

Present: Syed Mansoor Ali Shah, Syed Hasan Azhar Rizvi and Irfan Saadat Khan, JJ

BASHIR AHMAD---Petitioner

Versus

ADDITIONAL DISTRICT JUDGE, HAFIZABAD and others---Respondents

C.P. No. 5918 of 2021, decided on 3rd November, 2023.

(Against the order of the Lahore High Court, Lahore, dated 06.10.2021, passed in W.P. No. 50349 of 2019).

(a) Constitution of Pakistan---

---Arts. 4 & 10A---Fair trial---Scope---Duty of Courts to deal with everyone in accordance with law---Courts, from top to bottom, must always remember that while dealing with matters of life, liberty, body, reputation or property of all persons must be dealt with in accordance with law, and that every person appearing before them is entitled to a fair trial and due process for the determination of his civil rights and obligations or in any criminal charge against him.

Maxwell v. Department of Trade 1974 QB 523 per Lawton, L.J. ref.

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

---S. 5 & Sched.---Constitution of Pakistan, Arts. 4 & 10A---Maintenance of minor---Grandfather, obligation of---Scope---Decree for maintenance of minor passed against the father of a child by the Family Court---Such decree cannot be executed against the grandfather---Child has to institute a suit for maintenance against his grandfather, in case no property of his father, the judgment debtor, is found for the execution of the decree.

Under the Islamic law of maintenance of the children, if the father of a child has died or the father, being a poor person, has no financial resources to maintain his child, the obligation to maintain such child passes on to his grandfather provided he is financially in easy circumstances. Thus, obligation of a grandfather to maintain his grandchild is dependant upon two conditions: (i) the father of the child must be a poor person who has no financial resources to maintain that child, and (ii) the grandfather of the child must be a person who is financially in easy circumstances. In case either of these conditions is not fulfilled, the grandfather is not under any obligation to maintain his grandchild. These two conditions are thus also the grounds of defence available to a grandfather against whom his grandchild makes a claim of maintenance. The grandfather must be provided with

an opportunity to defend the claim made against him by rebutting the existence of either of these two facts. This is the requirement of the fundamental right guaranteed by Article 10A of the Constitution of Pakistan, which mandates that for the determination of his civil rights and obligations, a person shall be entitled to a fair trial and due process.

Rehmat Bibi v. Mohammad Ali PLD 1971 Lah. 151 and Nizam Khan v. Additional District Judge PLD 1976 Lah. 930 ref.

The matter of providing maintenance to his grandchild is a matter of civil obligation; for its determination, the grandfather must be provided with a fair trial and due process. Both the above conditions, the fulfillment of which brings a grandfather under obligation to maintain his grandchild, are factual propositions, not legal ones. Their existence or non-existence can, therefore, only be proved through producing their respective evidence by the parties in a properly instituted suit for maintenance. Such evidence cannot be recorded in the execution proceeding nor can any determination be made therein by the executing court on these facts. The recording of evidence and making of findings on these facts in an execution proceeding would be a useless exercise, as despite making a positive finding, an executing court cannot modify the decree nor can it execute the decree against a person who was not a party to the suit. Further, the Family Courts Act, 1964 prescribes a procedure for how the claims of maintenance are to be entertained and decided by the Family Courts. Such a claim made against a grandfather operates against his property; he is, therefore, entitled to be dealt with the procedure prescribed by law, i.e., the Family Courts Act, as per Article 4 of the Constitution. Therefore, a decree for maintenance passed against the father of a child cannot be executed against the grandfather, and the child has to institute a suit for maintenance against his grandfather, in case no property of his father, the judgment debtor, is found for the execution of the decree.

Naseem Akhtar v. Shalimar General Insurance 1994 SCMR 22; Province of Punjab v. Burewala Textile Mills 2001 SCMR 396; Tariq Khan v. Jawad Asami 2007 SCMR 818; Attiq-ur-Rehman v. Sajad Hussain 2009 SCMR 684; Humayun Hassan v. Arslan Humayun PLD 2013 SC 557; Ahmed Nawaz v. Province of Punjab 2015 SCMR 823 and Shajar Hussain v. Abdul Majeed 2006 SCMR 913 ref.

Nawazish Ali v. Family Judge 2021 CLC 1841 approved

Mavra Arshad v. Ehsan Ghani 2005 SCMR 1293 distinguished.

In the present case, the petitioner (grandfather) was neither a party to the suit instituted by his grandchild against his father nor was any decree passed against him. A decree that was not passed against the petitioner cannot be executed against him or his property. The order, whereby the executing court attached the property of the petitioner, and the order, whereby his application for the release of the attached property was dismissed, both are illegal. Petition for leave to appeal was converted into appeal and allowed accordingly with the observation that the minor decree-holder, if so advised, is at liberty to institute a suit for maintenance against the petitioner, his grandfather, in accordance with the law, and if such a suit is instituted, the Family Court may make an appropriate order for interim maintenance of the minor at an appropriate stage of the suit if it is satisfied that the two conditions which make a grandfather liable for providing maintenance to his minor grandchild are *prima facie* fulfilled.

Muhammad Shahid Tasawar Rao, Advocate Supreme Court for Petitioner.

Khalid Pervaiz Warraich, Advocate Supreme Court for Respondents.

Date of hearing: 3rd November 2023.

JUDGMENT

SYED MANSOOR ALI SHAH, J.---'Doing what is right may still result in unfairness if it is done in the wrong way.'¹ The right thing must be done in the right way. Just ends are not justified unjust means. The present case is a classic instance of doing a right thing in a wrong way. In their urge to provide a child with due maintenance at the earliest, the courts below have circumvented the due process of law, and instead of achieving the desired result, have thrown the parties into a protracted, unnecessary litigation. Courts in this country, from top to bottom, must always remember that while dealing with matters of life, liberty, body, reputation or property of all persons must be dealt with in accordance with law,² and that every person appearing before them is entitled

to a fair trial and due process for the determination of his civil rights and obligations or in any criminal charge against him.³

2. Briefly, the facts necessary to state for the decision of the present petition are that in the year 2018, the petitioner's grandson, Muhammad Rehan, then aged about 3 years, instituted a family suit through his mother, Aziz Fatima, for his maintenance against his father and the petitioner's son, Ansar Abbas. The suit was decreed and a petition was filed for the execution of the decree against the judgment debtor, Ansar Abbas. Despite issuing the warrant of his arrest, the presence of the judgment debtor could not be procured to pay the decretal amount nor could the decree holder trace out any of his property. The decree holder found the revenue record of the property owned by the petitioner, his grandfather, and requested the executing court to attach that property for recovery of the decretal amount, which was accepted by the executing court, and the petitioner's property was attached vide order dated 07.09.2018. The petitioner filed an application for the release of his property from attachment, pleading that he had neither been a party to the suit nor had any decree been passed against him. The executing court dismissed this application of the petitioner by its order dated 17.10.2018. The petitioner challenged the orders of the executing court in the High Court invoking its writ jurisdiction. Through the impugned order, the High Court dismissed his writ petition; hence, this petition for leave to appeal.

3. We have heard the learned counsel for the parties, read the cases cited by them and examined the record of the case.

4. Under the Islamic law of maintenance of the children, if the father of a child has died or the father, being a poor person, has no financial resources to maintain his child, the obligation to maintain such child passes on to his grandfather provided he is financially in easy circumstances.⁴ This statement of Islamic law is not disputed before us. The matter of contention between the parties that requires determination by us is: whether a decree for maintenance passed against the father of a child can be executed against the grandfather or the child has to institute a suit for maintenance against his grandfather, in case no property of his father, the judgment debtor, is found for the execution of the decree.

5. As it is evident from the above statement of the Islamic law of maintenance of the children, the obligation of a grandfather to maintain his grandchild is dependant upon two conditions: (i) the father of the child must be a poor person who has no financial resources to maintain that child, and (ii) the grandfather of the child must be a person who is financially in easy circumstances. In case either of these conditions is not fulfilled, the grandfather is not under any obligation to maintain his grandchild. These two conditions are thus also the grounds of defence available to a grandfather against whom his grandchild makes a claim of maintenance.

6. A child who claims his maintenance from his grandfather has to prove these two conditions, and the grandfather must be provided with an opportunity to defend the claim made against him by rebutting the existence of either of these two facts. This is the requirement of the fundamental right guaranteed by Article 10A of

the Constitution of Pakistan, which mandates that for the determination of his civil rights and obligations, a person shall be entitled to a fair trial and due process. The matter of providing maintenance to his grandchild is a matter of civil obligation; for its determination, the grandfather must be provided with a fair trial and due process.

Both the above conditions, the fulfillment of which brings a grandfather under obligation to maintain his grandchild, are factual propositions, not legal ones. Their existence or non-existence can, therefore, only be proved through producing their respective evidence by the parties in a properly instituted suit for maintenance. Such evidence cannot be recorded in the execution proceeding nor can any determination be made therein by the executing court on these facts. The recording of evidence and making of findings on these facts in an execution proceeding would be a useless exercise, as despite making a positive finding, an executing court cannot modify the decree⁵ nor can it execute the decree against a person who was not a party to the suit.⁶ Further, the Family Courts Act 1964 prescribes a procedure for how the claims of maintenance are to be entertained and decided by the Family Courts. Such a claim made against a grandfather operates against his property; he is, therefore, entitled to be dealt with the procedure prescribed by law, i.e., the Family Courts Act, as per Article 4 of the Constitution.

7. We, therefore, hold that a decree for maintenance passed against the father of a child cannot be executed against the grandfather, and the child has to institute a suit for maintenance against his grandfather, in case no property of his father, the judgment debtor, is found for the execution of the decree.⁷ The case of *Mavra Arshad*⁸ relied upon by the respondents does not advance but rather contradicts their stance as in that case, the grandfather was a party to the suit as a defendant, along with the father of the child.

8. In the present case, the petitioner was neither a party to the suit instituted by his grandchild against his father nor was any decree passed against him. A decree that was not passed against the petitioner cannot be executed against him or his property. The order dated 07.09.2018, whereby the executing court attached the property of the petitioner, and the order dated 17.10.2018, whereby his application for the release of the attached property was dismissed, both are illegal. By dismissing the writ petition of the petitioner filed against those orders, the High Court has failed to exercise the remedial jurisdiction vested in it under Article 199(1)(a)(ii) of the Constitution. The present petition is, therefore, converted into an appeal and the same is allowed. By setting aside the impugned order, the writ petition of the petitioner is accepted, declaring that the orders of the executing court, dated 07.09.2018 and 17.10.2018, were made without lawful authority and are therefore of no legal effect. Consequently, the application of the petitioner for the release of his property from the attachment stands allowed. It is, however, clarified that the minor decree-holder, if so advised, is at liberty to institute a suit for maintenance against the petitioner, his grandfather, in accordance with the law, and if such a suit is instituted, the Family Court may make an appropriate order for interim maintenance of the minor at an appropriate stage of the suit if it is satisfied that the two conditions which make a grandfather liable for providing maintenance to his minor grandchild are *prima facie* fulfilled.

MWA/B-5/SC Appeal allowed.