

IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA

Civil Revision Application No. S- 78 of 2023

Dur Muhammad

v.

Zafarullah son of Sanwalo Malik and Three Others

Applicant: Dur Muhammad son of Sher Dil Malik,
through Mr. Abdul Rehman Bhutto,
Advocate.

Respondent No.1: Zafarullah son of Sanwalo Malik. Nemo.

Respondent No.2: Assistant Manager NADRA Kashmore.
Nemo.

Respondent No.3: The Director General, Regional Head
Office, NADRA Airport Road, Sukkur.
Nemo.

Respondent No.4. Chairman NADRA Islamabad. *Nemo*

Date of Order : 18.01.2024

Date of Reasons : 26.01.2024

J U D G M E N T

JAWAD AKBAR SARWANA-J.: Dur Muhammad s/o Sher Dil Malik has filed this Civil Revision Application No.78 of 2023 aggrieved by the Judgment and Decree dated 01.04.2023 passed by the learned District Judge/MCAC Kashmore at Kandhkot in Civil Appeal No.24/2023 and the Judgment and Decree dated 30.01.2023 passed by the learned IInd Civil Judge Kashmore in Civil Suit No.165/2022 filed by Zafarullah (Respondent No.1) against Dur Muhammad, NADRA, et. al.

2. The brief facts as available in the revision, which the impugned Judgments of the Appellate Court and the trial court have discussed in detail, are that Zafarullah, aged 22 years (in 2022), filed a civil suit seeking a declaration that he was the son of Dur Muhammad, but Dur Muhammad denied the said paternity. Zafarullah stated that Dur Muhammad was married to his mother, Zulekhan and had two children, Rehmat Khatoon and Zafarullah. Zafarullah added that he was born two years before Dur Muhammad divorced (gave talaq) to Zulekhan in 2002. After their separation, Zulekhan (Plaintiff's mother) went to live with her parents until she remarried in 2007.

3. The trial court believed the evidence of Zafarullah (Ex. No.16), his Mother, Zulekhan (Ex. No.17); his Phupi/Buwa/Aunty, Bakht Bhari (Ex. No.18); and his stepfather, Sanwala Malik (Ex. No.19). Zafarullah also produced copies of his primary school leaving certificate and examination slip of SSC-II which showed that Dur Muhammad was his father. Accordingly, the trial court proceeded to decree Zafarullah's suit and held that he was the son of Dur Muhammad. The Appellate Court concurred with the Judgment and Decree of the trial court.

4. The learned Counsel for Dur Muhammad argued that both the trial and appellate courts have misread the evidence. He contended that Dur Muhammad had deposed during the trial that he divorced Zafarullah's mother, Zulekhan, in 1998, and therefore, Zafarullah, admittedly born in 2000, could not be his son. He urged that the trial court and the appellate court should have ordered a DNA test to settle the paternity of Zafarullah.

5. I have heard the learned Counsel, reviewed the file and read the impugned Judgments of the trial and the Appellate courts.

6. At the outset, Dur Muhammad did not lead any documentary evidence during the trial that he divorced Zulekhan in 1998. Nothing was brought on record to support his contention. Zulekhan deposed that she lived with Dur Muhammad until 2002. Dur Muhammad produced no evidence of the dissolution of marriage under the Dissolution of Muslim Marriages Act, 1939. There is a presumption of marriage based on continued and prolonged cohabitation unless the same is dislodged by cogent evidence.¹ Indeed, when Dur Muhammad was asked in his cross-examination if Zafarullah was his son, he did not deny it but claimed he did not know. A Division Bench of this Court, in High Court Appeal No.145 of 2018, Cantonment Board Clifton v. Nadim Ahmed Ansari, has held that:

“[i]f, in his cross-examination, a witness states, “I cannot say”, “I cannot say anything”, and “I am not aware of it”, it means that the witness is avoiding telling the truth. Or that he is not sure about his assertions. In either case, he is not a reliable witness.”

7. In view of the above, when put in the witness box, Dur Muhammad did not deny Zafarullah’s paternity. Instead, he claimed that he did not know and the Court correctly drew an adverse presumption from his response.

8. Accordingly, Dur Muhammad’s contention based on oral testimony, given the available evidence and presumption of law, did not carry weight and was correctly rejected by the trial and the Appellate courts. The two courts correctly relied on Article 128 of the Qanun-e-Shahadat Order, 1984, which states that where a child is 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, while the mother remains unmarried, it shall be the conclusive proof that he is the legitimate child of that man.

¹ Abdul Majid Khan v. Anwar Begum, PLD 1989 SC 362; Loung v. Allah Ditto, 2002 CLC 1307

In the present case, Zafarullah was born to Dur Muhammad and Zulekhan two years prior to their divorce. Dur Muhammad had declined to acknowledge his child after more than 18 years. It is a trite principle of Muslim law that the paternity of a child born in lawful wedlock carries the presumption of truth, and it cannot be refuted by simple denial.² The law inclines towards the presumption of paternity rather than illegitimacy.³ Accordingly, a child born during wedlock has the parentage of the husband. There is no need for an express acknowledgement or an affirmation.⁴ The legitimacy of a child cannot be questioned merely because of the father's claim without any evidence to substantiate the same.⁵ Dur Muhammad produced no evidence to controvert the evidence produced and relied upon by Zafarullah in support of his contention that he was the son of Dur Muhammad.

9. With regard to Dur Muhammad's claim for DNA testing, there is nothing available on record to suggest that he had moved either the trial or Appellate courts to conduct such DNA testing. Even otherwise, the Supreme Court of Pakistan in Muhammad Nawaz v. Additional District and Sessions Judge and Others, PLD 2023 SC 461, has held that resort to DNA testing may be made depending on the facts and circumstances of the case where the evidence produced by both parties is evenly balanced that no conclusion can be drawn or where the party upon whom the onus lies has not produced any evidence. In the present case, Zafarullah relied on documentary evidence, such as his school and educational records disclosing Dur Muhammad as his father. In the circumstances brought on record, Dur Muhammad cannot question the paternity of Zafarullah by asking for a DNA test of Zafarullah, notwithstanding Dur Muhammad put up such plea after

² Muhammad Arshat v. Sughran Bibi, PLD 2008 Lah 302.

³ Muhammad Nazir v. Ali Muhammad, 2003 SCMR 1183.

⁴ Abdul Rashid v. Safia Bibi, PLD 1986 FSC 10.

⁵ Sharafat Ali Ashraf v. Additional District Judge, Bahawalpur, 2008 SCMR 1707.

more than 18 years of his son's birth⁶ and that too before this Court exercising Revisional Jurisdiction.

10. Finally, no jurisdictional error or irregularity in the concurrent findings of facts recorded by the court of competent jurisdiction or on the point of law has been identified in the impugned judgments that could justify this Court's interference under Section 115 CPC. The Applicant has not shown that the two courts have acted in the exercise of jurisdiction illegally or with material irregularity, which calls for any interference by this Court.

11. In view of the above, the revision is dismissed with no order as to costs.

JUDGE

S-Ashfaq/*

⁶ See *Ghazala Tehsin Zohra v. Mehr Ghulam Dastagir Khan*, PLD 2015 SC 327.