IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 245 of 2009

Plaintiff	:	Saeeduddin Qureshi, through Mr. Muhammad Salam Kazmi, Advocate.
Defendant No.1	:	Waqar Saeed, through Mr. Khawaja Shams Ul-Islam, Advocate.

Suit No. 1408 of 2013

Plaintiff	:	Waqar Saeed, through Mr. Khawaja Shams Ul-Islam, Advocate.
Defendant No.1	:	Mst. Imtiaz Bibi, through Mr. Muhammad Salam Kazmi, Advocate.

Dates of hearing	:	14.11.2019 and 25.11.2019

ORDER

YOUSUF ALI SAYEED, J – Suit Number 245 of 2009 was filed on 24.02.2009 by one Saeedudin Qureshi (since deceased) denying paternity of the Defendant No.1, Waqar Saaed, on the assertion that whilst he had contracted marriage with the Defendant No.2, namely Mst. Bushra (also since deceased) in the year 1968, no children were born from their wedlock, but at the insistence of the Defendant No.2 he had allowed her to bring up the Defendant No.1, who was her nephew, as their real son and had given the Defendant No.1 his own name, albeit that the he was allegedly born in the year 1976 to one Mst. Shafqat Bibi, who was the sister of the Defendant No. 2, from her marriage to one Nasir Ali Chohan.

2. It had been pleaded that the Plaintiff was thus not the biological father of the Defendant No. 1, but had brought up the child like his son, and permitted his name to be entered in educational certificates of the Defendant No.1 reflecting him to be the father, so that the Defendant No.1 should not feel that he was without one of his parents.

3. Ergo, it had been acknowledged that even in Form "B", the Defendant No. 1 was shown to be the Plaintiff's son, and had also then been issued a computerized National Identity Card by the NADRA (i.e. the Defendant No.3) in which the Plaintiff was accordingly shown to be his father.

4. It was further stated in the Plaint that the Plaintiff had then entered into a second marriage in the year 1991 with one Mst. Imtiaz Bibi, and from the wedlock a daughter, Ishna Saeed, had been born on 12.12.1998, with it being averred that as the Plaintiff was over 70 years of age at the time of institution of the Suit and keeping poor health, he wanted to set the record straight as regards the paternity of Defendant No. 1 so that he would not be "able to usurp properties and assets of Plaintiff which are quite sizeable, when in law he does not stand to inherit anything from the Plaintiff", it being further stated that "This will also be to the detriment of the real daughter".

5. On this basis, it was prayed that this Court be pleased to:

> "(a). Declare that the Plaintiff is not the biological / real father of the Defendant No. 1.
>
> (b). Permanently restrain Defendant No. 1 from using the name of Plaintiff as his father.
>
> (c). Direct Defendant No. 3 and 4 to correct the parentage of the Defendant No. 1 by deleting the name of the Plaintiff as his father in Defendant No. 3's records."

6. Conversely, Suit Number 1408 of 2013 has been filed by Waqar Saeed, alleging inter alia that he and Bushra Qureshi are the only legal heirs of Saeeduddin Qureshi and that Mst. Imtiaz Bibi and Ishna Saeed are not his widow and real daughter, with declarations being elicited in that regard. Both these Suits have since been proceeding together, along with Execution No. 13 of 2009, in relation to the compromise decree made in earlier Suits between Saeeduddin Qureshi and Bushra Qureshi in respect of their competing claims to certain immovable properties.

7. It is in this backdrop that an Application has been filed by the Defendant No.1 in Suit No. 245/09, under Order 7, Rule 11 CPC, bearing CMA No. 5043/18, assailing the maintainability of that Suit in light of the principle laid down by the Honourable Supreme Court in the case reported as Ghazala Tehsin Zohra versus Mehr Ghulam Dastagir Khan and another PLD 2015 Supreme Court 327, and seeking rejection of the plaint accordingly.

8. Learned counsel for the Defendant No.1 pointed out that it had been admitted in the pleadings of Saeeduddin Qureshi that in Form "B" he had himself shown the Defendant No. 1 to have been born on 05.01.1977 and to be his son from Bushra Siddiqui, and had permitted his name to be entered as the father of the Defendant No.1 in his educational certificates, and that the CNIC issued to the Defendant No.1 on 20.01.2004 also reflected that relationship. On this note, it was submitted that the aforementioned case that had come up before the Apex Court had emanated from a suit where a father had similarly sought a declaration to the effect that the children were not his natural/biological children and that any official record in this regard was bogus and had been fraudulently prepared, and that 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, it had been held that the 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. It was submitted that in light of the Judgment of the Apex Court, the Suit was barred and following the demise of Saeeduddin Qureshi on 22.12.2009, Mst. Imtiaz Bibi and Ishna Saeed, who had then assumed the mantle as plaintiffs whilst professing to be his legal heirs, even otherwise had no locus standi in the matter, hence the Plaint ought to be rejected. On query posed as to how Suit No. 1408 of 2013 was then maintainable, learned counsel made a categorical statement to the effect that said Suit was not being pressed and was being unconditionally withdrawn.

9. Learned counsel for Mst. Imtiaz Bibi and Ishna Saeed conceded in light of the pleadings that Saeeduddin Qureshi had himself put down his name as the father of the Defendant No.1 in all official and academic records, and when called upon to address the point of maintainability arising in terms of the aforementioned Judgment of the Honourable Supreme Court as well as the doctrine of *estoppel*, could not advance any submission in that regard other than to point out that after the commencement of proceedings on CMA No. 5043/18, an Application under Order 6 Rule 17 CPC, bearing CMA No. 15439/19 had been filed seeking to delete all the original prayers and substitute the same with a single prayer "To declare that the Defendant No. 1 is the adopted son of the Plaintiff and he is not entitled to get any share in the inherited property of the Plaintiff". According to him, this served to preserve the Suit.

10. Having examined the matter and considered the arguments advanced, it transpires that this is not a case of the Plaintiff having been unaware as to the antecedents of the Defendant No.1's birth or having lacked conjugal access in the marital relationship at the time. On the contrary, as per the case set up in the Plaint, Saeeduddin Qureshi himself admitted to having voluntarily embarked upon a course of conduct over the course of decades embracing and reflecting the Defendant No.1 as his real son, without any reservation, despite being aware that he was allegedly his wife's nephew. Hence this is not a case where any fraud or forgery is attributable to the Defendant No.1 or any third party and it is apparent that Saeeduddin Qureshi is estopped by his own conduct from then disavowing the official status of the Defendant No.1.

11. The amendment sought to be introduced vide CMA No. 15439/19 would also be of no avail in that regard, and that Application is itself *ipso facto* a virtual concession that the Suit is not maintainable. Even otherwise, no denial of paternity could be made after the time period stipulated by the Honourable Supreme Court as per the principle laid down in the case of Mehr Ghulam Dastagir Khan (Supra), nor can such time period be circumvented through basing a case on the claim of a child having been adopted and seeking a declaration to that effect, the operative parts of that Judgment reading as follows:

> "10. We are cognizant of the ramifications and serious consequences which will follow if the impugned judgment remains a part of our case law as precedent. We, first of all, take up for comment the provisions of Article 128 ibid. The Article is couched in language which is protective of societal cohesion and the values of the community. This appears to be the rationale for stipulating affirmatively that a child who is born within two years after the dissolution of the marriage between his parents (the mother remaining un-married) shall constitute conclusive proof of his legitimacy. Otherwise, neither the classical Islamic jurists nor the framers of the Qanun-e-Shahadat Order could have been oblivious of the scientific fact that the normal period of gestation of the human foetus is around nine months. That they then extended the presumption of legitimacy to two years, in spite of this knowledge, directly points towards the legislative intent as well as the societal imperative of avoiding controversy in matters of paternity. It is in this context that at first glance, clause 1(a) of Article 128 appears to pose a difficulty. It may be noted that classical Islamic Law, which is the inspiration behind the Qanun-e-Shahadat Order (though not incorporated fully) and was referred to by learned counsel for the appellant also adheres to the same rationale and is driven by the same societal imperative. In this regard, it is also worth taking time to reflect on the belief in our tradition that on the Day of Judgment, the children of Adam will be called out by their mother's name. It shows that the Divine Being has, in His infinite wisdom and mercy, taken care to ensure that even on a day when all personal secrets shall be laid bare the secrets about paternity shall not be delved into or divulged.

11. We may, at this point, add that the Qanun-e-Shahadat Order ('QSO') stipulates that when one fact is declared *"to be conclusive proof of another [fact], the Court shall on proof of one fact, regard the other as proved and shall not allow evidence to be given for the purpose of disproving it"* (emphasis supplied). This provision of the QSO [Article 2(9)] has to be reconciled with clause 1(a) of *ibid*. It now remains to be seen as to how clause (a) of Article 128(1) of the QSO is to be interpreted. Can an attempt be made to interpret Article 128 and Article 2(9) of the QSO harmoniously so as to save the entire Article 128 to the extent relevant for the present case. The stipulation in Article 128 is that the birth of a child within the period stipulated in Article 128 is conclusive proof that he is a legitimate child. Once the relevant facts as to commencement and dissolution of marriage and the date of birth of a child within the period envisioned in Article 128 are proved, and the date of birth is within the period specified in Article 128(1), then the Court cannot allow evidence to be given for disproving the legitimacy of a child born within the period aforesaid. How then is the husband's refusal to own the child to be dealt with? The answer follows.

12. It is a matter of concern that on such a vital issue we have not received much assistance at the bar as to how Article 128 *ibid* is to be interpreted. Redundancy is not lightly to be imputed to the legislature. For the purpose of harmonious construction of the said statutory provision, we may have resort to section 2 of the West Pakistan Muslim Personal Law (Shariat) Application Act, 1962 (Act V of 1962) which stipulates that *"notwithstanding any custom or usage, in all questions regarding ... legitimacy or bastardy ... the rule of decision, subject to the provisions of any enactment for the time being in force shall be the Muslim Personal Law (Shariat) in cases where the parties are Muslims"*. Since both parties before us are Muslims and section 2 aforesaid specifically refers to legitimacy or bastardy, resort must be made to the Muslim Personal Law (Shariat) for the purpose of reconciling what may appear to be conflicting provisions of Article 128 of the QSO. 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.

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 miogynistic 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."

12. As such, it is apparent that Suit No. 245 of 2009 is barred in terms of the Judgment of the Honourable Supreme Court in the case of Mehr Ghulam Dastagir Khan (Supra) as well as the doctrine of *estoppel*, hence CMA No. 5043/18 is allowed, with the Plaint being rejected and CMA No. 15439/19 being dismissed as a consequence. Furthermore, in view of the statement made by counsel for the Defendant No.1 as to the unconditional withdrawal of Suit No. 1408 of 2013, that Suit accordingly stands dismissed as withdrawn. There is no Order as to costs in either matter. The Office is directed to place a copy of this Order in the file of connected Suit No. 1408 of 2013.

JUDGE

Karachi.
Dated __________