IN THE HIGH COURT OF SINDH AT KARACHI

Misc. Appeal No.41/2019

DATE ORDER WITH SIGNATURE(S) OF JUDGE(S)

Before: Mr. Justice Nazar Akbar

Appellants	:	Roshan Ara & others through Mirza Sarfaraz Ahmed, advocate.
		Versus
Respondent No.1	:	Abdul Karim
Respondent No.2	:	Shah Nawaz Through Mr. Shabbir Ahmed Kumbher, advocate.
Respondent No.3	:	Public at Large.
Date of hearing:		**03.03.2020**

JUDGMENT

NAZAR AKBAR, J.- The instant Miscellaneous Appeal is directed against the order dated 17.05.2019 passed by the learned IInd Additional District Judge, Thatta whereby appellants' objections to the succession petition filed by the respondent were dismissed and the SMA was granted in favour of Respondent No.1.

2. To be very precise, the facts of the case are that Respondent No.1 being husband of deceased Mst. Jahan Ara has filed SMA No.02/2018 for grant of succession certificate in respect of (i) an amount of Rs.1,23,449.60 lying in NBP Makli Branch (ii) Another amount of Rs.6,50,158.02 lying in MCB Limited Thatta Branch in the accounts maintained by the deceased, and (iii) her service emoluments i.e L.P.R, benevolent funds, group insurance, gratuity, pension etc. from the Education Department, Government of Sindh, as deceased wife of Respondent No.1 was working as High School Teacher at the time of her death. Respondent No.1 in the succession petition has declared that the deceased has been survived by two legal heirs namely (1) Abdul Karim, (husband) and (2) Shah Nawaz (son of deceased).

3. The trial Court got the list of legal heirs verified from the concerned departments including S.H.O of the concerned police station, NADRA office, Mukhtiarkar and office of Town Committee. The SHO concerned has also recorded statement of two persons of the locality, who in their statements have also clearly deposed that the legal heirs of deceased Mst. Jahan Ara are the applicant (Respondent No.1) and her son Shah Nawaz (Respondent No.2). However, the appellants being real sisters of the deceased appeared filed their written objections to the succession petition alleging that petitioner has concealed the fact that the objectors are also legal heirs of the deceased being her real sisters and Respondent No.2 is adopted son not real son of the deceased. According to them Respondent No.2 is real son of brother of Respondent No.1/applicant namely Haji Abdul Rehman Shoro and as per Sharia law, adopted son is not entitled to claim inheritance in the properties of the deceased. The learned trial Court after going through the documentary evidence on record as well as statements recorded by the SHO, declined the objections of the applicants and allowed SMA in favour of Respondents No.1 and 2. The appellants being aggrieved by the order passed by the trial Court in SMA have preferred instant Miscellaneous Appeal.

4. I have heard learned counsel for the parties and perused the record.

5. The appellants claim that they are entitled to the share in the assets of the deceased Mst. Jehan Ara as real sister of deceased is subject to a declaration that the minor Shahnawaz is not the child of their deceased sister. Learned counsel for the appellant has contended that reliance placed by the trial Court on the NADRA record and other documents was misreading of the documents. The

objectors have filed two applications to fetch some evidence to prove their claim that the minor is not son of deceased Jehan Ara. First application was to constitute a medical board for the minor to go through the DNA test and second application was to call record from the Education department regarding availing maternity leave by the deceased. First application was dismissed on merit being outside the scope of **Section 373** of Succession Act, 1925 by order dated **18.5.2010** and second application was dismissed for non-prosecution on **19.1.2019.** The appellants are also aggrieved by dismissal of the said applications. Learned counsel has also contended that on receiving the objections Court should have converted the proceeding into a suit as required under **Section 295** of Succession Act, 1925.

6. The contention of learned counsel for appellant that SMA should have been converted into civil suit in the case in hand is misconceived. The objection was not about not giving share of inheritance to the objectors or having included certain property in the assets of deceased which were not owned by the deceased at the time of death. The objection was that minor was not son of the deceased Jehan Ara. It was in the nature of seeking a declaration from the Court that the deceased Jehan Ara was issueless. This objection has been turned down by the trial Court on the following reasoning:-

> "It appears that applicant have produced documentary proof of NADRA and other department i.e. the Union council, Mukhtiarkar and SHO of the police station Makli clearly shows that minor Shah Nawaz is the real son of applicant and deceased Mst. Jahan Ara. It is admitted fact that objectors have not challenged such documentary proof before any competent court of law and as such birth certificate and child registration certificate of minor showing that he is the real son of deceased lady, is still intact, which clearly showing that the minor

> Shah Nawaz is the real son of deceased Mst. Jahan Ara".

Learned counsel has not disputed that these documents were official record, therefore, before raising objection to the legal status of the minor after the death of his mother Jahan Ara, they should have also sought declaration and cancellation of the official document which have adversely affected their interest in the assets of the deceased.

7. Beside the above another hurdle in the way of appellants is that their objection was barred by **Article 128** of Qanun-e-Shahadat Order, 1984, (QSO, 1984) which is reproduced below:-

> **128. 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—
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> (a) the husband had refused, or refuses, to own the child ; or
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> (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 come to an end.
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> (2) Nothing contained in clause (1) shall apply to a non-Muslim if it is inconsistent with his faith.

In view of the above provision of QSO, 1984 conclusive proof of legitimacy of a child or his status as son of deceased cannot be disproved by any oral evidence as against the documentary evidence from official record which is public document as defined in **Article 85** of the QSO, 1984 and have to be accepted by the Court as a proof of the fact that Respondent No.2 is son of the deceased in terms of **Article 128** of QSO, 1984. In presence of documentary evidence read with **Article 128** QSO, 1984 the civil Court cannot hold that the

child was not born from the said marriage. In the case in hand the father has not challenged that deceased was not mother of the minor. The appellant have failed to challenge or rebut the evidence of official record of NADRA and other evidence before the trial Court and showing grievance against the dismissal of their request for DNA test. The DNA test as a sole proof of paternity of a child has been repeatedly disapproved by the Hon'ble Supreme Court. The Hon'ble Supreme Court in its recent judgment reported as *Mst. Laila Qayyum vs. Fawad Qayum and others* (**PLD 2019 SC 449**), has dismissed a suit for declaration brought by a brother against his sister seeking declaration that she was adopted daughter and not real daughter of his father. In this case several other judgments of Hon'ble Supreme Court on the subject of DNA test with reference to **Section 128** of QSO, 1984 as well as maintainability of suit for such declaration in terms of **Section 42** of the Specific Relief Act, 1877 have been referred and relied by his lordship Justice Qazi Faez Isa who has authored the judgment. Relevant para 10, 13 & 14 are reproduced below:-

> *10. To challenge another's adoption or legitimacy of birth does not assert the plaintiff's own legal character. In the case of Daw Pone v. Ma Hnin May[17] the Court[18] upheld the dismissal of a suit which sought "a declaration that the defendant was not the keittima daughter [a particular kind of adoptee] of her and her late husband". The Court held, that:*
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> > *Looking at S. 42, Specific Relief Act, it applies only in cases in which a person entitled to some legal character or to any right as to any property brings a suit against a person denying or interested to deny his title to such character or right, and the relief to be given there-under is purely discretionary. Nobody has never denied that Daw Pone is entitled to any legal character or right as to property that I can see. But she is bringing a suit for a declaration to establish a negative case, for, some time or other, I suppose, the defendant has claimed to be her keittima daughter. The learned District Judge dismissed that suit, apparently upon the*

> *merits and taking the view that the defendant was the keittima daughter of the plaintiff.*[19]

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13. In the case of Ghazala Tehsin Zohra[23] *the putative father was not allowed to challenge the paternity of the child after the period mentioned in Article 128 had expired. This Court reiterated that a child born within the period mentioned in* ***Article 128****, "shall constitute conclusive proof of his legitimacy". The learned Judge observed, and we agree, that:*

> *It is for the honour of 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.*[24]

Jawwad S. Khawaja, J further explained that Article 128, "is couched in language which is protective of societal cohesion and the values of the community"[25]

14. Learned Mr. Awan is also right in referring to the case of Salman Akram Raja wherein it was held that a free lady cannot be compelled to give a sample for DNA testing as it would violate her liberty. If a sample is forcibly taken from Laila to determine her paternity it would violate her liberty, dignity and privacy which Article 14 of the Constitution of the Islamic Republic of Pakistan ("the Constitution") guarantees to a free person. The cases of Muhammad Shahid Sahil and B. P. Jena referred to by learned Mr. Faisal Khan, who represents Fawad, are distinguishable and are also not applicable to the present case. In the case of Muhammad Shahid Sahil the DNA of a rapist was sought by the victim to compare it with the DNA of the child born as a consequence of the rape. And in the case of B. P. Jena the Indian Supreme Court considered section 112 of the Evidence Act. Section 112 of the Evidence Act was the precursor of Article 128 of the Qanun-e-Shahadat Order, however, the wording of the two provisions is materially different. In any case, the Supreme Court of India observed that, "In a matter where paternity of a child is in issue before the court, the use of DNA is an extremely delicate and sensitive aspect"[26] *and that:*

> *DNA in a matter relating to paternity of a child should not be directed by the court as a matter of course or in routine manner, whenever such a request is made. The court has to consider diverse aspects including presumption under Section 112 of the Evidence Act; pros and cons of*

> *such order and the test of 'eminent need' whether it is not possible for the court to reach the truth without use of such test.*[27]

8. Learned counsel for appellant in support of his contention that trail Court should have allowed the request for DNA test of Respondent No.2 has relied only on the case of Estate and Assets of Late Abdul Ghani in the matter of SMA No.42 and CMA No.936 of 2008 (**2012 YLR 1752**); It is regretted that learned counsel for the appellant has referred to an obsolete case law reported in the year 2012 on the subject of DNA test. He was unable to lay his hand to any judgment on the point of relevance of DNA TEST in the matters touching the paternity of a child, that too, after the death of mother or father. Lawyers are generally considered as officers of Court to assist the Courts in administration of justice for a fair decision by referring to the latest view of Superior Courts and not by suppressing it. It is difficult to believe that the latest view of Supreme Court in **Laila Qayyum** case (supra) was not accessible to the learned counsel. It was not only one case, the Supreme Court in Laila Qayyum case has referred to other judgments from Indian jurisdiction and two more cases from its own jurisdiction namely (i) *Salman Akram Raja ..Vs.. Government of Punjab* (**2013 SCMR 203**) and *Ghazala Tehsin Zohra ..Vs.. Ghulam Dastagir Khan* (**PLD 2015 SC 327**). The Appellants' only hope to grab the inheritance of the child was dependent on his DNA test to determine the status of minor as child of the deceased. The trial Court has rightly refused such request of the appellant on merit on the basis of evidence and after the Supreme Court judgment in the case of Mst. Laila Qayyum (supra) I think the frivolous challenge to the paternity of a child to deprive him/her of inheritance by asking the Court for DNA test of the child is settled in favour of the child once for all.

9. The other contention of the counsel for the appellant that the proceedings of SMA should have been converted into civil suit is also misconceived in the facts of the case in hand. The word 'objection' simplicitor is not enough for the Court seized of a succession petition to convert it into a suit. It is the duty of the Court to prima facie examine the nature of objection, motive of the objector and his/her interest in the estate of the deceased. In the case in hand the objection raised by the appellant was dismissed on merit by relying on the official documents as against the oral evidence of interested persons and in view of the judgment of Supreme Court in the case of Laila Qayyum (supra) the objection was not even legally sustainable.

10. In view of the above facts and law the instant Miscellaneous Appeal was dismissed by short order dated **03.03.2020** and these are the reasons for the same.

JUDGE

Karachi
Dated:11.03.2020

SM / Ayaz Gul