ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

C.P. No.S-927 of 2010

DATE ORDER WITH SIGNATURE OF JUDGE

Present:-
Mr. Justice Muhammad Ali Mazhar
Mr. Justice Agha Faisal

Dr. Aisha Yousuf.....Petitioner

Versus

Khalid Muneer & others.....Respondents

Direction/Disposed of matter
1.For hearing of CMA No.7325/2014
2.For hearing of CMA No.7326/2014
3.For hearing of CMA No.7241/2015
4.For hearing of CMA No.168/2016
5.For hearing of CMA No.169/2016

Date of Hearing: 21.02.2019

Mr. Zia Ahmed Awan, Advocate for the Petitioner
a/w Mr. Itrat H. Rizvi, Advocate.

Mr. M. Rafi Kamboh, Advocate a/w Respondent No.1.

Muhammad Ali Mazhar, J: The petitioner filed application (CMA No.7325/2014) for modification of the order dated 10.12.2011 passed by learned single Judge of this court in this constitution petition. If we jot down in chronological order, the facts of this case are that the respondent No.1 filed G & W Application No.681/2008 in the court of Family Judge, Karachi-South. The case was decided with some visitation rights according to the schedule mentioned in the order itself. Being dissatisfied, the petitioner filed an appeal to the District Judge, Karachi-South. The appeal was disposed of with some modification in the order of Family Judge. Being dissatisfied, the petitioner filed this constitution petition which was disposed of on 10.12.2011 with some modification thereafter against the order passed by this court, the petitioner and

respondent No.1 both filed their separate Civil Petitions for Leave to Appeal (CPLAs) in the hon'ble Supreme Court and their CPLAs were dismissed vide order dated 14.03.2012. The relevant excerpts of the aforesaid orders are reproduced below with their case numbers in chronological order:

(i) Order dated 29.04.2010 passed by Family Judge, Karachi-South in G & W Application No.681/2008.

"The applicant being father has right to meet minor and no one can deprived him for visitation rights as minor should be familiar with her father. The sufficient time has to be given to father for meeting with his children, hence respondent is directed to hand over custody of minor to the applicant on alternate Saturday in the evening at 6:00 P.M. and taken back on next day i.e. Sunday in the evening at 6:00 P.M. It is also directed that on the Eid occasions, the custody of minors be handed over to applicant on second day of Eid in the morning at 10:00 a.m. and returned back in the evening at 7:00 P.M. on the same day. In the school summer vacations, the custody of minor be handed over for one month to applicant and in the winter vacation the custody of minor be handed over for 07 days to the applicant, on birthday meeting will be held on at 6:00 P.M, to 8:00 P.M. but both will not remove the custody of minor from the jurisdiction of this court and if so desire they can take with the permission of the Court. The respondent will inform regarding progress of education of minor to the applicant time to time."

(ii) Judgment dated 02.09.2010 passed by District Judge, Karachi-South in G&W/Family Appeal No.33/2010.

"After hearing the arguments advanced at length and so also carefully perusing the case law cited, I came to conclusion that the verdict of the trial court regarding the permanent custody of minor is not being disputed nor challenged as admittedly Respondent has not preferred appeal against the impugned order. Perusal of the impugned order reveals that after sifting the entire evidence recorded and carefully looking to the pleadings, the learned Guardian Court came to conclusion that the welfare of minor regarding her permanent custody lies with the mother (the Appellant) and the only controversy in appeal is the visitation right to be allowed to Respondent to meet his child/daughter, which right otherwise to my view in no way can be denied to the Respondent being father and natural guardian of the said minor. Further to my view the learned family court has passed the impugned order by considering each and every aspect of the matter and so also to my view the impugned order being legal, proper and within the four

corners of law, as such, calls for no interference by this court in exercise of the appellate authority. However, I am in agreement with the view expressed by learned counsel for the appellant that custody of minor directed to be handed over to the Respondent for one month in the school summer vacations is certainly excessive and same is hereby reduced to a fortnight period and more so taking into consideration the tender age of the minor baby and since her birth she is living with her mother (the Appellant). Further more, since her childhood till now, she is being maintained and looked after by her mother all alone. Further the Respondent shall be bound to follow the directives and taking and handing over back the custody of the minor to the Appellant. I have also gone through the case law cited by the learned counsel for the Appellant and I am in agreement with the law laid down by the superior courts but the facts of the reported cases have no bearing with the facts of the case in hand and so the said case law is of no help to the Appellant."

(iii) Judgment dated 10.12.2011 passed by this Court in this constitution petition (C.P. No.S-927/2010).

"17. Result of the above discussion is that this Constitution Petition is disposed of by permitting the mother to take the child out of the country subject to her furnishing P.R. bond and surety as stated above and visitation rights are modified from one day in a fortnight to two days every month while maintaining other visitation rights as discussed above."

(iv) Order dated 14.03.2012 passed by Supreme Court in CPLA No.959-K/2011 and CPLA No.13-K/2012.

"3. Mr. Zia Ahmed Awan, learned ASC for the petitioner Dr. Aisha Yousuf contends that the order of two days meeting of baby Fasiha with her father is a harsh order, contrary to her welfare, which is likely to effect her regular attendance in the school where she is study at Dubai, therefore, in all fairness such period of meeting may be reduced to one day in a month or at least to the extent that it shall not be counted as her mandatory meeting with the father for complete 48 hours in every month.

5. After considering the arguments advanced before us by the parties' counsel, we are not inclined to grant leave to appeal in either of the two petitions for the simple reason that it is welfare of the minor which is of paramount importance and consideration before the Guardian Court, while deciding the question of her/his custody or meeting with the parents. In the instant case, when the petitioners have already separated in the year 2008 by way of divorce, the loss of their disassociation, which is likely to affect the minor in her future life, cannot be washed of in toto. In such circumstances, keeping in view the welfare of the minor, a reasonable

> and fair order has been passed by the High Court to accommodate both the parties in an equitable manner. The judgment of the High Court of Sindh impugned in these petitions, demonstrates that such exercise has been undertaken by the Court in a very balanced, prudent and pragmatic manner, calling for no further interference at this stage."

2. It appears from the last order of the hon'ble Supreme Court that the learned counsel for the petitioner, who also appeared before us to argue the modification application, had argued before the hon'ble Supreme Court that the order of two days' meeting of Baby Fasiha with her father is a harsh order, contrary to her welfare which is likely to affect her regular attendance in the school where she is studying, therefore, the period of meeting may be reduced to one day in a month or at least to the extent that it shall not be counted as her mandatory meeting with the father for complete 48 hours in every month. The High Court order was passed by the learned single Judge on 10.12.2011 thereafter the petitioner and respondent No.1 both filed their Civil Petitions for Leave to Appeal (CPLAs) in the hon'ble Supreme Court but the record reflects that the application for modification of the order dated 10.12.2011 has been filed by the petitioner on 04.12.2014 which is much after the order passed by the Supreme Court on 14.03.2012. The learned counsel for the petitioner argued in support of modification application that this court has ample jurisdiction to modify the order. He also referred to the judgment of apex court rendered in the case of **Hussain Bakhsh vs. Settlement Commissioner, Rawalpindi (PLD 1970 Supreme Court 1)** in which the Supreme Court held that apart from the High Court's power to correct errors apparent on the face of the record in the exercise of its inherent jurisdiction, it has power under the Code of Civil Procedure to review its own order made in writ jurisdiction in a civil matter.

3. In the modification application, the petitioner has prayed that the order is liable to be modified to the extent to withdraw

the condition of meetings of the ward with the respondent No.1. She has further prayed to sustain the remaining conditions of the order dated 10.12.2011 and let the ward to remain with the petitioner at UAE till her stay in UAE. An alternate prayer has been made that the respondent No.1 may be allowed to meet with the ward if he so desires on his own expenses at UAE. She has further prayed for the directions against the respondent No.1 to bear 50% educational expenses of the ward and deposit the outstanding maintenance of the ward with the Nazir of District & Sessions Court South at Karachi.

4. The counsel for the respondent No.1 opposed this modification application. He argued that in fact this is a sort of review application which could have been filed before the same Judge who was seized of the matter but during his tenure no such application was filed, however, he was retired in the year 2012 and after his retirement this modification application has been moved in the year 2014. He further submits that only clerical mistakes can be rectified and not the whole substance of the order. He prayed that the modification application may be dismissed.

5. In the nutshell whatever has been prayed here in support of the modification application cannot be considered at this stage when all such questions have already been settled and the matter started from the Court of Family Judge and ended in the Supreme Court. At present the order passed by the learned single Judge of this court in this petition has been merged with the order of the Supreme Court and through this modification application what the petitioner is trying to achieve is the same which she could not succeed earlier. This modification application cannot be allowed as the second round of litigation in the controversy which is set at naught upto the level of hon'ble Supreme Court.

6. In fact this is an application for review under the garb of which the nomenclature of modification has been mentioned which could have been filed before the same learned single Judge who was seized of the matter within the period of limitation of filing review but after lapse of two years' time this application of modification was filed on the same grounds which have already been decided by all four courts. The learned counsel referred to the case of **Hussain Bakhsh** (supra) which is distinguishable and not attracting the facts and circumstances of the present case. We have no jurisdiction at this stage to entertain any such application for the alleged modification.

7. We dismissed the CMA No.7325/2014, CMA No.7326/2014 and CMA No.7241/2015 filed by the petitioner in this disposed of petition through our short order. Above are the reasons. So far as the CMA No.168/2016 and CMA 169/2016 filed by the respondent No.1 are concerned, the learned counsel for the respondent No.1 does not want to press these applications which are also dismissed as not pressed. However, he submits that after collecting certified copies of the reasons, the respondent No.1 may move proper application for compliance of the earlier order passed by this court.

Judge

Judge

Asif