

P L D 2022 Balochistan 108

Before Muhammad Hashim Khan Kakar and Nazeer Ahmed Langove, JJ

Mst. SAMEENA ANWAR and 2 others---Petitioners

Versus

The MANAGER, UNITED BANK LTD. and others---Respondents

Constitution Petition No. 188 of 2020, decided on 4th October, 2021.

(a) Contract Act (IX of 1872)---

----S. 124---Constitution of Pakistan, Art. 199---Constitutional petition---Contract of indemnity---Withdrawal of amount from missing person's Bank account---Scope---Petitioner along with her daughters sought direction to the respondents to release the amount lying in the Bank account of her missing husband---Contention of respondents was that the amount could not be released in favour of the petitioners until and unless death of the missing person was confirmed and a succession certificate was issued by a court of competent jurisdiction---Validity---Section 124 of Contract Act, 1872, furnished a complete answer to the contention of respondents---Spouse of the missing person would guarantee through affidavit or execute personal bond indemnifying the Bank---In the event of the appearance of missing person, the Bank would not be responsible for re-payment of such amount to the missing person, which had already been released to his spouse/family members---Spouse of the missing person would be responsible for satisfying the claim of the missing person---Constitutional petition was allowed and the respondents were directed to release the amount in question to the spouse of missing person after obtaining affidavit or personal bond.

(b) Qanun-e-Shahadat (10 of 1984)---

----Arts. 123 & 124---Burden of proving death of person known to have been alive within thirty years---Burden of proving that person is alive who has not been heard of for seven years---Scope---Court cannot declare a missing person dead for the simple reason that a human being does not come into existence on account of any law of the country---Life is not dependable on a law---If the law does not bring into existence a human being by its declaration, it can certainly not declare such human being to have died that too in case of missing persons.

(c) Islamic law---

----Missing person is to be regarded alive till the expiry of ninety years from the date of his birth.

(d) Qanun-e-Shahadat (10 of 1984)---

---Arts. 123 & 124---Burden of proving death of person known to have been alive within thirty years---Burden of proving that person is alive who has not been heard of for seven years---Scope---Article 124 of the Qanun-e-Shahadat, 1984 only creates a presumption regarding the missing person and it only deals with the concept of production of evidence; the effect of such evidence and the concept of proof and as to on whom such burden would lie---Basically Arts. 123 & 124 of the Qanun-e-Shahadat, 1984, define the concept of burden of proof and apply to a person who desires a judgment from the Court---Judgment indicated in these Articles is restricted to any legal right or liability and does not extend to anything else.

(e) Qanun-e-Shahadat (10 of 1984)---

---Arts. 123 & 124---Burden of proving death of person known to have been alive within thirty years---Burden of proving that person is alive who has not been heard of for seven years---Scope---Difference exists between natural and civil deaths---Natural death is the phenomenon of the termination of physiological features of creatures, including humans---Besides the natural death of a person, which is due to the termination of all its physiological functions, legislations provide even the civil death, which presumes a possible natural death---Civil death is always verified by the court decision which recognizes the person dead---In cases of civil deaths, the decision of Court is not based on the fact of physical death, but on its presumption due to the absence of the person from his last residence and the absence of news for a certain period---Civil death and natural death have same consequences but this does not mean that they are equal institutes---The first is based on the presumption of death therefore in a precarious situation which can be recovered in the future, the second is based on the end of all physiological functions of the person, therefore, the situation is sure---In civil death, the uncertain situation continues because the person declared dead can reappear.

(f) Qanun-e-Shahadat (10 of 1984)---

---Arts. 123 & 124---Burden of proving death of person known to have been alive within thirty years---Burden of proving that person is alive who has not been heard of for seven years---Scope---Presumption of death under Arts. 123 & 124 of the Qanun-e-Shahadat, 1984 and issuance of succession certificate actually provide a way for the relatives of missing persons to deal with the financial affairs of the missing person.

Kamran Murtaza, Adnan Ejaz and Tahir Ali Baloch for Petitioners.

Malik Sultan Mehmood, Syed Iqbal Shah, D.A.G. and Shai Haq Baloch, Additional Advocate General on Court notice for Respondents.

Date of hearing: 21st September, 2021.

JUDGMENT

MUHAMMAD HASHIM KHAN KAKAR, J.---The instant Constitutional Petition, filed under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 ('the

Constitution'), carries the following prayer clause:

"It is, therefore, respectfully prayed that this Hon'ble Court may be pleased to declare the act/action of respondent of not releasing the amount kept in the account of husband/ father of petitioners namely Abdul Ghaffar to be illegal, as such, not maintainable, consequently directions may kindly be issued to respondents to release the amount in favour of petitioners with any other relief and cost of the proceedings throughout in the interest of justice"

2. The facts arising out of the instant Constitutional Petition are that Abdul Ghaffar is husband of petitioner No. 1, whereas petitioners Mst. Maisa and Mst. Maiba are his daughters. Abdul Ghaffar was an employee of Balochistan Workers Welfare Board and his services were attached with Home and Tribal Affairs Department, Government of Balochistan. On 20th December, 2009, he left the house for buying some household articles at about 3:30 p.m., but never returned home. His absence was duly reported in the police station, Khuzdar, by means of filing FIR No. 228 of 2009, but of no avail. The petitioners as well as other family members also tried level best to find the abductee and in this regard besides filing complaint before the Commission for Enforced Disappearance, also approached this Court.

3. The abductee i.e. Abdul Ghaffar was maintaining his account No. 047601202552 at United Bank Ltd, Jinnah Road, Quetta Branch wherein an amount of Rs. 660,484.50 are lying. It is case of the petitioners that due to abduction of their guardian, they are facing great hardships and hardly managing their day to day affairs. They approached the respondents and apprised them about all the facts and circumstances with the request to release the said amount, but their request was not entertained, hence the instant petition.

4. In pursuance of notices, respondents appeared and submitted parawise comments, stating therein that the said amount cannot be released in favor of petitioners, unless and until the confirmation of death of Abdul Ghaffar and production of Succession Certificate, issued by a competent Court of law.

5. We have heard Mr. Kamran Murtaza, learned counsel for the petitioners, Malik Sultan Mehmood for respondents and learned Additional Advocate General and also perused the available record. The pivotal questions those warrant determination in the instant petition is whether a Court can declare a missing person to be dead and whether without having a succession certificate, the amount in question can be released in favor of petitioners?

6. After hearing arguments of the parties, we are of the opinion that a Court cannot declare a missing person dead for the simple reason that a human being does not come into existence on account of any law of the country. The life is not dependable on a law. If the law does not bring into existence a human being by its declaration, it can certainly not declare such human being to have died that too in case of missing persons. So far as presumption under Article 124 of the Qanun-e-Shahadat Order, 1984 ('the Order, 1984') is concerned, it is common ground between the parties that Abdul Ghaffar is unheard of since 20th December, 2009 and the provisions of Article 124 of the Order, 1984 are fully attracted and there is a presumption of law that he is dead. According to the Muhammadan law, a missing person is to be regarded alive till the expiry of ninety years from the date of his

birth. Article 124 of the Order, 1984 only creates a presumption regarding the missing person and it only deals with the concept of production of evidence; the effect of such evidence and the concept of proof and as to on whom such burden would lie. Basically Articles 123 and 124 of the Order, 1984, define the concept of burden of proof and applies to a person who desires a judgment from the Court. The judgment indicated in these Articles is restricted to any legal right or liability and does not extend to anything else.

7. At this juncture, we should also bear in mind that there is difference between natural and civil deaths. Natural death is the phenomenon of the termination of physiological functions of creatures, including humans. Besides the natural death of a person, which is due to the termination of all its physiological functions, legislations provide even the civil death, which presumes a possible natural death. Civil death is always verified by the court decision which recognizes the person dead. In cases of civil deaths, the decision of Court is not based on the fact of the physical death, but on its presumption due to the absence of the person from his last residence and the absence of news for a certain period. Civil death and natural death have same consequences but this does not mean that they are equal institutes. The first is based on the presumption of death therefore in a precarious situation which can be recovered in the future, the second is based on the end of all physiological functions of the person, therefore, the situation is sure. In civil death, the uncertain situation continues because the person declared dead can reappear.

8. The phenomenon of missing person is not new one, particularly for the people of Balochistan and we are facing this menace right from 9/11 after joining the 'war on terror'. A number of people are reported missing and some are found safe and well, but in some cases, they remain missing while causing distress and uncertainty for their loved ones. The presumption of death under Articles 123 and 124 of the Order, 1984 and issuance of succession certificate actually provide a way for the relatives of missing persons to deal with the financial affairs of the missing person. In this part of our beloved country, people are reluctant to apply for succession certificate/ letter of administration within the purview of Article 124 of the Order, 1984 on account of emotional attachment and especially when they are hopeful for safe and sound return of their loved one. A presumption of death is not appropriate in every situation as in the instant case. We have come across a number of cases where missing persons have surfaced after 10/12 years and likewise, the petitioners are also expecting the return of their loved one.

9. The families of missing persons live in constant stress, often waiting years for news about their loved ones. It is difficult for them to accept, until reliable proof is provided, that the missing person may no longer be alive. In most of the case the family believes that the missing person has been detained or hidden somewhere and is still alive, in other words will come back.

10. Reverting to the second question, the stance of the respondents that the amount in question cannot be released in favor of the petitioners for want of succession certificate is also devoid of force and has no legs to stand because section 124 of the Contract Act, 1872 furnishes a complete answer which reads as under:

"A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a contract of indemnity."

11. In view of above provision of law as well as peculiar circumstances of the case, the

petitioner No.1 who is spouse of Abdul Ghaffar and claiming to be entitled to the amount in question, shall before such amount is paid, guarantee, through affidavit or personal bond, re-payment of such amount to the missing person if subsequently he appears and makes any claim thereto. Similarly, in the event of the appearance of missing person, the respondent bank shall not be responsible for re-payment of such amount to the missing person which has already been released to his spouse/ family members, and the latter shall personally be responsible for satisfying the claim of the missing person. Even otherwise, it is admitted feature of the case that the petitioners were materially depending upon the income of their family head i.e. Abdul Ghaffar, as such, they were/are justified to withdraw the amount in question which certainly would enable them to meet their immediate needs.

As a result of above discussion, petition is allowed and respondents are directed to release the amount in question to petitioner No.1 after obtaining an affidavit or personal bond of like amount.

SA/33/Bal.

Petition allowe