

HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

R.A No.149 of 2004

Syed Ghulam Qadir Shah & others V/s Syed Habibullah Shah & others

Applicants : Through Mr. Hakim Ali Siddiqui, Advocate
Respondent No.1 : Through Mr. Naimatullah Soomro, Advocate
Respondents No.2 to 4 : Through Mr. Arbab Ali Hakro, Advocate
Dates of Hearing : 3,5,8 & 10 of October, 2019
Date of Judgment : 10.10.2019

J U D G M E N T

MAHMOOD A. KHAN, J: 1. This Revision Application has been filed in respect of concurrent findings, passed by the learned trial Court as well as learned appellate Court in F.C Suit No.28 of 1997 and Civil Appeal No.10 of 2003 respectively, whereby the suit and the appeal as filed by the applicants were dismissed.

2. The relevant background of the matter being that the applicants filed the suit titled as "declaration and correction of certificates and injunction", stating in the plaint that the plaintiffs are the real sons of Late Haji Syed Ghulam Shah from his third wife Mst.Darya Khatoon, whereas the defendant Nos.1 to 4 are also the sons of said propositus from the first wife. That the plaintiffs were brought up in the care of the their deceased said father at his place of residence however the defendant Nos.1 to 4 bearing a grudge against them due to apprehension of being entitled to inherit the property by the late father during the childhood of the plaintiffs took them to primary school mentioned the name of defendant No.5 as their father who was one of their "kamdar" namely

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Mela Bux. It is further claimed that the plaintiffs had no acquiring consciousness of the mischief they discovered the wrong. Accordingly the wrong parentage continued to be entered in the school leaving certificate and other school certificates along with the employment record when the plaintiff took employment in the District Council Nawabshah. That the plaintiffs were conscious as to the mischief done against them by distorting their identity and parentage by defendant No. 1, their father also died and the plaintiffs started making applications to various education authorities and also to the Government of Sindh. Eventually the plaintiffs mother, swore her affidavit to the effect that the plaintiffs are sons of Haji Syed Ghulam Shah (deceased), while a notification was duly published in Sindh Government Gazette dated 28th March 1996, notifying that fathers name of the plaintiffs was erroneously written as Maula Bux Solangi at the time of admission in the school while their fathers correct name is Syed Haji Ghulam Shah. The Section Office of Government of Sindh Education Department also wrote a letter to the Chairman Board of Intermediate/Secondary Education Sukkur to take necessary steps in order to correct the name of the parentage of the certificate and their caste in response to the plaintiffs' correspondence. The application of the plaintiffs was enquired into by the lower revenue officials and for a decision was referred to the Assistant Commissioner Nawabshah who held prolonged enquiry into the matter and finally advised the plaintiffs to seek remedy from a competent Civil Court vide his letter dated 2-6-1996. That at present the position is that in birth and residence certificates along with NICs as well as the Gazette above given the name of the plaintiff's father and has

been correctly mentioned as Haji Syed Gulam Shah and caste Syed, while in plaintiffs School certificate, appointment order, duty report in District Council Nawabshah erroneously mentioned as Moula Bux Solangi and their caste as Solangi. In an FIR filed against plaintiff No.1 and acquittal judgment in his favor also the name of the father of said plaintiff has been correctly recorded. That the plaintiffs are entitled to their proper identity and family lineage and their true cast but the defendant No.1 to 4 have denied this right to them further sake of inheritance and even since coming to age plaintiffs have been making continuous effort and approaches to various authorities for rectification of their father hood and caste without success. Cause of action is claimed to have arose in 1971 when the parentage and cast of the plaintiff was said to have been erroneously recorded by defendant No.1 at the time of admission in the school and subsequently on each succession dad. Following prayers are made;

Declaration that the correct name of plaintiffs father is Haji Syed Ghulam Shah and their true caste is Syed, while the entry of their father's name as Moula Bux Solangi in their Educational and service documents and caste as Solangi are incorrect and erroneous liable to modification.

The name of plaintiffs father as Maula Bux Solangi and their casts as Solangi in the School Certificates, appointment order duty order and other documents be ordered to be delivered before this Court and corrected and modified accordingly.

Defendants be restrained by permanent injunction from opposing the entry of correct name of plaintiffs father and caste in the Educational and service documents, directly indirectly in any manner whatsoever along with costs and any other relief.

3. To the plaint the written statement was filed by the defendants in objection denying the claim of lineage stating that the parentage of the plaintiffs is shown as per desire of the their mother. It was further

claimed that the said mother is under the influence of the plaintiffs, her affidavit is arranged by the plaintiffs. The notification relied by the plaintiffs was erroneously written and is not correct, published at the instance and influence of the plaintiffs along with the letter of the section officer Education Department without knowledge of the defendants. It was also claimed that the plaintiffs acquired documents showing parentage of Haji Syed Ghulam Shah and cast as Syed are incorrect. It is lately claimed that "Mst.Daray Khatoon d/o Lal Bux Langhani, the mother of plaintiffs was married to one Samandar Khan Langhani who's cousin Sukhio Langani abducted her an such FIR was lodged with Police station Nao Abad. Sukhio Langhani to save himself took shelter form late Syed Haji Ghulam Shah. At that time she was pregnant and gave birth to first child Ghulam Qadir and thereafter she lived and cohabited with Sukhio who died natural death. After his death the said Mst.Darya Khatoon was working as maid servant. She with ulterior motive to save her sin and life has given the parentage of plaintiffs as shown in their certificates, otherwise she never married with late Syed Haji Ghulam Shah nor she ever lived and co-habited with him as his wife nor the plaintiffs are sons of the late Syed Haji Ghulam Shah, who was a big personality of Nawabshah and after his death for an ulterior motive the plaintiffs have taken the plea that they are his sons."

4. Issues as under were framed and are so described for conclusion in the judgment of the trial Court;

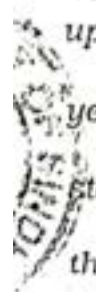
1. Whether plaintiffs are sons of Haji Syed Ghulam Shah by their 3rd wife Mst.Darya Khatoon? (Determined as not proved)
2. Whether defendant No. 1 got recorded wrong parentage of plaintiffs in primary school Bhooral i.e. defendant No.5? (Determined as not proved)
3. Whether plaintiff's wrong parentage continued to be recorded in the school leaving certificate of plaintiff and in employment record of Plaintiff No. 1? (Determined as not proved)

4. Whether notification was published in Sindh Govt. Gazette dated 28.03.1996 pointing out error in father's name of plaintiffs? If so, what its effect? (Determined accordingly)
 5. Whether Section Officer (ACD), Govt. of Sindh, Education Department wrote a letter to the Chairman Board of Intermediate & Secondary Education Sukkur to take necessary steps to correct name of plaintiff's father in their education certificate? If so, what its effect? (Determined accordingly)
 6. Whether plaintiffs are not sons of defendant No.5? (Determined as negative)
 7. Whether plaintiffs are sons of Lal Bux Leghari or Sukhio Loung? (Determined as not proved)
 8. Whether plaintiffs' mother Darya Khatoon was not married to Haji Syed Ghulam Shah? (Determined as not proved)
 9. Whether plaintiffs' mother Mst.Darya Khatoon was married to Lal Bux Leghari and abducted by Sukhio Leghari? (Determined as not proved)
 10. Whether the plaintiffs are entitled to the relief sought for? (Determined as negative)
 11. What should the decree be? (Suit stands dismissed)
5. The plaintiff No.1 examined himself along with three witnesses namely Bongul Khan, Bugul Khan and Faiz Mohammad. The judgments describes production of exhibits being original copy of Gazette Notification as Exh-95, affidavit of Mst.Darya Khatoon as Exh-96, Residence Certificate as Exh-97 to 100, Death Certificate of Syed Ghulam Shah as Exh-98, Birth Certificate of Syed Ghulam Hyder Shah as Exh-99, Birth Certificate of Naim Akhtar at Exh-100, Original letter of Section Officer as Exh-101, copy of general register at Exh-102, 103 and 104, certified copy of judgment in in Sessions Case No.56 of 1991 as Exh-105, original letter addressed to Ghulam Kadir issued by Asst. Commissioner and SDM Nawabshah dated 2.6.1996 as Exh-106, Certified copies of electoral roll as Exh-107 & 108, application dated

10.12.1995 addressed to District Education Officer, Nawabshah and order thereon as Exh-109, affidavits as Exh-110 & Exh-111, special power of attorney as Exh-112, Original copy of protest "Ihtijaj" (in Sindhi language) as Exh-113, affidavit of S.Ghulam Mohammed Shah as Exh-114 and application to the Secretary Govt. of Sindh by Naim Akhtar Shah at Exh-115. All the said witnesses were duly cross examined. The defendants however preferred neither to enter the witness box themselves nor any witness was brought up on their part, however the learned trial Court by its judgment dated 4-1-2003 was pleased to dismissing the suit by the above determination of the issues and the learned appellate Court was also pleased to maintain the same by making a generalized discussion in its judgment dated 6-3-2004.

6. The trial Court discussion of the issues forgiven follows along with the lapses and shortcoming observed. Under issue No.1 the trial Court preferred to discuss almost the whole of the case casting the burden of proof on the plaintiffs while confining itself to the cross examination part derived conclusions therefrom. The documentary evidence as present on the record (to whatever extent it was considered) is found to have been seen in light of the said conclusions drawn and the same stood rejected, the dates of issue/creation of the said documents have also been discussed and a negative presumption stands taken in this regard. An outstanding indulgence is observed for Ex.105 being a Judgment passed by the Sessions Judge Nawabshah in Sessions Case No.56/1991 wherein the plaintiff No.1 is specified as son of Ghulam Shah, the same however is also discredited on the pretext that "there is no evidence that he is same Ghulam Qadir Shah who is plaintiff in this case" although even no such suggestion to this effect is found in the cross examination of the said witness. The electoral lists and related documents have also not been given any credit on the ground that the earlier lists have not been brought up. As such nothing\

but a negative angle/element has been observed to all the evidence discussed which naturally rests in a favoring to the defendants. Irrespectively the genuine critical analysis which has to be balanced is found missing, the conclusion of this issue however is made on account of limitation on the ground that the plaintiffs have failed to bring a suit within three years of attaining majority having filed the suit in 1996 at age 30 years, the said issue is replied in negative accordingly. The issues No.2 stands determined as not proved on the consideration that no evidence in this regard is present as no witness has been examined to prove the same, school register/teacher has not been called to prove the entries were got made by the defendant No.1. It is apparent that the trial Court failed to distinguish between the two elements of the said issue i.e. the alleged act of defendant No.1 and presence of wrong parentage as such failed to consider that even if the alleged act of defendant No.1 was not proved directly (irrespective to the deposition of the plaintiff) the entry of parentage for which the case was all about was an admitted controversy requiring a finding on merits itself. For proving the claimed parentage all the other direct evidence as brought forward was always present which failed the attention of the trial Court. The issue No.3 was also determined as not proved by re-discussing that the wrong parentage was not challenged within three years of attaining majority or during the service period. This time the oral evidence of the plaintiff was referred however the same was treated as not sufficient to prove the same. It is however found strange that the element of delay as pointed out which was otherwise admitted in the plaint itself alongwith its explanation given, no question was put up to enable determination whether the same was present or otherwise, yet a negative inference was drawn by the trial Court. The Issue No.4 stood "determined accordingly" on the discussion that the publication of the gazette does not amount to pointing out error in the father's name of



the plaintiff having no effect. In this regard strangely the wordings of subject notification stood totally ignored being;

The Sindh Government Gazette

Published by Authority

KARACHI, THURSDAY, MARCH 18, 1996

Part II

MISCELLANEOUS NOTICE ADVERTISEMENTS AND NOTICES

It is hereby notified for general information that at the time of admission in the school the Father name of SYED GHULAM QADIR SHAH and SYED NAEEM AKHTAR SHAH was erroneously written as MoLA BUX SOLANGI which is incorrect while their father correct name is SYED HAJI GHULAM SHAH.

Therefore, in future they may be called and written with their father correct name.

MST DARYA KHATOON

W/o

SYED HAJI GHULAM SHAH (Late)

F/o

1. SYED GULAM QADIR SHAH
2. SYED NAEEM AKHTAR SHAH

Address:-

Goth Bural Deh 19, Dad Taluka
Nawabshah

It is very strange that the trial Court was unable to comprehend the wordings of this exhibit, as such it is clear that the judgment of trial Court is based upon non-reading of the evidence and the appellate Court also has also apparently failed to appreciate the material on record.

7. The issue No.5 discusses letter issued by Section Officer of Government of Sindh to the Chairman Board of Secondary Education Sukkur for taking steps to correct the name of the plaintiffs father describing the same as "routine official letter" terming as having no legal effect. This issue was concluded as "replied accordingly". I have field to comprehend what is meant by "routine official letter" and "replied accordingly" where the contents of the said exhibit are:

GOVERNMENT OF SINDH
EDUCATION DEPARTMENT

Karachi, dated the 6th March, 1996.

No.S.O(ACD-I) S.7-87/96

To,
The Chainman,
Board of Intermediate/Secondary/Education,
Sukkur.

SUBJECT: REQUEST FOR CORRECTION OF YOUR FATHERS
NAME AND CASTE

I am directed to enclose herewith an application (original) of Syed Ghulam Qadir Shah and Sted Naeem Akhtar Shah sons of Late Syed Haji Ghulam Shah on the subject noted above.

You are requested to take further necessary action as per rules of your Board.

Sd/-

(DOST MOHAMMAD AGHA)
SECTION OFFICER (ACD-I)

8. To term the wording of this letter as "routine official letter" is nothing but another example of non-reading of the evidence present on record. The issue No.6 stands replied in negative again on the ground that the plaintiffs having failed to challenge the name of their father within the period of three years after attaining majority (already referred above which was otherwise never taken up in the cross examination to be given adverse in order to nullify the pleadings). This issue was determined as failing to prove that the plaintiffs are not the sons of the defendant No.5.

9. The issue Nos.7 to 9 stands discussed together and stood determined as not proved by putting the burden on the defendants who had not lead evidence and the consequential issue Nos.10 and 11 were determined as given above without discussion.

Learned Counsels were heard repeatedly, wherein they have presented their respective cases. This Court on the second date called upon the parties as to their willingness for "DNA profiling to conclude the

matter of paternity coming from same father as siblings" to which the learned counsel for the applicants conceded forthwith whereas for the respondents No.1 to 4 time was sought to seek instructions however the same was declined eventually on 8-10-2019. Learned counsel for the applicant referred to there being no rebuttal to the evidence brought forward on part of the respondents whereas for the respondent requirement of Qanun-e-Shahadat Order 1984 was called into question along with the concurrent findings as present and reliance was made to reported cases of 2013 SCMR page 203 and 2016 SCMR page 274.

11. According to the learned counsel for the applicants irrespective to this case having concurrent findings the impugned judgments are based upon misreading and non-reading of evidence. He also contended that the learned trial Court as well as appellate Court had failed to consider the primarily element of non-rebuttal to the deposition of the applicants and that the evidence that was brought-up by and on part of the applicants was not entertained and the Courts below have come up with their own conclusions which are not based upon evidence. Learned counsel further contended that the evidence brought forward on part of the applicant was never considered by the learned trial Court nor was re-appreciated by the appellate Court with the proper perspective/form as present on record.

12. Learned counsels for the respondents conversely referred to provisions of Specific Relief Act in respect of declarations and relied upon the portion of the learned trial Court as well as appellate Court judgments for appreciating the evidence. It was contended that the alleged father of the applicant Ghulam Shah had expired in 1972 and from 1962 to 1996, the applicants have failed to claim the paternity. He has further referred to Section 42 of Land Revenue Act, requiring 90 days for correction of Foti Khata alongwith the provisions of Muslim

Personal Law as to the paternity from Mullah and Tayyab Jee. Learned counsel has also referred to Article of 148 of Qanun-e-Shahadat Ordinance and contended that no evidence brought forward on part of the applicant as to the alleged father Ghulam Shah acknowledging the said paternity is present alongwith the claimed valid marriage required in the matter. It is also contended that the other evidence brought forward is not confidence inspiring and the evidence of the mother is contrary as she was not produced and as such the best evidence was not produced. Learned counsel has relied upon the case laws reported as Muhammad Akram @ Akan v. Mst. Pathani through LRs (2001 MLD 1037), Mirza Lal Hussain v. Custodian of Evacuee Property & others (1992 MLD 1280), Atta Muhammad & others v. member Board of Revenue & others (2002 CLC 464) and Muhammad Saeed Sehgal v. Kazi Khursheed Hassan Proprietor India Film Bureau (PLD 1964 SC 598).

13. *Having heard the learned counsel and gone through the record with their able assistance, it seems that the trial Court as well as the appellate court has preferred to consider the matter under Article 129 illustration (g) of the Qanun-e-Shdat Order 1984, i.e. available presumption, however the direct evidence available on record has been ignored by discrediting the same for the alleged defects said to have been present therein. It has however not been considered that this was not a case of preponderance at all (as no evidence has come forward from the opposing side). There being an apparent loss of sharing of inheritance involved and the failure still present creates nothing but a negative presumption for the defendants was available in this regard. It is also observed as already referred above that the plaintiff No.1 had examined himself along with the three witnesses namely Bongul Khan, Bongul Khan and Faiz Mohhammad who are very close relatives of the plaintiffs being real uncle, relative grandfather and relative uncle, all*

from the maternal side of the plaintiffs, who gave direct evidence as to the valid marriage and acknowledgment of paternity, whereas the defendants have preferred not to lead any evidence on their part nor have they preferred to bring forward any witness in support of their assertions and/or in rebuttal. As to the impugned judgments the same are found to be based upon an extreme negative appreciation of evidence. It is observed that the specific and positive evidence present on record has not been referred in judgments and apparently the witness have been discredited on account of not remembering the name of "Vakils" (representatives) of "Nikah" (marriage ceremony) as though the cross examination is a test of memory and not a process for bringing forward the facts. The appellate Court in its judgment went a step further to discredit the witnesses belonging to the mothers side and requiring of independent person/s of the village. The same is however in complete defiance to the common practice and knowledge that only close relatives are directly aware of the actualities of marriage and childbirth whereas independent persons are aware of facts only by way of hearsay information and by the disclosures made to them without any firsthand knowledge actually ever present with them. The Courts below not only failed to take notice of Ex.105 being certified copy of judgment in in Sessions Case No.56 of 1991 establishing the name of the father of the plaintiff No.1 (which had to be based upon some kind of investigation by the local police official) on the trial Court had even attempted to discredited the same on account of alleged identification remarking that the same could be another person although no such suggestion had come up in the cross examination. The Courts below have failed to observe that though suggestions have been made, the evidence of the witness remained unshaken and is direct and corroborating with each other. It bears from the record that the trial Court as well as the appellate Court has preferred the version of the

respondents ignoring that the same remained without support of evidence to be substantiated and appreciated, i.e. preferring to ignore the obvious as present on record and appreciate the absent. As to the appellate Court judgment it is also observed that although now the accepted form of the appellate Court judgment may not requiring specific discussion of issues for re-appraisal and a matter could be dealt with/though the points of determination on concurrence, but the same are also found absent. As such the said judgment is prima-facie in violation of the Order 41 Rule 31 C.P.C. The discussion itself is found to be sketchy without appreciating and cogent reasoning to uphold the trial Court judgment. Very strangely not addressing the prime question required for an appellate Court to consider in cases where no evidence is coming in rebuttal being "Whether the material/evidence brought on record/present is acceptable or the same defies commonsense or is contrary to the record". It is also observed that although no specific issue as to limitation was got framed in the matter yet this matter was determined accordingly, as such not only the whole scheme of civil proceedings has been violated, a travesty of justice has taken place by deciding the matter on a ground to which the plaintiff party were never on notice. This kind of exercise may be well termed as a surprise attack if not a covert operation. The exercises made in the impugned judgments are not covered by the powers available to a civil Court for reframing and recasting of the issues as no such powers is found exercised present and discussed directly or in derivation from the wording present in the said judgments. It is also observed that the Courts below had based the judgments on the ground of delay and acquired a negative presumption therefrom as a real father would not allow a wrong entry whereas the record shows that the Plaintiff No.1 was admitted in the school on 20-5-1977 whereas the Late Haji Syed Ghulam Shah had expired on 25-8-1972, (before the impugned entries were made) as such \

the presumption is based upon non-reading and non-consideration of the record.

14. Having come to a definite conclusions by the discussion given above that the impugned judgments are in no way tenable the normal option of remanding the matter for fresh writing of the judgment is not being considered as the matter is quite old having started in the year 1996 to redresses a grievance/fault/wrong having been committed in the year of 1977 as such not justified and was got concluded by the short order.

15. As the reasons of allowing the decree it may be observed that after going through the record wherein only the plaintiff has come forward to take the oath, only three issues are required, which tackle the core of the controversy and have also been addressed by the learned counsels being;

1. Whether the suit is maintainable?

2. Whether the plaintiffs are the sons of Late Haji Syed Ghulam Shah?

3. What should the decree be?

16. The first issue deals with all the legal aspects of the matter required to be looked into by a Court of law. The case of the plaintiffs is well covered by the relevant lawing being the provisions of Section 9 of the C.P.C. and the Sections 42 and 43 of the Specific Relief Act 1877. The plaintiffs have sought a declaration of their paternal parentage to which the cast follows which is being denied by the defendants (the defendant Nos.1 to 4 are claimed as agnate brother, or in law consanguine brothers whereas the defendant No.5 is claimed to be wrong father by the plaintiffs). The contesting defendants deny their father to be also the father of the plaintiffs. This required declaration is

required objecting to the alleged wrong entries in the educational record attributed to the claimed malafide act of the defendant No.1 to deprive the plaintiffs of their inheritance and as such denying the said paternity. The explanation of the delay given in the plaint is that the plaintiffs had no consciousness of the mischief which continued in the record. To this element of consciousness no cross examination is present as the same is limited to the acquisition of employment which otherwise was an admitted position in the pleadings. The said employment only without any further question to bringing forward any material in adversity cannot bring any disqualification; as no question for consciousness to the effects of wrong paternity are found present rather the clear and thoughtful assumes of the plaintiff establishes his credibility. The defendants, as such have failed to dislodge the claimed inability and claimed paternity of the plaintiffs. This is irrespective and otherwise to the established law that no one can take benefit of his own wrong and that in matters of inheritance limitation is not a conclusive material element. The failure of the required rebuttal to be present on part of the defendants and the plaintiffs being orphans as their father according to the record having already expired when the wrong entries were made along with the efforts present on their part to get the correction made subsequently (coming on record through the issuance of gazette and correspondence) bring the suit out of any question of maintainable by way of restraint from limitation and latches. The cause of action claimed in the pleadings that being 02.06.1996 and the suit filed in the same year is found well within time. Apart from these merits the claimed wrong done to the plaintiffs can also provide them subsequent cause of actions on later denials also as such cannot be restricted to give new/subsequent cause of action/s. This issue as such stands decided in affirmative.



17. As to the second issue "Whether the plaintiffs are the sons of Late Haji Syed Ghulam Shah" no rebuttal coming forward from the admitted sons of Late Haji Syed Ghulam Shah being defendant Nos.1 to 4 no arguments are entertain-able to acquire an adverse presumption. The requirement of proving paternity is provided in Article 128 of the Qanun-e-Shadat, Order 1984 (for a ready reference quoted 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:

- (a) the husband had refused, or refuses, to own the child; or
- (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.

(2)non-Muslim

The direct evidence present on record of three witnesses along with the documentary material (which was never challenged by the defendants in any proceedings) as to the valid marriage establishes the required fact that the plaintiffs were born during the continuance of a valid marriage between their admitted mother Mst.Darya Khatoon and Late Haji Syed Ghulam Shah. As such the plaintiffs have succeeded to establish that they are legitimate children from the said marriage required to prove there assertion. The exceptions as available under sub-clause (a) and (b) are not found to be present on record. The said assertion stands re-confirmed on account of the non-rebuttal on oath present on part of the defendants, where they despite naturally being adversely effected by having to share the inheritance have preferred not to take oath in rebuttal. (The trial Court having properly closed the side of the defendants on their failure to come forward in this regard and no agitation to the same found on record). The matter is found well covered by Article 129 (g) of Qanun-e-Shadat, Order 1984, for the presumption coming out of withholding of the evidence by the defendants being

un-favorable to them. The reference Article 129 for a ready reference being;

129. Court may presume existence of certain facts. The Court may presume the existence of any fact, which is thinks likely to have happened, regarding being had to the common course of nature events, human conduct and public and private business, in their relation to be the facts of the particular case.

(g) the evidence which could be and is not produced would, if produced, be unfavorable to the person who withholds it;

This issue as such stands decided in affirmative also resulting in the suit being liable to be decreed for the paternity claimed by the plaintiffs, which decides issue No.3. As such the suit of the plaintiffs stands decreed for and in respect to their claimed paternity of Haji Syed Ghulam Shah.

18. *In addition to the fore-given and after the this discussion on merits as to the material present on record, I would like to add that after the first hearing as the case was found to be without rebuttal in the larger interest of justice, I had myself offered "DNA profiling to conclude the matter of paternity coming from same father as siblings" in order to provide the parties a situation whereby the truth of the matter may be established on themselves within the available ambits of law, which was readily accepted by the plaintiffs whereas the same was declined on part of the defendant Nos.1 to 4 on acquiring instructions in this regard. This aspect on account of a positive declaration being sought as the defendant Nos.1 to 4 is not having any negative effect coming to them being the admitted sons of Late Haji Syed Ghulam Shah (rather the test itself based on that very understanding) by their failure of opting for the said test have provided this Court to acquire a negative presumption. This understanding is based upon the support of Articles 164 and 129 (g) of Qanun-e-Shadat, Order 1984. The reference Article 164 for a ready reference being;*

Art 164. Production of evidence that has become available because of modern devices, etc. — In such cases as the Court may consider appropriate, the Court may allow to be produced any evidence that may have become available because of modern devices or techniques.

19. *The inference as to DNA test offered being available for a positive declaration based upon forgiven as such is also found available in addition to the discussion based upon the already placed evidence on record. The authority referred to by the learned counsel for the respondent/s in this regard is for a negative declaration which is not available in law nor present in this case and as such nothing need further said to distinguish the same. The other authorities are not found relevant in the facts and circumstances of the present case which also need no discussion on account of the details already given for this case. The DNA test offered to was for the sibling from the same father which having been denied amounts to withholding material established to be present with the respondent. The said material of DNA testing is available by body substance wherefrom DNA is/can be extracted without any physical/bodily injury to the person/s being tested. The same for a positive declaration does not affect the party denying in any way as it is not a test of his own paternity but a test of being a real sibling from the same father as such a positive declaration, which is not in any way to cause any adverse effect to his own paternity. In the circumstances a court of law without forcing any submission to such a test can draw a negative inference where the same is refused provided of course the same is made for a positive declaration which is available under the provisions of Sections 42 and 43 of the Specific Relief Act 1877.*

20. *These are the reasons of the order passed on 10-10-2019 whereby this revision application was allowed by the short order after recording the arguments advanced by the learned counsels in the open Court, the impugned judgments as such stand set-aside and the "suit of*

the applicant/plaintiffs stood decreed for and in respect to their claimed paternity of Haji Syed Ghulam Shah" the prayer for and in respect of direction required to the educational authorities cannot be granted as prayed as the said educational authorities are not a party in the proceedings, however the declaratory decree being given may be available for the record to be read as "the plaintiffs having the paternity and beings sons Syed Haji Ghulam Shah". Costs throughout the proceedings also stands granted against the respondents/defendants.

Let the appellate decree accordingly be prepared.

Sd/- MEHMOOD A. KHAN,

JUDGE 9-2-2020

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