

Before Mrs. Syeda Tahira Safdar and Zaheer ud Din Kakar, JJ

AMINULLAH MANDOKHAIL---Petitioner

Versus

**GOVERNMENT OF BALOCHISTAN through Secretary Home and Tribal Affairs
Department and 4 others---Respondents**

Constitutional Petition No.962 of 2017, decided on 29th September, 2017.

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

---S. 25---Family Courts Act (XXXV of 1964), S.13---Criminal Procedure Code (V of 1898), S. 100---Constitution of Pakistan, Art.199---Constitutional petition---Alternate and efficacious remedy---Recovery of minor child---Execution of decree passed by Guardian Court---Custody of minor was decided in favour of father---Father filed execution of decree but in response to process, mother of minor did not produce him before the court---Father sought production of minor under Constitutional jurisdiction of High Court and to get his name placed on Exit Control List---Validity---Held, adequate powers were available with Executing Court to implement order of Family Court---In presence of remedy available under the law, i.e., Family Courts Act, 1964 and Guardians and Wards Act, 1890, High Court declined to exercise its extraordinary jurisdiction under Art.199 of the Constitution---Executing Court was fully empowered to issue directions for placing name of minor on Exit Control List if so required---Executing Court was fully empowered to execute the decree passed by the court competent jurisdiction---Father could apply to the Executing Court for redressal of his grievance and also for implementation of the decree---Constitutional petition was disposed of accordingly.

Zahoor Ahmed Baloch for Petitioner.

Nemo for Respondent.

Date of hearing: 26th September, 2017.

ORDER

MRS. SYEDA TAHIRA SAFDAR, J.---The petitioner Aminullah approached this court for issuance of a direction to the official respondents for recovery of the detainee Hamadan from the illegal detention of respondent No.4, and his production before this court, and also for taking legal action against the respondent No.4 for the acts on her part.

2 The brief facts as collected from the papers annexed with the petition that the petitioner applied the Family Court for custody of his son Hamadan, which was allowed by the trial court vide judgment dated 22nd March 2017. The visitation right of the mother of the child i.e.

respondent No.5 was secured, as she was allowed to visit the minor in the terms as contained in the order. As there was no appeal against the order, thus the petitioner applied the Family Court for execution of the decree. In response the process was issued to respondent Nos. 4 and 5 with direction to produce the minor, and for handing over his custody to the petitioner (decree holder). The last order sheet recorded on 15th September 2017 (wrongly mentioned as 15th July 2017), was with the facts that despite service of the process of the court, and the undertaking given respondent No.5 Dr. Shahista, she avoided to appear before the court and to produce the minor in compliance of the order. The executing court only called for submitting pay slip of the judgment debtor, it was might with an intent to issue direction for attachment of her salary. This direction made the petitioner aggrieved, resulted in filing of the instant petition.

3. The learned counsel for the petitioner in repetition of the facts as narrated, was of the view that as per knowledge of the petitioner, the respondent No.5 has resigned form the job and now intends to proceed abroad along with the minor. To stop the respondent No.5 from the intended act an application to place the name of the minor in Exit Control List was also filed by the petitioner, which was mainly pressed.

4. It was asked form the learned counsel that the petitioner had already filed an application to execute the decree, which is pending before the trial court, how the instant petition is maintainable for the same relief? It was replied that he (petitioner) only sought production of the minor whose life is in danger, as according to the report submitted before the executing court by the SHO Police Station Gawadar that the minor was not in the custody of his mother (respondent No.5).

5. A decree has been passed in favour of the petitioner by a court of competent jurisdiction, and he was allowed for the relief of the custody of his minor son. This judgment and decree was passed in the March 2017, as respondents Nos. 4 and 5 opted not to appeal against the order and decree, it has attained finality, thus to be implemented as required in the terms. He (petitioner) had already applied for its execution. The Law i.e. Family Courts Act 1964 (Act 1964) provided the procedure for enforcement of the decrees passed by a Family Court. Section 13 of the Act 1964 contained the procedure to be adopted by a Family Court to enforce its decree. Though this provision mainly deals with the decree passed in the terms of money, while the petitioner applied for the custody of the minor, thus the provisions of the Guardians and Wards Act, 1890 (Act 1890) shall have its application. Section 25 of the Act 1890 empower a court to issue process for return of the minor to guardian of his person. Reproduction of the Section would be for better understanding of the matter. It reads as under:

Section 25. Title of guardian to custody of ward.

- (1) If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.
- (2) For the purpose of arresting the ward, the Court may exercise the power conferred on a Magistrate of the First Class by Section 100 of the Code of Criminal

Procedure, 1898 (Act V of 1908).

- (3) The resident of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship.

In view the power to arrest a ward, and to deliver his custody to the guardian available to a Family Court. In addition all powers available under Section 100 Criminal Procedure Code (Cr.P.C) to a Magistrate, made available to a Family Court for the purpose. In addition the Section 45 of the Act 1890 is also in aid thereof. It reads as under:

Section 45. Penalty for contumacy.--(1) In the following cases, namely:--

- (a) if a person having the custody of a minor fails to produce him or cause him to be produced in compliance with a direction under Section 12, subsection (1), or to do his utmost to compel the minor to return to the custody of his guardian in obedience to an order under Section 25, subsection (1); or
- (b) if a guardian appointed or declared by the Court fails to deliver to the Court, within the time allowed by or under, clause (b) of Section 34, a statement required under that clause, or to exhibit accounts in compliance with the requisition under clause (C) of that section, or to pay into the Court the balance due from him on those accounts in compliance with a requisition under clause (d) of that section; or
- (c) if a person who has ceased to be a guardian, or the representative of such a person, fails to deliver any property or accounts in compliance with a requisition under Section 41, subsection (3), the person, guardian or representative; as the case may be, shall be liable, by order of the Court, to fine not exceeding one hundred rupees, and in case of recusancy to further fine not exceeding ten rupees for each day after the first during which default continues, and not exceeding five hundred rupees in the aggregate, and to detention in the civil jail until he undertakes to produce the minor or cause him to be produced, or to compel his return, or to deliver the statement or to exhibit the accounts, or to pay the balance, or to deliver the property or accounts, as the case may be.
- (2) If a person who has been released from detention on giving an undertaking under subsection (1) fails to carry out the undertaking within the time allowed by the Court, the Court may cause him to be arrested and re-committed to the civil jail.

5. In the case in hand the respondents Nos. 4 and 5, the judgment debtors, refused to comply the orders of the court, and also avoided the process of law, thus could be easily dealt under these Sections. The penalty provided by Section 44 of the Act 1890 could also be imposed in addition thereto, if the ward removed from jurisdiction of the court without prior approval. In view adequate powers available with the executing court to implement the order of the Family Court. Thus in presence of the remedy available under the Law i.e. Family Courts Act, 1965 and Guardians and Wards Act, 1890, not mandated this court to exercise its jurisdiction under Article 199 of the Constitution, extra ordinary in nature. As far placing the name of the minor in Exit Control List is concerned, the executing court is fully empowered to issue directions of the sort, if required, to the authority concerned.

In view of the stated facts in case in hand the decree is for custody of the minor, and the executing court is fully empowered to execute the order passed by a court of competent jurisdiction. The petitioner may apply the executing court by suggesting the modes as provided by the Law for redressal of his grievance, and also for implementation of the decree.

The petition stands disposed of with above observations.

MH/158/Bal.

Order accordingly.