife. Thereafter, a suit for maintenance was filed by the appellant for herself and for their two children. When notice of the suit was served on the respondent, he made out a written *talaq nama* (Ex. D/3) on 26.06.2001. On 6.7.2001, the respondent filed a declaratory suit denying his paternity of the two children mentioned above. Para five of the plaint which sets out the main thrust of the suit is in the following terms:-

"یہ کہ اب اچانک والدین کے بہکاوے کے باعث والدین وخود مدعا علیہا نے بلا جواز اور بے بنیاد طور پر من مدعی کے نطفہ اور خود کے بطن سے اولاد ہونا جتلانا شروع کر دی ہے۔ جس کا واحد مقصد من مدعی کی جائیداد ہضم کرنا ہے حقیقت یہی ہے کہ من مدعی کے نطفہ سے مدعا علیہا کے بطن سے کوئی اولاد پیدا نہ ہوئی ہے من مدعی ہرگز مدعا علیہا کی طرف سے جتلائے گئے بچوں (حانیہ فاطمہ وحسن مجتبیٰ) کا والد نہ ہے اور نہ ہی شرعاً و قانوناً من مدعی سے ان کا کوئی تعلق واسطہ نہ ہے من مدعی اس ضمن میں ہر قسم کا حلف دینے کو تیار ہے اور من مدعی ہر قسم کے میڈیکل ٹیسٹ کے لیے بھی تیار ہے مذکورہ بچے یا تو مدعا علیہا کی ناجائز اولاد ہیں یا پھر وہ کسی دیگر کی اولاد ہیں انہیں من مدعی سے صرف اور صرف لالچ کے تحت منسوب کرنے کا منصوبہ تیار کیا گیا ہے۔ درحقیقت ان کا من مدعی سے کوئی تعلق واسطہ نہ ہے۔"

These averments were denied by the appellant in her written statement.

2. Thereafter, 6 issues based on the pleadings were duly framed by the trial Court; the first two being relevant for the present matter are in the following terms:-

> *"1. Whether there was born no son or daughter out of marriage between the parties and Mst. Hania Fatima and Hassan Mujtaba have no relation whatsoever with the plaintiff and record if any, showing that the said children are son and daughter of plaintiff is forged, fictitious, result of fraud and inoperative upon rights of plaintiff? OPP*
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> *2. Whether plaintiff is estopped through his words and conduct to file his suit, OPD"*

3. The respondent-plaintiff appeared as his own sole witness as PW-1. An important element of his testimony is that although he leveled various allegations against the appellant and also imputed unchastity to her by naming some other person as the father of the two children, he admitted in his cross examination that he had conjugal access to the appellant in his marital relationship until the dissolution of his marriage with the appellant. The other significant aspect of the respondent's testimony is that he did not deny his paternity of the two children at or immediately after their birth. The relevance of this fact is considered below.

4. The trial went on for some time and when it was to conclude after the evidence of both sides had been recorded, the respondent filed an application on 27.10.2007 i.e. six years after filing of the suit. In the application, he prayed that a DNA test be conducted to establish his denial of paternity. The application was dismissed by the trial Court on 20.03.2008. A revision petition filed by the respondent was, however, allowed on 9.2.2010 by the learned Additional District Judge. The revisional judgment was affirmed when writ petition No.4729/10 filed by the appellant was dismissed. The revisional judgment and the judgment of the High Court, both proceed on erroneous bases and are liable to be set aside for the reasons considered below.

5. There are quite a few aspects of this case which have very far reaching consequences and, therefore, need to be dealt with in depth so that the law can be clearly enunciated in the light of Article 189 of the Constitution. However, before discussing these material aspects, it is important to set out briefly the relevant facts, to provide context for the discussion which follows.

6. The suit filed by the respondent sought a declaration to the effect that the two children Hania Fatima and Hassan Mujtaba were not the natural/biological children of the respondent/plaintiff, and that any official record in this regard was bogus and had been fraudulently prepared. In addition to the contents of para 5 of the plaint reproduced above, the plaint also stated that the respondent-plaintiff had extremely cordial relations with the appellant and that the agricultural land which he had given to the appellant at the time of their marriage had been retransferred to him by the appellant vide mutation No. 459 dated 26.3.2001. As per plaint, it is only after 26.3.2001 that the parents of the appellants became aware of the mutation and they forcibly took her away from the matrimonial home although the appellant statedly was not willing to go with her parents. It is also averred in the plaint that the appellant-defendant had applied to the Tehsildar for the cancellation of mutation No. 459 but the respondent obtained a temporary injunction against such cancellation.

7. Another important feature of this case is the *talaq nama (*Ex.D/3) which was made in circumstances which have relevance and are considered later in this opinion. In the *talaq nama* also it has been narrated that it is only after the above referred mutation that the parents of the appellant took her away from the respondent's home. Serious allegations against the character and chastity of the appellant were also made in the *talaq nama* which find mention in the respondent's plaint. The parties examined themselves as their own sole witnesses.

8. The chronology of relevant events such as the date of marriage (9.8.1997), date of birth of Hania Fatima (21.3.2000), date of birth of Hassan Mujtaba (9.2.2001) and the *talaq nama* (26.6.2001) are part of the record and are undisputed. Furthermore, from the *talaq nama* (Ex.D/3) it is clear that even according to the respondent-plaintiff the appellant was residing in the matrimonial home and it is only after mutation No.459 (26.3.2001) and before the *talaq nama* dated 26.6.2001 that the appellant was taken away from there by her parents. These facts and relevant dates make it clear that the two children Hania Fatima and Hassan Mujtaba were not only conceived but were also born during the subsistence of the marriage between the appellant and the respondent.

9. We were informed by learned counsel that there are judgments from Courts across the border dealing with and interpreting Section 112 of the Evidence Act, which provision

was the precursor to Article 128 of the Qanun-e-Shahadat Order. There are, however, material differences between the wording of Section 112 and Article 128 which obviously were not before the Courts considering Section 112 *ibid.* Judgments, therefore, which interpret section 112 are not helpful in the present case. Thus, as far as this Court is concerned, the matter before us is one of first impression requiring interpretation of Article 128 of the Qanun-e-Shahadat Order. Article 128 of the Qanun-e-Shahadat Order, to the extent relevant, 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 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:-*
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> *(a) the husband had refused, or refuses, to own the child;"*

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.

11. We may, at this point, add that the Qanun-e-Shahadat Order ('QSO') stipulates that when one fact is declared "*to be conclusive proof of another [fact], the Court shall on proof of one fact, regard the other as proved and shall not allow evidence to be given for the purpose of disproving it*" (emphasis supplied). This provision of the QSO [Article 2(9)] has to be reconciled with clause 1(a) *ibid.* It now remains to be seen as to how clause (a) of Article 128(1) of the QSO is to be interpreted. Can an attempt be made to interpret Article 128 and Article 2(9) of the QSO harmoniously so as to save the entire Article 128 to the extent relevant for the present case. The stipulation in Article 128 is that the birth of a child within the period stipulated in Article 128 is conclusive proof that he is a legitimate child. Once the relevant facts as to commencement and dissolution of marriage and the date of birth of a child within the 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 period aforesaid. How then is the husband's refusal to own the child to be dealt with? The answer follows.

12. It is a matter of concern that on such a vital issue we have not received much assistance at the bar as to how Article 128 *ibid* is to be interpreted. Redundancy is not lightly to be imputed to the legislature. For the purpose of harmonious construction of the said statutory provision, we may have resort to section 2 of the West Pakistan Muslim Personal Law (Shariat) Application Act, 1962 (Act V of 1962) which 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 before us 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 provisions 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. In the present case the daughter Hania Fatima was born on 21.3.2000 while the son Hassan Mujtaba was born on 9.2.2001. The very first denial of paternity appearing from the record is in the *talaq nama* (Ex.D3) which was made on 26.6.2001. Clearly, therefore, while applying the principles of Muslim Personal Law (Shariat) as mandated by the Act V of 1962, the respondent-plaintiff cannot be allowed to deny the legitimacy/paternity of the two children. This is also consistent with Article 2(9) of the QSO which, when read in the context of the present case, does not allow the Court to allow any evidence to be adduced to disprove legitimacy. The wisdom of this rule of Muslim Personal Law cannot be gainsaid, considering in particular the patriarchal and at times miogynistic societal proclivities where women frequently donot receive the benefit of laws and on the contrary face humiliation and degrading treatment. 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.

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.

14. The other question arising in this case which is of significance is that the two children Hania Fatima and Muhammad Hassan Mujtaba have not been impleaded as parties in the suit filed by the respondent-plaintiff. This, in our opinion, is a fatal flaw in the respondent's case and is by itself sufficient for the purpose of dismissing the suit because the appellant cannot act for or be compelled to act for or on behalf of the two minors. Fourteen years have passed since the institution of the suit. We find it quite extraordinary that the two children who are to suffer approbrium and vilification without their fault, for the rest of their lives should stand condemned without being given an opportunity of defending themselves through a proper and fair trial. Even their right to plead the Qanun-e-Shahadat Order and the Muslim Personal Law (Shariat) has been denied to them. We are also dismayed at the apparent lack of competent assistance at the Bar because the above discussed aspects of the case were not urged before us or apparently before the Courts below. It is most likely for this reason that grave prejudice has been caused to the appellant and her two children. An even more formidable reason for setting aside the impugned judgments is that no DNA test to determine paternity can possibly be conducted without the participation and involvement of the children whose legitimacy is being denied. A mother (such as the appellant) is wholly irrelevant for the purpose of a paternity test. Unfortunately this aspect of the case has been overlooked in the impugned judgments.

15. For completeness we may note the submissions of learned counsel for the respondent. He referred to the case titled *Muhammad Shahid Sahil Vs. The State* (PLD 2010 FSC 215) in support of his contention that a DNA test had been considered the best scientific evidence. The said case, however, is distinguishable firstly on the ground that it was a criminal case involving the rape of a woman and the question of paternity of a child alleged to be that of the rapist was in question when it was held by the Shariat Court that the rapist could be compelled to submit to a DNA test. That is not a relevant precedent in the circumstances of the present case for the reasons discussed above because there was no occasion for the Shariat Court to consider Article 2(9) or 128 of QSO or Section 2 of Act V of 1962 read with the established rules of Muslim Personal Law (Shariat) for the purpose of examining the question of legitimacy of a child born during the subsistence of a lawful marriage.

16. In view of the foregoing discussion, we allow this appeal with costs. As a consequence, the revisional judgment and the judgment of the High Court in Writ Petition No.4729/10 impugned before us are set aside and the suit of the respondent is dismissed. This judgment shall not preclude the appellant (or the two minors) from invoking any remedy available to them against the respondent, under law. It also appears to us from the record *prima facie,* that the respondent-plaintiff may have committed offences under Chapter XI PPC such as giving false evidence, while testifying as PW1. In the event the trial Court may proceed against him in accordance with law.

Judge

Judge

Islamabad
2nd February, 2015
A. Rehman

APPROVED FOR REPORTING.