IN THE HIGH COURT OF SINDH, AT KARACHI

Present:
Irfan Saadat Khan and
Yousuf Ali Sayeed, JJ

High Court Appeal No. 166 of 2019

Appellants	:	Najmul Hassan & others, through Mr. Abadul Hasnain, Advocate.
Respondents	:	Mst. Romana Qamar & others through Mr. Khawaja Shamsul Islam, Advocate.
Date of hearing	:	20.10.2020, 10.11.2010 and 24.11.2020

JUDGMENT

YOUSUF ALI SAYEED, J - This Appeal under Section 3 of the Law Reforms Ordinance 1972 emanates from Suit No.1821 of 2018 instituted by the Appellants before this Court on the Original Side (the "**Suit**"), espousing their claim to inheritance in respect of the estate of their late brother, Syed Qamarul Hassan (the "**Deceased**"), who apparently passed away on 08.02.2018, with the claim being entirely predicated on their assertion that the Deceased and Respondent No.1 (i.e. his widow) remained issueless and the Respondent No.2 was an adoptee, with it being contended on that premise that they (i.e. the Appellants) along with the widow (i.e. the Respondent No.1) were thus the only heirs of the Deceased and were accordingly entitled to succeed to his property, to the exclusion of the Respondent No.2.

2. Apropos the picture thus painted through the plaint, the cause of action was articulated in Paragraph 11 thereof as follows:

> "11. That the cause of action for filing the above suit has been accrued firstly in July, 1986, when the deceased married to the Defendant No 1; Secondly, in the year 2009, when the deceased and the Defendant No 1 adopted a male child and given him name as Shamsul Hassan; Thirdly, on various dates, when the deceased made the above mentioned assets and properties; Fourthly, on 08.02.2018 when the brother of the Plaintiffs, namely, Syed Qamar-ul-Hassan has been expired and left behind the Plaintiffs and Defendant No. 1 as his only surviving legal heirs, who are jointly inherited the above mentioned movable and immovable Properties; Fifthly, when the Defendant No. 1 took-over the physical possession of the said movable and immovable Properties and enjoying the same and driving, fetching and availing the benefits there-from and are not distributing any single penny amongst other legal heirs of the deceased Syed Qamar-ul-Hassan (i.e. the Plaintiffs); Sixthly, when the Defendant No.1 after keeping the Plaintiffs on false hopes and promises refused to distribute the said properties amongst all the legal heirs of the deceased Syed Qamar-ul-Hassan strictly in accordance with law and Sharia; Seventhly, on 31.07.2018 when the Plaintiffs through their counsel wrote letters to the respective companies, wherein the deceased was having shares; Eighthly, on 07.08.2018 when the counsel for the Plaintiffs received replies of the companies through their lawyer and the same is still continue day by day till the redressal of all and entire grievances of the Plaintiffs including distribution of all and entire above mentioned movable and immovable assets and properties and benefits there from derived by the Defendant No.1 etc. amongst all the legal heirs of the deceased according to their respective share and as per law and Sharia.
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> [emphasis supplied]

3. As per the prayers then enunciated, the Appellants principally sought a declaration as to the Respondent No 2's alleged lack of consanguinity and hereditary status vis-à-vis the Deceased, coupled with a direction for the Respondent No.1 to disclose what were termed "the entire true and real facts", with consequential relief being elicited through further prayers seeking the distribution of the estate as well as restraining the Respondents Nos. 1 and 2 from dissipating or creating any interest in favour of a third party over the corpus thereof. For purpose of reference, prayers (a) and (b) are reproduced:

> "(a). Declare that the adopted male child, namely Syed Shamsul Hassan is not the legal heir of deceased Syed Qamar-ul-Hassan and therefore he has neither inherited nor has any share in the movable and immovable assets and properties left behind by the deceased Syed Qamar-ul-Hassan.
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> (b). Direct the Defendant No.1 to disclose the entire true and real facts about the said adopted male child Syed Shamsul Hassan before the Honourable Court; so also direct all the authorities concerned not to treat the said adopted male child Syed Shamsul Hassan as the son of deceased Syed Qamar-ul-Hassan under any circumstances of whatsoever nature."

4. As it transpires, the plaint was completely bereft of reference to any document or material that could evince their claim as to the adoptive status of the Respondent No.2, hence, presumably to bolster their hand, the Appellants had *inter-alia* proposed in Paragraph 7 that:

> "7. ... It is further submitted that in case of refusal of the Defendant No.1 about the fact that Syed Shamsul Hassan is an adopted child, the Plaintiffs are ready and willing to bear all and entire expenses of DNA test etc., in order to confirm and prove the fact of actual, real and true relation of the said adopted male child Syed Shamsul Hassan with the Defendant No.1 and deceased Syed Qamar-ul-Hassan and that he is not a legal

heir of deceased Syed Qamar-ul-Hassan, so all and entire dispute and issues would be resolved and the assets and properties left behind by the deceased Syed Qamar-ul-Hassan could be distributed amongst the real and actual legal heirs of the deceased Syed Qamar-ul-Hassan strictly in accordance with law and Sharia."

5. The Respondents Nos. 1 and 2 jointly filed their written statement, whereby they categorically denied the allegations and along with which they annexed copies of various identity documents relating to the Respondent No.2 generated from the official computerized record - viz. his Birth Certificate, Form-B and the Family Registration Certificate, as well as a copy of his Passport issued on 16.03.2011. The aforesaid Respondents also filed an Application under Order 7, Rule 11 CPC, bearing CMA No. 17222/18 (the "**Underlying Application**"), seeking the rejection of the plaint on the following grounds:

"(i) That the suit as framed is not maintainable as the plaintiffs have no locus standi and legal character to file the same.

(ii) That the suit is barred in terms of Sections 42, 54 and 56 and all the enabling provisions of the Specific Relief Act, hence the same is liable to be dismissed with exemplary cost.

(iii) That a suit for partition should have been filed with a unified title and unified possession which are lacking in the present suit. Admittedly the suit property is not in the name of the plaintiffs nor their predecessor, hence suit for partition is not maintainable and liable to be dismissed with heavy cost.

(iv) That the suit is also barred in terms of the mandatory provisions of Shariah, Quran and Sunnah as well as Article 128 of Qanoon Shahadat Order and also in terms of the West Pakistan Muslim Personal Law Shariat Application 1962 hence is liable to be dismissed with heavy cost."

6. After hearing the submissions advanced on behalf of the Parties for and against the Underlying Application, the learned single Judge seized of the matter was pleased to allow the same vide an Order made on 04.03.2019 (the "**Impugned Order**"), with the plaint consequently being rejected, hence this Appeal.

7. Proceeding with his arguments, learned counsel for the Appellants submitted that the learned single Judge had erred in allowing the Underlying Application, as the case set up in terms of the plaint had been viewed through the prism of Article 128 of the Qanun-e-Shahadat Order, 1984 (the "**QSO**") and held to have been barred on that basis, whereas, per learned counsel, the claim being one of adoption rather than illegitimacy, was removed from Article 128; instead fell within the contemplation of Articles 46 and 64 of the QSO, with triable issues having been raised that necessitated a determination of the Suit on merits, after the settlement of issues, evidence and so on. He sought to advance his case by contending that prior to the date of birth of the Respondent No. 2, the Respondent No.1 had suffered an ectopic pregnancy, due to which she had to undergo a procedure for removal of both the pregnancy and the tube. Per learned, counsel, this condition, coupled with the fact that the Respondent No.1 was around 45 of years of age at the time of the Respondent No.2's birth, provided arguable grounds. Reliance was placed on the judgments in the cases reported as Muhammad Akram vs. Mst. Haliman Bibi and 6 others 2010 CLC 781, Hote Khan and 2 others vs. Mst. Khanzadi and 2 others 1987 MLD 694, and Haji Allah Bakhsh vs. Abdul Rehman and others 1995 SCMR 459.

8. Conversely, learned counsel for the Respondents Nos. 1 and 2 submitted that the Impugned Order had been correctly made. He submitted that all of the data entries in the official computerized record showing the Deceased and Respondent No.1 as being the parents of the Respondent No.2 had been undertaken during the lifetime of the Deceased, under his aegis, with the Deceased having consciously and correctly acted to ensure so. He submitted that such a record was irrefutable, and argued that the Appellants had no locus-standi to maintain the Suit so as to question the same and/or parentage of the Respondent No.2 and that no question of the Respondents being required to undergo a DNA test could conceivably arise. He contended that the Suit was vexatious and misconceived and had been filed for the lust of money, with the ulterior motive of depriving the Respondent No.2 of his identity and right of the inheritance. In support of his contentions, he placed reliance upon the judgments of the Honourable Supreme Court in the cases reported as Mst. Asma Naz vs. Muhammad Younas Qureshi 2005 SCMR 401, Ghazala Tehsin Zohra vs. Mehr Ghulam Dastagir Khan and another PLD 2015 SC 327, Mst. Laila Qayyum vs. Fawad Qayum PLD 2019 SC 449, as well as a Single Bench judgment of this Court authored by one of us (namely Yousuf Ali Sayeed, J), while sitting on the Original Side, in the case reported as Saeeduddin Qureshi vs. Waqar Saeed & 3 others 2020 MLD 1441.

9. Having heard and considered the arguments advanced, we would turn firstly to the Impugned Order so as to look to the reasoning of the learned Single Judge, as reflected in Paragraphs 7 and 8 thereof, which read as follows:

"7. It is my candid opinion that the only person- who could question the parentage of the defendant No.2 was his late father, and it would only be entertained during his lifetime while after his death under the law this chapter is closed forever. Nevertheless, it should be noted that in order to prove the family lineage; there are some Islamic conditions that are taken into account in Islamic legislation as such Sharia does not recognize this kind of testing. The Holy Prophet ﷺ said:

> *"The boy is for the owner of the bed and the stone is for the person who commits an illegal sexual intercourse (i.e. the child will not be traced back to him)." (Al-Bukhari and Muslim)*

8. From the above narration of the Holy Prophet ﷺ it is clear that whosoever has a wife and she give birth to a child on his bed, it is his child and his parentage is definitely traced back to him. I would like to accentuate that under the provision of Article 128 of Qanoon-e-Shahadat, even the father of a child can question the parentage of a child within six lunar month of his birth and not thereafter. It is also my considered view that even in case of denial, the alleged father cannot demand DNA matching, if the child is born to a woman during the continuity of his marriage with her. In such case, the only way available to him is by way of Li'aan i.e. both spouses make an oath that he/she is truthful in his/her claim and then invoke the curse of Allah on the one who is lying and repeat it thrice. This action only takes place when a man denies his child and accuses his wife with adultery. Nevertheless, an adverse claim regarding the parentage of a person by the close relatives of his father, like in the present case, cannot be entertained in any circumstance. On the contrary, in the present case, the father of the defendant No.2 has admitted and acknowledge the defendant No.2 as his legitimate child, as such the plaintiffs' claim to the parentage of defendant No.2 cannot be entertained. It is not out of place to highlight that as per the dicta of the Hon'ble Supreme Court laid down in the case of Ghazala Tehsin Zohra (supra), DNA testing in civil cases is not permissible. The upshot of the entire discussion is that neither any cause of action accrued in favour of the plaintiffs nor the relief claimed by them is permissible under the law, as such the listed application is allowed and the plaint of the instant suit is rejected by invoking the provision under Order VII Rule 11 CPC. All pending applications are also disposed of."

10. Whilst the aforementioned finding may have been made with reference *inter alia* being made to Article 128 of the QSO, that is not to say, as was sought to be contended by learned counsel of or the Appellants, that the learned single Judge based his assessment of the case entirely on the assumption that the case was one of illegitimacy. Indeed, it is evident from the Impugned Order that the learned single Judge essentially found that the Appellants had no *locus standi* in the matter and that there was therefore no valid cause of action underpinning the Suit. As such, it is this determination that falls to be tested as per the cited caselaw on the subject.

11. As for the precedents cited on behalf of the Appellant, the cases of *Muhammad Akram* and *Hote Khan* (Supra) are totally distinguishable on the facts and no principle of law was laid down therein that is applicable to the matter at hand, whereas the case of *Haji Allah Bakhsh* touched upon the principle that the contents of the plaint are to be presumed to be correct for purposes of an assessment under Order 7, Rule 11 CPC, but that strict view has then come to be refined in terms of the subsequent judgment of the Apex Court in the case reported as Haji Abdul Karim and others v. Messrs Florida Builders (Pvt) Limited PLD 2012 SC 247, where it was held as follows:

> "After considering the ratio decidendi in the above cases, and bearing in mind the importance of Order VII, Rule 11, we think it may be helpful to formulate the guidelines for the interpretation thereof so as to facilitate the task of courts in construing the same.
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> Firstly, there can be little doubt that primacy, (but not necessarily exclusivity) is to be given to the contents of the plaint. However, this does not mean that the court is obligated to accept each and every averment contained therein as being true. Indeed, the language of Order VII, Rule 11 contains no such provision that the plaint must be deemed to contain the whole truth and nothing but the truth. On the contrary, it leaves the power of the court, which is inherent in every court

> of justice and equity to decide whether or not a suit is barred by any law for the time being in force completely intact. The only requirement is that the court must examine the statements in the plaint prior to taking a decision.
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> Secondly, it is also equally clear, by necessary inference, that the contents of the written statement are not to be examined and put in juxtaposition with the plaint in order to determine whether the averments of the plaint are correct or incorrect. In other words the court is not to decide whether the plaint is right or the written statement is right. That is an exercise which can only be carried out if a suit is to proceed in the normal course and after the recording of evidence. In Order VII, Rule 11 cases the question is not the credibility of the plaintiff versus the defendant. It is something completely different, namely, does the plaint appear to be barred by law.
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> Thirdly, and it is important to stress this point, in carrying out an analysis of the averments contained in the plaint the court is not denuded of its normal judicial power. It is not obligated to accept as correct any manifestly self-contradictory or wholly absurd statements. The court has been given wide powers under the relevant provisions of the Qanun-e-Shahadat. It has a judicial discretion and it is also entitled to make the presumptions set out, for example in Article 129 which enable it to presume the existence of certain facts. It follows from the above, therefore, that if an averment contained in the plaint is to be rejected, perhaps on the basis of the documents appended to the plaint, or the admitted documents, or the position which is beyond any doubt, this exercise has to be carried out not on the basis of the denials contained in the written statement which are not relevant, but in exercise of the judicial power of appraisal of the plaint.

12. By contrast, the judgments cited on behalf of the Respondents are of decided relevance, with the case of Asma Naz (Supra) being that of a child who had come forward to file suit after attaining majority, seeking to restrain her father from denying that she was his real daughter. Noting that she had always been treated as a real daughter and her official documents reflected that she had been publicly known and acknowledged as being such, the Honourable Supreme Court observed as follows:

> “It may be noted that according to Mahomedan Law right of inheritance is-extended to a heir whose legitimate status is accepted, otherwise, such right neither can be extended nor acquired. It is also a settled proposition of law that the legitimate or illegitimate status of a person is established in view of the proof of birth but in a case where such proof is not coming forward, then on the rule of acknowledgement by an acknowledger, in respect of status of a person, a conclusive presumption can be drawn that he/she is his/her legitimate child and once such status is confirmed, it cannot be destroyed by any subsequent act of the acknowledger, or of anyone claiming through him, as it has been held in the cage of Muhammad Allahdad Khan and another v. Muhammad Ismail Khan and others 1888 ILR. Vol. X Allahabad 289. In this report another important question was also highlighted i.e. "if a man acknowledges another to be his son and other be nothing, which obviously renders it impossible that such relation should exist between them, the parentage will be established." Reference may also be made to the case of Muhammad Azmat Ali Khan v. Lalli Begum and others (I.L.R. Vol. IX page 8) where their lordships of Privy Council observed "according to Mahomedan Law the acknowledgement and recognition of children by a father as his sons gives them the status of sons, capable of inheriting as legitimate sons. Such acknowledgement may be in the express or implied, in the latter case the inference from the acts of father must depend upon the circumstances of each particular case." Applying the principle highlighted in this judgment on the case in hand in the light of documentary evidence, noted hereinabove, it can safely be held that petitioner/plaintiff had always been treated/ acknowledged by the respondent/ defendant as his daughter”

13. Even more relevantly, the other cases relied upon by the Respondents were all matters where either the putative father or a sibling had sought to deny the paternity of a party. For instance, the case of Mehr Ghulam Dastagir Khan (Supra), emanated from a suit where a father had sought a declaration to the effect that certain children were not his natural/biological offspring and that any official record in this regard was bogus and had been fraudulently prepared. After examining Article 128 of the

Qanun-e-Shahadat Order in juxtaposition with Section 2 of the West Pakistan Muslim Personal Law (Shariat) Application Act, 1962 (Act V of 1962) and the rules of Muslim Personal Law, the Honourable Supreme Court held that legitimacy/paternity must be denied by the father immediately after birth of the child and within the post-natal period (maximum of 40 days) after the birth of the child, and there can be no lawful denial of paternity after this stipulated period. The relevant excerpt from that judgment is reproduced as follows:

> "For this purpose, it is necessary to ascertain the rules of Muslim Personal Law when a person denies that he is the natural/biological father of children born within the period stipulated in Article 128 *ibid*. The Muslim Personal Law (Shariat) is clear and well settled on the subject. Firstly, it provides that legitimacy/paternity must be denied by the father immediately after 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* Yousaf.
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> There can be no lawful denial of paternity after this stipulated period. The *Hedaya*, Fatawa-e-Alamgiri and other texts are all agreed on this principle of Shariat. In the present case the daughter Hania Fatima was born on 21-3-2000 while the son Hassan Mujtaba was born on 9-2-2001. The very first denial of paternity appearing from the record is in the *talaq nama* (Exh.D3) which was made on 26-6- 2001. Clearly, therefore, while applying the principles of Muslim Personal Law (Shariat) as mandated by the Act V of 1962, the respondent-plaintiff cannot be allowed to deny the legitimacy/paternity of the two children. This is also consistent with Article 2(9) of the QSO which, when read in the context of the present case, does not allow the Court to allow any evidence to be adduced to disprove legitimacy. The wisdom of this rule of Muslim Personal Law cannot be gainsaid, considering in particular the patriarchal and at times misogynistic societal proclivities where women frequently do not receive the benefit of laws and on the contrary face humiliation and degrading treatment. It is for the honour 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.

> 13. The rationale of the law set out in Article 128 of the QSO read with section 2 of Act V of 1962 is quite clear. Both statutes ensure (in specified circumstances) an unquestioned and unchallengeable legitimacy on the child born within the aforementioned period notwithstanding the existence or possibility of a fact through scientific evidence. The framers of the law or jurists in the Islamic tradition were not unaware simpletons lacking in knowledge. The conclusiveness of proof in respect of legitimacy of a child was properly thought out and quite deliberate. There is a much greater societal objective which is served by adhering to the said rules of evidence than any purpose confined to the interests of litigating individuals. There are many legal provisions in the statute book and rules of equity or public policy in our jurisprudence where the interests of individuals are subordinated to the larger public interest. In our 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."

14. In the case of Laila Qayyum (Supra), which was somewhat more akin to the instant case, a suit had been filed whereby the plaintiff had alleged that the party who was the Petitioner before the Apex Court was "an abandoned infant in a local hospital" and had been adopted by his parents, late Abdul Qayum and Nasreen Begum, and brought up as their own daughter, with declarations having been sought that she was not their real daughter and had no right to their legacy. A prayer was also advanced that the documents showing her to be their daughter be cancelled to such extent. The matter had come up to the Honourable Supreme Court from an order made by the trial Court, allowing an application for DNA testing moved by the plaintiff, which Order had then been set aside on appeal but restored by the Peshawar High Court under its writ jurisdiction. The relevant passages from the Judgment rendered by the Apex Court in the matter are as follows:

"8. A court can make a declaration in a suit in favour of a person who is entitled to any *legal character* or to any right, as to any property, which another is denying. Laila has not denied either Fawad's legal character or his right to any property. Instead Fawad alleges that Laila is not Abdul Qayum's daughter and therefore not his heir and not entitled to inherit the properties left behind by him (the prayer however only refers to "legacy"). Fawad seeks a negative declaration and one which has nothing to do with Fawad's own *legal character*..."

"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:

> "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."

11. Fawad also seeks the cancellation of documents which show Abdul Qayum to be Laila's father. A suit seeking cancellation of documents is filed under section 39 of the Specific Relief Act, reproduced hereunder:

> **39. When cancellation may be ordered.**
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> Any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable; and the

> Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.
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> If the instrument has been registered under the Registration Act, the Court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation.

The documents, the cancellation of which Fawad seeks are not shown to cause *him serious injury*. Since the essential condition of causing him serious injury, mentioned in section 39 of the Specific Relief Act, is not met therefore Fawad's suit seeking cancellation of the said documents is also not maintainable.

12. The suit was also barred by Article 128 of the Qanun-e-Shahadat Order. Only a putative father, within the time prescribed in Article 128, may challenge the paternity of a child.

> **128. Birth during marriage conclusive proof of legitimacy.**
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> (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.

Abdul Qayum (the father) had not challenged Laila's paternity. Article 128 does not permit a putative brother (Fawad) to challenge his sister's paternity.

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"

"16. Fawad sought to deprive Laila of her identity and of her inheritance. The Court cannot legally make the declarations the plaintiff seeks nor can it order the cancellation of the documents. The suit filed by Fawad cannot be decreed. To keep such a suit pending only harasses the petitioner further and may deprive her of her inheritance. Already a lot of court time has been taken up to attend to this frivolous suit. Therefore, we invoke our ancillary powers, granted to us under Article 187 of the Constitution, as it is necessary for doing complete justice, and exercising such powers dismiss the suit pending before the Senior Civil Judge Gulkada, Swat."

15. Furthermore, as to the permissibility of DNA testing being compulsorily carried out so as to conduct a comparative analysis and match of their DNA (i.e. that of the plaintiff and defendant) with that of their mother and other siblings, the Apex Court went on observe and hold in that very case (Ibid) that:

"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]

15. There is yet another reason why a DNA test should not be allowed. If the proposed DNA testing is done it would neither confirm nor negate Laila's paternity. The same also holds true for Fawad and those of his siblings whom he acknowledges. Abdul Qayum died sixteen years ago and his DNA can now be accessed if his body is disinterred from the grave and a sample taken from his remains. Fawad's suit however is premised on the assumption that he is the son of Abdul Qayum, then, on the basis of this assumption, he denies Laila's paternity. Fawad's assertion that Abdul Qayum is his father is equally assumptive to Laila asserting this."

16. In yet another case analogous to that hand, being that of Saeedudin Qureshi (Supra), the plaintiff had unreservedly represented himself as being the real father of the defendant and put down his name as such and reflected the defendant to be his real son in all official and academic records, but had then come forward after decades of such conduct to allege that the defendant was not his biological son and had been adopted. After the demise of the plaintiff, the suit was then pursued by his second wife and daughter from the second marriage. Upon hearing of an Application under Order 7 Rule 11 CPC, those representatives of the putative father were held to be *estopped* from denying paternity and the status of the child, and with reference to case of Mehr Ghulam Dastagir Khan (Supra), it was held such a denial could not be made after the time period stipulated by the Apex Court, and the principle could not be circumvented by basing a case on the claim that the child had been adopted and seeking a declaration to that effect. The suit, being based on that footing, was thus held to be barred and the Plaint rejected accordingly.

17. To our minds and as per our understanding, the following principles may be distilled from these judgments:

    (a) That the status of a person in terms of his being of legitimate or illegitimate birth is established in view of the proof of birth but in a case where such proof is not forthcoming, then on the rule of acknowledgement by an acknowledger, in respect of status of a person, a conclusive presumption can be drawn that he/she is his/her legitimate child and once such status is confirmed, it cannot be destroyed by any subsequent act of the acknowledger, or of anyone claiming through him;

(b) If a man acknowledges another to be his child and there be nothing, which obviously renders it impossible that such relation should exist between them, parentage will be established;

(c) As per Mahomedan Law, the acknowledgement and recognition of children by a father as his sons gives them the status of sons, capable of inheriting as legitimate sons. Such acknowledgement may be in the express or implied, and in the latter case, the inference to be drawn from the acts of father would depend upon the circumstances of each particular case;

(d) Continual unequivocal representation by a person portraying himself or herself as the parent of a child, identifying and holding out the child to be his or her own, would then estop that person or anyone else claiming as his or her representative from denying paternity;

(e) Only the putative father may challenge the paternity of a child, and that too, within the time prescribed in Article 128 of the QSO, failing which the suit would be barred;

(f) Article 128 of the QSO does not permit any other person to challenge paternity and cannot be circumvented by basing a case on the claim that a child had been adopted and seeking a declaration to that effect.

(g) To challenge another's adoption or legitimacy of birth does not assert a plaintiff's own legal character, and under Section 42 of the Specific Relief Act, a declaration cannot be sought in that regard or as to the persons incapacity to inherit, and a suit seeking the cancellation of official documents reflecting another persons parentage is also not maintainable;

18. Indeed, if the position were otherwise, the floodgates would be thrown open to an endless stream of litigation on the part of persons seeking to disentitle others on a mere allegation as to their adoptive status, whether they be heirs seeking to thereby enhance their share(s) or strangers to an estate seeking to succeed by ousting those otherwise legitimately entitled.

19. In our view, in the matter at hand, the case sought to advanced by the Appellants vide the Suit was clearly barred by the aforementioned principles. As of their own showing, while stating their cause of action, the Appellants were clearly aware that the Deceased had given the Respondent No.2 his name, and the plea taken on their behalf during the course of arguments as to their being unaware that the identity of the Respondent No.2 was so reflected in his official documents beggar's belief. The contention that they ought to then have been allowed to seek cancellation of those documents is also misconceived, with it being apparent from the case-law referred that recourse to such a step was not open to them in law.

20. That being so, we find no error or infirmity in the Impugned Order and are of view that the learned single Judge decided correctly in allowing the Underlying Application. Hence, the Appeal fails, and is dismissed, along with all pending miscellaneous applications.

JUDGE

JUDGE

Karachi
Dated _____