W.P. No.25711-2013

Mst.Shamim Akhtar Additional District Judge,etc.

23.02.2015 Mr.Shahid Nawaz Langrial, Advocate for the petitioner.
Syed Imran Haider, Advocate for respondent No.2.

The petitioner, through this Constitutional Petition, seeks setting aside impugned order dated 24.09.2013 passed by the learned Additional District Judge, Gujranwala, whereby he directed the parties to approach the Medical Superintendent, DHQ, Hospital, Gujranwala to get managed DNA profile test within 7 days in order to determine the controversy arrived at between the parties.

2. Brief facts giving rise to the filing of this writ petition are that on 09.06.1988 the petitioner contracted marriage with respondent No.2 in lieu of dower amount Rs.25,000/-beside fixation of Rs.1,00,000/- for the construction of house for her within a period of two years which was not paid. The parents of the petitioner at the time of marriage graced her with dowry

articles valuing Rs.8,44,270/- . From their wedlock Muhammad Umair Tayyab was born on 02.03.1995 whose birth entry was recorded initially in the Union Council, Kot Inayat Khan Tehsil Wazirabad District Gujranwala and thereafter the entry was also recorded in the record of NADRA in the shape of "B" form. Respondent No.2 took the petitioner alongwith minor child who was at that time aged about 3 months to Saudi Arabia where he was employed and the Saudi Government also approved permanent family visa to respondent No.2. However, in the year 1996 respondent No.2 contracted second marriage after getting permission from the petitioner by making a commitment to fulfill his responsibilities to his wife as well as the minor child. But the second marriage his attitude towards the petitioner was changed as he started ignoring her as well as minor and thereafter he sent forged divorce deed to the petitioner which was not made effective till filing of the petition. The petitioner filed a suit for maintenance allowance and dowry articles in which he submitted his written statement shockingly denying the parentage of the minor child. During the

pendency of the suit, he moved an application for the DNA test of the minor which was dismissed by the learned Judge Family Court vide order dated 03.04.2008. The suit was partially decreed to the extent of maintenance allowance for the minor child at the rate of Rs.1500/- per month with 10% annual increase vide judgment and decree dated 26.06.2008. The appeal was filed by the petitioner before the appellate court which was withdrawn vide order dated 01.09.2008. The petitioner consequently filed W.P.No.16838 of 2008 for setting aside the order dated 01.09.2008 passed by the learned Addl.District Judge, which writ petition was allowed and case was remitted back to the appellate court with direction to proceed in the matter on merit after hearing the parties. The District Judge on 23.04.2009 while deciding appeals of both the parties after framing of two issues directed the parties to appear before the learned trial court on 13.05.2009. The petitioner aggrieved of order dated 23.04.2009 filed W.P.No.16904 of 2009 before this Court which was again remanded to the appellate court on 07.12.2011 by setting aside findings on issue No.3 and maintaining on other issues.

The petitioner once again filed W.P.No.14960 of 2012 which was accepted and the case was remanded back vide order dated 18.10.2012 by setting aside judgment dated 17.03.2012 passed by the learned Additional District Judge on all issues, after compliance of direction contained in order dated 07.12.2011 passed in W.P.No.16904 of 2009. Meanwhile, on 24.09.2013 vide the impugned order the learned Addl.District Judge directed the parties to approach Medical Superintendent, DHQ, Hospital, Gujranwala for DNA profile test of the minor, hence this writ petition.

3. Learned counsel for the petitioner contends that order dated 03.04.2008 refusing to conduct DNA profile test of the child passed by the learned Judge Family Court has not been challenged; therefore, it has attained finality and cannot be upset. The minor namely, Muhammad Umair Tayyab now is aged about more than 18 years and therefore, his DNA test may create complications. He further argues that in view of the stand taken by respondent No.2 on various occasions i.e. entry in the record of union council, entry in the record of NADRA and entry in Saudi Government he can

not resile and deny his parentage. Places reliance on AMAN ULLAH vs. THE STATE **[PLD 2009 Supreme Court 542]** and KHIZAR HAYAT vs. ADDITIONAL DISTRICT JUDGE, KABIRWALA and 2 others **[PLD 2010 Lahore 422]** and prays for setting aside of the impugned order passed by the appellate court.

4. Conversely, learned counsel for respondent No.2 submits that Muhammad Umair Tayyab was adopted son and to ascertain this truth DNA test is necessary. He claims that in the event of its affirmation he would not challenge his parentage.

5. Arguments heard. Record perused.

6. The main emphasis of the learned counsel for the petitioner is that since there is ample evidence on record to prove parentage of Muhammad Umair Tayyab, therefore, no DNA profile test is required whereas learned counsel for respondent No.2's view is that Muhammad Umair Tayyab is adopted son.

7. In this respect it is expedient to refer to section 128 of Qanoon-e-Shahadat Order, 1984 which provides that a child born during the continuance of a valid marriage and within two years after its dissolution shall be conclusive

proof that he is legitimate child of that man, unless the man denies the same. Section 128 of Qanoon-e-Shahadat Order, 1984 is re-produced 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 comes to an end.*
> *(2)Nothing contained in clause (1) shall apply to a non-Muslim if it is inconsistent with his faith."*

Noticeably, after taking stand at so many places like NADRA, Saudi Embassy, etc, some strong and irrefutable evidence is required.

8. DNA profile test is always conducted with the consent of the person concerned and is normally applied in criminal cases as held by the Hon'ble Supreme Court in SALMAN AKRAM RAJA and another vs. GOVERNMENT OF PUNJAB through Chief Secretary, and others **[2013 SCMR 203]**. In KHIZAR HAYAT vs. ADDITIONAL DISTRICT JUDGE, KABIRWALA

and 2 others **[PLD 2010 Lahore 422],** relevant extract is re-produced below:-

> *"Now I would like to dilate upon the question of conducting the DNA Test. DNA Test is not to be directed as a matter of routine in cases where the father refuses to acknowledge his child born during lawful wedlock, for the reason that otherwise the presumption under Articles 117, 118, 119 and 128 of Qanun-e-Shahadat Order, 1984 that a child born during the continuance of a valid marriage and within two years after its dissolution, provided the mother remaining unmarried during this period, shall be conclusive proof that he is legitimate child of that man, unless the man denies the same.*
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> *It has been observed by this Court that it has become a common practice that when the relationship between the parties become strained after marriage and even extreme hatred is developed between the spouses and the same is dissolved, the parties do not spare each other and even go to this extent that often father refuses to acknowledge the child for the reason either to evade maintenance or to deprive the child from inheritance of in case of his second marriage at the insistence of his second wife or pressure of the elders of the family and this trend is not only damaging but also very dangerous for the society and in such a situation request for DNA test is not proper."*

In another case supra **[PLD 2010 Lahore 422]** it was held by this Court that, point of time at which father denied paternity was a relevant factor, so considerable delay in raising the plea of illegality was not permissible. The judgment

cited by the learned counsel for respondent No.2 titled as Mst.SHAMSHAD BIBI vs. BUSHRA BIBI and 3 others **[PLD 2009 Islamabad 11]** relates to the DNA test which was ordered to be conducted with the consent of the parties. However, no such consent is available either by mother or by child himself. Where the consent is not given this test cannot be contradicted, though adverse inference may be drawn by the court of such a refusal.

9. In this view of the matter, this writ petition is allowed, the impugned order is set aside and it is declared that in this case there is no need for a DNA test. However, the parties may prove their case before the learned Judge Family Court, where the case is still pending.

(ALI BAQAR NAJAFI)
JUDGE

Approved for reporting.

J U D G E

Ali Gauhar/*