

IN THE HIGH COURT OF SINDH AT KARACHI

C.P No. S-2108 of 2017

Present

Mrs. Justice Kausar Sultana Hussain

Mst. Abeera Khan D/O M. Tanseer Khan.....Petitioner

Versus

Adnan Jamil S/O Jamil Ahmed & another.....Respondents

Date of Hearing 12.04.2018

Date or Order 13.07.2018

Mr. Afnan Saiduzaman Siddiqui, advocate for petitioner
Mr. Ghulam Asghar Pathan, advocate for respondent No. 1.
Ms. Yasmeen Sultana, State Counsel.

J U D G M E N T

Kausar Sultana Hussain, J. :- Through this Constitution Petition the petitioner Mst. Abeera Khan has challenged the order dated 01.08.2017 of learned 2nd Family Judge, Karachi-Central, passed in G&W Case No. 811 of 2017, (Re-Adnan Jamil V/s Mst. Abeera Adnan), whereby interim custody of minor babies (1) Fatima Adnan and (2) Khadija Adnan was ordered to be handed over to the respondent/father while disposing of an application under Section 12 of Guardian & Ward Act, 1890.

2. Relevant facts necessary for disposal of instant petition are that the respondent filed a petition under Section 25 of the Guardian & Ward Act, 1890 for custody of the minors Fatima Adnan and Khadija Adnan, aged about 7 & 5 years, respectively. Alongwith the said petition an application under Section 12 of the Act was also filed praying for interim custody of the minors. The Family Judge after hearing both the sides disposed of the application under Section 12 of the Act and directed the

petitioner/mother to hand over the interim custody of the minors to the respondent/father till final disposal of main Guardian & Ward Application. The petitioner aggrieved of said order, firstly preferred an appeal under Section 14 of the Family Court Act, 1964 bearing No. 88 of 2017, but the same was dismissed by the learned Additional District Judge-VI, Karachi Central, vide judgment dated 12.9.2017 observing that an appeal against the said order is not maintainable, thereafter, preferred petition in hand.

3. In support of instant petition, the learned counsel for the petitioner while highlighting the contents of written reply filed in G&W Case No. 811 of 2017, has argued that learned Family Judge failed to understand the very objective and interpretation of provision of section 12 of the Guardian & Ward Act, 1890 and travelled in contravention of law. He has pointed out that both the minors are female and come within Hizanat period. He has further argued that learned Family Judge ignored the fact that the petitioner is mother and having constitutional right to keep the custody of the minors. He has further argued that learned Family Judge did not consider the fact that all necessities of life have been providing by petitioner/mother to the minors and no substantive material brought by the respondent/father to show that the life of the minors is in danger or their health is not proper or they have been deprived of any necessity of life at the hands of the petitioner. He has further argued that the learned Family Judge while passing the impugned order completely ignored the requirement and objective of provisions of law and passed an erroneous order by handing over interim custody to the respondent/father till disposal of the case, even no visitation right

has been given to the petitioner/mother, hence same is liable to be set aside. In support of his arguments he has relied on **PLD 2001 Supreme Court-1, 2017 YLR Note 279 (Sindh), 2015 YLR 1765 (Lahore), 2014 YLR 152 (Sindh), 2008 CLC 654 (Karachi), 2017 CLC Note 59 (Peshawar).**

4. In rebuttal, the learned counsel for the respondent has strongly refuted the above contentions and argued that the petitioner lives lonely at different places as she has no own residence in Karachi and there is also no any relative available here in Karachi. He has further contended that the petitioner has no source of income to maintain the children and it is the respondent/father, who is sound in wealth and has been paying the maintenance and looking after the welfare and education of the minors. Learned counsel has referred an application moved by the petitioner to the School of minors for the purpose of withdrawing the minors from their school and contended that this sole fact shows ill will of the petitioner as such welfare of the minors not lies with her. While supporting the findings of the learned Family Judge, the learned counsel has argued that there are no lawful ground exists for interference in the impugned order, hence instant petition is liable to be dismissed.

5. Considered the submissions and perused the impugned order so also available record in the prospective of relevant provisions of law. It is noted that petitioner through petition in hand has questioned the order passed by the learned Family Judge on application under Section 12 of the Guardian & Ward Act, 1890, operating part whereof is reproduced here as under :-

"In view of above facts and circumstances, it has been disclosed that, respondent is living alone at Karachi in the

rented premises and no male member has been disclosed by respondent side that he is living with them, neither she is shown any source of income that, she is able to maintain the minors properly, as per order or judgments of the apex courts that, while deciding the custody of minors the paramount consideration would be welfare of the minors. It is therefore, admitted position that, both the minors were being provided standard education by applicant side in the top of school of Karachi and bearing heavy fees. Though the minors are in tender age and respondent is real mother but she has not any relative and male family members in Karachi to look after the minors, and as per statement of the applicant's counsel that, the respondent moved an application for withdrawing the minors from the school and same application was not denied by the respondent's counsel and perusal of the application shows that respondent is trying to remove the minors from Karachi to Multan. And the respondent is not in position to provide standard education and maintain well to the minors.

In the light of above discussion, respondent is hereby directed to hand over the interim custody of the minors till final disposal of above G & W application."

6. Before discussing the merits of the caption order, it would not be out of place to observe that an appeal under section 14 of the Family Court Act, 1964, bearing No. 88 of 2017 was preferred by the petitioner before filing instant Constitution Petition, which was dismissed by the learned Additional District Judge-VI, Karachi (Central) on account of maintainability holding that an appeal is not maintainable against the impugned order. It is also noted that the petitioner has not challenged the order passed by the learned appellate court in this Constitution Petition. However, per settled principles the Courts in the cases pertaining to the custody of a child are not supposed to go into the technicalities of the law and they should decide the case keeping in view mainly the welfare of

the child. Reliance in this regard is placed to the case of Mst. Khalida Parveen Versus Muhammad Sultan Mehmood and another (PLD 2004 Supreme Court-1).

7. Reverting to the merits of the impugned order, it is found that same at the face of it appears to be un-justified and perverse owing to the fact that both the female are minors aged about 7 & 5 years and as such come within a right of Hizanat bestowed to the mother under the law. The most irritating and astonishing fact, which is surfaced in the impugned order that learned Family Judge has completely ignored the relation of the petitioner being mother with the minors even did not bother to pass an order of meeting/visitation and proceeded to dispose of the application under section 12 of the Guardian & Ward Act, 1890 in an arbitrary manner by directing her to hand over the custody of female minors to the respondent/father. In guardianship matters courts exercise quasi parental jurisdiction, the supreme consideration, in this context is the welfare of the minor, to achieve this purpose courts have unfettered powers, thus, application under Section 12 of the Guardian & Ward Act, 1890 is required to be decided on this principle. It may be observed that, it is an inherent right of the real parents to meet and visit their children. The learned Family Judge has based the impugned decision of parting interim custody of female minors from petitioner/mother to respondent/father on the grounds that she has no any male member in Karachi, does not own any house, and she moved application to the School management for withdrawing the minors from there. Record reflects that the petitioner/mother in her written statement in para-12 and 13 categorically given the detail of sources of income/funds owned by her; besides in para-6 already explained

the reasons for moving application to the minors School for getting them admitted in another School nearer to her residence. It also appears that both the petitioner as well as respondent are claiming to have been paying monthly fee of the School of the minors. To adjudge the above facts, evidence of the parties is must, which is yet to be commenced. It may be observed here that mere non-availability of funds or paucity of the mother to maintain her children could not be treated as a disqualification of mother to refuse her the custody of her children, more particularly falling within Hizanat period. Reliance is placed to case of **Yaqoob Ahmed Versus Mst. Shaista & 2 others (2008 CLC 654 Karachi)**. Likewise, the presumption drawn by the learned Family Judge against the petitioner/mother about removal of minor wards from the jurisdiction of the Court, is premature for the reasons discussed above. Nonetheless, the learned trial Court being Family Judge has got ample powers to restrain a party from initiating or taking any step/act contrary to the welfare of the minors for pending adjudication of custody matter.

8. In the discussed circumstances, the findings of the learned Family Judge appears to be perverse and patently illegal, renders the decision to be interfered by this Court under its Constitutional jurisdiction. Resultantly, the impugned order is set aside and instant Constitution Petition is allowed. Learned Family Judge is directed to decide the application under Section 12 of the Guardian & Ward Act, 1890, afresh in accordance with law, after hearing both the parties. Instant Constitution Petition stand disposed of accordingly.

J U D G E