

JUDGMENT SHEET.
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

W.P No.596 of 2016
Soofia Munir & another
Versus.

Judge, Family Court (West), Islamabad & another

Date of Hearing:	28.04.2016
Petitioners by:	Syed Khawar Ameer Bukhari, Advocate
Respondent No.2 by:	Mr. Sajid Mehmood Shad, Advocate

MIANGUL HASSAN AURANGZEB, J:- Through the instant Writ Petition, the petitioners, Soofia Munir and her son, Zurain Bin Tahir, impugn the order dated 27.11.2015, passed by the learned Judge Family Court, Islamabad, whereby, respondent No.2's application under Section 12 of the Guardians and Wards Act, 1890 ("G&W Act"), was allowed.

2. The record shows that petitioner No.1 and respondent No.2 (Khawaja Tahir Iqbal) got married on 29.07.2007. They were blessed with a son (petitioner No.2) on 02.07.2009. The marriage turned sour and respondent No.2 contracted a second marriage. On 20.06.2012, the petitioners filed a suit for recovery of dower amount, maintenance allowance and dowry articles before the learned Judge, Family Court, Islamabad, against respondent No.2. The suit instituted by the petitioners was decreed *ex-parte* on 21.01.2013. This decree was set aside on 20.01.2015. Thereafter, respondent No.2 filed a written statement and contested the suit. On 10.07.2015, respondent No.2 filed an application under Section 12 of the G&W Act for the issuance of a schedule for meetings with his minor son. This application was opposed by petitioner No.1, who was of the view that the learned Judge Family Court, while adjudicating upon a suit for the recovery of dower etc. could not entertain and decide an application under Section 12 of the G&W Act. Vide order dated 27.11.2015, the said application was allowed by the learned Judge, Family Court, who ordered that respondent No.2 could meet his minor son in the Court on every 1st and 3rd

Saturday of each month from 10:30 am to 12:01 pm. The petitioner No.1's objection to the maintainability of respondent No.2's application under Section 12 of the G&W Act was dealt with in the following manner:-

"5. Perusal of the application showed that it is filed in the instant suit for recovery of dower etc. and that it has been filed U/S-12 of Guardian and Wards Act. However the fact that the same application was presented in the instant suit, is enough to ascertain that the application for meeting with the minor was intended to be presented before this court for its decision in the instant suit. It would be against the norms of justice if the instant application is dismissed on this mere technicality. Perusal of the record also showed that though the defendant paid the interim maintenance to the minor but he is not paying that regularly on monthly basis but paying in bulk, and interim maintenance for the month of the November is still due.

6. Minor is admittedly the son of the applicant/defendant and being father, the defendant has every right to meet with minor son. Keeping in view the fact that outstanding interim maintenance has been paid by the applicant/defendant and the fact that applicant/defendant being real father has a right to meet his minor son, the instant application for meeting with the minor is allowed by condoning the technicality that the application was filed U/S 12 of the Guardians and Awards Act, 1925."

3. It is said order dated 27.11.2015, which has been impugned in the instant Writ Petition.

4. Learned counsel for the petitioners submitted that respondent No.2, in his written statement, did not seek any visitation rights; that on 08.09.2015, the learned Judge Family Court framed the issues; that no issue was framed regarding a schedule for meetings between respondent No.2 and his minor son; that relief beyond the issues could not have been granted by the learned Judge Family Court; that respondent No.2 could have filed a separate suit/application for custody under the provisions of the G&W Act; that two separate *fora* are provided under the law for dealing with applications for recovery of dower etc. and for dealing with custody and visitation rights regarding a minor; that the learned Senior Civil Judge had not entrusted respondent No.2's application under Section 12 of the G&W Act to the learned Judge Family Court; that under Section 9 of G&W Act, an application with respect to the guardianship of the minor is to be filed before the District Court; that the District Court has delegated/entrusted the power to entertain and decide applications under the G&W Act to the Senior

Civil Judge; that it is in the said capacity that the Senior Civil Judge marks cases under the G&W Act to other Civil Judges; that the jurisdiction of a Family Court is determined in accordance with Sections 4 & 5 of the West Pakistan Family Courts Act, 1964 ("WP-FC Act"); that the jurisdiction under the G&W Act and under the WP-FC Act, cannot be amalgamated; and that the suit instituted by petitioner No.1 was not for dissolution of marriage. Learned counsel for the petitioners prayed for impugned order dated 27.11.2015 to be set aside.

5. On the other hand, learned counsel for respondent No.2, defended the impugned order dated 27.11.2015 by submitting that the writ petition instituted by the petitioners was not maintainable. He drew the attention of the Court to the second proviso to Section 7(2) of the WP-FC Act, and submitted that respondent No.2 could have, in a suit for recovery of dower etc., filed an application for visitation rights. He further submitted that Section 5, read with Item No.5 in Part-I of the Schedule to the WP-FC Act, gave the Family Court the jurisdiction to adjudicate upon an application for custody or visitation rights regarding a minor. He further submitted that as the impugned order dated 27.11.2015 was interim in nature, a writ petition against the same was not maintainable. In making his submissions, the learned counsel for respondent No.2 placed reliance on the cases of Anne Zahra Vs. Tahir Ali Khilji (2001 SCMR 2000), Munir Alam Vs. Civil Judge/Family Court Lahore (2009 CLC 442), Syed Aqdas Abbas Vs. Mst. Samina Shahbaz (2010 CLC 32), Mst. Maham Shabbir Vs. Salman Haider (2014 CLC 330), Aamir Shahzad Vs. Additional District Judge Multan (2015 CLC 632), Shamim Akhtar Vs. District Judge (2016 MLD 242) and Major Muhammad Khalid Karim Vs. Mst. Saadia Yaqub and others (PLD 2012 SC 66).

6. I have heard the arguments of the learned counsel for the contesting parties and have perused the record with their able assistance.

7. The impugned order dated 27.11.2015 was passed by the learned Judge Family Court, on respondent No.2's application under Section 12 of the G&W Act, which reads as follows:-

“12. Power to make interlocutory order for production of minor and interim protection of person and property. (1) The Court may direct that the person, if any, having the custody of the minor shall produce him or cause him to be produced at such place and time and before such person as it appoints, and may make such order for the temporary custody and protection of the person or property of the minor as it thinks proper.

(2) If the minor is a female who ought not to be compelled to appear in public, the direction under sub-section (1) for her production shall require her to be produced in accordance with the customs and manners of the country.

(3) Nothing in this section shall authorize:--

(a) the Court to place a female minor in the temporary custody of a person claiming to be her guardian on the ground of his being her husband, unless she is already in his custody with the consent of her parents, if any; or

(b) any person to whom the temporary custody and protection of the property of a minor is entrusted to dispossess otherwise than by due course of law any person in possession of any of the property.”

8. The import of Section 12 of the G& W Act has been well explained by the Hon'ble Islamabad High Court in the case of Mst. Maham Shabbir Vs. Salman Haider (2014 CLC 330), in following terms:-

“11. Section 12 of the Guardians and Wards Act empowers the Courts to direct a person to produce a person before the Court and then the Court can pass order for the temporary custody of the minor. It has to be kept in view that this Order is only regarding temporary custody, which is usually passed at the time when the evidence is not produced before the Court. This order must be passed keeping in view the welfare of the minor, but at the same time complete judgment without recording evidence must be avoided. For example, a suckling baby has to be given to his or her mother. Even without passing any final judgment regarding custody of the minor. Order under section 12 of the Guardians and Wards Act should not become the order passed under section 25 determining the rights of the parties in respect of the custody of minor. Difference between order under section 12 as well as section 25 of the Guardians and Wards Act must be kept in view.”

9. Sections 5 (1), 7 and 25 of the WP-FC Act read as follows:-

“5. Jurisdiction.—(1) Subject to 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 Part I of the Schedule.”(Emphasis added)

10. Item No.5 of Part-1 of the Schedule to the said Act reads, as follows:-

“5. Custody of children, and the visitation rights of parents to meet them”.

11. The controversy raised by the petitioners can be adequately put to rest in the light of the *dictum* of the Hon'ble Supreme Court of

Pakistan in the case of Major Muhammad Khalid Karim Vs. Mst. Saadia Yaqoob (PLD 2012 SC 66). The Hon'ble Supreme Court in the said case has interpreted Sections 5 & 7 of the WP-FC Act, 1964, and Sections 9 and 25 of the G&WA, and held as follows:-

“Under Section 5 of the Act 1964, the Family Court has the exclusive jurisdiction to entertain, hear and adjudicate (emphasis supplied) all the matters which fall within the first schedule to the Act; this admittedly includes the custody and guardianship matter.”

12. The second proviso to Section 7(2) permits claims regarding custody of children and visitation rights of parents to meet their children, to be filed along with or in a suit for dissolution of marriage. No doubt, the suit instituted by the petitioner No.1 was not for the dissolution of marriage. Nevertheless, Section 5 of the WP-FC Act, *inter- alia*, provides that the family courts shall have exclusive jurisdiction to entertain, hear and adjudicate upon matters specified in Part-1 of the Schedule to the said Act. Item No.5 of Part-1 of the Schedule to the said Act reads *“custody of children, and the visitation rights of parents to meet them”*. In view of these provisions, the learned Judge Family Court did have the jurisdiction to entertain and adjudicate upon an application for the visitation rights filed by any of the parents to meet their minor child. It matters not whether such an application is routed through the Court of learned Senior Civil Judge or filed directly in proceedings already pending before the learned Judge, Family Court. Such proceedings before the learned Judge, Family Court may well be for the recovery of dower etc. The law does not bar an application under Section 12 of the G&W Act, to be filed in proceedings other than that for the dissolution of marriage. Even otherwise, Courts must endeavor to harmonize the provisions of the same statute. As there is a specific prescription in the WP-FC Act (Section 5 read with Entry No.5 of Part-I of the Schedule of the WP-FC Act), giving the Family Court jurisdiction over *“custody of children, and the visitation rights of parents to meet them”*, the same must be given effect to in letter and spirit.

13. Now as regards the argument of the learned counsel for the petitioners that respondent No.2 should have instituted an

independent action before the District Court under the provisions of the G&W Act for custody or visitation rights regarding his minor child. Section 25 of the WP-FC Act reads as follows:-

“25. Family Court deemed to be a District Court for purposes of Guardians and Wards Act, 1890.—A Family Court shall be deemed to be a District Court for the purposes of the Guardians and Wards Act, 1890, and notwithstanding anything contained in this Act shall, in dealing with matters specified in that Act follow procedure prescribed in that Act.”

14. The argument of the learned counsel for the petitioners runs contrary to said Section 25 *Ibid*, and the law laid down by the Hon'ble Supreme Court of Pakistan in the case of Anne Zahra Vs. Tahir Ali Khilji (2001 SCMR 2000) where Section 25 of the WP-FC Act has been interpreted in the following terms:-

“By virtue of section 25 of the West Pakistan Family Courts Act, every Family Court has been designated as District Court, therefore, there is no Guardian Judge as such under the Guardians and Wards Act whereas the Family Court under the said Act competently seized of a matter relating to matters of minors shall be deemed to be a District Court.”

15. In the said case, it has also been held as follows:-

“The West Pakistan Family Courts Act, 1964 has an overriding effect in so far as the matters included in the Schedule, therefore, initially it is the Family Court which has to be approached in respect of matters relating to custody of minors being one of the listed items in the Schedule ...”

16. Consequently, I find the contention of the learned counsel for the petitioners that respondent No.2 should have filed an application under Section 12 of the G&W Act before the Court of Senior Civil Judge, Islamabad, who in turn should have marked it to the learned Civil Judge hearing the petitioners' suit for recovery of dower etc., to be hyper technical and against the avowed object to the WP-FC Act viz. The expeditious disposal of the family disputes by a special forum created by the law. In the case of Major Muhammad Khalid Karim Vs. Mst. Saadia Yaqub and others (PLD 2012 SC 66), it has been held as follows:-

“It seems that on account of delays, in the adjudication of this class of cases, which possibly was due to the complexity of procedure and the rush of work in such courts, but undoubtedly was adversely affecting the family union and comity, the legislature in order to prevent the above enforced the act, 1964. It is so clear from the preamble of the Act that this law was enforced with a vivid object to take out the matters falling within the ambit thereof from

the ordinary regime qua dispensation of justice, and for the disposal of such matters, special forum was created in which the rigors of procedural implications and requirements of the Evidence Law (Qanun-e-Shahadat Order, 1984) were either dispensed with or were simplified; with an addition of a statutory mechanism, enabling the parties for an amicable settlement of their disputes, through the courtesy of the Court was provided. ...”

17. Furthermore, in the case of Aamir Shahzad Vs. Additional District Judge Multan (2015 CLC 632), the object of the WP-FC Act has been explained by the Hon'ble Lahore High Court in the following terms:-

“7. It is a settled principle of law that purpose of enacting the special law regarding the family disputes is to advance justice and to avoid technicalities which are hindrance in providing ultimate justice to the parties. It is pertinent to mention here that West Pakistan Family Courts Act, 1964 was promulgated for the expeditious settlement and disposal of disputes relating to marriages and other family affairs and special procedure was provided to achieve this object ...”

8. The purpose of enacting Family Courts Act, 1964 is to frustrate the technicalities for the purpose of justice between the parties in the shortest possible manner. All that the Family Courts Act, 1964 has done is that it has changed the forum, altered the method of trial and empowered the Court to grant better reliefs. The provisions of Civil Procedure Code, 1908 as well as Qanun-e-Shahadat Order, 1984 are not applicable in stricto sensu to proceedings before the Family Court by virtue of section 17 of the Act, 1964. Family Court has to regulate its own proceedings in accordance with the provisions of the Act, 1964; and in doing so it has to proceed on the premises that every procedure is permissible unless a clear prohibition is found in law ...”

18. Learned counsel for the petitioners submitted that he was fully abreast of the law that interlocutory orders passed by the learned Judge Family Court could not be interfered with in the constitutional jurisdiction of this court, but clarified that the petitioners have assailed the Order dated 27.11.2015 on the ground that it was in excess of the jurisdiction of the learned Judge Family Court.

19. In the case of Mst. Maham Shabbir Vs. Salman Haider (2014 CLC 330), the Hon'ble Islamabad High Court held as follows:-

“9. ... High Court in exercise of its writ jurisdiction is not sitting as a Court of appeal, or court of revision. Its jurisdiction to interfere on the point of fact is limited. Interlocutory order if does not suffer from any illegality, malafide or is not in excess of jurisdiction or lack of exercise of jurisdiction or not based on misreading, misconstruing or discarding of the evidence and material on record cannot be challenged in constitutional jurisdiction. Nevertheless, the facts of each case are to be considered separately and no uniform principle can be determined for exercising the writ jurisdiction.”

20. As explained hereinabove, I do not find any jurisdictional infirmity in the learned Judge, Family Court, Islamabad, entertaining and deciding an application under Section 12 of the G&W Act in a suit for recovery of dower etc. Resultantly, the petition, being devoid of merits is dismissed, but in the circumstances of the case, there shall be no order as to costs.

**(MIANGUL HASSAN AURANGZEB)
JUDGE**

ANNOUNCED IN AN OPEN COURT ON _____/2016

(JUDGE)

APPROVED FOR REPORTING

(JUDGE)

Qamar Khan*

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