

# **HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD**

**C.P No. 5-450 of 2022**

[Asif @ Atif versus Province of Sindh & Ors]

**Date of hearing and Order: 26.09.2022**

Mushtaque Ali Tagar, advocate for petitioner

Mr. Om Parkash H. Karmani advocate a/w respondent No.5  
& minor Master Abu Hurera

Mr. Allah Bachayo Soomro Additional A.G Sindh a/w ASI  
Muhammad Shafi of PS Gareebabad

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## **ORDER**

**ADNAN-UL-KARIM MEMON, J.-** Through this Constitutional Petition, the petitioner has challenged the order dated 16.04.2022, whereby learned Family Judge Hyderabad directed the petitioner / judgment debtor to deposit the decretal amount in three installments within 90 days.

2. Facts of the matter are that petitioner and respondent No.5 married in the year 2014; out of such wedlock they have one issue namely Master Abu Hurera; however, due to strained relations between the couple, respondent No.5 left the house of petitioner and started residing with her parents. Thereafter, the petitioner moved an application bearing No.5-525 of 2015 under Section 491 Cr. P.C before the competent court of law, but the custody of minor was handed over to respondent No.5 / mother. Finally, respondent No.5 filed a Suit bearing No. 64 of 2017 before learned Family Judge concerned for maintenance, which after due process was decreed and petitioner/father was directed to pay Rs.3,500/- per month as maintenance to respondent No.5, which could not be paid by the petitioner and respondent No.5 filed execution application bearing No.01 of 2020, wherein, she claimed arrears from 2017; the said execution application was allowed whereby petitioner was directed to pay the entire amount of arrears; however, due to non-compliance he was also lodged to civil prison. Meanwhile, the brother of petitioner filed miscellaneous application in the above-referred Execution Application, wherein the petitioner was directed to pay arrears of decretal amount in three installments within 90 days vide impugned order dated 16.04.2022.

3. Mushtaque Ali Tagar learned counsel for the petitioner has argued that the petitioner is a poor person having a total monthly income of Rs.22,000/- as such he can't pay Rs.30,000/- as installment of arrear along with regular monthly maintenance; however, learned Family Judge / Executing Court has hurriedly passed the impugned order without looking into the financial condition of the petitioner. He submits that respondent has contracted second marriage, thus she is

not entitled to any relief; that petitioner is ready and willing to pay regular monthly maintenance as well as arrears in easy installments. He prayed for setting aside the impugned order.

4. Mr. Om Parkash H. Karmani learned counsel for respondent No.5 challenged the maintainability of this petition on the ground that the same has been filed against interlocutory order passed in Execution Application. He supports the impugned order and submits that the petitioner deliberately avoided compliance of judgment and decree passed by learned Family Judge on lame excuses; therefore, the impugned interlocutory order requires no interference by this Court. He prayed for dismissal of instant petition.

5. Adverting to the submission made by learned counsel about the right of temporary custody of minor, in principle, the mother has the preferential right till the minor attains the age of seven years in the case of male and the age of puberty in case of female minors. It is also not denied that the minor has still not reached the said age. Nothing adverse against the mother has been brought on record.

6. It is well-settled law that paramount consideration while deciding the question of custody of the minor is the welfare of minor irrespective of age, sex, and religion. Primarily, welfare includes his / her moral, spiritual, and material well-being. While considering what is the welfare of minor, the Court shall have regard to the age, sex, religion of the minor, the character and capacity of proposed guardian, his / her nearness of kin to the minor, and the preference of minor if he or she is intelligent enough to make it. On the aforesaid proposition, I am fortified by the decision rendered by Honorable Supreme Court of Pakistan in the case of Humayun Hassan v. Arslan Humayun and another, **PLD 2013 SC 557**.

7. In principle, in the cases concerning custody of child, learned Family Court is not required to go into the intricacies / technicalities of the matter and confine its findings to the extent of welfare of child/minor, which is paramount consideration. Since the arrangement, so made by the trial court, as discussed supra is good for the minor. Primarily, the reasoning assigned by the Family Court is in accord with the settled principles for governing temporary or permanent custody of the minor; and, the maintenance issue.

8. In the light of facts and circumstances mentioned above, the instant petition is dismissed along with pending application(s).