

Judgment Sheet

ISLAMABAD HIGH COURT
ISLAMABAD

W.P. No. 3767/2013

Mst. Maham Shabbir
Vs.
Salman Haider & another

Petitioner by: - **Ms. Jamila Jahanoor Aslam, Advocate ,**
Petitioner, in person.
Respondent No.1 by: - **Sardar Asmat Ullah Khan Advocate ,**
Respondent No. 1, in person.
Date of hearing: - **09-10-2013**

Riaz Ahmad Khan J: - This judgment is directed to dispose of W.P. No. 3767 of 2013.

2. Brief facts of the case are that the petitioner Mst. Maham Shabbir was married to respondent Salman Haider in the year 2001. Out of the wedlock, two children namely Ryna Salman and Ibrahim Salman were born in the year 2005 and 2009 respectively. Unfortunately, the relations between the spouses got strained and allegedly the petitioner, wife, was turned out of the house by her husband. At that time, the spouses were living in Karachi, so the petitioner/wife filed petition under Section 491 Cr.P.C. before learned District & Sessions Judge, Karachi (South) and vide order dated 16-10-2010, the custody of the two minors was handed over to the petitioner. Marriage between the parties was dissolved on 24-09-2011 on the basis of Khula. The petitioner then moved to Islamabad where her parents had been residing. On 31-03-2012, the petitioner/wife entered into a marriage contract with one Farooq Manan Khawaja. According to petitioner/wife her second husband is owner of an advertising agency situated in Karachi, however, he visits Islamabad once or twice in month. It has further been submitted that the petitioner/wife resides in Islamabad, however, because of the new development of second marriage of petitioner/wife, respondent father filed a petition for custody of minors before the Guardian Judge, Islamabad. Alongwith the said petition, another application, under Section 12 of the Guardian & Wards Act, for interim custody of the minors, was also filed. Arguments on the said application were addressed and thereafter vide order

dated 30-09-2013, learned Guardian Judge-West, Islamabad granted interim custody to the father/respondent. Feeling aggrieved of the same, present writ petition was filed.

3. Learned counsel for the petitioner/wife submitted that the second marriage of petitioner/wife could not be considered as a ground for allowing custody of the minors. It was further submitted that the learned trial Court erred while deciding the application regarding interim relief, as the whole case was decided. The character of petitioner wife was discussed and erroneous conclusions were made on the basis of whims and conjectures. Minors had been living with the mother since their birth and at this stage, their custody could not be given to the father. It was further submitted that the welfare of the minors was not kept in view by the learned Guardian Judge.

4. On the other hand, learned counsel for respondent submitted that the writ was not maintainable for the reason that under Section 14 of Family Court Act read with Section 12 of the Guardian & Wards Act, no writ could be filed against the interim order. It was further submitted that the impugned order had been passed after appreciating different aspects and after taking into consideration welfare of the minors. According to the learned counsel, the petitioner herself had agreed to give up her rights regarding children, she had contracted second marriage and was living in Islamabad. She had given an undertaking before the learned Guardian Court that she would not remove the children from the jurisdiction of Court at Karachi; even then, she brought children to Islamabad, as she intended to contract marriage at Islamabad. It was further submitted that the stepfather would not be able to provide required love and affection to the minor children and it would not be in the interest of justice to handover the custody of minor to the petitioner wife and the stepfather of the minors. According to the learned counsel, the petitioner as well as respondent No.1/ex-husband of the petitioner had filed criminal cases against each other and in such a situation, it cannot be expected from the second husband of the petitioner that he would pay for the education and brought up of minors.

5. I have heard learned counsel for the parties and have also perused the record.

6. The first question requiring determination is as to whether writ against an interim order is maintainable or not? Sub-section 1 of West Pakistan Family Court Act, 1964 provides as under:-

(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.

Sub-section 3 of section 14 of the said Act provides as under:-

“No appeal or revision shall lie against an interim order passed by a Family Court.”

One interpretation is that the word decision given and decree passed used in sub-section 14 are two different words. Decree passed means formal expression adjudicating a fact or law, a controversy or an issue. In other words, the decree is the final outcome of the adjudication and against that decision can be any decision given by the Judge Family Court. Following this interpretation, any interlocutory order passed under Section 12 of the Guardian & Wards Act becomes appealable under Section 14(1)(a) of the West Pakistan Family Courts Act, 1964. This view was taken in judgment reported as PLD 1989 Lah 38 and PLD 1999 Lah 33.

7. On the other hand in many other judgments, it was held that the way the word decree and decision have been used in section 14 shows that the word decision should be read as ejusdem generis (of the same kind or class) to the word decree. In other words, the decision as well as decree are both outcome of the final adjudication. Decision itself means judgment as well as act of deciding determination of point under deliberation or discussion. By adopting this definition it becomes clear that any final judgment or decision would be appealable as provided in section 14 of the West Pakistan Family Courts Act, 1964, but if the judgment or decision is not a final adjudication the same would not be appealable. This view was followed in judgments reported as 1986 CLC 620, PLD 1976 Lahore 1015, 1979 CLC 754 and 1989 ALD 506 (1).

8. In my humble view, the words decision given or decree passed are to be taken as ejusdem generis. In other words, appeal lies only against final judgment and not against any interlocutory order.

9. However, it has to be kept in view that whether the Court while arriving at a finding even on a question of fact, had omitted from consideration or misread evidence, its findings would be open to correction

by High Court in exercise of its power of judicial review. 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.

10.. Coming to the facts of the present case, learned lower Court while deciding the application regarding interim custody has discussed the dissolution of marriage on the basis of Khulah and has held that the petitioner husband was an innocent party. It has further been held that the petitioner wife is on the family way, which fact has strongly been denied by the petitioner wife. Then it has been held that the husband of the petitioner wife is working in showbiz. This fact again has been denied by the petitioner wife. Even otherwise, if a person is working in showbiz, it does not mean that he must be a bad person. Because of the above stated reason, the custody of the minors was given to the father.

11. Section 12 of the Guardian 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 Guardian & 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 Guardian & Wards Act must be kept in view.

12. The minors in the present case, are with the mother since their birth. The mother had been separated from her first husband in 2010 and the marriage was dissolved in the year 2011. In other words, since 2010 the minors have been living with the mother. On the other hand, the mother has

contracted second marriage and now it is to be determined as to what would be the effect of second marriage on the welfare of the minors. The question as to whether the mother would be in a position to maintain the children and would be in a position to provide love and affection to the minors, are questions which would require evidence. Only in final adjudication after recording of evidence, these questions can be decided. Presently only issue is as to who is entitled to the temporary custody of the minors till decision of the main case.

13. Since the learned Trial Court has stepped into the merits of the case and that too without recording of evidence, therefore, the judgment is in excess of jurisdiction. I therefore, set aside the impugned judgment. The case is remanded back to the learned trial Court for deciding the application afresh in accordance with law. It is also to be kept in view that U/S 12 of the Guardian and Wards Act, 1890 as amended vide Amendment Act, 2008, the application U/S 12 of the Guardian and Wards Act is required to be decided on the first date. Since, the main case is also at the stage of recording of evidence, so it would be in the interest of justice to decide the main case at the earliest but not later than three months. Accordingly, instant writ petition stands disposed of.

Approved for reporting

(Riaz Ahmad Khan)
Judge

JUDGE.

Wajid