ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

Suit No. 902 of 1997
Alongwith
Suit No. 341 of 2003

Order with signature of Judge(s)

1. For hearing of CMA No.2929/2013 (u/o VII rule 11 CPC)
2. For hearing of CMA No.4140/2007 (u/s 151 CPC)
3. For Arguments

11.10.2021

Mr. Muhammad Yaseen Khan Azad, Advocate for the plaintiff in Suit No.902 of 1997
Mr. Mushtaq A. Memon, Advocate for plaintiff in Suit No.341/2003
Mr. Mansoor ul Arfin, Advocate for defendant No.1 in Suit No.902/1997
Ch. Muhammad Iqbal, Advocate for defendant No.2 in Suit No.902/1997

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1. Deferred.

2. Learned counsel for the plaintiff in Suit No.902 of 1997 files statement attaching therewith a letter addressed to the Punjab Forensics Science Agency which, he contends has been sent to the said entity on 07.10.2021, as well as the statement encloses a copy of communication made by his office to Genetrack Pakistan limited in furtherance of this Court's order dated 23.09.2021.

This aforementioned order was passed having considered CMA No.4140 of 2007, which was moved on behalf of the plaintiff, where a request has been made for this Court to direct the defendant No.1 i.e. Dr. Azhar Masood Ahmed Faruqui to have his DNA test done in order to determine the issue with regard to his paternity. In this long and protracted litigation initially filed by Mrs. Sardar Begum Farooqui mother of the defendant No.1, seeking a declaration in respect of a House constructed on Plot No. JM-3.545, (old No.59/6), admeasuring 725 square yards situated at Feroz Shah, Mehta Road, Naseen Colony, Naseem Co-operative Housing Society Ltd., Karachi, as well as

declaration to the effect that defendant No.1 was not her real son rather having been adopted upon being found on the road side. Per counsel, it is worth pointing out that within a few months of filing of the said suit, the plaintiff herself expired, coupled with the fact that this suit was only preferred after the death of her husband Ghulam Nabi Farooqui, which took place on 25.06.1989. It is also worth stating that as per the learned counsel of the defendant No.1, said defendant's mother was seriously ill in the last few months of her life to the extent that her eyesight was also extremely weak and she could hardly see. It is alleged that the said suit was filed when she was on death bed without her consent and only her thumb impression was used and she never appeared in this Court.

One of the objections raised as to the very admissibility of the said application was also that it was preferred after evidence having been closed three years ago. While through order dated 23.09.2021 counsel for the plaintiff was directed to address the issue of maintainability of the instant application, in the later part, the said order posed a question seeking technical assistance from any person skilled in DNA sciences as to whether such a test could yield any reliable results. It appears that the plaintiff took fifteen days to write a letter with regard to DNA test efficacy to any forensic agency. Delay has not been explained. Counsel states that if some more time is given to him, he would produce replies of the said Laboratory/Agency in this Court. The very fact that communication was made after fifteen days of the order passed by this Court to the Forensic Agency does not inspire this Court's confidence that the plaintiff took the matter expeditiously. Be that as it may, the very maintainability of the application that it having been filed when the evidence had already been closed is not addressed by the learned counsel.

To summarize, this Court has been approached to force DNA test of an individual, who is around 73 years old, whose both parents have since expired, particularly when evidence on the issues as reproduced hereunder is already recorded:-

1. Whether the applicant/intervenor impleaded as plaintiff under this order of 21-9-1998 is also surviving legal heir of deceased plaintiff Mst. Sardar Begum Farooqi?
2. Whether the defendant No.1 was not real son of deceased plaintiff Mst. Sardar Begum Farooqi, if not, to what effect?

Learned counsel for defendant No.1 has drawn Court's attention to Rule 200 of the Sindh Chief Court Rules (Original Side) and states that if it was the intention of the plaintiff that DNA test be performed on the defendant No.1 to determine that whether he was biological son of the plaintiff or not, an application ought to have been filed at the time of institution of the said suit, which the plaintiff failed to do, and after having filed the suit in the year 1997 such application is only been made in the year 2007, i.e. after 10 years when the biological mother of the said defendant had already expired, is nothing but an attempt to delay the proceedings. Counsel also took this Court to Article 128 of Qanun-e-Shahadat, 1984, which provides that any child born during the continuance of a valid marriage between a woman and a man is to be conclusively held to be a legitimate child born out of that marriage, unless opposed by father. Learned counsel also referred to Article 338 of the Muhammadan law, which deals with the similar situation. Counsel contends that since the biological parents having been expired and even the brothers and sisters of the plaintiff's mother have also expired, the result of any DNA test done on the defendant viz-a-viz sons and daughters of the plaintiff may not always be reliable or yield any perusable results. This being purely a question of science and a number of factors influencing it, could not be taken as a gospel truth. Per learned counsel, the plaintiff now wishes to match DNA of the defendant

No.1 with themselves under the assumption that their DNA is in the purest form of all, for which no proof can be adduced as their own parents have also expired, hence the entire exercise is an exercise in futility.

The learned counsel for the defendant No.1 also states that there is plethora of Supreme Court judgments, which are on the point that no one could be forced to give his DNA test as this also infringes privacy of an individual, and until and unless it is a criminal case, courts are usually reluctant in allowing DNA tests of the parties in civil matters. Per learned counsel, the matter should be decided on the evidence brought to this Court in the form of various statements and documents as issue with regards to paternity of the defendant No.1 is already framed by this Court on 21.09.1998 on which evidence has already been led.

Learned counsel for the plaintiff could not support his contentions with any judgments of the superior courts.

Heard the counsel and perused the record.

In the given circumstances, to me this application seeking forcible DNA test of the defendant No.1, 73 plus years old, whose parents have since expired and that request having now been moved by his cousins, is least to say an utterly farfetched idea. It is an admitted position that father of the defendant No.1 never challenged paternity of his son and his mother, in the life time of her husband, never challenged the paternity of the said child. As seen from the Muhammadan law as codified under Article 128 of the Qanun-e-Shahadat, 1984, as well as being cognizant of the rights given by Article 35 of the Constitution of the Islamic Republic of Pakistan, 1973, which protects bond between mother and child, I do not wish to travel in these uncharted waters particularly when evidence is already available on this issue and a

conclusive judgment can be passed thereon. With regards efficacy and necessity of conducting DNA tests, the Hon'ble Supreme Court in a number of cases including *Mst. Laila Qayyum v. Fawad Qayyum and others* (PLD 2019 SC 449) and *Ghazala Tehseen Zohar v. Mehr Ghulam Dastagir Khan* (PLD 2015 SC 327) has held that DNA is a personal right of a person and only in exceptional circumstances it can be interfered with. The Apex Court has relied on Article 128 of Qanun-e-Shahadat, 1984, which states that birth during marriage is a conclusive proof of a child's legitimacy. Neither with the plaint nor with the application any document has been attached to show that the defendant No.1 did not take birth during the continuance of marriage between the plaintiff and the defendant No.1's father. Rather the defendant No.1 with his written statement has attached a document titled "Extract from Duplicate of Register of Births in the Municipal Limits of Karachi" issued to his father registering birth of the defendant No.1 in the house of his father on 10.06.1948 (Annexure D/2) Page 155. It is worth noting that Article 128 of Qanun-e-Shahadat, 1984 only empowers a putative father to challenge legitimacy of a child. Such a declaration cannot be sought by a mother under Qanun-e-Shahadat, 1984. Worth referring is Article 2(9) of Qanun-e-Shahadat, 1984, which bars taking evidence of a fact that has been decided as conclusive proof by Qanun-e-Shahadat itself. The apex Court in the case PLD 2015 SC 327 (*supra*) has held that:-

> "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.
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> 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) 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."

It is an undisputed legal position that the law set out in Article 128 of Qanun-e-Shahadat, 1984 endows an unquestioned and unchallenged legitimacy on the child born within the periods stipulated in the said Article, notwithstanding the existence or possibility of any fact finding escapade by scientific means. In my humble view the framers of the law or jurists in the Islamic tradition were not unaware simpletons lacking in knowledge. Conclusiveness of proof in respect of legitimacy of a child was properly thought out and quite deliberate. Much greater societal objective was served by adhering to the said rules of evidence than any purpose confined to the interests of litigating individuals. Many legal provisions existed in the statute book and rules of equity or public policy in the jurisprudence where the interests of individuals were subordinated to the larger public interest. In above

referred judgment the Hon'ble Supreme Court has held that law did not give a free licence to individuals and particularly unscrupulous fathers, to make unlawful assertions and thus to cause harm to children as well as their mothers, here sadly it was used by the mother, if at all she knew what she was doing, as it does not appear to be a natural act of a mother. To me, this application if allowed will open a floodgate of disputes as to legitimacy of rival siblings and cousins and will create "Fisad-ul-Arz" hence dismissed. Parties are directed to proceed towards final arguments, for which this matter is already fixed.

In the connected Suit bearing No.341 of 2003 Mr. Mushtaq A. Memon, learned counsel for the plaintiff states that the said suit has been filed by Dr. Azhar Masood Ahmed Faruqui (defendant No.1 in the earlier suit) against Mst. Khursheed Begum Faruqui (his aunt), who has since expired and now represented by her legal heirs with regard to two properties, where one property is the subject matter of the Suit No.902 of 1997, whereas, another is property bearing No.318, Garden West, Karachi, where through the instant suit a declaration has been sought by the plaintiff Dr. Azhar Masood Ahmed Faruqui that he be declared as sole owner of the said property, and whilst this Court through its order dated 04.08.2004 directed the parties to maintain *status quo,* learned counsel draws Court's attention to Nazir report dated 21.06.2021, from where it emerges that property No.318, Garden West, Karachi has been sold four months ago by one of the legal heirs of Mst. Khursheed Begum Faruqui namely Amjad, defendant No.1(a) in violation of this Court's order where *status quo* was directed to be maintained and is in violation of the principle of *lis pendens*. Learned counsel for the plaintiff seeks time to file his objection to the Nazir report however is not able to answer whether the said property was in fact sold or not? Be that as it may, Nazir has attached photographs of the property, the conduct of the defendant No.1(a), as seen from the Nazir report, (subject to the

objections filed by the counsels) is of serious concern. Let notice be issued to the said defendant namely Amjad Waheed Ahmed Farooqi for the next date of hearing to clarify his position with regards to the statement made by the Nazir of this Court in his report.

To come up on 04.11.2021. Office is directed to place copy of this order in the connected suit.

JUDGE

Barkat Ali, PA