IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:
Mr. Justice Mushir Alam
Mr. Justice Qazi Faez Isa

Civil Petition No. 4876/2018 and
Civil Misc. Application No. 11213/2018
(On appeal against the judgment dated 05.10.2018 of the Peshawar High Court, Mingora Bench (Dar-ul-Qaza), Swat, passed in W. P. No. 215-M/2017)

Mst. Laila Qayyum *(in both)* *...Petitioner/Applicant*

versus

Fawad Qayum, etc. *(in both)* *...Respondents*

For the Petitioner/Applicant: Mr. Muhammad Ikhlaque Awan,ASC
Syed Rifaqat Hussain Shah, AOR

For Respondent Nos. 1-5: Mr. Faisal Khan, ASC

For Respondent No. 6: Mr. Shaukat Hayat, Senior Clerk

For Respondent No. 10: Mr. Mujahid Khan, Law Officer

Date of Hearing: 14th February, 2019

J U D G M E N T

Qazi Faez Isa, J. Fawad Qayum (respondent No. 1, "**Fawad**") filed a suit against Mst. Laila Qayum ("**Laila**"), alleging that Laila was "an abandoned infant in a local hospital" and was adopted by his father, late Abdul Qayum, and mother, Nasreen Begum, in the year 1996 and was brought up as their own daughter. The fact of adoption was however concealed from Laila and she was made to believe that she is the (real) daughter of Abdul Qayum and Nasreen Begum, Fawad further alleged. In his suit Fawad sought two declarations; firstly, that Laila was not the real daughter of Abdul Qayum and Nasreen Begum and, secondly, that Laila has no right to their "legacy". He also prayed that the documents showing Laila to be the daughter of Abdul Qayum be cancelled to such extent. These documents were issued by the Government Girls School, Saidu Sharif, Swat, the Government Girls Degree College, Saidu

Sharif, the Board of Intermediate and Secondary Education, Saidu Sharif, Swat, the Office of the Deputy Commissioner, Swat and the National Database and Registration Authority ("**NADRA**") (respectively arrayed as defendant Nos. 6 to 10 in the suit). The suit was filed on 19th June, 2015 when Laila was nineteen years old. Laila filed her written statement and denied Fawad's allegations.

2. The suit was pending when Fawad filed an application ("**the application**") seeking a deoxyribonucleic acid ("**DNA**") test to be conducted and Laila's DNA be compared with that of Fawad's, the DNA of his siblings (defendant Nos. 3 to 5 in the suit) and with that of his mother (Nasreen Begum) to determine whether Laila is the daughter of Abdul Qayum. The application did not, as per procedural requirement, cite any provision of law whereunder it was submitted. The learned Trial Judge allowed the application on 9th February, 2017. However, his order was set aside by the learned Appellate Court Judge vide judgment dated 15th March, 2017, which was challenged by Fawad in a writ petition before the Peshawar High Court, Mingora Bench (*Dar-ul-Qaza*), Peshawar. The High Court set aside the judgment of the Appellate Court and restored the order of the Trial Court, which had directed that the DNA test be carried out.

3. Mr. Muhammad Ikhlaque Awan, the learned counsel representing Laila, states that Laila was brought up by Abdul Qayum and Nasreen Begum as their daughter and all records, including those prepared on the basis of information provided by Abdul Qayum and Nasreen Begum, show Laila to be Abdul Qayum's daughter. He challenged Fawad's *locus standi* to question Laila's paternity and contends that the suit filed by him was not maintainable under sections 39 and 42 of the Specific Relief Act, 1877. He also refers to Article 128 of the Qanun-e-Shahadat Order, 1984 and the cases of *Ghazala Tehsin Zohra v Ghulam Dastagir Khan*[1] and *Salman Akram Raja v Government of Punjab*[2] and

[1] *Ghazala Tehsin Zohra v Ghulam Dastagir Khan* (PLD 2015 Supreme Court 327).

submits that the same were not followed for contrived reasons by the learned Judge of the High Court. Concluding his submissions the learned counsel states that it is no longer possible to take Abdul Qayum's DNA for comparison with Laila's, therefore her paternity cannot be challenged.

4. On the other hand Mr. Faisal Khan, the learned counsel representing the respondent Nos. 1 to 5, supports the impugned Judgment and states that Fawad's claim was supported by Nasreen Begum, who was initially arrayed as defendant No. 2 but was later transposed as plaintiff No. 2 in the suit. Therefore, a case for conducting DNA tests was made out. Learned Mr. Khan relies upon the cases of *Muhammad Shahid Sahil v State*[3] and *B. P. Jena v Convenor Secretary, Orissa State Commission for Women*[4]. Mr. Khan informs us (in response to our queries) that Abdul Qayum and Nasreen Begum were married in the year 1969 and their marriage continued till Abdul Qayum died on 25th December, 2002, when Laila was six years old. Laila was then brought up by Nasreen Begum who continued to show Laila as the daughter of Abdul Qayum.

5. The Law Officer of NADRA states that NADRA, as per their applicable procedure, verified the matriculation certificate / secondary school certificate of Laila, which was issued long before the filing of the suit. The said certificate showed Laila as Abdul Qayum's daughter therefore she was issued with a computerized national identity card ("**CNIC**"). The CNIC showed her to be the daughter of Abdul Qayum and complied with the Family Registration Certification of Abdul Qayum.

6. We have heard the learned counsel for the parties, examined sections 39 and 42 of the Specific Relief Act, Article 128 of the Qanun-e-Shahadat Order, the judgments they have referred to and the documents on record.

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[2] *Salman Akram Raja v Government of Punjab* (2013 SCMR 203).
[3] *Muhammad Shahid Sahil v State* (PLD 2015 FSC 215).
[4] *B. P. Jena v Convenor Secretary, Orissa State Commission for Women* (AIR 2010 Supreme Court 2851).

7. First of all we need to consider whether Fawad had the requisite *legal character* to seek the abovementioned declarations and seek the cancellation of the said documents. A declaratory suit is filed under section 42 of the Specific Relief Act, 1877, reproduced hereunder:

> **42. Discretion of Court as to declaration of status or right.**
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> Any person entitled to any legal character or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:
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> **Bar to such declaration.** Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief that mere declaration of title omits to do so.
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> *Explanation*. A trustee of property is a "person interested to deny" a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee.

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*. To consider whether such declarations can be sought under section 42 of the Specific Relief Act it would be appropriate to review the case law.

9. In the case of *Deokali Koer v Kedar Nath*[5] Lawrence Jenkins, CJ, writing over a hundred years ago said that not every kind of declaration can be sought under section 42 of the Specific Relief Act and that the Courts needed to be vigilant in entertaining all manner of suits:

> The section does not sanction every form of declaration, but only a declaration that the plaintiff is "entitled to any legal character or to any right as to any property;" it is the disregard of this that

[5] *Deokali Koer v Kedar Nath* (ILR 39 Calcutta 704).

> accounts for the multiform and, at times, eccentric declarations which find a place in Indian plaints.
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> If the Courts were astute - as I think they should be – to see that the plaints presented conformed to the terms of section 42, the difficulties that are to be found in this class of cases, would no longer arise. Nor would plaintiffs be unduly hampered if the provisions of section 42 were enforced, for it would be easy to frame a declaration in such terms as would comply with the provisions of the section where the claim was one within its policy.[6]

In *Khanchand v Jacobabad Municipality*[7] a division bench of the Sind Chief Court, consisting of Davis, CJ and Thadani, J, reiterated what Lawrence Jenkins, CJ had said in *Deokali Koer* about the scope of section 42 of the Specific Relief Act. The suit had sought a declaration that a certain person had ceased to be the Chief Officer of a Municipality was dismissed, which decision was upheld by the Chief Court.

In the case of *Abdur Rahman Bhuiya v Commission of Narayanganj Municipality*[8] the High Court of East Pakistan (Dacca), consisting of Rahman and Murshad, JJ, also endorsed the views of Lawrence Jenkins, CJ. A suit, which had sought a declaration that from a particular date the defendants could not continue as Commissioners of the Municipality and all their acts, including demanding taxes from the plaintiffs were illegal, was held not to be maintainable under section 42 of the Specific Relief Act.

In the case of *Abdur Rahman Mobashir v Amir Ali Shah*[9] Aftab Hussain, J[10] identified the type of declarations which could be sought with regard to one's *legal character* and those which could not:

> 31. Section 42 of the Specific Relief Act applies only to a case where a person files a suit claiming entitlement to any legal character or to any right to property which entitlement is denied by the defendants or in denying which the defendants are interested. It cannot apply to a case where the plaintiffs do not allege their entitlement to any legal character or any right to property or its denial by the defendants. As a necessary corollary

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[6] *Deokali Koer v Kedar Nath* (ILR 39 Calcutta 704, 709).
[7] *Khanchand v Jacobabad Municipality* (AIR 1946 Sind 98).
[8] *Abdur Rahman Bhuiya v Commission of Narayanganj Municipality* (PLD 1959 Dacca 5).
[9] *Abdur Rahman Mobashir v Amir Ali Shah* (PLD 1978 Lahore 113).
[10] The other member of the Bench was K.M.A. Samdani, J.

> it cannot apply to a case where only the entitlement to legal character or the property of the defendants is denied by the plaintiffs.[11]

A number of cases from the courts of the subcontinent were considered which led the learned Judges of the Lahore Court to observe and determine, that:

> 36. It is clear from these authorities that section 42 would be attracted to a case in which the plaintiff approaches the Court for the safeguard of his right to legal character or property but where right to his own legal character or property is not involved, the suit is not maintainable. The suit must be one which must bring benefit to him in regard to these two rights. No suit involving any other right, hypothetical or abstract would be competent under that section. The Court will not therefore entertain suits in which no benefit accrues to the plaintiff or where the plaintiff sets up merely an abstract right to satisfy his ego or satisfy his grudge against another person. Section 42 cannot be invoked in matters of mere sentiments which have no concern with the vindication of the plaintiff's title to status and property.[12]

> ... Section 42 of the Specific Relief Act deals with legal right as well as the threat or invasion to it by a person having corresponding duty not to invade it but to respect it. It would, therefore, apply only to a case where a plaintiff sues for declaration of his own legal right whether to property or legal character provided it is invaded or threatened with invasion by the defendant. It does not deal with the negation of the defendant's rights. Consequently, a declaration that the defendant has no right to do something which does not infringe upon any legal right to property or legal character of a plaintiff cannot be given under section 42. The cause of action under this section should, therefore, be a threat of injury to the plaintiff's own right or removal of cloud cast on his own title. It does not allow the plaintiff to come to the Court to show his hostility only to what the defendant considers his own right and which action does not cast any cloud upon the plaintiff's own title.[13]

With regard to seeking a negative declaration the Court observed that this could only be done if there was, "some threatened injury or infringement of the plaintiff's right":

> 43. I agree with the argument of the learned counsel for the respondents that even negative declaration can be given *Salim Ullah Beg v. Mst. Makin Begum* (1)*, Sughran v. Rehmat Ali* (2)*, Amina Begum v. Ghulam Nabi* (3) *and U Arzeina v. Ma Kyin Shwe and another* (4)*,* but such declaration must also be one affecting some threatened injury or infringement of the plaintiff's right. This type of negative declaration can be granted on the principle that what can be done directly can also be justified if done indirectly.[14]

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[11] *Abdur Rahman Mobashir v Amir Ali Shah* (PLD 1978 Lahore 113, 131) [31].
[12] *Abdur Rahman Mobashir v Amir Ali Shah* (PLD 1978 Lahore 113, 133) [36].
[13] *Abdur Rahman Mobashir v Amir Ali Shah* (PLD 1978 Lahore 113, 135) [41].
[14] *Abdur Rahman Mobashir v Amir Ali Shah* (PLD 1978 Lahore 113, 136) [43].

In the case of *Rehmatullah Khan v Government of Pakistan*[15] Sardar Muhammad Raza Khan, J writing for a three-member Bench of this Court, held that, a suit filed on the basis of an application submitted to the Government seeking a declaration that the plaintiff was entitled to the installation of a petrol pump was not maintainable:

> 7. The permission by Pakistan State Oil to Gul Nawaz Khan to sell their petrol in his filling station, if at all granted, would have constituted a license which even if granted could have been withdrawn at any time. Seen from any angle, no vested right was created by filing an application or even by submission of a feasibility report. In the event of non-creation of any vested right, no relief can be sought under section 42 of the Specific Relief Act. In the circumstances, the petitioners were rightly non-suited by the two Courts below.[16]

10. To challenge another's adoption or legitimacy of birth does not assert the plaintff'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.[19]

However, a person can bring a suit to assert that he/she is someone's child if his/her legal character is denied. In *Daw Pone v Ma Hnin May* the Court had preserved the adoptee's right to claim such legal character:

> If at any time she desires to make a claim that she is the keittima daughter of Daw Pone, that is a matter for her and her legal advisers, and we desire to say nothing which may be put forward in defence of it. Ma Hnin May has been brought here to appear in answer to this appeal and we think she ought to have her costs,

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[15] *Rehmatullah Khan v Government of Pakistan* (2003 SCMR 50).
[16] *Rehmatullah Khan v Government of Pakistan* (2003 SCMR 50, 53) [7F-G].
[17] *Daw Pone v Ma Hnin May* (AIR 1941 Rangoon 220).
[18] Roberts, CJ and Dunkley, J.
[19] *Daw Pone v Ma Hnin May* (AIR 1941 Rangoon 220, 221) (Roberts, CJ).

> two gold mohurs, for her appearance; and the appeal is dismissed.[20]

A Full Bench of the Lahore High Court in the case of *Abdul Karim v Sarraya Begum*[21] held that the suit claiming the plaintiff to be the legitimate daughter of Abdul Karim (defendant) was maintainable even though the plaintiff had no present interest in the property of the defendant:

> ...the declaration of the legitimacy of a child of a muslim governed by the Mahomedan law certainly does not confer on such child any present interest in the property held by the father. It, however, does confer on the child the right to succeed to the father in case the latter predeceases the child and dies intestate. Even in case of testacy the child will have the right to succeed to his or her legal share in the estate left by him except to the extent of one-third. During his or her minority the child has a legal right to be maintained by the father. He or she may have a right of pre-emption in respect of any sale of agricultural land made by the father. The declaration of legitimacy thus carries with itself very important legal incidents and it cannot be seriously contended that a declaration of legitimacy does not amount to a declaration of a legal character.[22]

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

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[20] *Daw Pone v Ma Hnin May* (AIR 1941 Rangoon 220, 221) (Roberts, CJ).
[21] *Abdul Karim v Sarraya Begum* (AIR 1945 Lahore 266).
[22] *Abdul Karim v Sarraya Begum* (AIR 1945 Lahore 266, 270-1).

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.
>
> (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"[25].

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[23] *Ghazala Tehsin Zohra v Ghulam Dastagir Khan* (PLD 2015 Supreme Court 327).
[24] *Ghazala Tehsin Zohra v Ghulam Dastagir Khan* (PLD 2015 Supreme Court 327, 335).
[25] *Ghazala Tehsin Zohra v Ghulam Dastagir Khan* (PLD 2015 Supreme Court 327, 335).

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

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[26] *B. P. Jena v Convenor Secretary, Orissa State Commission for Women* (AIR 2010 Supreme Court 2851, 2857-8) [13].
[27] *B. P. Jena v Convenor Secretary, Orissa State Commission for Women* (AIR 2010 Supreme Court 2851, 2858) [13].

assumption, he denies Laila's paternity. Fawad's assertion that Abdul Qayum is his father is equally assumptive to Laila asserting this.

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. We also award costs throughout, to be paid by the respondent No. 1 to the petitioner. Copy of this judgment be sent to the Trial Court. Copy be also sent to the Registrar, Peshawar High Court, for placing it before the learned Judge who had passed the impugned Judgment.

17. Accordingly, we set aside the impugned judgment, convert this petition into an appeal and allow the same in the aforesaid terms. C. M. A. No. 11213/2018 stands disposed of as being infructuous.

Judge

Judge

Bench-IV
ISLAMABAD
18th February, 2019
(Farrukh)

Approved for Reporting