HCJD/C-121

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD

R.F.A. No.620 of 2022

Malik Mohammad Rafiq and 2 others

Versus

Public at Large and others

Appellants by	**:**	**M/s Raheema Khan, Mohammad Sanaullah, Mohammad Sannan Khan, Saad Javed Satti, Advocates.** **Raja Rehan (Legal Assistant).** **Dr. Yaser Aman Khan, Advocate on behalf of Professor Dr. Mohammad Munir (Amicus Curiae).** **Mr. Adeel Wahid, Advocate (Amicus Curiae)**
Respondents by	**:**	**Ex-parte.**
Date of Hearing	**:**	**08.11.2022**

Babar Sattar, J:- The appellants have impugned judgment and decree dated 21.09.2021 pursuant to which the appellants' suit to have appellants No.1 and 2 declared as the adoptive parents of appellant No.3 was dismissed.

2. Respondent No.2, Mr. Ijaz Umar ("Mr. Umar") and Respondent No.3, Samina Umar ("Mrs. Umar") are the biological parents of appellant No.3. The appellant No.1, Malik Mohammad Rafique ("Mr. Rafique"), and appellant No.2, Tehmina Rafique ("Mrs. Rafique"), are the adoptive parents of appellant No.3, Osman ("Osman"). Appellants No.1 and 2 claimed to have adopted Osman on 28.08.1986. Mrs. Rafique is the real sister of

Mrs. Umar. Osman was born on 07.08.1986 in Vienna, Austria, and the appellants claim that in view of the fact that Mr. and Mrs. Rafique did not have any children of their own. Mr. and Mrs. Umar allowed them to adopt their son Osman on 28.08.1986 in Islamabad.

3. The appellants claimed in the suit that they did not execute any adoption deed at the time of adoption of Osman i.e. 28.08.1986 but continued to act as the adoptive parents of Osman throughout their lives. They finally decided to execute an adoption deed on 06.04.2021 stating that Mr. and Mrs. Rafique adopted Osman on 28.08.1986 and discharged their responsibilities as adoptive parents by providing for maintenance, education and other needs of Osman. The adoption deed was executed on 06.04.2021 by Mr. and Mrs. Rafique on one hand; and Mr. and Mrs. Umar and Osman on the other. The appellants then sought a declaration from the Civil Court that Mr. and Mrs. Rafique were the adoptive parents of Osman. The learned Civil Court issued a proclamation but nobody appeared from public-at-large to oppose the suit. Mr. and Mrs. Rafique as the plaintiffs and Mr. and Mrs. Umar as defendants filed their affidavits in evidence supporting the suit. Included in the documentary evidence as Exh.P4 was a bank statement which reflected that Osman had a joint account with Mrs. Rafique maintained with Standard Chartered Bank since 16.04.2007. The learned Civil Court after perusing the evidence adduced before it held that the appellants had failed to explain the inordinate delay of almost 35 years in seeking the declaration and concluded that the parties had acted in a

collusive manner in seeking the declaration of adoption in favour of Mr. and Mr. Rafique and with such findings dismissed the suit.

4. This Court by order dated 08.11.2021 observed that the questions that arise from the appeal are the following:

(i) Whether or not adoption is permitted under the laws in Pakistan;

(ii) What rights accrue to an adopted child as well as adopting parents in the event that adoption is permissible;

(iii) Can a declaration re adoption be issued in relation to an adult who wishes to be declared an adopted child after attaining the age of majority and if an adoption deed was not executed at the time of adoption, can a declaration be granted in relation to such adoption after the passage of almost three decades.

The Court also appointed Professor Dr. Mohammad Munir and Mr. Adeel Wahid, Advocate as Amici Curiae.

5. Professor Dr. Mohammad Munir submitted his brief in which he opined that the Islamic concept of adoption is different form the Western concept of adoption, as under Islamic law the rights of an adopted child were not the same as those of biological child. While adoption was not prohibited under Islamic law and was actually encouraged in the interest of the poor, the needy and especially orphans, adoption within Islamic jurisprudence did not create a parent-child fiction in a sense that an adopted child had no right to inherit from adoptive parents, the adoptive parents were not *Mehram* to the adopted child (with the exception of a breast-fed adopted child) and the adopted child could not use the name of the adoptive father. However, the adoptive parents were liable to maintain and

provide for the adopted child. He submitted that under Section 42 of the Specific Relief Act, 1877 **("Act"),** adoptive parents could seek a declaration for adoption and Article 119 of the 1st Schedule of the Limitation Act, 1908, provided for a period of limitation as well. However, such limitation period would begin to run when the rights of the adoptive parents or the adopted child were interfered with. He submitted that there was no prohibition in law to issue a declaration in relation to an adopted son who had attained the age of majority.

6. Mr. Adeel Wahid, Advocate also filed an amicus brief and assisted the Court. He submitted that while adoption was not regulated under any statutory framework, it was pervasively practiced under the sanction of superior courts in Pakistan and was not violative of the laws of Pakistan as interpreted in accordance with principles of Islamic law. While relying on case law enumerating the rights of adopted children, he submitted that there were certain restrictions in terms of the rights of an adopted child. But the question of the rights that accrued to an adopted child and the rights and responsibilities conferred on adoptive parents was not a reason to deny a declaration to adoptive parents or an adopted child regarding the status of such relationship. He submitted that under Section 42 of the Act a declaration could be sought for the recognition of the status of adoption as such status had "legal character" within the meaning of such phrase under Section 42 of the Act. He submitted that Section 42 of the Act read together with Article 119 of the 1st Schedule of the Limitation Act, 1908, suggested that limitation for seeking a declaration began to run from the

time when the adoption was interfered with. He further contended that declaration of adoption not only secured the rights of the adopted child during such time that the child was a minor but also vested certain rights in adoptive parents for which purpose a declaration could be sought. He submitted that in India there had been promulgated the Maintenance and Welfare of Parents and Citizens Act, 2007, which vested certain rights in parents and such rights would be available to adoptive parents as well. He submitted that while such statutory law did not exist in Pakistan, it was conceivable that such law might be promulgated as a bill entitled the Maintenance and Welfare of Old Parents and Senior Citizens Bill, 2019, had been moved before the Senate. He opined that adoption was permitted under the laws of Pakistan, the rights of adoptive parents to custody and maintenance were recognized by the courts in Pakistan, and there was nothing barring a Court from issuing a declaration of adoption in relation to an adult who wished to be declared an adopted child after attaining the age of majority.

7. Learned counsel for the appellants took the Court through the factual background of adoption and submitted that Osman had been adopted and treated as an adopted son by Mr. and Mrs. Rafique. She submitted that Mr. and Mrs. Rafique had discharged their obligations as adoptive parents and now in their old age they wished to declare to the world that they were the adoptive parents of Osman and for such purpose a declaration was being sought. She submitted that the appellants had no collateral purpose and had merely filed the suit to seek issuance of a declaration with regard to their identity as the

adoptive parents of Osman and for Osman to be identified as the adopted son of Mr. and Mrs. Rafique. She submitted that the limitation period prescribed under Article 119 of the 1st Schedule of the Limitation Act, 1908, was six years and such limitation period was to be counted from the time when the right of an adopted child or adoptive parents was denied. And consequently the learned Civil Court had failed to appreciate that the limitation period prescribed under Article 119 did not begin to run from the date of adoption in 1986. She submitted that Mr. and Mrs. Umar had filed their affidavits supporting the affidavits filed by Mr. and Mrs. Rafique and confirming that Mr. and Mrs. Rafique were the adoptive parents of Osman and had discharging their responsibilities as such in raising Osman. And consequently the learned Civil Court ought to have issued the declaration sought.

8. Let us first consider the law in relation to adoption under Section 2 of the West Pakistan Muslim Personal Law (Shariat) Act, 1962 **("Muslim Personal Law")** provides that questions in relation to, *inter-alia,* adoption and guardianship are to be decided in accordance with Muslim Personal Law where the parties are Muslims. Subsequently, the Enforcement of Shari'ah Act, 1991, was promulgated, which also provides that while deciding questions of law principles of Islamic Jurisprudence are to be taken into account where they are not in conflict with provisions of statutory law. Article 4(2)(b) of the Constitution of Pakistan provides that, "no person shall be prevented from or be hindered in doing that which is not prohibited by law." This Court agrees with the opinion rendered by the learned Amici

that there is no law prohibiting adoption. And principles of Islamic law and jurisprudence have been relied upon by superior courts in issuing declarations with regards to the rights of adopted children and adoptive parents, which questions have largely emerged in the context of the rights of adoptive parents to custody and the responsibility of adoptive parents to provide for the maintenance of an adopted child.

9. Article 119 of the 1st Schedule of the Limitation Act, 1908, also provides for a period of limitation to obtain a declaration that an adoption is valid. This too is reflective of the fact that the legislature has conceived that such declaration would be sought pursuant to Section 42 of the Act. It can therefore be safely concluded that there is no prohibition under the law in force in Pakistan against adoption and where non-biological parents adopt a child, they are entitled to seek a declaration regarding the legal character of such relationship. Such declaration may be required for exercise of the right of the adoptive parents to custody and provide travel permissions for a minor and to otherwise exercise guardianship rights in relation to such child. Such declaration may also be needed for identification purposes as under the NADRA Ordinance, 2000, all citizens are to be registered and consequently there is need to declare the status of adoptive parents in relation to an adoptive child for purposes of identification. Likewise there can be circumstances in which after an adopted child attains the age of majority and is gainfully employed, there might be benefits such as medical cover or benefits of an insurance that afford coverage to the parents as an employment benefit. And for such

purpose a legal declaration of the relationship between the employee and his adoptive parents might be required. Thus without dwelling on the rights and responsibilities of adoptive parents and the rights and entitlements of an adopted child which question is not in issue in the instant appeal it can be concluded that there might be need to seek the legal declaration regarding the relationship between adoptive parents and adopted child and such declaration is permissible in view of the laws of Pakistan and can be granted in a suit pursuant to Section 42 of the Act.

10. Let us take a look at the jurisprudence related to the questions before the Court. In ***Rabia Khatoon Vs. Aziz-ud-Din Biswas*** ***(PLD 1965 SC 665)*** where an adoptive father had made a gift to a minor child, the august Supreme Court held that the adoptive father occupies the role of a defacto guardian and takes care of the person and property of the minor. And the rules applicable to a gift from a father to minor son (i.e. where the requirement of handing over actual possession of the corpus of the gift to complete the conditions of a Mohammadan gift is not applicable) would be attracted in the case of an adoptive father as well. In ***Miss Nancy Ruth Baney Vs. District Judge, Islamabad*** ***(PLD 2011 Islamabad 6)*** this Court allowed an adoptive mother in her capacity as guardian to take the adoptive child to the United States to live with her with the consent of biological parents as the same was found to be in the welfare of child. In ***Miss Fauzia Iqbal Vs. Farhat Jahan*** ***(PLD 2015 Lahore 401)*** the learned Lahore High Court was seized with a matter where the child was adopted by the paternal aunt

when she was five years old and had been taken care of by the aunt till she reached the age of twelve. In deciding on the question of custody the learned High Court found that the welfare of the minor lay with the aunt and not with the biological mother.

11. In ***Mariam Bibi through Abida Parveen Vs. Naseer Ahmad (PLD 2015 Lahore 336)*** the learned Lahore High Court applied the concept of constructive guardianship to hold that an adoptive father was responsible for the maintenance of adoptive minor daughter when the fact of adoption and presentation of the minor to public-at-large as an adopted child was not denied. It was held that the relationship was one of fiduciary nature and the adoptive parent was duty bound to act solely in the interest of the minor. It was observed that adoption was allowed in Islam but the change in the family name was not allowed and a semi-familial relationship between the adopted child and the adoptive mother only arose where the child was breastfed by the adoptive mother. That an adopted child had no right to inheritance and adoptive parents could only will 1/3rd of their property to devolve on an adopted child while enumerating such terms of adoption as recognized within Islamic law the Court observed that Islam ordains that the poor, the needy and orphans be helped and consequently encouraged adoption to such purpose.

12. In ***Miss Laila Qayyum Vs. Fawad Qayyum (PLD 2019 SC 449)*** it was held that "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."

The august Supreme Court observed that a suit under Section 42 of the Act was maintainable only where a declaration re entitlement to legal character or property was sought while endorsing a judgment of the Lahore High Court in ***Abdur Rehman Mobashir Vs. Aamir Ali Shah Bokhari*** ***(PLD 1978 Lahore 113)*** where at page 131 the following was observed:

> ***"****Section 42 of the Specific Relief Act, 1877, 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. …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.*
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> *…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 …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."*

13. In view the case law as discussed above, it can be concluded that adoption constitutes "legal character" for purposes of Section 42 of the Act and a declaration of such legal character can be sought by an adoptive parent or an adopted child. Section 42 of the Act states the following:

> ***"Discretion of Court as to declaration of status or right.*** *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 than a mere declaration of title, omits to do so.*

> *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.***"**

The bar to seeking a declaration under Section 42 above is also provided within the provision. It is settled law that a claimant cannot seek a mere declaration where he/she is able to seek further relief contingent upon such declaration (see for example ***Ali Mohammad Vs. Mohammad Bashir (2012 SCMR 930), Mohammad Akram Vs. Mst. Noor Begum (PLD 2019 SC 599) and Nasir Ali Vs. Mohammad Asghar (2022 SCMR 1054).***

14. In the instant case the appellants sought a mere declaration and no further relief. To the extent that declaration in relation to the identity of a relationship between appellants No.1 and 2 in their capacity as adoptive parents of appellant No.3, they need not have sought any further relief. As the declaration was not with regard to property or otherwise a declaration which required further relief to give such declaration effect. What the appellants were however required to do was state the reason for seeking the declaration to establish the cause of action and when such cause of action accrued to them.

15. Order VII Rule 1 of Code of Civil Procedure, 1908, prescribes the particulars to be contained in a plaint which includes, *inter-alia,* "the facts constituting cause of action and when it arose". A perusal of the plaint reflects that no cause of action has been stated other than the fact that appellants No.1 and 2 are old and wish to seek a declaration that they continued

to act as adoptive parents of appellant No.3. This omission becomes relevant in the context of the limitation in relation to a declaration suit, the period for which is prescribed under Article 119 of the 1st Schedule of the Limitation Act, 1908, as six years. According to the pleadings of the appellants, Mr. and Mrs. Rafique adopted Osman on 28.08.1986 at Islamabad and Osman stayed with his adoptive parents who brought him up as their own son. The plaint does not mention when the right of the adoptive parents or the adopted son was interfered with creating a cause of action to file the instant suit. No cause of action has been identified or pleaded in the evidence adduced by the appellants before the learned Civil Court with regard to the accrual of the cause of action and nothing is mentioned in the adoption deed either.

16. In ***Rehman Vs. Yara through L.Rs and others*** ***(2004 SCMR 1502)*** the august Supreme Court observed in relation to Section 42 of the Act read with Article 120 of the Limitation Act, 1908, that "the cause of action would accrue when a person concerned would feel himself aggrieved of the situation when he would feel it necessary to approach the Court of law for relief which he considered fit and proper in accordance with law." Likewise it was held in ***Arif Zaman Vs. Pir Dost Ali Shah through Legal Heirs and others*** ***(2005 MLD 98)*** that limitation under Article 120 of the Limitation Act, 1908, does not begin to run until a right is denied and that there exists no right to sue until there emerges an unequivocal threat to the right. The same principle applied in relation to Article 119 of the 1st Schedule of the Limitation Act, 1908.

17. In the instant case neither the pleadings state what was cause of action required the appellants to file a suit for declaration nor state when such cause of action accrued for purposes of limitation. This is why the learned Civil Court correctly held that the appellants failed to explain an inordinate delay of almost 35 years in seeking a declaration and dismissed the suit on such basis. Learned counsel for the appellants has failed to satisfy the Court that the opinion formed by the learned Civil Court in relation to the question of limitation suffers from any infirmity.

18. Even in the event that the appellants had crossed the hurdle of limitation, it was for the appellants to prove through reliable evidence on a balance of probability, that Mr. and Mrs. Rafique were the adoptive parents of Osman and acted as such from 28.08.1986 onward when they adopted Osman through a verbal agreement with Mr. and Mrs. Umar, the biological parents of Osman. A perusal of the record reflects that no such evidence was led.

19. This Court allowed the appellants multiple opportunities to adduce the relevant record to establish that Mr. and Mrs. Rafique had in fact acted as the adoptive parents of Osman. What was produced was employment letters of Mr. Umar, which reflect that he was employed with International Atomic Energy Agency and posted in Vienna, Austria. This does not help the appellants' case. A letter from Osman's school was produced which states that he was admitted in Froebel's International School in Islamabad in August, 1998 and left in June, 2005. No record was however adduced to establish that Osman attended

a school in Islamabad when he reached school going age in or around 1990, while in the custody of Mr. and Mrs. Rafique. So the school certificate also does not establish that Osman continued to live with Mr. and Mrs. Rafique once he was of school going age. The copies of the passport of Osman that were presented on the direction of the Court also reflect that most of his passports were issued in Vienna, Austria, and state that he is a student studying in Vienna, Austria. The permanent address of Osman as listed on the passport is also listed as an address in Lahore and is not the address of Mr. and Mrs. Rafique in Islamabad. This Court had afforded these opportunities to the appellants to adduce such record for the Court to consider whether this might be an appropriate case to be remanded back to the learned Civil Court to record evidence and determine whether or not Osman had in fact lived as an adopted son of Mr. and Mrs. Rafique. But the record produced does not create an impression that Osman lived as an adopted son of Mr. and Mrs. Rafique from 1986 onward or that another opportunity before the Civil Court to adduce evidence would help the cause of justice.

20. In view of the above, it was due to lack of evidence regarding Osman having lived his life as the adopted son of Mr. and Mrs. Rafique that the learned Civil Court concluded that the suit appeared to be of a collusive nature. Learned counsel for the appellants has failed to satisfy the Court that the impugned judgment and decree suffers from any legal infirmity. The appeal is without merit and ***dismissed*** with no order as to cost.

21. This Court would also like to express its profound gratitude to Professor Dr. Mohammad Munir and Mr. Adeel Wahid, Advocate, the learned amici, for their valuable assistance to this Court.

(BABAR SATTAR)
JUDGE

Approved for reporting.

M.A. Raza