

2020 M L D 1118

[Balochistan]

Before Muhammad Hashim Khan Kakar and Rozi Khan Barrech, JJ

ABDUL KHALIQ---Petitioner

Versus

ADDITIONAL DISTRICT AND SESSIONS JUDGE-IV and 2 others---Respondents

Constitution Petition No.601 of 2018, decided on 29th October, 2019.

Family Courts Act (XXXV of 1964)---

---Ss. 14 & 25---Guardians and Wards Act (VIII of 1890), Ss. 7, 47 & 4(5)---Petition for appointment as guardian---Family Court deemed to be a District Court for purposes of Guardians and Wards Act, 1890---Petitioner's petition for appointment as guardian of the minor was dismissed by the Guardian Judge---Appeal filed thereagainst was dismissed by District Judge in view of S.47 of Guardians and Wards Act, 1890---Validity---Section 4(5) of Guardians and Wards Act, 1890 had to be read with S.25 of Family Courts Act, 1964, which deemed the Family Court to be a District Court for the purposes of Guardians and Wards Act, 1890---Matters pertaining to guardianship and custody of minors laid within the exclusive jurisdiction of Family Court, who while dealing with the matter had to adopt the procedure laid down in Guardians and Wards Act, 1890---Order passed by Family Court did not amount to an order of a District Judge nor right of appeal became available before High Court rather the appeal had to be preferred under S.14 of the Family Courts Act, 1964 which clearly described the forum of appeal---Petition for appointment of guardian was heard and decided by the Family Court not having the status of a District Judge, therefore, the appeal had to be filed before a District Judge---Constitutional petition was allowed and the appellate court was directed to decide the appeal on merits.

Petitioner in person.

Muhammad Ibrahim Lehri and Muhammad Ali Rakhshani for Respondent No.3.

Date of hearing: 14th October, 2019.

JUDGMENT

ROZI KHAN BARRECH, J.---Brief facts of the case are that the petitioner filed a suit under the provisions of sections 7 and 10 of the Guardians and Wards Act, 1890 for grant of guardianship certificate to petitioner being natural guardian of his minor daughter, with the averments that marriage between him and respondent No.3 was solemnized, but same was dissolved while out of the wedlock one child namely Amber was born, who is now

in custody of respondent No.3 and accordingly prayer was made for appointment of petitioner as legal guardian of his minor daughter and further prayer was made for issuance of guardianship certificate in his favour.

After institution of the suit, notice was served upon respondent No.3, who duly contested the suit by filing written statement. The trial court dismissed the suit filed by the petitioner on 24.03.2018 being not maintainable. Being aggrieved the petitioner filed an appeal under Section 14 of Family Courts Act, 1964 before the learned Additional District Judge-IV, Quetta, which was dismissed vide judgment dated 2nd May 2018. Hence, this petition.

3. We have considered the arguments advanced by learned counsel for the parties and have also perused the available record with their valuable assistance.

4. It may be observed that the appellate court while dismissing the appeal filed by the petitioner observed that appeal is not maintainable in view of Section 47 of Guardians and Wards Act, 1890. The petitioner filed a suit for appointment as Guardian of his minor daughter under Sections 7 and 10 of Guardians and Wards Act, 1890. While dealing with the matter, the provisions of 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.

5. 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.

6. The question in the case 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."

7. Keeping in view the mentioned provisions as the matter in hand pertains to guardianship and custody of the minor, the exclusive jurisdiction lies with the 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 or guardianship 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 Guardians 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 a person notified by the Government to be of such rank and status, in such case the appeal shall lie to the High Court.

8. The suit for appointment of guardian was heard and decided by the Family Court 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-IV, Quetta was under some misconception thereby committed an error, while holding the contrary view. The appellate court only referred to section 47 of the Act, 1890 and ignored the remaining provisions as noted in preceding paras. It was ignored that in the matters pertaining to family disputes jurisdiction 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 2nd May 2018 of Additional District Judge-IV, Quetta 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.

SA/153/Bal.

Case remanded.