

Journal

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Court

SINDH HIGH COURT

Date

1984-12-23

Appeal No.

CONSTITUTIONAL PETITION NO. S-55 OF 1982

Judge

NASIR ASLAM ZAHID

Parties

MST. HAYAT KHATOON—PETITIONER VERSUS .ALLAH DINO AND ANOTHER—RESPONDENTS

Lawyers

A.A.DARESHANI FOR APPELLANT. M.L.SHAHANI FOR RESPONDENT NO. 1.

Statutes

WEST PAKISTAN FAMILY COURTS ACT (XXXV OF 1964) – SS.2, 5 AND 25 AND SCHEDULE, ITEM 5
PROVISIONAL CONSTITUTION ORDER (1 OF 1981) – ARTICLE 9 WEST PAKISTAN FAMILY COURTS
RULES, 1965 – RR.3 AND 7 GUARDIANS AND WARDS ACT (VIII OF 1890) – S.25

Judgment

This is a constitutional petition filed by the petitioner. The petitioner was first married to one Allah Bachayo Pahor, who died on 19-12-1978. Out of this wedlock 11 children were born 7 sons and 4 daughters. According to the petitioner, at the time of the death of Allah Bachayo, 5 children were minors, namely Wazir (11 years old), Mumtaz (7 years), Irshad (6 years), Najma (8 years) and Hajra (3 years). According to the petitioner, there were differences between her and 3 of her elder sons, namely, Allah Dino (respondent No.I), Ghulam Rasool and Shabbir, who wanted to usurp the property of the petitioner and they also wanted the petitioner to re-marry one of their relation which the petitioner declined. According to the memo, of petition, the relationship of the petitioner with her three grown up sons and other relatives, therefore, became strained. The petitioner then made an application under sections 7 and 10 of the Guardians and Wards Act for her appointment as guardian of the persons of her 5 minor children.-This application which was numbered as 22 of 1979 was granted by the learned Civil Judge and Family Court, Shahdadpur by order dated 21-5-1979. It is the case of the petitioner that in spite of her having been appointed as guardian of the minor children, her three eldest sons, namely respondent No.I, Ghulam Rasool and Shabbir snatched away 4 of the minor children (except Mst. Hajra) and the petitioner was driven out of the house and she, therefore, shifted to Kandiaro, District Nawabshah, where she, later on, married one Haroon Pahor, claiming to be a distant relation. According to the petitioner, she has been living with her second husband Haroon Pahor since then.

According to the petitioner, she was not left alone even in Kandiaro and attempts were made to kidnap the remaining minor child Mst. Hajra. In the circumstances the petitioner filed a complaint before respondent No.2 Civil Judge and 1st Class Magistrate Kandiaro. And on the said complaint an order was passed by respondent No.2 whereby the boy Irshad was given in custody of the petitioner and it was directed that in the event of recovery of this boy in consequence of any complaint/search warrant or other orders the Executing Officer shall in the first instance produce the said boy in the Court of Civil Judge and F.C.M., Kandiaro. Reference was also made about the order dated 21-5-1979 passed by Mr. Bin Yamin, Civil Judge, Shahdadpur according to which the petitioner had been declared as guardian of the minors.

The petitioner also filed a Civil Suit No.27 of 1981 in the Court of respondent No.2 against her four major sons and two other persons claiming the following reliefs (a) The marriage of the petitioner with Muhammad Haroon be confirmed and declared as valid. (She had claimed that she had been married three months earlier with Muhammad Haroon, a distant relation); (b) The defendants may be restrained from interference and disturbance to the peaceful life of the petitioner with Muhammad Haroon; (c) The defendants be restrained from snatching the minor girl from the legal custody of the petitioner.

In the'said Suit No.27 of 1981 the petitioner also filed an application for interim injunction and by order dated 25-3-1981 an ad interim order of status quo was granted by the respondent No. 2. This suit was fixed for hearing before respondent No. 2 on 10- 11-1981 on which date the petitioner alongwith Mst. Hajra and Irshad, who, according to the petitioner had joined her, appeared before the respondent No.2 but the case was adjourned to 24-11-1981 for want of time. It is then averred in the memo, of petition that

while the petitioner was waiting on 10-11-1981 in the Court premises in connection with her Suit No.27 of 1981, a suit under section 25 of the Guardians and Wards Act was filed by the respondent No.1 (Allah Dino) against the petitioner in which the respondent No.1 (Allah Dino) prayed that the Court may give the custody of minors Mst. Hajra and Irshad to Allah Dino on the following grounds: - (i) That Allah Dino had been appointed as gurdian of the two minors by the civil Court, Shahdadpur and a certificate to that effect was attached.

(ii) The said two minors were present in the Court.

* (iii) If the said two minors were not snatched from the petitioner and given in custody of Allah Dino, the life of the minors would be ruined. - (iv) There was liklihood that the petitioner would take away the minors to some unknown place as the petitioner had kidnaped them from the custody of the defendants.

(v) It would be in the interest of justice that the said minors be given in the custody of Allah Dino who was their brother.

This suit was admitted to hearing and summons were ordered to be issued to the petitioner. The grievance of the petitioner is that on the same application thereafter respondent No.2 passed an order that Allah Dino deserved to be given the custody of the two minors. From the order it appears that it was passed in the presence of the petitioner and that she had made submissions also before the respondent No.2. This order which was also passed on 10-11-1981, and which has been impugned in this Constitutional Petition, is reproduced here:- & "Mr. Allah Dino has filed an application under section 25 of Guardian and Wards Act. His contention is to the effect that he has been appointed as gurdian of his minor brothers and sister named below by the Court of Civil Judge, Shahdadpur vide order dated 7-1-1981: He has produced the said order according to which the applicant stands appointed as guardian of the following minors:- (1) Wazir Ahmed.

(2) Ghulam Mustafa.

(3) Muhammad Hassan.

(4) Mst. Najman.

(5) Mst. Hajran.

The applicant submits that out of the said five minors, minors No. 1, 3 and 4 are with him while minors Nos. 2 and 5 are in illegal custody of their mother Mst. Hayat Khatoon who has allegedly illicit terms wftth Haroon Pahore who is residing at Kandiaro. Mst.

Hayat Khatoon alongwith her Advocate Mr. Allah Bux Waryani is present and she submit that the said Haroon is her husband for declaration of whose status she has filed Suit No.153/81 in this Court. Admittedly the mother, as per her own contention has left the house of her husband and sons and her alleged husband Haroon does not have his own house/property or means of livelihood and he is working as servant. Under the circumstances the applicant deserves to be given the custody of two minors namely

Ghulam Mustafa and Mst. Hajran aged about 11 years and 7 years respectively. The applicant submits that in order to avoid circumstances of law and order and in view of the fact that from the said guardian, the applicant seeks police aid to accompany him to safer place. The request appears to be genuine and is granted in the interest of justice. Let the S.H.O. ' Kandiaro may required to provide police force for the purpose.

To safeguard the interest of the mother and to enable her to obtain remedy 'if any from superior Courts, the applicant is ordered to execute bond in the sum of Rs.5,000 to produce the minors in this Court if and when so required. Given under my hand and seal of the Court, this 10th day of November, 1981.11 I have heard at length arguments of Mr. A. A. Dareshani, learned counsel for the petitioner and Mr. M. L. Shahani, learned counsel for the respondent No.l. -

2. Mr. A. A. Dareshani has raised the following contentions in support of the present constitutional petition:- .

(a) Respondent No.2 as Family Court Judge had no jurisdiction to entertain the Suit under section 25 of the Guardians and Wards Act and the case should have been filed before the District Judge.

(b) Section 25 of the Guardians and Wards Act was not applicable in the instant case.

* (c) Rules of Natural Justice have been flouted as the impugned order was passed without any prior notice to the petitioner.

According to the learned counsel for the petitioner, the petitioner was present in the Court on account of the hearing fixed before the respondent No.2 in the suit filed by her against Allah Dino and others. No hearing was granted to the petitioner and hardly any opportunity was granted to the petitioner to defend her case.

* (d) Respondent No.2 had earlier passed a status quo order in the suit filed by the petitioner which status quo order was still in force and even in the suit filed under section 25 of the Guardians and Wards Act by Allah Dino, notice had been ordered but after some time he disposed off the whole case by giving the custody of the two minors to Allah Dino. According to the learned counsel, there has been violation of all rules of natural justice and procedure. In fact it was argued that the impugned order is a perverse order.

3. Mr. M. L. Shahani, learned counsel for the respondent No. 1 in. reply argued that the petition was not maintainable. It was submitted that the Family Judge (respondent No. 2) had jurisdiction to entertain the family suit filed by Allah Dino. It was further submitted that no rule of natural justice had been flouted and the petitioner was heard before the order was passed. It was further contended that against the order an appeal could have been filed but the petitioner allowed the period of limitation to expire. According to the learned counsel rule 22 (1) of the Family Court Rules prescribes a period of 30 days for filing an appeal and the rule itself provides for extension of this period but in the present case, even the application for a copy of the impugned order was made after two months. According to the learned counsel, an alternate remedy being available, it was not resorted by the petitioner and in fact the period of limitation was allowed to lapse

and then this constitutional petition was filed after about 4 months of the passing of the impugned order.

According to the learned counsel the petition is not competent as alternate remedy was available and in any case the petition suffers from laches.

A counter-affidavit has been filed by respondent No. I in which he has stated that petitioner's husband, who was also father of respondent No. I, died on 19-12-1978, and before expiry of Iddat period, the petitioner voluntarily left the house of her husband and went with one Muhammad Haroon to Kandiaro where both of them married on 9-2-1979 and in this connection she got public notice published in the newspaper. Photo copy of the notice published in the newspaper of such notice is filed as Annexure 'A' to the counter-affidavit dated 31-7-1982 of respondent No. I. It is then averred in para. 3 of the said counter-affidavit that the said Muhammad Haroon divorced the V petitioner and executed Talaqnama on 1-4-1979. Photo copy of the Talaqnama has been filed as Annexure 'B' to the said counter-affidavit. In her affidavit-in-rejoinder dated 5-9-1982, the petitioner has admitted that she married Haroon. She has not denied the notice given by her in the newspaper. She has not specifically denied the execution of Talaqnama by Muhammad Haroon on 1-4-1979. According to the counteraffidavit of Allah Dino, even after the said Talaqnama by Muhammad Haroon, the petitioner has been living with Muhammad Haroon and this is sinful. According to the respondent No. I, the character of the petitioner will reflect on her children. In the counter-affidavit, Allah Dino denied that he had any notice of the proceedings before the Civil Judge and Family Court, Shahdadpur, where the petitioner was appointed as guardian of the persons of her minor children. According to the respondent No. I, notice of the application of the petitioner was published in weekly 'Mujahid' of Shahdadpur dated 9-4-1979 and this weekly newspaper had very limited circulation and it was not widely read by the people of the locality, and, moreover respondent No. I, and his brothers were residing in the interior of Shahdadpur and they had no approach to the newspapers. He has further averred that he and his brothers were not party to the said application before the Civil Judge, Shahdadpur and the application filed by the petitioner for being appointed as guardian was also not in proper form. It was further averred that the petitioner had never custody of the minors since she left the house and married Muhammad Haroon but later on she came back to Shahdadpur for some time and stayed with her brothers and somehow induced Mst. Hajra and Irshad and took them away and started living with Muhammad Haroon. According to the respondent No. I, petitioner's taking of these two children to Dhoopali, Taluka Kandiaro, was without permission of the Court as respondent No. I had been granted guardianship certificate by the Court. It is then stated in the counter-affidavit of respondent No. I that he is real brother of all the minor children of the petitioner and he had also applied to the same Civil Judge Shahdadpur for appointing him as guardian of all the minors and same Judge after observing all formalities allowed his application and he was appointed as guardian. According to the respondent No. I, after having been appointed as guardian, he moved an application under section 25 of the Guardians and Wards Act in the Court of Civil Judge, Kandiaro for custody of the aforesaid two minors—Mst. Hajra and Irshad—and which application was granted. In para. 7 of his counter-affidavit, respondent No. I has stated that at present the petitioner is living with Muhammad Haroon who has divorced the petitioner and their living together is against the injunctions of Islam. It is further stated that Muhammad Haroon has no house of his own at Dhoopali nor sufficient means to bring up the minors

and allowing the minors to live with the petitioner and Muhammad Haroon would be detrimental to the interest of minors and it would seriously affect the future of minors. He has also stated in fiara. 8 of the counter-affidavit that as the petitioner is not a fit person to be a guardian of the minors and that she had taken the minors out of the jurisdiction of the Court without prior permission, respondent No.1 has made an application under section 39 of the Guardian? and Wards Act for revocation of guardianship of the petitioner.

As observed earlier, a rejoinder has been filed by the petitioner in which various adverse allegations have been denied. However, as noticed earlier the fact that she had married Muhammad Haroon within her Iddat period has not been specifically denied. The giving of notice in the newspaper about her marriage to Muhammad Haroon in February, 1979 and the execution of Talaqnama by Muhammad Haroon has not been denied specifically denied. After referring to the reply on merits, it was submitted by Mr. M. L.

Shahani learned counsel for the respondent No.1 that this is a case where no relief ought to be granted to the petitioner under the constitutional jurisdiction of this Court.

4. The contention of Mr. A. A. Dareshani, learned counsel for the petitioner, that respondent No. 2 as Family Judge , has no jurisdiction to entertain the application under section 25 of the Guardians and Wards Act is based on rule 7 of West Pakistan Family Courts Rules, 1965. Before going to this rule, reference may be made to certain provisions of the West Pakistan Family Court Act, 1964. Section 2(i)(b) of the Act defines Family Courts as meaning a Court constituted under that Act. Section 3 provides that Government shall establish one or more Family Courts in each district or at such other places as it may deem necessary and appoint a judge for each of such Courts . According to section 4, no person shall be appointed as a Judge of a Family Court unless he is or has been a District Judge, an Additional District Judge a Civil Judge. Section 5 deals with jurisdiction of the Family Courts and it lays down that subject to the provisions of the Muslim Family Laws Ordinance/1961 and the Conciliation Courts Ordinance 1961, the Family Courts shall have exclusive jurisdiction to entertain, hear and adjudicate upon matters specified in the Schedule to the Act. In the Schedule, apart from other matters, item No.5 is about custody of children and item No.6 is about guardianship. Accordingly Family Courts constituted under the Act have exclusive jurisdiction over suits and other proceedings relating to custody of children. Then we come to the West Pakistan Family Courts Rules, 1965. Rule 3 states as follows:- "Subject to the provisions of rule 7, the Courts of the District Judge, Additional District Judge, and Civil Judge shall be the Family Courts for the purposes of the Act." The relevant rule is rule 7 which reads as follows:- "Rule 7 Suits relating to custody of children and for guardianship shall be instituted in and be heard and tried by the Court of the District Judge, but such Court may transfer any such suit to the Court of the Additional District Judge, the Senior Civil Judge, the Civil Judge First Class or the Civil Judge First Class (Additional), having jurisdiction as provided in rule 6, and thereupon the Court to which such suit is so transferred shall have jurisdiction to hear and try the same.

(2) Suits triable under the Act, other than those relating to the custody of children and for guardianship shall be instituted in, and be heard and tried by, the Court of the Civil Judge, having jurisdiction as provided in rule 6, and where in any district there is no such Court, such suits shall be instituted in and be heard and tried by the Court of the District

Judge or the Additional District Judge.

(3) Notwithstanding anything contained in sub-rules (1) and the Court of District Judge may- (a) recall any suit made over by it for trial under sub-rule (1) to any court specified in that rule, and either try such suit itself or refer it for trial to any other Court within the District; (b) send for the record and proceedings of any suit pending for trial in any Court in the District and hear and try the suit itself or refer it for trial to any other Court within the District, and thereupon the Court of the District Judge or the Court to which such suit is so transferred, as the case may be, shall have jurisdiction to hear and try the suit."

According to Mr. A. A. Dareshani, rule 7 is very clear and a suit relating to custody of children has to be instituted in the Court of District Judge but then the District Judge, instead of hearing and trying that suit, has the power to transfer such suit to the Court of Additional District Judge, Senior Civil Judge or other Civil Judge having jurisdiction and thereupon the Court to which such suit is so transferred shall have jurisdiction to hear and try the suit. According to the learned counsel the institution of the suit in the Court of respondent No.2 (Civil Judge and Family Court Kandiaro) was not permitted by law and as such the impugned order is a nullity and deserves to be quashed. Learned counsel also relied upon a Divisions Bench authority of the Lahore High Court in the case of Muhammad Ismail v. Fazal Ahmad PLD 1969 Lah. 834. The relevant part of the judgment of the Lahore High Court in this case is reproduced here:- "The position as it emerges from the two rules read together, therefore, is that the Administrative Civil Judge, Rahim Yar Khan, was invested with the powers of the Family Court but he could not directly entertained an application under section 25 of the Guardian and Wards Act. Rule 7 reproduced above regulates the institution of suits relating to the custody and guardianship of children. They have to be instituted in the Court of the District Judge who may either hear and try the suit himself or may transfer the same to any of the Courts subordinate to him, of course not below the rank of a Civil Judge First Class (Additional). In the instant case, however, a perusal of the record makes it abundantly clear that the application was filed by the respondent directly in the Court of the Administrative Civil Judge and it did not come to him on transfer by the District Judge. The inevitable consequence that follow therefrom is that the entire proceedings culminating in the impugned order were without jurisdiction and, as such have to be struck down." Rule 7 of the West Pakistan Family Courts Rules, 1965 and PLD 1969 Lah. 834 supports the contention of the learned counsel for the petitioner. However, Mr. M. L. Shahani, learned counsel for respondent No.1 referred to section 5 of the Family Courts Act 1964 and item No.5 of the Schedule to the Act and also relied upon section 25 of the Act to argue that the suit under section 25 of the Guardian and Wards Act was properly entertained by the Civil Judge, Kandiaro. Section 5 and item No.5 of the Schedule to the Act have already been referred earlier. Section 25 of the West Pakistan Family Courts Act 1964 is to the following effect 11A Family Court shall be deemed to be a District Court for the purposes of the Guardian and Wards Act, 1890, and notwithstanding anything contained in this Act, shall in dealing with matters specified in that Act, follow the procedure prescribed in that Act." According to Mr. M. L. Shahani, rule 7 of the West Pakistan Family Courts Rules, 1965 is subordinate to the provisions of the Family Courts Act, 1964 and in view of sections 5 and 25 of the Act read with item No.5 of the Schedule to the Act, every Family Court has jurisdiction to entertain a Family Court suit for custody of children and it is not necessary that the suit should be instituted first in the Court of District Judge and then to be transferred to any Civil Judge or Additional District Judge. Learned counsel also relied upon a Full Bench authority of the erstwhile Sind and Baluchistan Courts in the case of

Zaibun Nisa v.

Muhammad Mozammil PLD 1972 Kar. 410 and submitted that this Full Bench authority has dissented from the decision of the Lahore High Court reported in P L D 1969 Lah. 834. I have gone through the two judgments of the Lahore High Court and Sind and Baluchistan High Court. The point on which the Full Bench of the Sind and Baluchistan High Court dissented from the judgment of the Lahore High Court was about the forum of appeal. According to P L D 1969 Lah. 834, if the order had been passed by a Civil Judge as Family Court, such order was appealable directly to the High Court and not to the District Judge, whereas the Full Bench of the Sind and Baluchistan High Court in P L D 1972 Kar. 410 took the view that an appeal against a decree or decision of a Family Court under the Guardian and Wards Act, when its presiding Judge is not a District Judge or a Judge of equivalent rank, lies to the District Court and not the High Court. However, the point whether a suit for' custody of children or for guardianship was required by law to be instituted before District Judge and could not be instituted before a Civil Judge acting as a Family Court was not before the Full Bench of the Sind and Baluchistan High Court and as such it is not correct to suggest that the decision of the Lahore High Court in that context has been dissented from the view taken in that regard by the Lahore High Court in P L D 1969 Lah. 834.

5. In my view, the provisions of law are reasonably clear and there appears to be no ambiguity. As observed earlier, the power was with the Government to establish the Family Courts. In accordance with this power, by rule 3 of the West Pakistan Family Courts Rules, 1965, it was provided that Courts of District Judge, Additional District Judge and Civil Judge, shall be the Family Courts for the purposes of the Act but subject to the provisions of rule 7. And, as seen earlier, rule 7 specifically provides that suits relating to custody of children and for guardianship shall be instituted in and to be heard and tried by the Court of the District Judge but the District Judge may transfer any such suit to a Family Court presided over by an Additional District Judge or a Civil Judge. Reading rules 3 and 7 together with section 2(i)(b) and section 3 it follows that a family suit for custody of children must be instituted in the Court of District Judge who can then transfer the case to an Additional District Judge or Civil Judge having jurisdiction under rule 5. Mr. A. Dareshani is, therefore, correct in his contention that the family suit under section 25 of the Guardian and Wards Act was wrongly instituted by respondent No.1 in the Court of Civil Judge, Kandiaro. It should have been instituted in the Court of District Judge Nawabshah who could then transfer the case to a Court having jurisdiction under rule 5 of the West Pakistan Family Court Rules, 1965.

6. There are other patent infirmities and illegalities in the impugned order dated 10-11-1981 of Civil Judge Kandiaro. Without giving notice and proper hearing to the petitioner, the entire suit was decided on the same day when it was instituted. This is an arbitrary exercise of jurisdiction by the Civil Judge. Then apparently he had initially ordered issuance of notice to the petitioner but after some time on the same day he went ahead and disposed off the entire suit in favour of the respondent No.1.

7. An argument was raised by Mr. M. L. Shahani that an alternate remedy by way of appeal was available to the petitioner but he did not avail the same. According to the learned counsel for respondent No.1, in the circumstances, the present constitutional petition is not maintainable. In the facts of this case I do not agree with this contention.

The impugned order is patently without jurisdiction and has been passed in an arbitrary manner and in complete disregard of the provisions of law and principles of natural justice. The present constitutional petition is maintainable.

8. The impugned order dated 10-11-1981 is, therefore, declared to have been passed without lawful authority and to be of no legal effect. However, minors have remained in the custody of respondent No.1, their real brother, for the last over 3 years. An order had been passed on 10-11-1982 in the present constitutional petition by Mr. Justice Z.C. Valiani, when four minors were produced by the respondent No.1 in the High Court. The learned Judge found that all the four minors were intelligent and on his, question, they flatly refused to go with the petitioner and in the circumstances, at that stage, he did not [j disturb the custody of the minors. In the background and facts and circumstances of this case it is ordered that the suit under section 25 ft of the Guardians and Wards Act filed by the respondent No.1 will be deemed to have been present before the District Judge, Nawabshah to whom the R & P of the case be sent. As soon as R & P of the case is received by the District Judge Nawabshah he will issue notices to the petitioner as well as respondent No.1 for appearance before him with a direction to respondent No.1 to produce Ghulam Mustafa and Mst. Hajran before the District Judge and on the day when the minors are produced before the District Judge he will pass further orders about the custody of the children in accordance with the law. In the background and facts and circumstances of this case it is directed that the District Judge himself will decide the suit and dispose off it in accordance with law within two or three hearings. The office is directed to send the R & P to the District Judge, Nawabshah forthwith.

9. The petitioner will be entitled to costs in this petition as against the respondent No. 1.