Order Sheet
IN THE HIGH COURT OF SINDH CIRCUIT COURT
AT HYDERABAD

C.P No.S-421 of 2020

Sohail Abbasi Vs. Mst. Khushboo & others.

1. For orders on office objections.
2. For orders on MA No.1110/2020.
3. For orders on MA No.1111/2020.
4. For orders on MA No.1112/2020.
5. For hearing of main case.

Date of hearing: **01.02.2021.**
Date of order: **15.02.2021**

Mr. Ghulam Sarwar Qureshi, Advocate for petitioner.

O R D E R

ARSHAD HUSSAIN KHAN, J: - The petitioner through instant constitutional petition has challenged the Judgment & Decree dated 26.08.2020 passed by learned VIth Additional District Judge / MCAC, Hyderabad, in Family Appeal No.33 of 2020 maintaining the Judgment & Decree dated 10.02.2020 passed by learned Civil / Family Judge-II, Hyderabad, whereby Family Suit bearing No.212 of 2017 [Re- Mst. Khushboo v. Sohail Abbasi], filed by the respondent No.1, was partly decreed and partly dismissed.

2. Brief facts leading to the filing of this petition are that the respondent No.1 / plaintiff filed suit for maintenance, recovery of dower amount and recovery of dowry articles against the petitioner / defendant in the court of learned Civil / Family Judge-II, Hyderabad stating therein that she married with petitioner / defendant on 07.07.2016 at Hyderabad and dower amount at the time of nikah was fixed at Rs.50,000.00 [rupees fifty thousand only], which is still unpaid despite repeated demands by her. At the time of marriage valuable dower articles worth Rs.1,000,000.00 [rupees ten hundred thousand only] were also given to respondent No.1. It is averred that after *rukhsati* the petitioner and respondent No.1 started living together as husband and wife at the petitioner's residence and subsequently respondent No.1 conceived. Respondent No.1 as legally wedded wife performed all marital obligations proving her to be an obedient and loving wife of the petitioner. Further averred that attitude of the petitioner / defendant with respondent No.1 / plaintiff was not good

and he used to maltreat her on petty issues. Respondent also came to know that the petitioner / defendant is involved in bad habits, however despite such fact, she remained with petitioner being faithful wife with hope that he will mend himself. On 28.10.2016, the petitioner all of sudden without any prior information to respondent No.1 left for Saudi Arabia. The petitioner after going to Saudi Arabia neither contacted nor sent single penny towards the maintenance for the respondent. Subsequently, on 07.11.2016 respondent No.1 left the house of her in-laws/petitioner and started living with her parents. Thereafter on 08.11.2016 she got her ultrasound. On 15.11.2016 the petitioner sent divorce deed to respondent No.1 from Saudi Arabia and thereafter the petitioner although sent legal notice asking respondent to take back the dowry articles, however, did not return the same. Consequently, in February 2017, respondent filed Family Suit No. 212 of 2017 and upon notice of the case petitioner through his attorney filed the written statement and contested the suit. During pendency of the said suit, on 12.06.2017 respondent No.1 gave birth to a baby boy who was named as Muhammad Zamair. Subsequently, upon application of respondent No.1/plaintiff, the family court allowed the respondent to amend the plaint. Thereafter, the petitioner was also allowed to file amended written statement.

3. During pendency of the family suit, though an application to conduct D.N.A test was filed on behalf of the petitioner in order to ascertain as to whether the child (Muhammad Zamair) is real son of petitioner / defendant or not, which application was also allowed however, the D.N.A test could not be carried out for want of samples due to the conduct of the petitioner/defendant. Subsequently, upon the statement of the petitioner for not pressing his application for DNA test, learned Family Judge passed the order on 08.04.2019. Relevant portion whereof is reproduced as under:

> "Since the application under section 151 CPC is decided vide order dated 24.09.2018 and same has attained finality and at this stage it cannot be pressed as same is not pending, but decided. However, this Court observes that defendant is not willing or giving samples for DNA test examination, rather defendant has doubt upon all the process as well as result of DNA test examination, as mentioned in para 08 of the statement dated 08.04.2019. I am of the humble view that this court can not ensure forcibly collection of samples from either party, and as per available record it seems that order dated 24.09.2018 is not being complied by defendant and presently he is reported to have gone to Saudi Arabia on account of his job, and no fruitful result be achieved if case is adjourned for collection of samples for DNA Test as Defendant is not willing for such exercise. Therefore, keeping in view all present circumstances

and in the interest of justice, the case is adjourned for 23.04.2019 for evidence. Parties are directed to lead evidence."

4. The learned trial court also framed following amended issues:-

1- Whether the minor namely Muhammad Zamaair is real offspring of defendant?

2- Whether the plaintiff is entitled for maintenance of minor, if yes then for what period and at what rate?

3- Whether the plaintiff is entitled for maintenance for herself, if yes, then for what period and at what rate?

4- Whether the plaintiff is entitled for recovery of dowry articles as per list annexed with plaint, if yes, then what articles or in alternate what amount?

5- Whether the plaintiff is entitled for recovery of medical expenses, if yes, then what amount?

6- What should the decree be?

5. Learned trial court after recording evidence, heard the arguments of parties and partly decreed the suit of the plaintiff / respondent No.1 and partly dismissed with no order as to costs declaring the minor namely Muhammad Zamair as real offspring of the petitioner / defendant and entitlement of the plaintiff to receive maintenance for minor at the rate of Rs.10,000/- [rupees ten thousand] per month for minor since his birth till his legal entitlement with 10 % annual increment. However, respondent No.1 / plaintiff was declared to be not entitled for maintenance for herself and other claims. The said judgment and decree of the suit were subsequently challenged by the defendant / petitioner in the Family Appeal bearing No.33 of 2020, which was dismissed by the learned VIth Additional District Judge / MCAC-II, Hyderabad vide its judgment dated 26.08.2020. The petitioner has assailed the concurrent findings of facts arrived at by both the courts below through the impugned judgments and decrees by filing the instant petition.

6. Learned counsel for the petitioner during the course of arguments has contended that judgments and decrees impugned in the present proceedings are bad in law, equity and principles of natural justice with ignorance of facts and material available on the record. He has argued that though minor is not legitimate child of petitioner and in this regard despite the fact that the application for D.N.A test was allowed by trial Court but the respondent No.1 / plaintiff failed to appear before the laboratory including her counsel and the learned courts below failed to consider the very fact while

passing the impugned judgments. It is also argued that both the courts below failed to consider the material fact that respondent No.1 did not produce the birth certificate of HMC or NDRA which proves that the birth certificate, produced in the case, was managed one. It is further argued that judgments and decrees impugned in the present proceedings have passed by both the learned courts below by ignoring the evidence available on the record. Lastly, he prayed for setting aside the impugned judgments and decrees.

7. I have heard the arguments of learned counsel for the petitioner and perused the material available on the record.

In the present proceedings the petitioner has assailed the concurrent findings of two courts below. The claim of respondent No.1 / plaintiff with regard to maintenance for herself was dismissed while dower amount and dowry articles have been received by her as admitted in her cross-examination before the trial Court. In view of such position, there remains main issue that is legitimacy as to whether the petitioner is father of the minor baby boy of respondent No.1 / plaintiff or not as the petitioner denies of being his father. In this regard, in view of the order dated 08.04.2019 passed by learned Family Judge on the petitioner's statement for not pressing the DNA test, chapter for conducting DNA test has become over.

8. It may be observed that Paternity is an important and sensitive matter since it has many legal and social consequences. The issue of paternity is likely to attain added significance in a society with religious inclinations. That is why the modes in which paternity is ascertained are elaborated in sufficient detail in almost all legal systems. In Pakistan, the determination of paternity is a matter of personal law. Since Pakistan is a Muslims majority country, it seems appropriate to briefly state some important points of Muslim Personal Law on the subject, which would make the tricky relationship between DNA and paternity disputes more understandable.

9. On the basis of a well-known saying of the Holy Prophet (PBUH), a child is attributed to a person in whose wedlock he/she is born. In a situation where dispute arises as to the paternity of a child, and no direct evidence is available to ascertain paternity, the mode of presumption is resorted to in order to fill the void of factual evidence. There is a difference of opinion among the Muslim scholars as to what should be the maximum period of time for extending paternity to a

child born after the dissolution of marriage. The Pakistani legislature has enacted Article 128 of the Quanan-e Shahadat Order, 1984 [QSO] in line with the Hanafi point of view. According to this provision, a child born after six lunar months of marriage and within two years after dissolution of marriage, the mother remaining unmarried, will be considered legitimate and attributed to his/her putative father. According to the said provision, this fact is regarded as a 'conclusive proof' and no evidence can be admitted to refute it. Article 2 (9) of QSO states that 'When one fact is declared by the Order [QSO] to be conclusive proof of another, the Court shall, 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'.

There are two exceptions to this: (a) if the child is disowned by the father, and (b) if the child is born after six lunar months once the mother declares expiry of her *iddat* period.

10. In view of the aforementioned principles, the legal framework of paternity does not leave much space for the admissibility of DNA evidence. One of the reported cases on the subject is *Muhammad Arshad v. Sughran Bibi and 2 others (PLD 2008 Lah 302)*. In this case, a suit for recovery of maintenance was filed by the mother and her minor son. The petitioner (father) disowned the minor while responding to the claim. For substantiating his contention, an application was filed by the petitioner in a Family Court praying for a DNA test of the child which was dismissed. Thereafter, the petitioner filed a petition in the Lahore High Court to challenge the order of the Family Court dismissing his application. While considering his petition, the Court observed that the determination of a child's legitimacy entailed far-reaching consequences, and therefore, the determination of such crucial and vital issue should not be done in a cavalier manner. The Court felt that the accusations levelled by the petitioner and his act of disowning the child born in the wedlock needed to be substantiated through tangible proof and credible evidence, which were found to be missing in the petitioner's case. Following the traditional stance supported by Pakistani law, the Court highlighted that the paternity of a child born in a lawful wedlock invariably carries the presumption of truth and thus the mere denial could never take away the status of legitimacy as 'child follows the bed'. The metaphor of bed in the *hadith* implies the owner of the marital bed, i.e. the woman's husband. The Court further observed that if the petitioner

was right in his stance, he should have resorted to the process of *liyan* *[According to this process, the spouses individually swear four times as to the truthfulness of their assertions and then during the fifth time invite curse upon them if any of them has told a lie. Thereafter, the marriage stands dissolved and if the divorced wife gives birth to a child, he/she will not be attributed to the husband]* instead of challenging the paternity for the first time in a suit for maintenance. Consequently, the petition was dismissed *in limine* and the Family Court's order of refusing the request for DNA test was held to be lawful. It appears that the Court was reluctant to go beyond the conclusive presumption of paternity enshrined in Article 128 of the QSO, and for this purpose, it foreclosed the process of discovery of a piece of evidence (i.e. DNA) which might have jeopardized the concept of presumptive paternity/legitimacy without there being any other credible evidence.

11. In *Sharafat Ali Ashraf v. Additional District Judge, Bahawalpur and 3 others* *[2008 SCMR 1707]*, the petitioner denied his marriage with the respondent and filed a suit for jactitation of marriage after the respondent had filed a suit for maintenance. During the pendency of the suit, a daughter was born, and was impleaded as a party. The Family Court held the respondent and the daughter entitled to maintenance, and the appellate courts also upheld its decision. Thereafter, the petitioner contended before the Supreme Court that the courts below were guilty of gross injustice by not conducting a DNA test. The Court analyzed the record of the case and found that there was convincing and substantial evidence of marriage between the parties, and the lower courts had rightly concluded that the parties were lawfully married. The petitioner had denied the fact of marriage and the legitimacy of his daughter without substantiating his claim by reliable evidence. He was unable to prove that the daughter was born either after the dissolution of marriage, or that the respondent had committed adultery. Since the daughter was born after six lunar months of the marriage and before the conclusion of two years since dissolution, her legitimacy and the consequent paternity could not be called into question through unsubstantiated claims. While dismissing the petition, the Court further underscored that the case of the petitioner was motivated to avoid his responsibility of maintaining the daughter.

12. Reverting to the case in hand, from perusal of record it appears that, learned trial Court has elaborately discussed each and every

issue of the matter in its judgment. For the sake of convenience, the relevant portion with regard legitimacy of baby boy born to the respondent No.1 / petitioner is reproduced as under:-

> "8. Since, it is admitted position that till 07.11.2016, the plaintiff remained with defendant at his house and such child was conceived during substance of marriage and if divorce dated 15.11.2016 was announced, same is deemed as not effective, as it is a settled principle of Islamic Law that divorce during pregnancy is not effective and same would take effect after the birth of child. Besides, Islamic law is very much clear that child born after six months of marriage and within two years of termination of marriage is presumed to be legitimate child. Reliance is placed from case of Muhammad Parvaiz v. Additional District Judge, ETC (2000 Shariat Decision 553), and case of Muhammad Arshad v. Sughra Bibi and 2 others (PLD 2008 Lahore 302), and case of Waqar Ahmed v. Nomina Akhter and 3 others. (PLD 2010 Peshawar 10).
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> **9.** It is a settled principle of Islamic Law in respect of the presumption of child born during subsistence of marriage; section 340 of Mahomedan law, 1998 21st edition (Pakistan 1995) is reproduced as under:
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> > **340. Legitimacy: when conclusively presumed:** The fact that any person was born during the continuance of valid marriage between his mother and any man, or within two hundred and eighty days day after its dissolution, the mother remaining unmarried, shall be conclusive prove that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have being be gotten."

13. Record also transpires that learned lower appellate court while deciding the family appeal, preferred by the present petitioner against the Judgment and decree of learned trial Court, considered the material/evidence available on the record and passed the speaking order. Relevant portion whereof is reproduced as under:

> "11. *The main grievance of the appellant is that minor for whom maintenance is allowed is not his son, hence he is not liable to pay the maintenance to him. Record shows that marriage in between the appellant and respondent is admitted to had taken place on 07.7.2016 and on the same day Rukhsati was held. In para No.4 of the written statement, it is stated that respondent left the house of appellant on 07.11.2016 when she was not pregnant while minor was born on 12.6.2017 after the period of about seven months plus and she was divorced on 15.11.2016. Nothing is agitated in the written statement that marriage held was not consummated. It is settled principle of law that birth of the minor during the subsistence of marriage is conclusive proof of legitimacy. To this aspect of the matter, respondent brought on record legal notice sent to her by the appellant at Ex.21-K and she replied such legal notice which is brought at Ex.21/L in which at para No.4 it was stated by the*

respondent that she is pregnant and for this demanded maintenance. This reply of legal notice was answered also by the appellant, copy whereof is brought on record at Ex.21/N, however, this document is silent with regard to the denial about paternity of the minor having in womb of respondent. No doubt, appellant denied in his written statement of the fact that minor is not his son but it is settled principle of law that he was to declare so within forty days after the birth of the child. Nothing like is claimed in the written statement or brought on record by the attorney of appellant in his evidence though the appellant was put on notice that respondent is having pregnant and such notice was received by the appellant. Record transpires that it is the appellant who through his counsel filed application for conducting of DNA test which though was not necessary as direct evidence was available but it was allowed and parties were put on notice to appear before the particular Laboratory for giving samples but it is only the respondent who appeared before the Laboratory while the record is silent to show that appellant ever appeared there. On the contrary, record transpires the fact that it was the appellant who requested the learned trial court time and again through his counsel that he takes his said application back which too after passing of the order. Even otherwise, when direct evidence to prove a fact is available then expert opinion is not necessary. As is discussed above, that had the minor not the son of the appellant, it was he to deny such fact immediately after the birth of the child or within forty days of his birth. Honourable Supreme Court in the case law reported as PLD 2015 SC 327 while making detailed discussion at plasitum "a" held that ***"Muslim personal law was clear and well settled on such subject as it provided that legitimacy/paternity must be denied by the father immediately after the 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 Yousuf). No lawful denial of paternity could be made after said stipulated period".*** *Same is the position of the case in hand as the appellant did not deny the fact of paternity of the minor though was put on notice by the respondent. Thus the finding as to issue No.1 is based upon correct appraisal of evidence. So far the maintenance of minor allowed to be paid at rate of Rs.10,000/- per month is concerned, when it is proved that appellant is father of minor and if it is so; a father has to maintain his child, of course, according to source of his income….."*

14. Since legitimacy of a child has been established to be son of petitioner / defendant, therefore, it is duty of petitioner / defendant to maintain his son according to his financial status. In this regard, learned family court has widely emphasized and settled the maintenance amount for the son / child keeping in view the financial status of petitioner / defendant. In view of the above position, the concurrent findings by the two courts below are based on facts and sound appreciation of evidence available on record, which cannot be set at naught by this Court under writ jurisdiction unless it is proved that the same are perverse, erroneous and against the existing record which in the present case has not done.

15. It is now well established that Article 199 of the Constitution casts an obligation on the High Court to act in the aid of law and protects the rights within the frame work of Constitution, and if there is

any error on the point of law committed by the courts below or the tribunal or their decision takes no notice of any pertinent provision of law, then obviously this Court may exercise constitutional jurisdiction subject to the non-availability of any alternate remedy under the law. This extra ordinary jurisdiction of High Court may be invoked to encounter and collide with extraordinary situation. This Constitutional jurisdiction is limited to the exercise of powers in the aid of curing or making correction and rectification in the order of the courts or tribunals below passed in violation of any provision of law or as a result of exceeding their authority and jurisdiction or due to exercising jurisdiction not vested in them or non-exercise of jurisdiction vested in them. The jurisdiction conferred under Article 199 of the Constitution is discretionary with the objects to foster justice in aid of justice and not to perpetuate injustice. However, if it is found that substantial justice has been done between the parties then this discretion may not be exercised. So far as the exercise of the discretionary powers in upsetting the order passed by the court below is concerned, this court has to comprehend what illegality or irregularity and/or violation of law has been committed by the courts below which caused miscarriage of justice. Reliance is placed on the case *Muslim Commercial Bank Ltd. through Attorney v. Abdul Waheed Abro and 2 others* ***(2015 PLC 259)***.

16. The upshot of the above position is that no illegality, irregularity or jurisdictional error in the concurrent findings of the learned courts below, which resulted into the impugned judgments and decrees, could either been pointed out or observed. Resultantly, the petition in hand being devoid of any force and merit is **dismissed** in *limine* along with all listed applications.

JUDGE

Hyderabad;
Dated 15.02.2021.

Abdullah Channa/PS