

Before Mrs. Syeda Tahira Safdar and Abdul Qadir Mengal, JJ

ABDUL HAMEED---Petitioner

Versus

Mst. SHABNAM alias SHABANA and 2 others---Respondents

Constitutional Petition No.9 of 2013, decided on 23rd July, 2013.

Guardians and Wards Act (VIII of 1890)---

---Ss. 47, 4(5) & 25---West Pakistan Family Courts Act (XXXV of 1964), Ss. 14 & 5, Sched---Application for custody of minor---Forum of appeal---Application filed under S.25 of Guardians and Wards Act, 1890 was accepted by Family Court---Appeal preferred before Additional District Judge was dismissed for want of jurisdiction---Validity---While entertaining petition for custody of minor and other related matters under Guardians and Wards Act, 1890, same was not to be dealt with in isolation rather the provisions of West Pakistan Family Courts Act, 1964 were to be read co-jointly---Family Court constituted under the provisions of West Pakistan Family Courts Act, 1964 had exclusive jurisdiction in the matters enumerated in the Schedule attached to the said Act---Section 5 of West Pakistan Family Courts Act, 1964 with the Schedule attached therein described the limits of jurisdiction vested with Family Court---Matters pertaining to custody of children and visitation rights of parents and guardianship would come in the exclusive jurisdiction of Family Court---Section 4(5) of Guardians and Wards Act, 1890 was not to be read in isolation rather to be read with S.25 of West Pakistan Family Courts Act, 1964---While dealing with the matters contained in Guardians and Wards Act, 1890, Family Court had to follow the procedure prescribed in the Guardians and Wards Act, 1890---Section 47 of Guardians and Wards Act, 1890 described the forum of appeal in the matters decided under the provisions of said Act as High Court---Any order passed by Family Court while

entertaining an application for custody of minor would not amount to an order of District Court nor right of appeal would become available before High Court rather appeal had to be preferred under S.14 of West Pakistan Family Courts Act, 1964---Appeal against order pertaining to matters covered by Guardians and Wards Act, 1890 should lie before District Court except where Family Court being presided over by District Judge or Additional District Judge or a person notified by the Government to be of such rank and status, and in such case appeal should lie to the High Court---If application for custody of minor was heard and decided by Family Judge not having status of District Judge, the appeal should lie to District Judge---Appellate Court was under misconception and had committed an error---Constitutional petition was accepted and order of Additional District Judge was set aside and Appellate Court was directed to decide the appeal on merit.

Attaullah Langove for Petitioner.

Kamran Murtaza and Adnan Ejaz for Respondents.

Date of hearing: 20th June, 2013.

JUDGMENT

MRS. SYEDA TAHIRA SAFDAR, J.---The petitioner Abdul Hameed by filing instant petition assailed judgment dated 5th April 2012 of Family Judge, Hub and order dated 23rd November 2012 of Additional District Judge, Lasbella at Hub, with a prayer that either the application filed under the provisions of the Guardians and Wards Act, 1890, (hereinafter referred as Act, 1890), be dismissed being without merits, or in alternate the matter be remanded to the appellate court for deciding the appeal on its own merits.

2. The learned counsel for the petitioner while making submissions placed question on order dated 23rd November 2012, whereby the appellate court failed to record any findings on merits of the case; rather the appeal was dismissed for want of jurisdiction, thereby held that the appeal shall lie to the High Court as per requirement of section 47 of the Guardian and Wards Act, 1890. The learned counsel contended that the appellate court was on error while holding that the court has no jurisdiction in the matter, rather section 47 of the Act, 1890 was to be read with section 14 of the Family Courts Act, 1964, (hereinafter referred as

Act, 1964) and while reading co-jointly the jurisdiction vests with the Additional District Judge, who was competent to hear the case. The learned counsel placed reliance on:--

Imtiaz Ali v Mst. Naseeban

2002 CLC Karachi 1378

He requested that the case be remanded to the appellate court for making a decision on merits of the case.

3. The learned counsel for respondent No. 1 also agreed with the submissions made by the counsel for the petitioner. He also referred to:--

Anne Zahra v Tahir Ali Khilji

2001 SCMR page 2000

4. The perusal of the case file reveals that respondent No. 1 Mst. Shabnam filed an application under section 25 of the Guardians and Wards Act, 1890, thereby sought custody of minor Abdul Waheed. This application was entertained and the proceedings were held thereon. The trial court vide judgment dated 5th April 2012 allowed the application, whereby the custody of the minor was directed to be handed over to respondent No. 1. But, feeling aggrieved the petitioner preferred an appeal before the Additional District Judge, Lasbella at Hub, who vide order dated 23rd November 2012 dismissed the appeal for want of jurisdiction, with making reference to section 47 of the Act, 1890 and held that the jurisdiction lies with the High Court.

5. The matter in hand pertains to custody of minors and appointment of Guardian, therefore, while dealing with the matter, the provisions of the Guardians and Wards Act, 1890 are to be kept in sight and the procedure provided therein need to be adopted. But,

while entertaining a petition filed for custody of minor and other related matters under the Act of 1890, it is not to be dealt in isolation rather the provisions of the Family Courts Act, 1964 are to be read co-jointly. Because, the Family Courts constituted under the provisions of the Act, 1964 having exclusive jurisdiction in the matter enumerated in the Schedule attached with the Act 1964. Section 5 of the Act with the Schedule attached describe the limits of the jurisdiction vests with the Family Courts constituted under the Act. It is evident that in the list in Part-1 of the Schedule matters pertaining to custody of children and visitation rights of parents and guardianship exists at Serial Nos. 5 and 6, describing them to be in exclusive jurisdiction of a Family Court.

6. A court in the Guardians and Wards Act, 1890 is defined in section 4(5) of the Act, 1890, which reads as under:--

"Section 4(5) "The Court" means:

- (a) the District Court having jurisdiction to entertain an application under this Act for an order appointing or declaring a person to be a guardian; or
- (b) where a guardian has been appointed or declared in pursuance of any such application:
 - (i) the Court which, or the Court of the Officer who, appointed or declared the guardian or is under this Act deemed to have appointed or declared the guardian; or
 - (ii) in any matter relating to the person of the Ward the District Court having jurisdiction in the place where the ward for the time being ordinarily resides; or
- (c) in respect of any proceeding transferred under section 4-A, the Court of the officer to whom such proceeding has been transferred."

But this provision is not to be read in isolation, rather to be read with section 25 of the Family Courts Act, 1964, which described a Family Court deemed to be a District Court for purposes of the Guardians and Wards Act, 1890, but it is further elaborated that while dealing with the matters contained in the Act, 1890, the Family Court has to follow the procedure prescribed in the Act of 1890, In view thereof a Family Court have exclusive jurisdiction to entertain matters pertaining to Guardianship or custody of minors, but have to follow the procedure provided in Act, 1890.

7. But, the question in hand was the forum of appeal in cases of guardianship or custody of minors, therefore, the relevant provision would be section 47 of the Act 1890, describing the forum of appeal in the matters decided under the provisions of Guardians and Wards Act, 1890, as High Court. But as the matters pertaining to guardianship and custody of minors vests within the exclusive jurisdiction of a Family Court constituted under the provisions of the Family Courts Act, 1964, therefore, the forum provided therein to entertain the appeals against the orders would be relevant and has to be adhered to. Section 14 of the Act, 1964 elaborate the court before which an appeal has to be filed. This section reads as under:--

"Section 14. Appeal.---(1) Notwithstanding anything provided in any other law for the time being in force, a decision given or a decree passed by a Family court shall be appealable-

(a) to the High Court, where the Family Court is presided over by a District Judge, an Additional District Judge, or a person notified by Government to be of the rank and status of a District Judge or an Additional District Judge.

(b) to the District Court, in any other case.

(2) No appeal shall lie from a decree by a Family court--

(a) for dissolution of marriage, except in the case of dissolution for reasons specified in clause (d) of item (viii) of Section 2 of the Dissolution of Muslim Marriages Act, 1939,

(b) for dower or dowry not exceeding rupees thirty thousand.

(c) For maintenance of rupees one thousand or less per month.

(3) No appeal or revision shall lie against an interim order passed by a Family court.

(4) The appellate Court referred to in subsection (1) shall dispose of the appeal within a period of four months."

8. Keeping in view the mentioned provisions as the matter in hand pertains to guardianship and custody of the minor, therefore, exclusively lies within the jurisdiction of a Family Court, who while dealing with the matter has to adopt the procedure laid down in the Guardians and Wards Act, 1890. In view thereof any order passed by a Family Court while entertaining an application for custody of the minor would not amount to an order of a District Court, nor right of appeal becomes available before a High Court, rather the appeal has to be preferred under section 14 of the Family Courts Act, 1964, which clearly describe the forum of appeal. In view thereof the appeal against an order pertaining to matters covered by Guardian and Wards Act, 1890, shall lie before a District Court, but with an exception that if the Family Court being presided by a District Judge or Additional District Judge or for a person notified by the Government to be of such rank and status, in such case the appeal shall lie to the High Court.

9. But, in the instant case the application for custody of the minor was heard and decided by a Family Judge, not having status of a District Judge, thereof the appeal shall lie to a District Judge, being empowered to proceed with the matter and make decision thereon. But, in case in hand the appellate court i.e. Additional District Judge, Lasbella at Hub was under some misconception thereby committed an error, while holding the contrary. The learned appellate court only referred to section 47 of the Act, 1890, ignored the remaining provisions as noted in preceding paras. It was ignored that the matter pertains to family in nature, exclusively vests with a Family Court constituted under the provisions of the Family Courts Act, 1964; therefore, the appeal shall lie to a District Court under section 14 of the Act, 1964.

In view thereof the petition is hereby accepted. Order dated 23rd November, 2012 of

Additional District Judge, Lasbella at Hub is hereby set aside. The appeal is deemed to be pending, while the appellate court is directed to decide the appeal on merits without any delay in shortest possible period of time.

AG/78/Bal.

Petition accepted