

2017 C L C 1747**[Lahore]****Before Mudassir Khalid Abbasi, J****MEMOONA ILYAS----Petitioner****Versus****ADDITIONAL DISTRICT JUDGE and others----Respondents**

W.P. No.8132 of 2017, heard on 2nd June, 2017.

Guardians and Wards Act (VIII of 1890)---

---Ss.12, 25 & 47---Family Courts Act (XXXV of 1964), S.5, Sched. & S.14---Suit for custody of minors by father---Visitations rights of the father---Scope---Guardian Court granted visitation rights to father for meeting children twice a month-- Father moved the Court again for handing over interim custody of children during school summer vacations---Guardian Court partially accepted the application against which father preferred appeal---Appellate Court passed order regarding interim custody to father adding considerable period of summer, winter and spring vacations and also on occasions of Muharram, both Eids and birthdays of minors as well as father's---Mother objected both revised schedules passed by Trial Court as well as Appellate Court---Order passed on application under mien S.12 of Guardians and Wards Act, 1890---Extent---Jurisdiction of Family Court---Scope---Right of appeal---Scope---Petitioner/mother contended that earlier order of visitations rights of father to meet twice a month passed under S.12 of Guardians and Wards Act, 1890 was final, which being interim in nature, was neither reviewable nor appealable in terms of S.47 of Guardians and Wards Act, 1890---Father asserted that Trial Court had ample powers to modify or review its earlier order in the interest of justice and provisions of Guardians and Wards Act, 1890 could not be read in isolation and combined reading of Family Courts Act, 1964 had made the decision of Family Court under Family Courts Act, 1964 appealable in terms of S.14 of the said Act---Validity---Provisions of Guardians and Wards Act, 1890 could not be read in isolation because the legislature, by design, had brought the disputes relating to the guardianship, within the purview of First Sched. of S.5 of the Family Courts Act, 1964, therefore, all the affairs relating to the guardianship would be exclusively triable by the Family Court under the Family Courts Act, 1964 because the statute which was later in time would prevail---In terms of S.14 of Family Courts Act, 1964 while excluding an interim order, a decree or decision given by the Family Court would be appealable---High Court observed that order passed by Family Court/Guardian Court under S.12 of the Guardians and Wards Act, 1890 was appealable under S.14 of Family Courts Act, 1964---Family Court had parental jurisdiction and there was no scope of such jurisdiction for any undue adherence to technicalities and Family Court being quasi-judicial forum could follow its own procedure which was not to be against the principles of fair trial---No legal infirmity or jurisdictional defect having been noticed, constitutional petition was dismissed accordingly.

Messrs Mehraj Flour Mills and others v. Provincial Government and others 2001 SCMR 1806; Suo Motu Case No.13 of 2007 PLD 2009 SC 217; Aley Nabi and others v. Chairman, Sindh Labour Court and another 1993 SCMR 328; Mst. Zaibun Nisa v. Muhammad Mozammil PLD 1972 Kar. 410; Syed Shamim Ahmad v. Mst. Riaz Fatima PLD 1975 Kar. 448; Muhammad Deen Malik and another v. IInd Additional District Judge, Karachi and 2 others 1982 SCMR 1223; Sakhawat Ali and another v. Mst. Shui Khelay PLD 1981 SC 454; Malik Khizer Hayat Khan Tiwana and another v. Mst. Zainab Begum PLD 1967 SC 402 and Muhammad Tabish Naeem Khan v. Additional District Judge, Lahore 2014 SCMR 1365 ref.

Mst. Sabira Sultana v. Asif Firdous 2011 YLR 1453 distinguished.

Mushtaq Ahmad Mohal for Petitioner.

Fahad Ahmad Siddiqui for Respondent No.2.

Muhammad Hammad Khan Rai, AAG on Courts call.

Date of hearing: 2nd June, 2017.

JUDGMENT

MUDASSIR KHALID ABBASI, J.--- This constitutional petition has been directed against judgment dated 18.02.2017 passed by learned Additional District Judge, Lahore whereby order dated 25.06.2016 passed by Guardian Judge, Lahore was set aside.

2. Precisely, the facts of the case are that respondent No.2 (father) filed a petition under Section 25 of the Guardians and Wards Act, 1890 against the petitioner for the custody of minor children along with an application for the grant of visitation rights under the provision of Section 12 of the Guardians and Wards Act, 1890. Guardian Judge allowed the visitation rights to the respondent-father to meet the children on every first and third Saturday of every month starting from 11:00 a.m. till 01:00 P.M. in the Court premises vide order dated 03.06.2015. Respondent No.2 again filed an application under Section 12 of the Guardians and Wards Act, 1890. Learned Guardian Judge vide order dated 25.06.2016, partially accepted the application for handing over the interim custody of the minors to the respondent No.2 during the summer vacations from 11.07.2016 to 11.08.2016. Feeling aggrieved, respondent No.2 filed an appeal before learned Additional District Judge who vide impugned order dated 18.02.2017 chalked out the following schedule:-

"(i) The interim custody of the minors shall be handed over to the petitioner on 2nd and 4th Saturday of every calendar month at 05:00 PM and petitioner shall return the interim custody of the minors to the respondent on 2nd and 4th Sunday at 05:00 P.M.

(ii) On the occasion of Eid ul Fitar the petitioner/father shall be entitled for interim custody of the minors on 2nd Day of Eid ul Fitar from 5:00 P.M and petitioner shall return the interim custody of the minors to the respondent on the 3rd Day of Eid ul Fitar at 5:00 PM.

(iii) On the occasion of Eid ul Azha the petitioner/father shall be entitled for interim custody of the minors on 2nd Day of Eid ul Azha from 5:00 PM and petitioner shall return the interim custody of the minors to the respondent on the 3rd Day of Eid ul Azha at 5:00 PM.

(iv) On the occasion of birthday of the minors the petitioner/father shall be entitled for interim custody of the minors from 5:00 PM and petitioner shall return the interim custody of the minors to the respondent on the next day of birthday of the minors at 05: PM.

(v) On the occasion of birthday of father of the minors petitioner/father shall be entitled for interim custody of the minors from 05:00 PM and petitioner/father shall return the interim custody of the minors to the respondent on the next day of birthday of father of the minor at 05:00 PM.

During summer vacations, the appellant will be entitled to meet with his minor children for one month. During spring vacations, he will be entitled to meet with his minor children for half of the vacations. During winter vacations, he will be entitled to meet with his minor children for five days. During Moharram ul Haram, he will also be entitled to meet with his minor children on 9th Moharram ul Haram at 11:00 A.M. and appellant shall return back custody of minors the respondent / mother on next day at 11:00 AM. All the above said meeting will be subject to submission of surety bonds and fee payable to the bailiff: "

Feeling aggrieved, petitioner has filed the present constitutional petition.

3. Learned counsel for the petitioner has mainly argued that in terms of Section 14(3) appeal before the learned District Judge was incompetent; therefore, impugned order is coram non judge, without jurisdiction. In this regard, he has relied on "Mst. Sabira Sultana v. Asif Firdous" (2011 YLR 1543), "Shamim Ara v. Bakhtawar Gul and 2 others" (2012 CLC 1881). Learned counsel for the petitioner further argued that lower appellate Court has

failed to appreciate, while passing the impugned order dated 18.02.2017 that any order in the presence of order dated 03.06.2015 regarding chalking out the schedule of meeting in accordance with the wishes of respondent No.2 would amount to review of earlier order dated 03.06.2015 after lapse of more than 1 year and 8 months, which is certainly not warranted by law as the same had attained finality and respondent No.2 has not challenged the same at any forum. Contends that in terms of Section 47 of Guardians and Wards Act order passed under Section 12 is not appealable. Moreover, impugned judgment is contrary to law and is liable to be set aside.

4. On the other hand, learned counsel for respondent No.2 has vehemently opposed the contentions advanced by the learned counsel for the petitioner mainly on the ground that Provisions of Guardians and Wards Act cannot be read in isolation and combined reading of Family Courts Act will lead to a conclusion that in fact Section 14 of the Family Courts Act provides that decision given under Family Courts Act is appealable. Contends that impugned order under Section 12 passed by Judge Family Court was not interim in nature. Further contends that appeal filed by respondent No.2 before the Additional District Judge was fully competent. Submits that Guardian Judge under the Family Courts Act is exclusively governed by said Act and can exercise powers to modify or review the order which was earlier passed. In this regard learned counsel for respondent No.2 has placed reliance on "Dr. Kiran Qadir v. Maj. Dr. Muhammad Ali Yousaf Khan" (PLD 2014 Lahore 17), "Abdul Hameed v. Mst. Shabnam alias Shabana and 2 others" (PLD 2014 Balochistan 39) and "Muhammad Anwar Khan v. Mst. Yasmin Zafar" (1987 SCMR 2029).

5. Arguments heard. Record perused.

6. Primary question involved in this case is that as to whether an appeal is competent before the District Judge against order dated 25.06.2016 passed by Guardian Judge under Section 12 of the Guardians and Wards Act whereby Guardian Judge partially accepted the application for handing over the interim custody of the minors to the respondent No.2 during the summer vacations from 11.07.2016 to 11.08.2016. Much emphases has been laid by the counsel for the petitioner that in terms of Section 5 of the Family Courts Act, 1964, Part-I of the schedule includes matters relating to the Guardianship, therefore, all such matters pertaining to the Guardianship shall be governed by the said Act and in that context Section 14(3) imposes a restriction upon filing an appeal against an interim order. He has relied on Section 47 of the Guardians and Wards Act which according to the learned counsel for the petitioner does not provide the remedy of appeal. For facility of reference Section 5 of the West Pakistan Family Courts Act, 1964 is reproduced as under:

5. Jurisdiction.-- [1] Subject to the provisions of the Muslim Family Laws Ordinance, 1961, and the Conciliation Courts Ordinance, 1961, the Family Courts shall have exclusive jurisdiction to entertain, hear and adjudicate upon matters specified in Part I of the Schedule.

Part-I of Schedule is given as under: -

SCHEDULE

[PART I]

- 1.
- 2.
- 3.
- 4.
- 5.
6. Guardianship.

Section 14(3) of Act *ibid* is reproduced herein below:-

Appeals.--- (1) 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---

(a) to the High Court, where the Family Court is presided over by a District Judge, an Additional District Judge or a person notified by Government to be of the rank and status of a District Judge or an Additional District Judge; and

(b) to the District Court, in any other case.

(2) No appeal shall lie from a decree passed by Family Court--

(a) for dissolution of marriage, except in the case of dissolution for reasons specified in clause (a) of item (viii) of section 2 of the Dissolution of Muslim Marriages Act, 1939;

(b) for dower [or dowry] not exceeding rupees [one hundred thousand] ;

(c) for maintenance of rupees [five thousand] or less per month.

(3) No appeal or revision shall lie against an interim order passed by a Family Court.

(4) The appellate Court referred to in sub section (1) shall dispose of the appeal within a period of four months.]

Section 47 of Guardians and Wards Act is reproduced as under:-

47. Orders appealable. An appeal shall lie to the High Court from an order made by a Court :-

(a) under Section 7, appointing or declaring to appoint or declare a guardian ; or

(b) under Section 9, subsection (3), returning an application ; or

(c) under Section 25, making or refusing to make an order for the return of a ward to the custody and of his guardian ; or

(d) under Section 26, refusing leave for the removal of a ward from the limits of the jurisdiction of the Court, or imposing conditions with respect thereto ; or

(e) under Section 28 or Section 29, refusing permission to a guardian to do an act referred to in the section; or

(f) under Section 32 defining, restricting or extending the powers of a guardian ; or

(g) under Section 39 removing a guardian ; or

(h) under Section 42, refusing to discharge a guardian ; or

(i) under Section 43, regulating the conduct or proceedings of a guardian or settling a matter in difference between joint guardians, or enforcing the order, or

(j) under Section 44, imposing a penalty: [Provided that, where the order from which an appeal is preferred is passed by an officer subordinate to a District Court, the appeal shall lie to the District Court'

7. At the first instance, it is observed that provisions of Guardians and Wards Act cannot be read in isolation because the legislature by design has brought the disputes relating to the guardianship, within the purview of First Schedule of Section 5 of the Family Courts Act, therefore, all the affairs relating to the Guardianship shall be exclusively triable by the Family Court under the Act *ibid*.

8. It is settled principle of interpretation of statutes that the statute which is later in time shall prevail. Reliance is placed on "Messrs Mehraj Flour Mills and others v. Provincial Government and others" (2001 SCMR 1806), "Suo Motu Case No.13 of 2007"(PLD 2009 SC 217) and "Aley Nabi and others v. Chairman, Sindh Labour Court and another "(1993 SCMR 328),

9. So far as Section 14(3) regarding the maintainability of the appeal before the Additional District Judge is concerned, plain reading of language of Section 14 makes it abundantly clear that notwithstanding anything provided in any other law for the time being enforce a decision given or a decree shall be appealable. The only exclusion is with regard to an interim order. Now the question before this Court is as to whether order dated 25.06.2016 passed by learned Guardian Judge/Judge Family Court under Section 12 of the Guardians and Wards Act was a decision or an interim order. This Court while confronted with the similar situation had already pronounced that such order falls within the purview of "decision given" and is appealable under Section 14 of Family Courts Act, 1964. Reliance is placed on "Mst. Zaibun Nisa v. Muhammad Mozammil" (PLD 1972 Karachi 410). In another pronouncement "Syed Shamim Ahmad v. Mst. Riaz Fatima" (PLD 1975 Karachi 448), it was observed that expressions or decisions given in Section 14 are not in any manner qualified by any such word as final, and therefore, an order under Section 12 is a decision given and is appealable. Further reliance has been placed on "Muhammad Deen Malik and another v. IInd Additional District Judge, Karachi and 2 others" (1982 SCMR 1223) and "Sakhawat Ali and another v. Mst. Shui Khelay" (PLD 1981 Supreme Court 454)

10. Learned counsel for the petitioner has relied on "Mst. Sabira Sultana v. Asif Firdous" (2011 YLR 1453). This judgment does not relate to a case of Guardianship and is a dispute pertaining to maintainability of appeals against an order passed in a suit for maintenance under Section 17-B which was under discussion, therefore, this judgment is inapt.

11. In view of the above, it can safely be concluded that the impugned judgment passed by Addl. District Judge was well within jurisdiction of the lower appellate Court.

12. So far as the argument of learned counsel for the petitioner that family Court could not pass the order dated 25.06.2016 whereby application filed by respondent No.2 for handing over custody of the minor during the summer vacations was illegal on the ground that when the application already decided no fresh application could be entertained. In this regard, it is observed that the Guardian Judge exercises a parental jurisdiction and there is no scope of such jurisdiction for any undue adherence to technicalities. Separate application can be made on fresh grounds. Reliance is placed on "Malik Khizer Hayat Khan Tiwana and another v. Mst. Zainab Begum" (PLD 1967 SC 402).

13. It has been categorically laid down by the Hon'ble Apex Court that the Family Court is a quasi-judicial forum which could draw and follow its own procedure provided such procedure is not against the principles of fair hearing and trial. Reliance is placed on "Muhammad Tabish Naem Khan v. Additional District Judge, Lahore and others" (2014 SCMR 1365), relevant portion is reproduced herein below:-

"Family Court empowered to strike off defendant's defence and pass ex parte decree---Scope---Family Court was a quasi-judicial forum, which could draw and follow its own procedure, provided such procedure was not against the principles of fair hearing and trial"

14. So far as the merits of the case are concerned, suffice it so to say that this Court under the constitutional jurisdiction cannot substitute the findings of the appellate Court. It is well established principle that powers of judicial review of this Court are not analogues to those of appellate Court, reason being that appellate Court is final Court for determination of question of fact. Purpose of the Family Courts is to resolve the family disputes expeditiously and in order to save the parties from ordeal of litigation and to curb the mischief of delaying tactics.

15. By now it has become an established law with particular reference to Family Courts Act, 1964 that interference under the constitutional jurisdiction is permissible only in case of any jurisdictional defect or legal infirmity which does not exist in the present case.

What has been discussed above, this Court is not persuaded to interfere in the impugned judgment, this petition is dismissed.

MQ/M-109/L Petition dismissed.

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