

ORDER SHEET
IN THE LAHORE HIGH COURT,
LAHORE
JUDICIAL DEPARTMENT

I.C.A. No. 69878 of 2022

Mst. Shabeena Younas. Versus Addl. District Judge, Lahore, etc.

<i>Sr. No. of order/ Proceedings</i>	<i>Date of order/ Proceeding</i>	<i>Order with signature of Judge, and that of Parties' counsel, where necessary</i>
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07.11.2022 Mr. Iftikhar Shahid, Advocate for appellant.

Through this Intra Court Appeal filed under Section 3 of the Law Reforms Ordinance, 1972, the appellant has called in question order dated 12.09.2022 passed by learned Single Judge of this Court, whereby W.P.No. 26904 of 2022 filed by the appellant has been dismissed.

2. Learned counsel for the appellant at the very outset has been confronted with the maintainability of the instant Intra Court Appeal on the ground of proviso to section 3(2) of the Law Reforms Ordinance, 1972. Learned counsel for the appellant has referred to Section 47 of the Guardian and Wards Act, 1890, wherein order on application under Section 12 of the said Act has not been made appealable, to contend that as the said Section 47 did not provide for appeal against the original order passed under said section, therefore, Intra Court Appeal is maintainable in view of judgment reported as **PLD 2003 Supreme Court 325** (*BASAI versus QAIM ALI and 8 others*), wherein according to him it has been held that Intra Court Appeal is competent where statutory remedy of appeal and revision was not available at the time of passing of the original order in the proceedings. Further has relied upon judgment reported as **2019 [M] S.L.R 306 [Lahore]** (Syed Muhammad Taqi Raza Naqvi Versus Judge Family

Court, etc) to state that this Court has held that appeal is not maintainable against an interlocutory order and application under Section 12 of the Guardian and Wards Act, 1890, being an interlocutory application, no appeal against order passed on the same was maintainable. Also relies on judgment reported as **2017 MLD 485** (*MALIHA HUSSAIN versus ADDITIONAL DISTRICT JUDGE-V and another*), wherein the learned Sindh High Court has observed that order passed on application under Section 12 is an interlocutory order, therefore, no appeal is maintainable against the same.

3. We have given due consideration to the arguments advanced by the learned counsel for the appellant and have also gone through the record with his able assistance.

4. There is no cavil to the principle laid down in BASAI's case (*supra*) that where the original order does not provide for any appeal, review or revision, then the order passed in constitutional jurisdiction is challengeable by filing an Intra Court Appeal before this Court, however, reliance of the learned counsel for the appellant on the Syed Muhammad Taqi Raza Naqvi's case (*supra*) relating to non-availability of appeal against an interlocutory order is distinguishable from the instant case as the order passed in the said case relates to fixation of interim maintenance allowance under Section 17-A of the Family Courts Act, 1964, where against appeal is not provided under the law and said case is not a case relating to decision of application under section 12 of Guardians and Wards Act, 1890, hence is distinguishable on facts as in the present case the appellant had challenged the order dated 25.04.2022 passed by learned appellate court, whereby the said court has reversed the order of the learned Guardian Judge dated 22.03.2022

passed on application under section 12 of the Guardians and Wards Act, 1890 whereby custody of minor had been retrieved by the Guardian Judge from the father to hand the same over to the mother and the Appellate Court by allowing appeal reverted the custody of the minors to their father, which was challenged before the single bench of this Court, which petition has been dismissed.

5. The reliance of the learned counsel on Maliha Hassain's case (*supra*) is also misplaced as in the said case Guardian Court had dismissed the application for interim custody of minor against which appeal had been entertained to allow said application and in such circumstances, the High Court by referring to Section 14(3) of the Family Court Act, 1964 held that order dismissing an application under section 12 of Guardians and Wards Act, 1890 was an interlocutory order and, hence, not appealable. In the said case, dismissal of an application for interim custody was treated as an interlocutory order with finality not attached to the same, hence, the provisions of Section 14(1) of the said Act providing for an appeal against "a decision given" having finality attached to the same had not been taken into consideration. In the present case appeal was availed against the original order whereby custody had been handed over to mother by retrieving the same from father and finality was attached to it, which order was reversed and the constitutional petition filed there against was dismissed, therefore, the afore-referred case is distinguishable from the present case on the basis of facts and said principle would not be applicable to the instant case.

6. The question of original order passed on Application under section 12 of the Guardians and Wards Act, 1890 being appealable or not came up for

consideration in judgments reported as **1987 MLD 2563** Mst. Lali versus Muhammad Raheem Bakhsh and another, **2006 YLR 2604** (*Ms Quratulain Aleem v. Muhammad Rehan Khan*), **2012 YLR 2266** (*SHAZIA AKBAR V/S MAQSOOD AHMED & ANOTHER*) and **1987 CLC 1630** (*Mst. HAFEEZA BAROHI Versus GUARDIAN JUDGE/FAMILY JUDGE and another*), which judgments on the basis of section 14(1) of the Family Courts Act, 1964 have declared the order passed on application under section 12 of the Guardians and Wards Act, 1890 whereby custody of minor is changed as appealable. For reference the relevant portion of Hafeeza Barohi's case (*supra*) is reproduced below:-

“4. The learned counsel submits that as the impugned order is not appealable, therefore, no appeal could be filed. Further contends that section 12 of the Guardians and Wards Act is not appealable by virtue of section 47 of the same Act. As the matter essentially falls within the purview of West Pakistan Family Courts Act 1964, therefore, by virtue of section 14 of the said Act, it does become appealable. The opening words of section 14 of the Family Courts Act 1964 read “Notwithstanding anything provided in any other law for the time being in force”. The effect of these words is to exclude any provision of the Guardians and Wards Act which may be in conflict with section 14. Reliance is placed on *Mst. Zaibun Nisa v. Muhammad Mozammil* PLD 1972 Kar. 410. The same question also came before the Supreme Court wherein their Lordships have in *Sakhawat Ali and another v. Mst. Shui Khelay* PLD 1981 SC 454 held that section 14 does provide appeal which would lie to the District Judge. Therefore, this petition is not maintainable as alternate remedy is available.

Even otherwise also the present petition has been filed challenging an interlocutory order. The main case under section 25 of the Guardians and Wards Act with regard to the custody of the minor is still pending, therefore, this Court would not interfere in writ jurisdiction. As has been held in *Mst. Kaniz Fatima and 3 others v. Member (Revenue), Board of Revenue, Punjab, Lahore and*

5 others PLD 1973 Lahore 495 writ petition would not lie to impugn or impeach order of interim nature.

For the reasons discussed above, I find no force in this petition which is dismissed in limine.”

7. In the present case, the learned Guardian Court had retrieved the minor from the father and handed over its custody to the mother vide order dated 22.03.2022, hence, to that extent finality was attached to order that had been passed on application under Section 12 of the Guardians and Wards Act, 1890 and was challengeable before the Appellate Court as “a decision given” in terms of Section 14(1) of the Family Courts Act, 1964 which appeal was entertained and Appellate Court had reversed the said order through order dated 25.04.2022 which was challenged through constitutional petition. In view of availability of appeal under Section 14(1) of the Family Courts Act, 1964 the question that appeal was not provided in Section 47 of the Guardians and Wards Act 1890 against an order passed on application under Section 12 of said Act has lost its efficacy in the present case.

8. In view what has been discussed above, it is held that original order passed by the learned Guardian Judge dated 22.03.2022 was an appealable order against which appeal had been availed, hence, Intra Court Appeal against dismissal of constitutional petition filed against the order of Appellate Court is not maintainable in proviso of Section 3(2) of Law Reforms Ordinance 1972. Reliance in this behalf is placed on **PLD 1984 SC 344** (*Mst. Karim Bibi and others vs. Hussain Baksh and another*), **PLD 1985 Supreme Court 107** (*Muhammad Abdullah vs. Deputy Settlement Commissioner Centre-I, Lahore*), **1999 SCMR 1357** (*Deputy Commissioner/Administrator, District Council, Attock*

*and another Vs. Lawrencepur Woolen Textile Mills Limited), **PLD 2005 SC 45** (M. Aslam Sukhera vs. Collector Land Acquisition), wherein it is provided that where the law provides remedy of appeal, review or revision against the original order, Intra Court Appeal would not be maintainable.*

9. For what has been discussed above, this Intra Court Appeal being devoid of merit is **dismissed** as not maintainable.

(CH. MUHAMMAD IQBAL) (MUZAMIL AKHTAR SHABIR)
JUDGE JUDGE

Zeeshan Khan

Approved for reporting.