

**P L D 2017 Balochistan 22**

**Before Mrs. Syeda Tahira Safdar and Muhammad Ejaz Swati, JJ**

**BIBI HUMERA---Petitioner**

**Versus**

**GHULAM DASTAGIR and 3 others---Respondents**

Constitutional Petition No.1046 of 2014, decided on 29th June, 2016.

**(a) Succession Act (XXXIX of 1925)---**

---S. 375---Succession certificate---Surety bond---Petitioner was widow of government official who lost his life while he was on duty---Award, pay and allowances given by government on the death of petitioner's husband were distributed among legal heirs in view of succession certificate issued by Court---Respondent was brother of deceased husband of petitioner and succession certificate was issued in his favour who submitted surety bond before the Court---Grievance of petitioner was that her brother in law had kept minor children with him and had also not distributed shares of petitioner and her minor children---Validity---Respondent was granted succession certificate being attorney of petitioner and other legal heirs and he was required to be dealt with under S.375 of Succession Act, 1925---High Court directed the Court which issued succession certificate to proceed with the matter and to get the amount of shares of minors recovered from respondent and the matter was remanded for the purpose---Constitutional petition was disposed of accordingly.

**(b) Family Courts Act (XXXV of 1964)---**

---S. 5, Sched.---Constitution of Pakistan, Art. 199---Constitutional petition---Maintainability---Alternate remedy---Custody of minors---Petitioner was mother of minors and sought custody of her minor children who were living with her brother-in-law---Validity---For custody of minors and alternate remedy was available before Courts established under Family Courts Act, 1964, and petitioner had every right to avail the same---Constitutional petition was disposed of accordingly.

Abdul Basit for Petitioner.

Muhammad Ibrahim Lehri, Naseer Ahmed Bangulzai, Additional Advocate General and Muhammad Ayub, Superintendent Deputy Commissioner, Mastung for Respondent No.1.

Date of hearing: 24th March, 2016.

**ORDER**

**MRS. SYEDA TAHIRA SAFDAR, J.--**The petitioner Bibi Humera wife of Muhammad

Ismail approached this court for the reliefs:

- "A. to declare that the respondent No.1 illegally and unlawfully removed the above named minors sons and daughters of the petitioner and kept them in an illegal and unlawful confinement.
- B. To declare that the private respondent No.1 has no authority or entitlement to keep the custody of minors sons and daughters of petitioner.
- C. To declare that the petitioner being real mother and natural guardian of the minors has fundamental rights to keep the custody of her minor sons and daughters.
- D. To direct the respondent No.1 to produce all the minors before this Hon'ble Court and thereafter be handed over to petitioner being real mother and natural guardian.
- E. In case of failure, the official respondents be directed to recover the minor from illegal and unlawful custody of respondent No.1 and be produced before this Hon'ble Court and hand over to petitioner.
- F. Directing the respondent No. I to return all the compensation amount and other dues of the Shaheed husband of the petitioner already received, to petitioner so that she would be able to bring up/look-after the minors properly and for the better future of the minors.
- G. Further the Deputy Commissioner Mastung, be directed to pay the monthly salary of Shaheed Muhammad Ismail to petitioner.
- H. The official respondents be directed to protect the life of petitioner and both minors.
- I. To pass such order as your lordship may seem fit and proper in the circumstances of the case."

2. It was case of the petitioner that her husband Muhammad Ismail was killed while on duty in the year 2011, thus he was declared Shaheed, and the Government of Balochistan announced an amount of Rs.2,000,000 (Rupees two million only) as compensation, besides monthly salary of the deceased. The deceased Muhammad Ismail was described to be survived by widow (petitioner) and five children. It was her case that she being an illiterate lady, while respondent No.1 (her brother in law) in concealed manner managed to obtain succession certificate from the court and on basis thereof received the amount of compensation and other dues of the Shaheed, for which only she and her children were entitled. In addition the monthly salary of the Shaheed was also received by respondent No.1, not allowed a single penny to her and her children. Thus in such state of affairs she was compelled to approach the Deputy Commissioner, Mastung and brought into his notice the act on part of the respondent No.1. Resultantly on 13th December 2014 a cheque of Rs.40,000/- (Rupees forty thousand only) was issued in her name on account of salary. While the Deputy Commissioner, Mastung vide letter dated 13th January 2014 directed the Manager, National Bank, Mastung Branch for payment of the salary to the petitioner. It was contended that her act to approach the Deputy Commissioner, Mastung annoyed the respondent

No.1, who after beating turned her out of the house, but forcibly retained the children. As a result she was compelled to take shelter at Quetta in her parents' house. Her efforts to approach the authorities concerned for taking action against the respondent No.1 failed due to his (respondent No. 1) influence. While she was under severe threat, thus sought redressal of her grievances from this Court.

3. The instant petition, followed by a number of applications with variety of reliefs including meeting with the minors, and payment of the monthly salary of the deceased to her, was filed, thus several directions were made and several orders were passed to streamline the subject issue. On 6th January 2015 a schedule for meeting of the mother and minors was prepared, while custody of two of the minors Alishbah and Nayab were handed over to the petitioner during course of hearing. While the remaining three were left to reside with their relatives as per past arrangement. This was also due to the fact that the minors, elder ones, showed less interest to join their mother, even not ready to accompany her on week ends, as directed.

4. To probe into the matter and to unveil the truth the respondents were asked to submit their replies. The respondent No.4 Deputy Commissioner, Mastung in his parawise comments was of the view that the amount of Rs.2,000,000/- (Rupees two million) was received by Bibi Humera (Petitioner), being one of the declared legal heir of the deceased. Further, she received the monthly salary from the Bank as arranged by the relevant office. The reply further suggests that the school, where the minors were studying had been approached for the details of monthly expenses, with an intent to transfer the amount directly to the school, to avoid its misuse.

5. It was observed that the minors Abdul Karim, Iram Ismail, and Naleem Ismail made their appearances before the court on 10th June 2015, they complained about non-payment of their school fees. On query the learned counsel for the petitioner stated that the salary was received by the petitioner, but nothing paid to the minors, who were residing apart from her. Thus the Deputy Commissioner, Mastung was directed to pay half of the salary to the minors to meet with the school expenses. It was further directed that the amount be directly paid to the educational institutions where the minors were studying to ensure its proper use.

6. In view of the fact that the compensation was awarded to the widow and children of the deceased, with sole purpose to provide them financial support, and to help them to lead an independent life, thus on complaint of misappropriation of the amount it was necessary to look into the matter to safeguard the interest of widow and the minors. Thus an effort was made to probe the utilization of the amount Rs.Two millions, which was received by Bibi Humera as compensation from the concerned office, a fact. On 15th June 2015 the petitioner was asked about receiving of money and its utilization. According to her she visited the Bank once, while respondent No.1 Ghulam Dastagir and his brother Ejaz accompanied her. While they obtained her signatures on number of papers. It was her statement that the amount of Rs.2,000,000/- was given to Ghulam Dastagir and Ejaz for the purpose to purchase a house for her and minors accommodation. There was complete denial on part of respondent No. 1 of receiving the amount.

7. To ascertain the truth footage of CCTV Camera of the relevant dates were called from the Bank, but to no avail, as the footage of CCTV Camera was not available already deleted after a

period of thirty days having no capacity of storage thereafter. The officials called from the office of Deputy Commissioner, Mastung disclosed that the cheque was prepared in the name of the petitioner (Bibi Humera) who received the cheque, while at relevant time respondent No. 1 accompanied her.

8. Apart from issuance of the cheque and its encashment a succession certificate for the purpose was obtained from the court of District and Sessions Judge, Kalat at Mastung in the names of the petitioner and the minors, a condition precedent. The name of Ghulam Dastagir (respondent No.1) appeared as special attorney in the process. The application filed for the purpose was allowed vide order dated 18th October 2011 by the District Judge, Kalat at Mastung, and the succession certificate was issued in the names of the petitioner, the minors and mother of the deceased Noor Bibi on 26th October, 2011.

9. The name of Ghulam Dastagir appeared as attorney in the succession certificate for applicants including the petitioner and the minors. In order to affirm the facts the record of the trial court was called. The perusal whereof reveals that the application was filed by respondent No.3 Ghulam Dastagir, and he pursued with the case till its decision. Before issuance of succession certificate as required by Section 372 Succession Act 1925 security was called, while this Ghulam Dastagir not only filed the bond to bound down himself for payment of debt to the applicants, while one Muhammad Azam son of Abdul Karim stood surety for him for the purpose. As a consequence the succession certificate was granted in the names of the petitioner Bibi Humera, the minors five in numbers, and Noor Bibi, mother of the deceased. The trial court further determined the shares of the petitioner, mother and also of the minors. The fact further apparent from the order dated 18 November, 2011 that the attorney for the applicants was directed to purchase Saving Certificates in the names of the minors and produce before the court. Compliance of this direction nowhere apparent from the record.

10. The petitioner approached this court with an assertion of fraud and misappropriation of the amount of compensation on part of the respondent No.1; further her deprivation of her own children by the same person. It was not denied rather a fact that the cheque for the amount of compensation was issued in the name of the petitioner by the office of the Deputy Commissioner, Mastung. There was no mention of the names of the persons on whose names succession certificate was issued and they were held entitled to the extent of their shares as determined by the court. It was also a fact that the petitioner received the monthly salary from the account maintained by her, but not paid any amount to the minors residing apart from her. The plea that she being an illiterate lady, thus was deceived by respondent No.1, who misappropriated the amount with misstatement obtained succession certificate not found support from the conduct on her part. She admitted to receive the cheque and handing over the money to respondent No.1 and his brother Ejaz for the purpose to purchase a house. It establishment that though she received the money, but not able to manage it, not only her share, but also the shares of the minors.

11. The learned counsel for the respondent No.1 objected maintainability of the instant petition, as the matter in issue a factual controversy, thus could not be dealt in exercise of constitutional jurisdiction. The learned Additional Advocate General in attendance was unable to assist the court on facts or on point of law involved therein.

12. Apart from the factual controversy the prime issue is the right of minors in the property devolved on them, as guaranteed by the Constitution, is to be secured. The mother of the minors (petitioner) showed her incapability to safeguard the interest of the minors in the money given for their livelihood, but she was unable to look after the person of the minors, who due to the act on her part residing apart from each other in three different places, which is highly unfortunate. Thus required some appropriate order to undo the mis-happening.

13. The succession certificate issued by a court of competent jurisdiction was the basic document to further proceed for disbursement of the debt received. It was in name of the mother, widow and the children of the deceased; further determined the shares of each of the persons coupled with direction of the trial court to purchase National Saving Certificate and place them before the court. It was to safeguard the interest of the minors. The trial court was cautious enough, thus not only determined the shares, but also to place the shares of minors in safe custody. Despite the same the attitude adopted by the office concerned i.e. Deputy Commissioner, Mastung was negligent. No steps were taken to safeguard the right of minors, nor in compliance of the referred order, rather the whole amount was handed over to the petitioner in shape of cheque, which was in the name of one of the applicants, though mother of the minors, but in violation of the court's order. This negligence caused loss of the money came in share of the minors. Thus both the petitioner, and the Deputy Commissioner, Mastung were responsible for all this mishap.

14. The issue in hand pertains to the amount of compensation and the monthly salary, and its disbursement to the persons in fact entitled for the same. For the purpose the petitioner applied for issuance of succession certificate not only for herself, but on behalf of the minors also. The succession certificate also issued in their names, consequently petitioner was able to receive the amount. Thus in view of the facts the law applicable i.e. The Successions Act, 1925 (Act 1925) shall be pressed into action. The succession certificate was issued by the court of District Judge, Kalat at Mastung in exercise of the powers available under Section 372 of the Act, 1925. The record of the trial court reveals that the petitioner and Noor Bibi mother of the deceased empowered Ghulam Dastagir (respondent No. 1) by issuing a power of attorney in his name who acted in his capacity as of attorney before the trial court. His name also mentioned as such in the succession certificate. The Bond was also submitted by him (respondent No. 1), and the person namely Muhammad Azam son of Abdul Karim stood surety for him (respondent No.1). The surety and the Bond were still intact which made both the named persons liable for the act they ensured. This security was obtained as mandated by Section 375 Succession Act 1925. This Section is comprehensive enough to deal with the situation in hand.

15. In view of the described facts respondent No.1 Dastagir was the main character, who applied for issuance of succession certificate. though in names of the widow, mother and minors, but he attended the proceedings till its finalization. The trial court while dealing with the matter overlooked the fact that the petitioners Nos. 3 to 7 were minors, thus could not be represented by an attorney, to whom the power was given by Humera Bibi and Noor Bibi. The application must be through next friend, a legal requirement. Despite this mistake on conclusion while issuing the succession certificate, the trial court determined the shares of the applicants including the minors and to further safeguard the interest of the minors a direction was made that Saving Certificates in the name of the minors be obtained. Thus compliance of the order was to be made either by

the petitioner and Noor Bibi or by this attorney (respondent No. 1). The record reveals that Ghulam Dastagir (respondent No.1) admitted his participation in court's proceedings, but also not denied to accompany the petitioner, when the cheque was handed over to her, and deposited in the Bank. Though he denied receiving of any amount from the petitioner, but this denial is of less legal effect with no consequence. It was due to the fact that the law mandated to hold liable the persons to whom the succession certificate was granted for all the mis-happening and for the purpose he required to submit bond with surety/security. It was done in the case in hand as the respondent No. 1 filed the bond with surety/ security in his own name. Thus he was liable to render the accounts as required. The debt received was with one of the applicants, while the remaining were deprived. Thus respondent No. 1 was liable for the act and has to be dealt under the Act 1925.

16. In view of the above discussion this petition is converted into appeal and allowed in the terms that:

i. The respondent No.1 Ghulam Dastagir was granted the succession certificate being the attorney of the applicants (petitioner, minors and Noor Bibi), thus required to be dealt with under Section 375 of the Succession Act 1925. Thus for the purpose the matter is remanded to the trial court with the direction to proceed with the matter, and get the amount, shares of minors recovered from the respondent No.1. All possible steps be taken for recovery of the amount from Ghulam Dastagir (respondent No.1) and Muhammad Azam the surety. On recovery, the amount to the extent of shares of the minors be deposited in the National Saving Center under regular scheme. The certificates shall remain in the custody of the trial court till the minors attained the age of majority, or till date some person duly appointed as guardian of the property of the minors by a court of competent jurisdiction.

The share of Noor Bibi, mother of the deceased, be also handed over to her.

ii. As far the share of the petitioner is concerned, the trial court apart from making efforts for recovery of shares of the minors also determine that whether the petitioner has received her share and if not its legal consequence.

iii. The salary of the deceased be also properly managed and the benefit must be reached to the minors beside the widow. The Deputy Commissioner, Mastung is directed to ensure payment of salary as directed directly to the institutions where the minors are getting education.

iv. As far the reliefs pertaining to custody of minors are concerned, an alternate remedy lies before the courts established under the Family Courts Act 1965, and the petitioner has every right to avail the same.

17. Before parting with the judgment it is noted with concern that due to gross negligence of the concerned civil administration and the Bank officials it is hard to ascertain in the constitutional jurisdiction that who had in fact received the amount in question and mis-utilized it and deprived the real persons of their right. There is no effective balancing mechanism to protect the rights of the persons entitled to receive the benefits, specifically the minor children of the

Shaheed. The Provincial Government must make some effective policy to deal with the like situation, to safeguard the interest of the minors, who are the real sufferers.

The relief allowed in the above terms.

MH/59/Bal.

Order accordingly