

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Constitutional Petition No. S-1138 of 2022

Date	Order with signature of Judge
------	-------------------------------

1. For hearing of CMA No.8260/2022
2. For hearing of main case

Date of hearing and order: 29.12.2022

Mr. Waheed Hussain, advocate alongwith Mr. Mossa Siddiqui, advocate for the petitioner

Mr. Javed Ahmed Chhatari, advocate alongwith Mr. Nisar Ahmed, advocate for respondent No.1 files Vakalatnama on behalf of respondent No.1, which is taken on record.

ORDER

Adnan-ul-Karim Memon, J. The present petition has been instituted against an interlocutory order dated 23.12.2022, (hereinafter referred as to the “Impugned Order”) passed by the learned Court of Civil and Family Judge Karachi (hereinafter referred as to the “Trial Court”), in Family Suit No. whereby interim custody of minors namely (1) Baby Emaan Salman Lohan aged about 11 years (2) Baby Minha Salman Lohan aged about 07 years and Baby Zohra Salman Lohan aged about 04 years were given to the respondent mother for four days with effect from 27.12.2022 (06:00 P.M.) to 31.12.2022 (06:00 P.M.). The petitioner-father being aggrieved by and dissatisfied with the aforesaid arrangement has filed the instant petition, inter-alia on the ground that the mother is not interested in taking over the custody of minors but just to cause inconvenience to him.

2. It is pertinent to reproduce the relevant portion of the Impugned Order herein below:

“In view of the above, interim custody of minors cannot be allowed for such long duration however I hereby allow instant application to the extent that respondent / applicant is allowed interim custody of minors for four days w.e.f. 27.12.2022 (06:00 PM) to 31.12.2022 (06:00 P.M) subject to deposition of original passport, CNIC, and PR bond in sum of Rs.250000/- before Nazarat branch of this Court. Applicant/ respondent is directed to hand over the custody of all three minors to applicant on 27.12.2022 at 06:00 P.M while applicant is also directed to return the custody of minors on 31.12.2022 at 06:00 P.M. bailiff is hereby appointed as commissioner for assisting both parties in handing over and taking over custody of minors and applicant is directed to pay bailiff Rs.1500/- as commissioner fee. Both parties are directed not to communicate with each other in order to avoid any scuffle. In case of any untoward incident bailiff may seek police assistance from SHO P.S concerned in accordance with law.”

3. This Court is well aware that the Impugned Order has been passed on an interlocutory application and this Court vide order dated 26.12.2022 framed the questions whether the interlocutory order passed by the learned Family & Guardian Judge East Karachi could be assailed in the constitutional petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 and whether the welfare of minors lies with the mother, when the petitioner / father had contracted second marriage.

4. Learned counsel for the petitioner has replied to the query and submitted that this petition is maintainable in terms of the ratio of the judgments reported in the case of Mst. Fatima Zehra v. Muhammad Shehroze and two others [2022 MLD 1506], Mst. Erum Raza and two others v. Syed Mutaqi Muhammad Ali and another [2018 MLD 727] and Muhammad Hassan Arif v. Additional District Judge & others [2022 MLD 323].

5. Learned counsel for the petitioner, inter alia, contended that the petitioner and respondent No.1 were married to each other on 21.3.2008 and out of the said wedlock children namely (1), Baby Emaan Salman Lohan aged about 11 years (2) Baby Minha Salman Lohan aged about 07 years and Baby Zohra Salman Lohan aged about 04 years were born and both the spouse lived together at the matrimonial abode. He further contended that respondent No.1 without the consent and permission of the petitioner left the house in March 2020 and the petitioner being the real father of the said minors is having lawful custody of the minors since March 2020. He further contended that vide order dated 23.12.2022, the learned trial Court allowed the interim custody of the minors for four days with effect from 27.12.2022 (06:00 P.M.) to 31.12.2022 (06:00 P.M.) subject to deposit of original passport, CNIC and PR bond in the sum of Rs.250,000/-. He further contended that after separation, respondent No.1 never tried to contact the petitioner during the intervening period and failed and neglected to take care of the minors, thus she has no right to interim custody as directed by the learned trial Court. Learned counsel further submitted that the impugned order is illegal and unlawful; that while passing the impugned order, the welfare of the minors, has totally been ignored, mostly the minors are getting the education and as such reversing the wellbeing of the minors, the right has been given to the respondent-mother to take custody of the minors round the clock, which is apathy. Learned counsel referred to the cross-examination of the respondent-mother and submitted that she has never been interested in the permanent custody of the minors rather she wants interim arrangement without assigning any reason, though she has been frequently visiting foreign countries and if the impugned order is allowed to be in the field,

the father shall suffer irreparable loss as in the intervening period custody of all three minors has been handed over to the respondent-mother, which shall compromise the welfare of the minors. He prayed for allowing the instant petition.

6. On the other hand, learned counsel for the respondent-mother supported the impugned order dated 23.12.2022 and submitted that the impugned order has been passed after taking into consideration the welfare of the minors by giving a schedule of the meeting of minors with the respondent-mother. In support of his contentions, he relied upon the case of Syed Saghir Ahmed Naqvi v. Province of Sindh & another [1996 SCMR 1165] and submitted that bypassing the statutory appellate forum in terms of Section 14(1) of the West Pakistan Family Court Act, 1964, this Court lacks jurisdiction to entertain the *lis* under Article 199 of the Constitution. He prayed for the dismissal of this petition.

7. Since the issue of custody and welfare of the minors is involved, this is of paramount consideration. Primarily, welfare includes his / her moral, spiritual, and material well-being. While considering what the welfare of the minor is, the Court shall have regard to the age, sex, and religion of the minor, the character and capacity of the proposed guardian, his / her nearness of kin to the minor, and the preference of the minor if he or she is the intelligent enough to make it. The aforesaid proposition has been set at naught by the Honorable Supreme Court in the case of Humayun Hassan v. Arsalan Humayun & another [PLD 2013 SC 557].

8. I have scanned the available record and perused the cited case laws. It is emphatically expressed by the learned counsel for the petitioner that an interlocutory order is not appealable; therefore, a constitutional petition can be filed in terms of the ratio of the judgments discussed supra.

9. In the present case, the matter pertains to the temporary custody of the minors, which falls under Section 12 of the Guardian & Wards Act (G& W Act) and the same has to be seen under the context of the G & W Act read with the provisions of Family Court Act discussed supra. There is no question about it that Section 12 of the G & W Act is not mentioned under appealable orders as provided within Section 47 of the G & W Act, but after amendment in the First Schedule of Family Court Act, whereby the jurisdiction of Family Court is extended and now the matter pertains to 'Guardianship' are within the domain of Family Court.

10. As per the provision of Section 14 (1) of the Family Court Act, "a decision given or a decree passed by a Family Court shall be appealable." Now, the provisions of Sections 47 and 48 are required to be read in the backdrop of the existing legal position.

11. Now, if I consider Subsection 1 of Section 14 of the Family Courts Act, according to which 'notwithstanding anything provided in any other law for the time being in force, a decision given or a decree passed by a Family Court shall be 'appealable'. Meaning thereby that although Section 12 is not mentioned under Section 47 of the G & W Act, an appeal can be filed against an order passed under Section 12 being a 'decision' given by a Family Court, and the same does not hit by sub-section 3 of Section 14 of the Family Courts Act. It is also obvious from the bare perusal of the aforesaid statutory provision, that appeal shall be filed before the District Court if the Family Court is not presided over by a District Judge or an Additional District Judge.

12. The Hon'ble Supreme Court of Pakistan has dealt with the issue of assailing orders passed on interlocutory applications, in writ jurisdiction, on numerous occasions and one such pronouncement is in the case of Muhammad Baran and others v. Member (Settlement & Rehabilitation), Board of Revenue, Punjab and others reported as PLD 1991 Supreme Court 691.

13. The upshot of the above discussion is that the practice of assailing interlocutory applications in constitutional jurisdiction has been disapproved by successive pronouncements of the Superior Courts.

14. The only exception to the aforesaid principle is when it could be demonstrated that the petitioner had no remedy available thereto but to invoke the constitutional jurisdiction to avoid abuse of the process of law leading to a grave and irremediable injustice thereto.

15. The arguments of learned counsel for the petitioner have failed to demonstrate any abuse of the process of law and have also failed to show any grave injustice if the Impugned Order remained in the field.

16. The case law cited by the learned counsel for the petitioner does not support his contentions.

17. In the present matter, the learned Family & Guardian Judge, Karachi East has made an interim arrangement vide order dated 23.12.2022 which is not required to be interfered with at this stage under Article 199 of the Constitution for the simple reason that the final order has yet to be passed. However, the arrangement of interim custody so made by the learned Family Court is modified to the extent that the period of interim custody of minors with the respondent-mother will start from today i.e. 31.12.2022 (06:00 P.M) to 04.01.2023 (06:00 P.M).

18. In view of the above discussion, it is very much clear that the impugned order passed by the Family Court is appealable before the

District Court; therefore, the same cannot be challenged in a constitutional petition under Article 199 of the constitution.

19. For the aforesaid reasons, this petition was dismissed by a short order dated 29.12.2022 and these are the detailed reasons.

20. It is stipulated that the observations made herein are tentative in nature and shall have no impact upon the determination of any dispute between the parties before any forum of appropriate jurisdiction in due consonance with the law. Let this order be communicated to the learned trial Court for compliance today through swift arrangements as well as a facsimile.

JUDGE

Zahid/*

