Order Sheet

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

C.P. No.S-517 of 2023

DATE	ORDER WITH SIGNATURE OF JUDGE

1. For orders on M.A. 2028/2023
2. For orders on M.A. 2029/2023
3. For hearing of main case

20.12.2023

1. Granted.

2&3. Briefly stated, Guardian Application 12 of 2022 was filed before the Civil Judge-I Tando Adam for the custody of a minor girl. Vide order dated 25.05.2023, the application was decided with directions in the following terms:

> "13. From evaluation of evidence on record, it transpires that mother / opponent has love and affection with her daughter more than applicant/father. Opponent/mother being single mother taking care of minor and father of opponent is maintaining his grand daughter. On the other hand, father submitted maintenance after filling of execution application. At present, minor is going to school, tuition and Madrasah and her mother is looking after her all necessities. On the other hand, applicant/father who usually does not attend the court for meeting purpose on different grounds and have another family and his work to look after. Further, case laws relied upon by the applicant are different than the present case, therefore, I am of the opinion that custody of minor should not disturbed from her mother who is looking after her since birth and with whom minor is very comfortable. Therefore, application under section 25 of the Guardian and Wards Act, 1890 is hereby dismissed with no order as to cost. Further, learned counsel for the applicant relied on 2016 YLR 1433 (Lahore) *Muhammad Ashraf versus Mst. Uzma Qamar in which Honourable High Court of Lahore allowed meeting of minor sons to the respondent/mother and allowed petitioner/father to get their temporary custody on every Saturday for twenty four hours, for three days on Eid-ul-Azha for the month of July of every year during summer vacations and for the last week of December of every year during winter vacations.* In the present case, minor is a female and have less affection with his father as father remained untouched with her for few years. Moreover, father has solemnized second marriage and step mother of minor have no feelings for the minor and father is always busy in his work. Therefore, applicant being father has meeting right with minor on every Saturday evening outside of the court with consent of both parents of minor for three hours in order to create love and affection of minor with her father. Hence, application under section 12 of the Guardian and Wards Act, 1890 is intact till further order with modification that meeting can be held outside of the court where minor is comfortable."

Guardian Appeal 12 of 2023 was then filed before District Judge Sanghar and the same was dismissed vide order dated 31.10.2023. Operative constituent is reproduced herein below:

> "9. Heard and perused the material on record. In this case, the available records indicate that the parties entered into matrimony on 23/10/2013. From this union, a female child, was born. The

marriage ultimately concluded on 27/01/2020. It is noteworthy that the custody of minor has been in continuous care of the respondent. It is an acknowledged fact that the respondent initiated legal action for maintenance, recovery of dower amount and delivery expenses so also for maintenance under Family Suit No.125 of 2019 for herself and the minor. This suit resulted in an ex parte decree in her favor. To fulfill this decree, an execution application was submitted under Application No.04 of 2020. The appellant appeared in the execution application and additionally filed a separate Guardian Ward application, seeking custody of the minor wherein impugned order was passed by learned Guardian Judge. In the context of this application U/s 25-A of Guardian Wards Act, the appellant's primary plea centers around allegations that the respondent obtained the ex parte decree through fraudulent means and misrepresentation, thus raising concerns about her character and her suitability as a mother for the minor child. The appellant further pleaded that the welfare of the minor Innaya is better served in his custody, given his biological relationship, stable financial standing, and capability to provide for and care for the minor. However, these allegations were denied by the respondent.

10. Needless to mention here the welfare of minor is always a paramount consideration while deciding his/her custody. Upon a meticulous examination of the evidence presented in this case, it becomes evident that the custody of the minor has consistently remained with the respondent since the time of her divorce. The minor, who is now around 8/9 years old, is receiving her education at Behria Foundation School. All the associated expenses are being shouldered by the parents of respondent, even the respondent is also a working woman engaged in online business, specifically the sale of artificial jewelry. Importantly, the respondent has not entered into a second marriage. Moreover, the minor is aged about 8/9 years having growing age and mother's role is essential in helping the female child navigate the challenges of puberty and ensuring her well-being during this critical stage of development. In contrast, the appellant, who is the biological father of minor, has indeed entered into a second marriage. Notably, the appellant did not take the initiative to file a Guardian Ward application for the custody of the minor soon after the divorce. It was only after the decree for maintenance was passed and he was summoned for its execution application that he presented such an application for custody of minor U/s 25-A of Guardian Wards Act, 1925, suggesting a lack of previous interest on the appellant's part regarding the custody of the minor. Furthermore, it is revealed that the appellant did not display a consistent interest in meeting with the minor in court premises which was ordered by learned Family Judge on an application filed under Section 12 of the Guardian Wards. Thus, the appellant could not establish the compelling circumstances or even agitated to suggest to shift permanent custody of minor from mother to father.

11. For what has been discussed hereinabove, this court finds no reason to interfere in the impugned order passed by learned trial Court. As a result of it, the appeal in hand is hereby dismissed, accordingly. Parties are left to bear their own costs. Let the copy of this order be sent to learned trial Court along with R & Ps of Guardian and Ward Application No.12 of 2022.”

The present petition assails the concurrent findings and seeks for them to be set aside.

The primary issue to consider is the maintainability hereof in view of Supreme Court's judgments in *Hamad Hasan*[1] and *Arif Fareed*[2], which disapproved of agitation of family matters in writ petition, however, perusal of the record failed to demonstrate the existence of any jurisdictional defect meriting recourse to writ jurisdiction. The crux of the pleadings was that the evidence was not appreciated by the respective forums in its proper perspective, hence, the exercise be conducted afresh in writ jurisdiction since no further provision of appeal was provided in the statute.

It is settled law that the ambit of a writ petition is not that of a forum of appeal, nor does it automatically become such a forum in instances where no further appeal is provided[3], and is restricted *inter alia* to appreciate whether any manifest illegality is apparent from the order impugned. It is trite law[4] that where the fora of subordinate jurisdiction had exercised its discretion in one way and that discretion had been judicially exercised on sound principles the supervisory forum would not interfere with that discretion, unless same was contrary to law or usage having the force of law. The impugned judgments appear to be well-reasoned and no manifest infirmity is discernable therein or that they could not have been rested upon the rationale relied upon.

The Supreme Court has recently had occasion to revisit the issue of family matters being escalated in writ petitions, post exhaustion of the entire statutory remedial hierarchy, in *Hamad Hasan*[5] and has deprecated such a tendency in no uncertain words. It has *inter alia* been illumined that in such matters the High Court does not ordinarily appraise, re-examine evidence or disturb findings of fact; cannot permit constitutional jurisdiction to be substituted for appellate / revisionary jurisdiction; ought not to lightly interfere with the conclusiveness ascribed to the final stage of proceedings in the statutory hierarchy as the same could be construed as defeating manifest legislative intent; and the Court may remain concerned primarily with any jurisdictional defect. Similar views were earlier expounded in *Arif Fareed*[6].

In so far as the plea for *de novo* appreciation of evidence is concerned, it would suffice to observe that writ jurisdiction is not an amenable forum in such regard[7].

It is the deliberated view of this Court that the present petition does not qualify on the anvil of *Hamad Hasan* and *Arif Fareed* and even otherwise no case is made out to interfere in respect of the findings on merit. Therefore, in *mutatis mutandis* application of the ratio illumined, coupled with the rationale

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[1] *Per Ayesha A. Malik J* in *M. Hamad Hassan v. Mst. Isma Bukhari & Others* reported as *2023 SCMR 1434*.

[2] *Per Amin ud Din Ahmed J* in *Arif Fareed vs. Bibi Sara & Others* reported as *2023 SCMR 413*.

[3] Per *Ijaz ul Ahsan J* in *Gul Taiz Khan Marwat vs. Registrar Peshawar High Court* reported as *PLD 2021 Supreme Court 391*.

[4] Per *Faqir Muhammad Khokhar J.* in *Naheed Nusrat Hashmi vs. Secretary Education (Elementary) Punjab* reported as *PLD 2006 Supreme Court 1124*; *Naseer Ahmed Siddiqui vs. Aftab Alam* reported as *PLD 2013 Supreme Court 323*.

[5] *Per Ayesha A. Malik J* in *M. Hamad Hassan v. Mst. Isma Bukhari & Others* reported as *2023 SCMR 1434*.

[6] *Per Amin ud Din Ahmed J* in *Arif Fareed vs. Bibi Sara & Others* reported as *2023 SCMR 413*.

[7] *2016 CLC* 1; 2015 *PLC 45*; *2015 CLD 257*; *2011 SCMR 1990*; *2001 SCMR* 574; PLD *2001 Supreme Court 415*.

delineated supra, this petition is found to be misconceived, hence, hereby dismissed *in limine* along with listed application/s.

Judge

Ali Haider