Date of hearing: 23.12.2016.

Order

The captioned writ petition has been filed under Section 44 of the Azad Jammu and Kashmir Interim Constitution Act, 1974, whereby, vires of the impugned order dated 14th September, 2015, recorded by the learned Judge Family Court No. 1, Muzaffarabad, has been challenged for having been passed without lawful authority.

2. The precise facts forming background of the instant writ petition are that private respondents, herein, filed a suit for maintenance allowance, before Family Court No. 1, Muzaffarabad, on 21st March, 2013. It is stated in the aforesaid suit that petitioner-defendant being a father of Respondents Nos. 3 to 6, is bound under law to provide them maintenance allowance. During pendency of the suit, petitioner moved an application for conducting DNA test of Respondents Nos. 3 to 6, which was opposed by Respondent No. 2, herein, through objections. The learned trial Court after hearing, accepted the aforesaid application with the direction that DNA report would be submitted on 23rd August, 2013, and petitioner will bear all the expenditures of the said DNA test, *vide* order dated 27th July, 2013. However, before the next date of hearing, i.e. 23rd August, 2013, petitioner filed another application stating therein that total expenses of DNA test are approximately Rs. 25,733/-, while respondents are claiming Rs. 45,000/-. The Family Court seized with the matter after obtaining objections, rejected the aforesaid application, *vide* order dated 25th October, 2013. Thereafter, petitioner moved third application for depositing Rs. 1,00,000/- (one lac), as expenditures of DNA test, on 11th November, 2013. The learned Judge Family Court, kept the same in abeyance by observing through order dated 2nd January, 2014, that after recording evidence of parties, an order for DNA test would be passed. After recording evidence of the parties, petitioner again craved for implementation of order pertaining to DNA test, dated 27th July, 2013, which application was rejected by the Family Judge, Muzaffarabad, *vide* impugned order dated 14th September, 2015, hence, the instant constitution petition.

3. The writ petition has been resisted by private respondents through written statement filed on 18th April, 2016, through which they negated the contents of writ petition and craved for dismissal of the same.

4. Sardar Pervaiz Akhter, the learned Counsel for petitioner, zealously argued that once an application for conducting DNA test was accepted by the learned Family Court *vide* order dated 27th July 2013, thereafter, the said Court could not review its earlier order under law. He further contended that as provisions of Civil Procedure Code, 1908, are specifically excluded from domain of Family Court, hence, the Court below unlawfully reviewed its earlier order against codel provisions, therefore, craved that by quashing the impugned order, the Family Court be directed to implement its earlier order relating to DNA test of minors, dated 27th July, 2013. The learned Counsel in support of his arguments cited the following authorities:--

(i) *Saghir Ahmad v. Mst. Rukhsana Tabassum* [1999 YLR (Lahore) 882].

(ii) *Public Works Department Azad Govt. Of the State of Jammu & Kashmir, Muzaffarabad, through Chief Engineer (Highways)* [PLD 2007 High Court (AJ&K) 7].

(iii) *Muhammad Hanif v. Member (S&G) Board of Revenue & 2 others* [2010 CLC (Lahore) 990].

5. Conversely, Raja Khalid Hussain Rathore, the learned Counsel for respondents, submitted that the Family Court after recording evidence of the parties, determined the matter in light of verdicts of Islamic jurists and arrived at the conclusion that under law DNA test of minors could not be conducted after more than 40 days of their birth. He further argued that petitioner raised question of paternity/parentage of minors in year 2013, even after five years of birth of last minor, whereas he has categorically admitted it correct in cross-examination of his statement, made before the trial Court on 20th May, 2015, that all the four minors were born after contracting 'Nikah' and before the divorce pronounced to Respondent No. 2, Noreen Ishaq. He further contended that as per version of petitioner, the dispute regarding paternity of minors arose in year 2008, however, astonishingly he kept mum for such a longtime, who took a false plea only to escape maintenance allowance to his children. The learned Counsel emphasized that Family Court did not commit any illegality while reviewing earlier order and dismissing DNA test application of petitioner, who craved for dismissal of writ petition with costs. He cited the following case law in support of his contentions:--

However, before the next date of hearing, which was 23rd August, 2013, petitioner-defendant filed second application on 21st August, 2013, stating therein that total expenses of DNA test are approximately Rs. 25,733/-, while private respondents are claiming Rs. 45,000/-; therefore, expenses of DNA test may be determined by Court and time for depositing the amount may be extended, which application was dismissed *vide* order dated 25th October, 2013, on the ground that the Court had already directed petitioner to bear all expenses of DNA test of minors and the report of the same can be filed at any stage, so the case was fixed for framing issues on 11th November, 2013. However, after-framing issues, petitioner-defendant moved another application before the Family Court for obtaining permission to deposit Rs. 1,00,000/- (one lac) as DNA test expenditures on 11th November, 2013, which was kept pending and the case was fixed for recording evidence. After recording evidence of the parties, petitioner-defendant requested to the Family Court for implementation of order dated 27th July, 2013, for conduction DNA test of minors/Respondents Nos. 3 to 6, which application was rejected through the impugned order dated 14th September, 2015.

8. As per aforementioned grievance of petitioner, it is to be determined as to whether Family Court committed illegality while reviewing its earlier order and disallowing the application for conducting DNA test of minors children, in light of relevant facts and law? It is worthwhile to observe here that a view given by a Court cannot be changed in review in an ordinary manner, however, where the view taken by a Court runs counter to the law and the Court failed to notice the same, in that eventuality there can be a valid ground for reviewing the earlier order. The aforesaid view finds support from a case reported as *Ch. Ajaib Hussain and another v. Mst. Zareen Akhtar and 11 others* [2003 YLR (SC AJ&K) 410], wherein, it was held as under:

> "The learned Counsel appearing on behalf of the petitioners relied upon a judgment reported as *Muhammad Latif Khan and 15 others v. Muhammad Ashraf Khan and 3 others* (1989 CLC 2402) wherein it was laid down that once a view had been taken by the Court it could not be changed in review merely because it was wrong. However, where the view taken by the Court runs counter to a judgment which was binding on a Court but the Court fails to notice it then in that case there could be a valid ground to review the judgment in accordance with the judgment having binding force upon the Court."

In another precedent case titled *Muhammad Saad Ali and 2 others v. Mst. Maryam Khan and 2 others* [2014 CLC (Peshawar) 715], while discussing point of review, it was observed by the Peshawar High Court as under:

> "No doubt provision of review is not provided in the Act, 1964 *ibid* and similarly provision of striking of defense is not there and the provisions of C.P.C. and Qanun-e-Shahadat Order, 1984 have also not been made applicable. But if a situation arises during the proceedings in a case before the Family Court, then whether it would be helpless to meet the situation. Answer to this question would be plumb No. It is not the mandate of law to make the Court helpless. The Family Court has got every jurisdiction to adopt any procedure/law to meet the situation to do the substantial justice between the parties and to secure the ends of justice. Since the Act, 1964 *ibid* is not comprehensive enough to meet every conceivable eventuality. So, the Family Court can adopt every procedure/law in furtherance of dispensation of justice unless the procedure/law going to be adopted is specifically prohibited. The Family Court when came across the situation of failure of the defendants to file written statement, borrowed the provision of striking off defense from the C.P.C. and passed an order in this regard, then the said Court while facing the situation of review of the same can take shelter of non-availability of the provision of review in the Act, 1964 *ibid*? No. The Family Court cannot refuse to exercise the jurisdiction on the ground of non-availability of provision of review. It is the principle of law that recourse to general is permissible when the provisions of special law are silent on a particular point except where the provisions of general law are inconsistent with the provisions of special law. Reference in this regard can be made to the case of *Muzaffar Ali v. Mst. Mehrun Nisa and 2 others* (1989 CLC 1805), *Muhammad Sarwar v. Sughran Bibi and 2 others* (1996 MLD 1057) and *Javed Bashir v. Judge, Family Court, Lahore and another* (2003 MLD 814). So, the circumstances have no hesitation to hold that the jurisdiction exercised by Family Court is not in accordance with the mandate of law, hence, the impugned orders are liable to be set aside."

9. It is an admitted fact that application of petitioner for conducting DNA test of minors was allowed by the learned Judge Family Court, *vide* its order dated 27th July, 2013, however, when the said Court, after attending relevant law on the subject, facts of the case and especially the statement of petitioner, came to the conclusion that all the four minors were born from wedlock of petitioner and Respondent No. 2, before giving her divorce, then order dated 27th July, 2013, was reviewed through the impugned order dated 14th September, 2015. It is settled principle of law that if decision of a Court is patently against law of the land, the same can be corrected in exercise of review jurisdiction, because the policy of law is to administer justice according to law and not in violation of the same. Therefore, in light of above quoted precedents, I am of the humble view that Family Court did not commit any illegality while reviewing its earlier order dated 27th July, 2013.

10. Now, I would like to dilate upon the question of paternity and conducting DNA test of minors/Respondents Nos. 3 to 6. The question of paternity and legitimacy of child has a far reaching impact; therefore, determination of such question should not be taken lightly. The allegation by husband or his act of disowning the child born out of the wedlock, should not be given weight, without a strict proof in this regard to the contrary. The paternity of a child born, out of the lawful wedlock, has a presumption of truth in its favour and simple denial, would not take away the status of legitimacy, as according to Muhammadan Law "child follows the bed" and every presumption is made in favour of legitimacy of the child. Such child is presumed to be an issue of his parents without any acknowledgement or affirmation of the parentage on the part of father. It is pertinent to observe here that the main pivotal point in the cases of paternity and legitimacy is presumptive evidence. In this context, Section 339 of Mulla's Muhammadan Law speaks as under:

> **"Paternity how established.–**(1) The paternity of a child can only be established by marriage between its parents. The marriage may be valid (Sahih), or irregular (Fasid), but it must not be void (Batil).
>
> Marriage may be established by direct proof, if there be no direct proof, it may be established by indirect proof, that is, by presumption drawn from certain facts. It may be presumed from prolonged cohabitation combined with other circumstances or from an acknowledgement of legitimacy in favour of a child.
>
> (2) When the paternity of a child is established, its legitimacy is also established."

11. The rule of substantive law is that a child born during the continuance of a valid marriage and not earlier than the expiration of six lunar months from the date of such marriage or within a period of two years after the dissolution of marriage, shall be the conclusive proof that the child so born is legitimate child of the spouses provided the mother remained unmarried. The aforesaid view find support from a case reported as *Muhammad Pervaiz v. Additional District Judge and others* [2000 CLC (Lahore) 1605], wherein, it was held as under:

> "Legitimacy has to be determined in line with Islamic principles. Paternity is established by the marriage between the parents of child. Under the Sunni law a child born after six months from the date of marriage and within two years of the termination of marriage is presumed to be legitimate child. In Shia law, there is a little variation in respect of the period. The starting point for counting six months is the date on which the marriage is consummated and the other limit is of ten months from the dissolution of the marriage. In every case where legitimacy of child is questioned the primary evidence is of mother of the child, who is the best person to testify that the child is legitimate issue from her husband. Whenever such evidence is proved to be disinterested, independent and impartial, it is always believed by the Court being truthful, trustworthy and confidence inspiring. The discharge of negative onus is placed on the father.

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. In this case the petitioner himself admitted that he divorced Respondent No. 2 in the year 1998 whereas Respondent No. 3 was born in the year 1997. The fact by itself indicated that Respondent No. 3 was born during the subsistence of the valid 'Nikah. Then under Article 128 of Qanun-e-Shahadat, 1984 it could safely be presumed that Respondent No. 3 is the legitimate child of the petitioner.

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 reflects 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."

After a detailed deliberation, in my humble 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. Hence, the Family Court did not commit any error while dismissing the application filed for conducting DNA test of minors; therefore, the impugned order dated 14th September, 2015, is maintained.

14. The crux of above discussion is that finding no substance in the instant writ petition, the same stands dismissed. As evidence of the parties has been completed; therefore, the learned Judge Family Court No. 1, Muzaffarabad, is directed to decide the suit filed for maintenance allowance by Respondents Nos. 2 to 6, within one month, from the receipt of the instant order. The office is directed to transmit an attested copy of the instant order to the concerned Family Court for compliance. The costs shall follow the eventuality.

(R.A.) Petition dismissed