

HCJD/C-121
JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD

Writ Petition No.2775-Q of 2023

Shafqat Hussain

Versus

Abdul Hameed and others

Petitioner by : **Mr. Mohammad Suhail
Khursheed, Advocate.**

Respondents by : **Raja Shuja-ur-Rehman,
Advocate.
Makhdoom Syed Fakhar
Imam Ali Shah Bokhari,
State Counsel.
M/S Tanveer Shah and
Hanif Kamal, ASIs with
record.**

Date of Hearing : **06.12.2023**

Babar Sattar, J:- The petitioner is seeking quashment of FIR No.293/2023 dated 04.08.2023 through which charges under sections 420, 468 and 471 of the Pakistan Penal Code, 1860 ("**PPC**") has been brought against the petitioner.

2. The learned counsel for the petitioner submitted that the allegation in the FIR is that the petitioner has facilitated falsification of NADRA record reflecting his son Mohsin Shafqat as his child. He submitted that the question of paternity of the petitioner's child cannot be determined by bringing criminal charges against him, and the charges as alleged are not made out from the content of the complaint. He submitted that the FIR was motivated by *mala-fide* as the complainant was a police officer who has recently retired and the I.O investigating the

complaint, who had registered the same, was the complainant's colleague and was trying to benefit the complainant in relation to the distribution of the property of the petitioner's former wife who was subsequently married to the complainant and had passed away. He submitted that the petitioner's wife, now deceased, Ms. Fozia Riaz, died on 22.09.2022. The couple had divorced in 2016 after which there were various disputes between them including with regard to the custody of their child, which case was initiated by Ms. Fouzia Riaz and proceedings were still pending. In the guardian petition filed by Ms. Fozia Riaz, the deceased wife of the complainant and the former wife of the petitioner, had claimed to be the mother of petitioner's son (i.e. Mohsin Shafqat). He submitted that in view of Article 128 of the Qanun-e-Shahadat Order, 1984 (**"1984 Order"**) a challenge to the paternity of the petitioner's son could not be brought about by a third party such as the complainant as held by the Supreme Court in **Mst. Laila Qayyum Vs. Fawad Qayum and others (PLD 2019 SC 449)**. The law as laid down by the Supreme Court clarified that no negative declaration with regard to paternity could be issued. The complainant wanted to dispossess Mohsin Shafqat, the son of the petitioner and his former wife Ms. Fouzia Riaz, from his share of property that devolved upon him after the death of Ms. Fouzia Riaz. And as he could not do so in civil proceedings in view of the law laid down by the Supreme Court, the impugned FIR had been registered to bring pressure to bear upon him and

force him into a settlement with the complainant through abuse of authority by police officials investigating the matter.

3. Learned counsel for the respondent submitted that the petitioner and Ms. Fouzia Riaz, had executed a divorce deed dated 05.06.2015, wherein it was stated that the parties had no children. He submitted that the petitioner had also filed a suit for declaration in relation to the property in the name of Ms. Fouzia Riaz, his former wife. In the written statement in response to the suit Ms. Fouzia Riaz had stated that the petitioner and Ms. Fouzia Riaz had adopted a child named Mohsin Shafqat. He submitted that the FIR did not suffer from any illegality as it alleged that the petitioner had falsified the Birth Certificate of Mohsin Shafqat by reflecting him as his son and that of Ms. Fouzia Riaz and had also falsified the Family Registration Certificate (FRC) again reflecting Mohsin Shafqat as his son and that of Ms. Fouzia Riaz. And it was the falsification of documents which formed the subject matter of the complaint.

4. In rebuttal, learned counsel for the petitioner submitted that no cognizable offence was made out in view of the content of the complaint in terms of section 154 of Cr.P.C. Ms. Fouzia Riaz had died on 22.09.2022. The Birth Certificate of Mohsin Shafqat was issued by the Government of Sindh and the certificate in lieu of Mohsin Shafqat was issued by NADRA during the life time of Ms. Fouzia Riaz and such documents and their particulars were never disputed or contested by her.

5. The law in relation to the ability of anyone other than the father of a child to challenge the paternity of the child is well settled. It was held in **Daw Pone v. Ma Hnin May (AIR 1941 Rangoon 220)** that where a petitioner was bringing a suit for declaration to establish a negative case that the defendant was not her daughter, such suit was not maintainable. The Court had held that if the defendant herself wished to make a claim that she was the daughter of the plaintiff, if so advised, she would have a legal right to seek such declaration under section 42 of the Specific Relief Act, 1877, but no one else had the right to seek a negative declaration.

6. The law laid down in **Daw Pone** was relied upon by the Supreme Court in **Laila Qayyum** and affirmed. In **Laila Qayyum** the putative brother of Laila Qayyum had challenged her paternity. The Supreme Court held that the suit as filed by Fawad Qayyum, *"was barred by Article 128 of the 1984 Order. Only a putative father, within the time prescribed in Article 128 of the 1984 Order, may challenge the paternity of a child ... Abdul Qayyum (the father) had not challenged Laila's paternity. Article 128 of the 1984 Order does not permit a putative brother (Fawad) to challenge his sister's paternity. In the case of Ghazala Tehsin Zohra Vs. Mehr Ghulam Dastagir Khan and another (PLD 2015 SC 327) the putative father was not allowed to challenge the paternity of the child after the period mentioned in Article 128 of the 1984 Order had expired. This Court reiterated that a child born within the period mentioned in*

Article 128 of the 1984 Order shall constitute conclusive proof of his legitimacy.”

7. After laying down the law as stated above, the Court elected to exercise its powers under Article 187 of the Constitution in order to do complete justice and dismissed the suit filed by Fawad Qayyum that was still pending adjudication before Senior Civil Judge, Gulkada, Sawat. This was done as it had been held that a putative brother had no *locus standi* to challenge the paternity of his sister on the basis that she was adopted.

8. The question regarding paternity of an individual had come before the Supreme Court in **Ghazala Tehsin Zohra** wherein the rationale behind Article 128 of the 1984 Order was enumerated, which needs to be reproduced at some length:

"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 unmarried) 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 fetus 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.

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 the birth of the child as per Imam Abu Hanifa and within the post natal period (maximum of 40 days) after the birth of the child as per Imam Muhammad

and Imam Yousaf. There can be no lawful denial of paternity after this stipulated period.

It is for the honor 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 defense against scurrilous stigmatization.

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.

An even more formidable reason for setting aside the impugned judgments is that no DNA test to determine paternity can possibly be conducted without the participation and involvement of the children whose legitimacy is being denied. A mother (such as the appellant) is wholly irrelevant for the purpose of a paternity test. Unfortunately this aspect of the case has been overlooked in the impugned judgments.”

9. The legality of a challenge to paternity came before this Court in **Urooj Tabani Vs. Federation of Pakistan through Secretary M/o Interior, Islamabad and 2 others (PLD 2021 Islamabad 105)**. It was held that a challenge to the

paternity of another person could not be allowed to persevere where it infringed on such person's fundamental rights guaranteed by Articles 9 and 14 of the Constitution. It was observed that, *"the knowledge of paternity is crucial because it is relatable to self-esteem, identity, respect in the society and privacy. It is, therefore, also an integral part of the constitutional right guaranteed under Article 14 i.e. inviolability of dignity of a person"*. The Supreme Court in **Mohammad Nazir Vs. Ali Mohammad (2003 SCMR 1183)** held that, *"the law leans in favour of presumption of paternity rather than illegitimacy unless proved by strong evidence. Relying on such dicta, this Court in Urooj Tabani held that, "the paternity of a registered person, once incorporated in a computerized National Identity Card, cannot be disputed unless the person challenging it has obtained a declaration from a competent civil court. The consequences of disputing a card holder's paternity are profound. The latter is exposed to unimaginable vilification without fault for the rest of his/her life. The paternity is of such immense importance to a human that it cannot be disputed unless the person challenging it has established it otherwise on the basis of strong evidence and through a fair trial before a competent court."*

10. The challenge to the paternity of a person came before the Sind High Court in **Suhail Abbasi Vs. Mst. Khushboo and others (2021 CLC 1904)** while relying on Article 128 of the 1984 Order, the Court held that, *"a child born after six lunar months of marriage and within two years after dissolution of*

marriage, the mother remaining unmarried, will be considered legitimate and attributed to his/her putative father. According to the said provision, this fact is regarded as 'conclusive proof' and no evidence can be admitted to refute it. Article 2(9) of QSO states that 'when one fact is declared by the Order [QSO], to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it'." In such case the father disowning a child beyond the period prescribed under Article 128 of 1984 Order was not allowed.

11. Most recently the legality of a request to conduct the DNA test to determine the paternity of individual came before the Supreme Court in **Mohammad Nawaz Vs. Additional District and Sessions Judge (Civil Petition No.2414-L/2015)** where by judgment dated 05.04.2023 the Supreme Court held that:

"It is also important to note that Article 128 of the Qanun-e-Shahadat 1984 declares that the fact that any person was born during the continuance of a valid marriage between his mother and any man shall be conclusive proof that he is the legitimate child of that man, unless the husband had refused, or refuses, to own the child. In the present case, the deceased Muhammad Hussain is not alleged to have refused to own the petitioner as his son during his lifetime. Therefore, if the petitioner proves that the deceased Muhammad Hussain's wife, Rashidaan Bibi, was his mother and he was born during the continuance of a valid marriage between his mother and the deceased Muhammad Hussain, this fact shall conclusively prove that he is the son of the deceased Muhammad Hussain and no evidence, including the evidence of DNA test, can be accepted to negate the statutory declaration made by Article 128 of the Qanun-e-Shahadat Order 1984."

12. In view of the case law discussed above, the following can be concluded:

- i.** No negative declaration can be sought under section 42 of the Specific Relief Act with regard to the paternity of an individual. Law only vests a right in an individual to seek a positive declaration regarding his/her paternity.
- ii.** In view of Article 128 of the 1984 Order, even a father cannot deny being the parent of a child beyond the period prescribed in the said provision of law. No third party, including a putative brother or sister or a family member or a relative, has *locus standi* to challenge the paternity of an individual as no evidence can be accepted to negate the statutory declaration made by Article 128 of the 1984 Order.
- iii.** The prohibition against bringing a challenge against the paternity of an individual is designed to protect the right of such individual to dignity and privacy guaranteed by Article 14 of the Constitution, as well as the collective interest of the society in protecting the rights and interests of women and children, including the privacy, identity, and reputation of children from being besmirched from allegations of illegitimacy.

13. Let us now apply the law to the facts of the present case. The petitioner claims to be the father of Mohsin Shafqat and further that Mohsin Shafqat was born during the period when the marriage of the petitioner with Ms. Fouzia Riaz (deceased) was intact. The Birth Certificate issued by the Government of Sindh dated 15.01.2013 reflects Shafqat Hussain Sheikh and Ms. Fouzia Riaz as the father and mother, respectively, of

Mohsin Shafqat. Likewise NADRA issued a certificate in lieu of children of less than eighteen years of age reflecting that Shafqat Hussain Sheikh and Ms. Fouzia Riaz are the father and mother, respectively, of Mohsin Shafqat. Such certificate was issued on 21.01.2013. The petitioner and Ms. Fouzia Riaz remained married till 2016. Neither of them challenged the authenticity of Birth Certificate issued by the Government of Sindh or the certificate issued by NADRA. Ms. Fouzia Riaz, who subsequently married the complainant who registered the impugned FIR against the petitioner, passed away on 22.09.2022. During her life she did not challenge Mohsin Shafqat's Birth Certificate or the NADRA Certificate reflecting her as the mother of Mohsin Shafqat. Likewise the petitioner has never challenged the authenticity of the Birth Certificate or the NADRA Certificate reflecting him as the father and Ms. Fouzia Riaz as the mother of Mohsin Shafqat till date.

14. In view of the law laid down by the Supreme Court in **Mohammad Nawaz** and **Mst. Laila Qayyum**, and the Sindh High Court in **Suhail Abbasi** even the petitioner is no longer vested with any authority to negate the statutory declaration and assumption made by Article 128 of the 1984 Order as the period prescribed for disputing the paternity of Mohsin Shafqat has long passed. Likewise the complainant who is the subsequent husband of Ms. Fouzia Riaz (deceased) has no *locus standi* to challenge the paternity of Mohsin Shafqat either directly or through any ancillary and or collateral proceedings, such as the complaint that forms the subject matter of the

impugned FIR. The identity and legitimacy of parental identity of Mohsin Shafqat is protected by Article 14 of the Constitution and the complainant has no right or standing to question the identity of such child or dispute his parentage in a bid to inherit a larger share of property left behind by Ms. Fouzia Riaz (deceased).

15. Under the NADRA Ordinance it is the parents of a child who are under an obligation to have such child registered under section 9 of the NADRA Ordinance. A minor child can obviously not have himself/herself registered under the provisions of the NADRA Ordinance. It is on the basis of credentials entered into the NADRA database on the basis of information provided by parents that an FRC is issued and subsequently a CNIC is issued, under section 10 of the NADRA Ordinance when a minor attains the age of eighteen. The authenticity of the factual details recorded in the NADRA database cannot be disputed except through a declaration issued by a Court of competent jurisdiction, as has already discussed above in view of the law laid down by the Supreme Court in **Mst. Laila Qayyum**. No negative declaration can be sought with regard to the paternity of a child, either directly or through collateral proceedings challenging the parental identity as reflected in an identity document issued by a state authority, such as a provincial government or NADRA.

16. As the complainant had no ability to seek a declaration under section 42 of the Specific Relief Act, 1877, to claim that Mohsin Shafqat was not the son of the petitioner and Ms. Fouzia Riaz (deceased), he relied on a criminal complaint filed to

achieve through the use of police power indirectly what he could not achieve directly. This is not permitted by law. What cannot be done directly can also not be done indirectly is a settled principle of law and equity. Consequently, the content of the complaint alleging that the petitioner had misreported facts to the Government of Sindh at the time of issuance of the Birth Certificate, and or to NADRA at the time of issuance of NADRA Certificate, that Mohsin Shafqat was his son did not constitute an offence for purposes of Pakistan Penal Code, 1860, and no FIR ought to have been registered in exercise of authority under section 154 of Cr.P.C.

17. The present case therefore falls within the exceptional circumstances where a High Court can exercise its constitutional authority to quash an FIR (see for example **Meraj Khan Vs. Gul Ahmed (2000 SCMR 122)** and **Bashir Ahmed Vs. Zafar ul Islam (PLD 2004 SC 298)**). This Court is of the opinion that the complainant has sought to abuse the process of law to question the legitimacy and identity of Mohsin Shafqat for pecuniary gain. In doing so he has used provisions of PPC and Cr.P.C. to bring pressure to bear upon the petitioner to enter into a settlement after instigating the arrest of the petitioner in relation to the impugned FIR. This Court therefore finds that it is a fit case for exercise of this Court extraordinary constitutional power to quash the impugned FIR that ought never have been registered as no cognizable offence is made out in view of the petitioner claiming that he is the father of Mohsin Shafqat as is

reflected in various documents which are alleged to have been fabricated by the petitioner.

18. The petition is therefore **allowed**. The impugned FIR is **quashed** and any proceedings initiated pursuant to such FIR stand vitiated. The Court will also grant the petitioner costs in the amount of Rs.100,000/- payable by the complainant/respondent No.1 within a period of 30 days. Learned counsel for the complainant will file a certificate with the Deputy Registrar (Judicial) of this Court stating that the order granting costs has been complied with by or before the expiry of 30-day period. Let a copy of this judgment be sent to Inspector General of Police Islamabad who will have an inquiry conducted to determine whether the police officer who registered the impugned FIR did so to benefit the complainant, a retired police officer, and whether the police power to arrest an accused was abused to force the petitioner into a settlement. If the answers are in the affirmative, the IGP will initiate disciplinary proceedings against those found responsible for abuse of authority, in accordance with law.

(BABAR SATTAR)
JUDGE

Announced in the Open Court on **22.01.2024**.

JUDGE