

ORDER SHEET**HIGH COURT OF SINDH, KARACHI**

Constitution Petition No. 980 of 2016

Date	Order with signature of the Judge
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PETITIONER : Muhammad Irfan Memon through Mr. Muhammad Ishaque Memon Advocate

RESPONDENT : Mst. Asma Memon through Mr. Irfan Ahmed Qureshi Advocate

Date of hearing : 12-07-2016

Date of Judgment : 12-07-2016

JUDGMENT

Muhammad Humayon Khan, J: -This is a petition against the Judgment dated 06-06-2016 passed by the learned District Judge, Malir, Karachi, in G &W Appeal No. 03/2016, whereby, Order dated 28-05-2016 of the learned VIIIth Civil & Family Judge, Malir, Karachi, was set-aside and the interim custody of minors namely Ballay Rakhio Memon, Areesha Khatoon Memon, Enab Memon and Hammad Ali Memon was ordered to be delivered to Respondent No.1 for the period from 07-06-2016 to 11-07-2016.

The relevant facts of the case are that the Respondent No.1 filed G & W Application under Sections 7 and 25 of the G & W Act against the Petitioner stating therein that the Respondent No.1 was married with the Petitioner on 06-03-1997 and out of the wedlock, four following children were born:-

Sr.#	Name of the Child	Sex	Age
01	Bhallay Rakhio Memon	Son	16 years
02	Areesha Khatoon Memon	Daughter	15 years
03	Enab Memon	Daughter	12 years
04	Hammad Ali Memon	Son	09 years

The Petitioner pronounced Talaq/Divorce on 02-03-2013. At the relevant time, Ward No.1 Balley Rakhio Memon was studying in Lawrance College, Ghorra Gali at Murree and the other three minor children were living with the Respondent No.1 at Karachi, but the Petitioner took away the minor children from the custody of the Respondent No.1 and in these circumstances, the Respondent No.1 filed G & W Application No. 108 of 2015 before the learned Family/Guardian Judge, Malir, Karachi.

Later on, the Respondent No.1 moved an application under Section 12 (3) of the G & W Act for interim custody of the minor children during summer vacation from 01-06-2016 to 31-07-2016, which was dismissed by the learned Family Judge vide Order dated 28-05-2016, against which, the Respondent No.1 filed G & W Appeal No. 03/2016 before the learned District Judge, Malir, Karachi, who allowed the said appeal by Judgment dated 06-06-2016, against which, the Petitioner has filed this petition.

I have heard the learned counsel for the Petitioner as well as Respondent No.1 and perused the material available on the record.

Mr. Muhammad Ishaque Memon, the learned counsel for the Petitioner argued that without touching to the merits of the case, the impugned Judgment dated 06-06-2016 cannot be implemented now

as the period of the interim custody was from 07-06-2016 to 11-07-2016 and secondly the impugned Judgment of the learned District Judge is without jurisdiction being in violation of Para 354 of Mohammadan Law.

On the other hand, Mr. Irfan Ahmed Qureshi, the learned counsel for the Respondent No. 1 argued that appeal under Section 47 of G & W Act was maintainable before the learned District Judge against the order of the learned Civil & Family Judge and secondly this Court is empowered to modify the order of the sub-ordinate Court under its inherent powers and lastly he argued that this Petition is not maintainable against the order of interim custody. In support of his arguments, the learned counsel relied upon the case law reported in 2014 CLC (Islamabad) 330 and 2014 MLD (Lahore) 1137.

The first contention of Mr. Muhammad Ishaque Memon, the learned counsel for the Petitioner is that the impugned Judgment cannot be implemented as the period of the interim custody was allowed from 07-06-2016 to 11-07-2016, which period has expired. However, the learned counsel has not cited any law or case-law in support of his contention.

The fact is that the Respondent No.1 moved application for interim custody of the minors during summer vacations for two months as the schools of the minors are closed. This application was moved on 13-05-2016, which was dismissed by the learned Family Judge by Order dated 28-05-2016 without assigning any cogent reason. It is

relevant to mention here that the Family/Guardian Judge is duty bound to do substantial justice in the cases of interim custody and should not act in harsh manner by keeping balance between the father and mother of the minors. Against this Order dated 28-05-2016, the Respondent No.1 preferred appeal before the learned District Judge, who allowed the said appeal by Judgment dated 06-06-2016 in the following terms:-

“In the light of above reasons, the order of trial court dated 28-05-2016 requires interference of this Court in its appellate jurisdiction, the same is illegal and without reasoning, therefore, the same is hereby set-aside. The temporary custody of minors namely balay Rakhio Memon, Areesha Khatoon Memon, Enab Memon and Hamad Ali Memon for the half vacations period with their mother/appellant. The Respondent is directed to deliver the custody of minors to appellant by tomorrow before 12 Noon before the concerned court. The Trial Court is directed to obtain PR bond of Rs. 500,000/- from the appellant with direction to keep them with proper care and custody in a separate house as mentioned in the above statement and to deliver back their custody to their father on the opening day of the Court on 11th July 2016 before the Court as the remaining vacation period the minors will enjoy with their father.

In terms of above directions the appeal in hand is allowed accordingly. Let the order be communicated to the Trial Court for compliance.”

With the above observations, the interim custody was allowed from 07-06-2016 to 11-07-2016. Instead of handing over interim custody of the minors to the Respondent No.1, the Petitioner on 07.06.2016 filed this petition, which was put up before this Court on 08-06-2016, when the following order was passed:-

"08.06.2016

M/s Ejaz Muhammad Bungash alongwith Urooj Akhlaque, advocates for the petitioner alongwith Ballay Rakhio Memon and Master Hammad Ali Memon.

1. Urgent application is disposed of.
2. Exemption application is granted but subject to all just legal exceptions.

3-4. It is stated by the learned Counsel for the Petitioner that Petitioner is father of Ballay Rakhio Memon aged about 17 ½ years, Areesha Khatoon Memon aged about 16 years, Enab Memon aged about 14 years and Master hammad Ali Memon aged about 10 years are in the custody of the Petitioner but the learned Trial Court vide Judgment dated 06-06-2016 without appreciating the pleadings of the parties and documents on record passed judgment for handing over the custody of the said children to the Respondent No.1. He further submits that Respondent No.1 is already married and in case custody of the children is handed over to her, Petitioner would be seriously prejudice. Let notice be issued to the Respondent No.1 and Advocate General Sindh, for 05-07-2016. In the meantime, operation of the impugned Judgment dated 06-06-2016 is suspended till next date of hearing."

Upon service, the Respondent No.1 moved an application for urgent hearing (CMA No. 4588/16) on 10-06-2016, which was put up on the same day and following order was passed:-

"10.06.2016

Mr. Irfan Ahmed Qureshi, Advocate for Respondent No.1

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1. Urgency disposed off.

Learned counsel for the Respondent No.1 pleads urgency. Without touching the merit and demerit of the case, let notice be issued to the petitioner for 17-06-2016, with direction to produce minors.”

On the next date of hearing i.e. 17-06-2016, the Petitioner remained absent and therefore the following order was passed:-

“17.06.2016

Mr. Irfan Ahmed Qureshi Advocate for Respondent No.1

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On the last date of hearing viz. 10-06-2016, notice of CMA No. 4588/2016 filed by Respondent No.1 was issued to the Petitioner for today with direction to him to produce the minors. As per record, notice was sent through TCS and its report is available on record shows that the same was served upon the Petitioner. Bailiff report also shows that notice of this CMA was received by the daughter of petitioner namely Aresha. Despite of this fact neither Petitioner nor his counsel are present. However, Mr. Munawwar Ali Memon Advocate holding brief for Mr. Ejaz Muhammad Bungash Advocate for Petitioner, who is said to be on general adjournment till 02-07-2016. Since the Petitioner has been served in this petition directly but he did not appear, therefore, office is directed to issue bailable warrant against the Petitioner in the sum of Rs. 25,000/-, to be served through SHO P.S. Malir, Cantt, with direction to produce minors before this Court. In case, none service of bailable warrant then SHO P.S. Malir Cantt is directed to appear in person on the next date. Adjourned to 24-06-2016.”

On 24-06-2016, the Petitioner was not available and therefore the following order was passed:

“24.06.2016

Mr. Shamsuddin Chandio, Advocate a/w respondent No.1

Mr. Muhammad Ishaque Memon, Advocate has filed his undertaking to file power on behalf of Petitioner on the next

date of hearing. Along with undertaking he has also filed statement with certain documents etc., which are taken on record.

Vide Order dated 17.6.2016, it was ordered to Petitioner to produce the minors/ children before this Court, but Mr. Ishaque Memon, Advocate submits that the Petitioner left Pakistan for USA on 13.6.2016 much prior of passing this Order. However, he undertakes that Petitioner would arrive Pakistan well before 05.7.2016 and he would produce minors on the said date.

In view of undertaking given by Mr. Ishaque Memon, advocate matter is adjourned to 05.7.2016, to be fixed as per Roster with direction to Petitioner to produce minors.”

In view of the above facts, circumstances and orders, it is established that the conduct of the Petitioner was malafide, harsh and unfair towards the Respondent No.1 for the reasons that the interim custody was allowed for a limited period from 07.06.2016 to 11.07.2016, which should have been obeyed by the Petitioner by realizing the fact that if the Petitioner is father then the Respondent No.1 is also mother of the minor children but he challenged this decision by filing this petition and upon obtaining suspension order of the operation of the impugned Judgment dated 06.06.2016, he left Pakistan for USA on 13.06.2016. In these circumstances, the first contention of the learned Counsel for the Petitioner that the impugned Judgment cannot be implemented as the period of the interim custody is expired, is totally misconceived and cannot be accepted.

On the other hand, Mr. Irfan Ahmed Qureshi, the learned counsel for the Respondent No.1 has rightly argued that this Court is empowered to modify the order or relief given by sub-ordinate Court under its

inherents powers but he has not cited any case law in support of his contention. However, I found three reported Judgements of our own Court on this point. The First case is reported in 2005 CLC (Karachi) 441 (Mehrab Khan through attorney versus Province of Sindh and others), wherein, the learned Division Bench of this Court has held in paragraph-11 of the reported Judgment that:-

“The objection of Mr. Jhamat Jethanand, that relief granted to the petitioner was different than the one prayed for. It is an established law that the Court can mould the relief in favour of the petitione even if it is not prayed for. Thereafter, the petitioner was entitled to the relief granted by this Court in order to meet the ends of justice as the petitioner appears to be was without supply of water.”

The second case is reported in 2014 PLC (C.S.) 1153 (Dr. Iqbal Jan and others verus Province of Sindh and others), wherein, the learned Division Bench of this Court has held that:-

“It is also well settled principle of law that the Court may take judicial notice of the changed situation and circumstances and can also mould and modify the relief accordingly.”

The third case is reported in 2015 CLC (Sindh) 1734 (Asif Kudia and others Vs. M/s. KASB Bank Limited and others) ,wherein, the learned Division Bench of this Court has held that:-

“16. It has been held time and again by the Hon'ble Supreme Court and High Courts that the Superior Courts have inherent and Constitutional powers to remedy and correct the wrongs committed by subordinate courts, and the High Court has vast powers in its inherent jurisdiction not only to mould the relief, but also to convert an Appeal, Constitutional Petition or Revision to any other remedy. The law cited on this point by the learned counsel for the appellant is fully applicable in the instant appeals. In this context, reference may be made to the case of Syed Ghazanfar Hussain through Legal Heirs and others v. Nooruddin and others, 2011 CLC 1303, decided by a learned Division Bench of this Court which has a binding effect on us.

We may also refer to Mst. Mubarak Salman and others v. The State, PLD 2006 Karachi 678, which is also binding on us, wherein it was held inter alia by a learned Division Bench of this Court that once it has been found that Presiding Officers of the Courts have abused the process of the Court, then it is incumbent upon the Superior Courts, and it is one of the duties of the Superior Courts, to correct such wrongs of the subordinate courts by exercising whichever powers available with them either inherent, supervisory, revisional or Constitutional powers, either on the application of any party or under its suo motu jurisdiction ; the reason being that it was the act of the Court done in the abuse of process of Court, that is to be corrected by the Court itself or by the Superior Court as soon as it is brought to its notice through any source; and, except for the superior Courts, there is no other authority which can correct such act of the subordinate courts.”

In view of the above reported Judgments, which have binding effect on me, I have no hesitation to hold that this Court has inherent powers to mould and modify the relief granted by sub-ordinate Court.

The second contention of Mr. Mohammad Ishaque Memon, the learned counsel for the Petitioner is that the impugned Judgment is without jurisdiction being in violation of Para-354 of Mohammadan Law. However, the learned counsel has not cited any case law in support of his contention. I am not impressed with this contention for two reasons. Firstly the ingredients of Para-354 of Mohammadan Law will be considered by the learned Guardian Judge at the time of final decision of the case in view of the evidence which will be produced before the learned Guardian Judge. Secondly, since the Respondent No.1 has made statement in writing, which is reproduced as under:-

“I Asma Memon D/o Tufail Ahmed Memon W/o Khalid Siyal bearing NIC No. 42000-0501515-4 R/o H. No. 78, Siyal Para,

Tando Wali Muhammad, Hyderabad, do hereby states that I, shall be responsible of the wards, i.e. their care, security and I shall look after them under my supervision and shall be living with me at Flat No.45, 5th Floor, Hashim Glaria, Alamdar Chow at Qsimabad, Hyderabad.

That the wards shall be remained with me till 11.07.2016 and no interference shall be made of any other stranger. In account to I am furnishing the P.R. bond as security and satisfaction of this Honourable Court of Rs. 500,000/-."

the ingredients of Para-354 of the Mohammadan Law are not come in the way of interim custody of the minor children to the Respondent No.1.

Mr. Irfan Ahmed Qureshi, the learned counsel for the Respondent No.1 has finally argued that this petition is not maintainable against the interlocutory order of interim custody but he has not cited any case law in support of his contention. However, I found case law reported in 2015 CLC (Sindh) 1734 (Asif Kudia and others Vs. M/s. KASB Bank Limited and others), wherein, the learned Division Bench of this Court has held that constitutional jurisdiction of High Court cannot be invoked against every interlocutory order passed by Court nor can every appeal against such order be converted into constitutional petition. This reported judgment has binding effect on me and I have no hesitation to hold that this petition against the order of interim custody is not maintainable in law. It is relevant to mention here that the petition against the interim custody for a limited period has to be dismissed summarily without notice to the Respondent to meet the ends of justice.

The Family/Guardian Judge is directed to proceed with the matter day to day and decide the same on merits within three months and submit compliance report through MIT-II of this Court.

Above are the reasons for the short Order dated 12.07.2016, whereby, I have dismissed this constitution petition alongwith listed application with the following directions:-

“Learned trial court is directed to comply with the judgment dated 06.06.2016 passed by the District Judge, Malir, Karachi in G & W Appeal No.03/2016 (Mst. Asma Memon Vs. Muhammad Irfan Memon), with modification that minors shall remain with the respondent No.1 from 14.07.2016 to 31.07.2016 as interim custody. However, respondent No.1 shall deliver back the custody of the minors to the petitioner on 01.08.2016, the remaining part of the impugned judgment dated 06.06.2016 shall remain as it is.

The learned Trial Court is further directed to immediately comply with the above direction and send compliance Report to the MIT-11, of this Court. The office is directed to send the order immediately to the Learned District Court, Malir, Karachi, as well as Trial Court for immediate compliance.”

This short order may be read as part and parcel of this Judgment.

JUDGE