

JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Writ Petition No.67546 of 2017
Tassadaq Nawaz Versus Masood Iqbal Usmani, etc.

JUDGMENT

Date of hearing: 29.05.2018

Petitioner(s) by: M/s Muhammad Azam Zafar Khan,
Muhammad Rizwan Rasheed and Sheikh
Muhammad Yar Zahoor, Advocates

Respondent(s) by: Ch. Imtiaz Ullah Khan, Advocate for the
respondent No.2

SHAHID BILAL HASSAN-J: Succinctly, the petitioner got married with respondent No.2 on 06.05.2011, out of the said wedlock a male child namely Muhammad Danial was born on 11.02.2012. Due to strained relations between the petitioner and respondent No.2 divorce occurred with mutual understanding on 23.04.2012 vide an agreement. The respondent No.2 contracted second marriage with Muhammad Ikhalq on 21.06.2013. Allegedly, the respondent No.1 filed an application for his appointment as guardian of the minor namely Danial on 21.09.2015, in which he categorically stated that the minor has been residing with him since his birth and this fact has been admitted by respondent No.2 by appearing in the witness box on 09.10.2015 in that application. The petitioner submitted his detailed reply to the said guardian petition. Apart from this, the petitioner filed a guardian petition on 14.11.2015 for the custody of his son Danial under section 25 of the Guardian & Wards Act, 1890 alongwith petition under section 12 of the Act. The

respondents No.1 & 2 submitted their written replies to the said petitions. The respondent No.2 filed a suit for recovery of maintenance, dower amount and dowry articles against the petitioner on 11.05.2016. The petitioner submitted his written statement to the said suit. After failure of pre-trial reconciliation proceedings, the learned trial Court consolidated that suit and guardian petition filed by the petitioner and framed consolidated issues on 29.05.2017. The learned trial Court dismissed the application under section 12 of the Act vide impugned order dated 12.06.2017, however, allowed the petitioner to meet his son only twice in a month on second and forth Saturday of every month in the Court premises subject to payment of travelling charges Rs.300/-. Being dissatisfied the petitioner has filed the instant constitutional petition.

2. Learned counsel appearing on behalf of the respondent No.2 has challenged the maintainability of the constitutional petition in hand and has argued that against order passed on an application under section 12 of the Guardian & Wards Act, 1890, appeal lies under section 14(1)(b) of the West Pakistan Family Courts, Act, 1964 before the District Judge when the order is passed by the Judge Family Court, because expression 'a decision given' in section 14 of the Family Courts Act, 1964 does not, in any manner, qualify by any such word as 'final'. Thus, he has prayed for dismissal of the constitutional petition in hand. Reliance has been placed on Syed Shamim Ahmad v. Mst. Riaz Fatima **PLD 1975 Karachi 448**, Mst. Akbar Jan v. Mst. Bibi Nasim and 4 others **2000 YLR 2652-Peshawar**, Abdul Majeed v. Additional District Judge, Talagang and 2 others **2009 CLC 1143-Lahore**, Memoona Ilyas v. Additional District Judge and others **2017 CLC 1747-Lahore** and Mst. Eram Raza and 2 others v. Syed Mutaqi Muhammad Ali and another **2018 MLD 727-Sindh**.

3. In response to the attack on maintainability of the constitutional petition, the learned counsel for the petitioner has argued that the word ‘decision’ used in section 14 of the Act is to be read in the garb of ‘decree’ and interlocutory order passed by the Family Judge is not appealable and only writ lies against the same, therefore, the instant constitutional petition is competent and maintainable. Relies on Syed Muhammad Raza Shah v. Syeda Salma Gilani and another **PLD 1976 Lahore 1015**, S. Azhar-Ul-Hassan Naqvi v. Mst. Hamida Bibi and 2 others **1979 CLC 754-Lahore**, Syed Maqsood Ali v. mst. Soofia Noushaba and 2 others **1986 CLC 620-Karachi**, Mst. Mahan Shabbir v. Salman Haider and others **2014 CLC 330-Islamabad** and Maliha Hussain v. Additional District Judge-V and another **2017 MLD 485-Sindh**. Thus, he has, while reiterating the grounds urged in the memorandum of the constitutional petition, prayed for acceptance of the same, setting of the impugned order and handing over interim custody of the minor son Danial to him.

4. Heard.

5. With regard to a non-appealable order, a full Bench of the Apex Court of the country in a case reported as Syed Saghir Ahmed Naqvi v. Province of Sindh through Chief Secretary and another **(1996 SCMR 1165)** has held:-

The contention of the learned counsel for the appellant that where appeal lies only against the final order a Constitution petition challenging the interim orders can yet be maintained is erroneous. In the Lahore case PLD 1990 Lah. 352 relied upon by the learned counsel for the appellant itself where a final order was passed pending proceedings in the Constitutional jurisdiction it was held that jurisdiction stood barred final order having come in the field.

It was further held:-

The statute excluding a right of appeal from the interim order cannot be passed by bringing under attack such interim orders in Constitutional jurisdiction. The party affected has to wait till it matures into a final order and then to attack it in the proper exclusive forum created for the purpose of examining such orders.

Similar view was adopted in a case reported as Mumtaz Hussain alias Butta v. Chief Administrator of Auqaf, Punjab, Lahore and another (1976 SCMR 450) by the Hon'ble Supreme Court of Pakistan, wherein it was invariably held:-

As the said Ordinance has taken away the right of petitioner to interim relief, learned counsel submitted that this was a ground which entitled the petitioner to prosecute a writ petition despite the pendency of the proceedings on the District Court. The argument is misconceived because the writ jurisdiction of the superior Courts cannot be invoked in aid of injustice and in order to defeat the express provisions of the statutory law.

6. The interim order passed in the instant case is under section 12 of the Guardian & Wards Act, 1890 and now it is to be seen whether the same is appealable or not. The learned Guardian Judge partially allowed the application and the petitioner has been allowed to meet his son namely Danial only twice in a month on second and forth Saturday of every month in the Court premises. The learned counsel for the petitioner has stressed upon filing of the constitution petition on the ground that the impugned order is not appealable as the matters pertaining to the guardianship issues shall be governed by the Family Courts Act, 1964 and under section 14(3) there is a restraint upon filing an appeal against an

interim order. No doubt , order passed under section 12 of the Guardian & Wards Act, 1890 is not mentioned under appealable orders as provided within section 47 of the Act, 1890 but after insertion of the word “Guardianship” in the First Schedule of Family Courts Act, 1964, the provision of appeal is available against an order under section 12 of the Act, 1890 before the District Judge or Additional District Judge as per the provision of Section 14 of the Family Courts Act, 1964. In actual, the provisions of Guardian & Wards Act cannot be read in isolation after bringing the matter pertaining to ‘guardianship’ under the jurisdiction of the Family Courts by the Legislature. All the matters, now, pertaining to guardianship shall be exclusively triable by the Family Courts created under the Family Courts Act, 1964, which is a later enactment comparing to Guardian & Wards Act, 1890, because it is the settled principle of interpretation that the statute later in time shall prevail to the earlier; reliance is placed on Aley Nabi and others v. Chairman, Sindh Labour Court and another (1993 SCMR 328), Messrs Mehraj Flour Mills and others v. Provincial Government and others (2001 SCMR 1806) and Suo Motu Case No.13 of 2007 (PLD 2008 SC 217).

7. So far as the argument that section 14(3) of the Family Court Act, 1964 bars appeal before the District Court in the matter in hand is concerned, plain reading of the language of section 14 of the Act, 1964 makes it vivid that notwithstanding anything provided in any other law for the time being enforce a decision given or a decree shall be appealable. The only exclusion is with regard to an interim order. While dealing with the similar situation earlier it was pronounced that such like order falls within the purview of ‘decision given’ and is appealable under section 14 of the West Pakistan Family Courts Act, 1964. In this regard reliance is placed on Mst. Zaibun Nisa v. Muhammad Mozammil PLD 1972 Karachi 410, Syed Shamim Ahmad v. Mst. Riaz

Fatima **PLD 1975 Karachi 448**, Mst. Akbar Jan v. Mst. Bibi Nasim and 4 others **2000 YLR 2652-Peshawar**, Memoona Ilyas v. Additional District Judge and others **2017 CLC 1747-Lahore** and Mst. Eram Raza and 2 others v. Syed Mutaqi Muhammad Ali and another **2018 MLD 727-Sindh**.

8. For the foregoing reasons, it is much clear on the subject that the impugned order passed by the learned Judge Family Court is appealable before the District Court; therefore, the same cannot be called into question in a constitutional petition. Be that as it may, I hold my hand back from entering into any discussion on merits of the case, may it prejudice case of either side, because after disposal of an application under section 12 of the Act, 1890 any of the parties of a guardianship proceedings may resort to move another application and such practice is not contrary to law as well as principle of res judicata, because orders with regard to interim custody of the minors are tentative and with the material changes in the situations, the Guardian Court can always be moved for modification of the orders so as to uphold welfare of the minors.

9. The case law relied upon by the learned counsel for the petitioner, with utmost respect to the same, has no relevance to the peculiar facts and circumstances of the case in hand; thus, it does not render any assistance or help to the petitioner's case.

10. In view of the above discussion and while placing reliance on the judgments *supra*, the constitutional petition in hand stands dismissed.

11. Before parting with this judgment, it is, however, observed that the petitioner may prefer appeal against the impugned order before the learned appellate Court, if so advised and desired, which shall be decided on merits in accordance with law or may repeat application under section 12 of the Act, 1890 because such practice is not contrary to law as well as principle of

res judicata as interim orders relating to the custody of the minors are tentative and with the material change in the circumstances, the Guardian Court can always be moved for modification of orders to promote the minors welfare. No order as to the costs.

SHAHID BILAL HASSAN
Judge

M.A.Hassan

Announced in open Court on 12.06.2018.

Judge

Approved for reporting.

Judge