

ORDER SHEET
**IN THE HIGH COURT OF SINDH,
CIRCUIT COURT HYDERABAD**

CP No. S- 808 & 811 of 2017

DATED	ORDER WITH SIGNATURE OF JUDGE
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1. For orders on M.A No.7829/2018
2. For orders on M.A No.4021/2018

Petitioner: through Mr. Muhammad Arshad S. Pathan,
Advocate.

Respondent No.1: through Syed Babar Ali Kazmi, Advocate for
respondent No.1.

Respondents No.2&3: through Mr. Habib-ur-Rehman Jamali, Assistant
Advocate General.

Date of Hearing: 18.01.2019.

Date of order: .1 .2019.

ORDER

ADNAN-UL-KARIM MEMON, J.- The Applicant has filed Application (M.A No.7829/2018) under Section 114 read with 151 CPC, 1908 before this Court on 21.12.2017 with a prayer that this Court may be pleased to review and / or recall the order dated 16.11.2017 passed by this Court in the aforesaid petitions and further be pleased to hear the same on merits. I have gone through contents of the aforesaid order, the operative part of which is reproduced as under:-

“ Learned Counsels agree that a direction be issued to the learned Trial Court i.e. Guardian court being VIth Civil Judge, Hyderabad, to comply with the order passed on 19.06.2017 in letter and spirit. Ordered accordingly. Matters stand disposed of.”

2. Mr. Muhammad Arshad S. Pathan, learned counsel for the Applicant in C.P No.S-808 of 2017, while assailing the aforesaid order passed by this

Court, has taken plea that this Court while passing the order dated 16.11.2017 did not consider the fact that the petitioner had engaged Mr.Hameedullah Dahri, Advocate in the present matter, but his junior Mr. Kashif Ali Lakho Advocate filed Vakalatnama and the matter was not proceeded on merits, but disposed of in terms of order dated 19.06.2017. Learned counsel for the Applicant has relied on Order 47 Rule 1 of the Code of Civil Procedure which provides for review of judgment. Learned Counsel for the Applicant further submitted that if this Court did not review the earlier orders dated 16.11.2017 and 19.6.2017 passed by this Court, which were merged by the Court, and his application for guardianship for custody of his 06 years old daughter, namely Vania Fatima, was dismissed and custody of his daughter was given to the Respondent/ mother Mrs. Bushra, which order is not just and fair and caused great injustice to the Applicant, which would continue if the said orders are not reviewed and recalled; that the Respondent/mother has contracted second marriage with a person who was already married and had a son aged about 8 to 10 years and future i.e. life, liberty and status of his daughter in a house where two persons i.e. husband of the Respondent/mother and his 08-10 years old son, strangers to his daughter, is at stake and bleak and it is not possible for him as a father to sustain such a torturing shock; that the learned court below has failed to appreciate the aforesaid factum of the case; that the interim order, which cannot be replaced being final order, but the same has been done through the order dated 16.11.2017, hence, it requires to be reviewed; that the learned trial Court's order shows the Petitioner as a Lecturer and an amount of Rs. 8000/- per month was ordered to be paid through the learned trial Court towards the maintenance of his daughter Vania Fatima, while ignoring the fact, on the Court file, that the Applicant is serving as a clerk in Education Department, Government of Sindh and his one sister and a widow sister and her children are also living with him/the Applicant

and they are being maintained by the Applicant and in such circumstances deduction of Rs.8,000/- is unjustified on this account also; that the Respondent mother/Bushra has produced false documents of Nobel High School that Baby Vania Fatima is studying there, whereas, the Applicant has obtained the documents from the said School that Baby Vania Fatima was never admitted there, as such, life of his minor daughter is in danger, as such the order dated 16.11.2017 may be reviewed and recalled and the matter may be heard and decided on merits as facts and legal position of the case have not been considered by the Court while passing the order dated 16.11.2017 passed by this Court, assailed through the instant Review Application. Learned counsel for the Applicant in support of his contention, relied upon the case of Mst Nazir vs. Hafiz Ghulam Mustafa (1981 SCMR 200) and argued that the custody of minor cannot be given to the Respondent- mother as she has contracted a second marriage and his minor daughter would not be looked after, which is a well-known fact. He next relied upon the case of Mst Rukaya Bibi vs. Noor Akbar (NLR 1984 273) and argued that the Respondent-mother has lost the right of Hizannat after termination of her marriage with minor's father/the Applicant and second marriage contracted by her. He further relied upon the case of Muhammad Aslam vs. Nazish Qazi and others (2018 YLR 1771) and argued the same plea as discussed supra. He lastly relied upon the case of Shabana Naz vs. Muhammad Saleem (2014 SCMR 343) and argued that the Honorable Supreme Court has already settled the aforesaid principle, therefore, the orders passed by this Court merits to be reviewed and recalled and the matter may be decided on facts and in the light of the decisions rendered by the superior courts; that the order passed by this Court, assailed through the instant Review-petition is contrary to the decisions of Honorable Supreme Court. In reply to another question about maintainability of Application against consent order, he relied upon the

affidavits filed by Mr. Kashif Ali Lakho, Advocate, who appeared before this Court on the very that date and argued accordingly.

3. On the other hand, the learned Counsel for the Respondent No.1 has argued that the Petitioner has filed this application with malafide intention and ulterior motives only in order to pressurize and blackmail her; that the Advocate Kashif Ali Lakho had argued the matter and if he was junior he would have held brief, but he did not do so; that the points raised in Para No.2 of the application had never been raised in Guardian Application such as (NAA-Mehram) so these points cannot be brought in scope of application under section 114 CPC; that the Petitioner is a lecturer, and the counsel for the Petitioner himself disclosed that petitioner is a lecturer and earning more than 50,000/- through other sources; that ward Vania Fatima is brilliant and star student of the Nobel High School and getting education regularly.

4. Mr. Habib-ur-Rehman Jamali, learned Assistant Advocate General adopted the arguments of the counsel for the Applicant.

5. At this stage, learned counsel for the parties in their abortive attempts have tried to re-argue the matter on merits, which this court cannot allow, as the Court is concerned with the grounds for review only as to whether the order dated 16.11.2017 passed by this Court merits to be reviewed and recalled?

6. I have heard the learned counsel for the parties on the listed application at S. No.1 and have perused the material available on record and the grounds presented by the parties.

7. For appreciating contention regarding power of review, first of all I set out Order 47 Rule 1 of the Code of Civil Procedure, 1908, which provides for review of judgment, reads as under:

1. Any person considering himself aggrieved -

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,
- (b) by a decree or order from which no appeal is allowed, or [c] by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

8. From perusal of provision of the Order 47, Rule 1, CPC, reproduced above, it is quite clear that the powers of review can be exercised only when before passing the order some important facts were neither produced by the parties before the Court nor after due diligence the same could surface during the proceedings preceding passing the order passed or an omission or error is apparently floating on face of the record.

9. I am cognizant of the fact that the Court of review has a limited jurisdiction circumscribed by the definite limits fixed by the language used in the relevant legal provisions. In the instant case an error on the part of the Court while dictating the order the words i.e. "Matters stand disposed of" have been used in last. The words 'sufficient reason' used in the Order 47, Rule 1 of the Code is wide enough to include a misconception of fact or law by a Court or even an Advocate. An application for review may be necessitated by way of invoking the doctrine "actus curiae neminem gravabit."

10. From the forgoing, I am of the view that the order can be reviewed, if there is a mistake or error apparent on the face of the record, as provided under Order XLVII (Section 114 CPC).

11. In view of the aforesaid principles, this Court desires to review the order dated 16.11.2017 passed by this Court, on the ground that there is an

error apparent on the face of the record and there is an obvious error as the parties consented to the extent that direction may be issued to the learned Trial Court i.e. Guardian Court i.e. Vith Civil Judge, Hyderabad, to comply in letter and spirit with the following order passed on 19.06.2017 by this court. However, the word “Matters stand disposed of” was obviously mistakenly used in the order sheet as discussed supra for the simple reason that the captioned petitions have not been decided on merits. The grounds taken by the Applicant in the listed application in C.P No.S-808 of 2017 are tenable in the eyes of law. For sake convenience of reference, an excerpt of the order dated 19.06.2017 passed by this court is reproduces as under:-

“Instant petitions challenges the judgment dated 20.08.2016 passed by the Family Judge / Guardian & Wards Court No.6, Hyderabad which relates to the issue of custody of minor. After full dress trial, four days custody was allowed to the petitioner in a month however for the remaining days custody was handed over to the father and the both the parties were directed to submit the surety. Though the counsel for the petitioner in C.P.No.S-808/2017 seeks time but is surfaced that the petitioner is working as Lecturer in College but he is not maintaining the minor, however he seeks custody and disqualification of mother to keep custody of minor baby Wania Fatima aged about five years.

Under circumstances judicial propriety demands that the petitioner who is a Lecturer shall pay Rs.8,000/- (Rupees eight thousand) per month for the maintenance of minor, to be deposited before the Guardian & Wards Court before the 5th of every month and Mst. Bushra (mother) would be entitled to receive the same. Order dated 18.05.2017 is modified in terms that the respondent in C.P.No.S-808/2017 would allow the minor for meeting with the father fortnightly during the court hours before the same court. Trial court shall ensure that the custody will remain for certain period with the father and thereafter it is handed over to the mother. In case of non-payment the trial court would be competent to take any coercive action. Needless to mention here that with regard to the previous or final determination of maintenance parties would be liberty to address this Court and this order is an interim arrangement. At this juncture, counsel for the petitioner In C.P No.S-808/2017 contends that the petitioner may be allowed to see his daughter on holy days. Accordingly, trial court would be competent to pass such direction as and when the petitioner approaches the Guardian & Wards Court as deems fit, keeping in view the attachment of minor and convenience of parties, and such meeting can be ordered for 2nd or 3rd day of Eid. Further it is clarified that in case of non-payment of maintenance father would not be allowed to meet the minor/his daughter. Adjourned.”

12. For the aforesaid reasons, I am persuaded by the contention of the learned counsel for the Applicant in the C.P No.S-808 of 2017 that the case of review is made out.

13. In the light of above facts and circumstances of the case and for the reasons alluded above, this Review Application (M.A No.7829/2018), therefore, is allowed to the extent that the aforesaid matter between the parties will remain pending till its final conclusion on merits. However, the direction issued to the learned trial court in the said order will remain intact.

14. The matter is posted for hearing and its disposal on merits in accordance with law.

J U D G E

karar_hussain /PS*