

IN THE HIGH COURT OF SINDH AT KARACHI

**Constitutional Petition No.1850/2018**

-----  
DATE ORDER WITH SIGNATURE(S) OF JUDGE(S)  
-----

**Before: Mr. Justice Nazar Akbar**

Petitioner: Abeera Khan through  
Mr. Ghulam Mujtaba Advocate.

Respondent No.1: Adnan Jamil through  
Mr. Ghulam Asghar Pathan, Advocate.

Respondent No.2: Civil Judge-III, Central, Karachi.

Date of hearing: 25.10.2018

Date of Judgment : 25.10.2018

**JUDGEMENT**

**NAZAR AKBAR, J.** The petitioner through this constitutional petition has challenged the order dated **18.8.2018** passed by III-Family/Civil Judge and Judicial Magistrate Karachi Central in Execution No.01/2018 in G&W Application No.811/2017 whereby the petitioner was directed to hand over custody of the wards to Respondent No.1 forthwith. In case she fails to do so, she was ordered to be liable to pay fine of ten rupees per day for each day of default, not exceeding Rupees Five Hundred in aggregate and shall be liable for civil imprisonment.

2. Briefly stated the facts of the case are that Respondent No.1 filed Guardian & Wards Suit No.811/2017 under **Section 25** of the Guardian and Ward Act, 1890 (G&W Act, 1890) before the III-Civil/Family Judge and Judicial Magistrate, Karachi Central stating therein that he was married with the Petitioner in November, 2008, and has two daughters from said wedlock. He has always given love

and affection to the Petitioner but due to her quarreling nature, it was hard for him to keep up. The Petitioner not considering the gratitude of Respondent No.1 on **16.9.2016** left for Multan alongwith her mother. Thereafter the Petitioner filed habeas corpus petition before this Court bearing C.P No.1704/2016 against Respondent No.1 for recovery of the custody of wards. Subsequently, a compromise reached between the parties and custody of wards was handed over to the Petitioner. After securing custody, the Petitioner was not allowing the meeting of wards with Respondent No.1. It was further averred that conduct of the Petitioner was against the welfare of wards as she was just O'level qualified in Cambridge system of education which is equivalent to matriculation and she does not have secure source of income.

3. After framing issues and hearing the parties learned trial Court by order dated **31.5.2018** has allowed the G&W Application No.811/2017 and the Petitioner was directed to handover custody of wards namely Fatima Adnan and Khadija Adnan to Respondent No.1. Respondent No.1 was also directed to ensure meeting of the minors with the Petitioner at her home. Said order was not complied with by the Petitioner, therefore, Respondent No.1 filed Execution Application No.01 of 2018 which was allowed by order dated **18.8.2018** by learned III-Civil/Family Judge and Judicial Magistrate Karachi Central which order is impugned herein through instant petition.

4. I have heard learned counsel for the parties and perused the record.

5. Learned counsel for the Petitioner admitted before this Court that the order dated **18.8.2018** impugned through this constitutional petition passed in Execution Application No.01/2018 in Guardian

and Wards Application No.811/2017 is an appealable order. However, he claims that he has filed this constitutional petition instead of going in appeal because earlier he has got an order in C.P No.2108/2017. The perusal of C.P No.2108/2017 shows that the same was directed against an interim order of trial Court dated **01.8.2017** whereby pending main case regarding custody of minors, an order on the application under **Section 12** of the **Guardian and Ward, 1ct, 1890**. The aforesaid petition against the interim orders passed in the main case was heard on **12.4.2018**, however, before announcement of judgment on **13.7.2018** the main petition was of Guardian and Ward under **Section 25** of the G&W Act, 1890 was disposed of on **31.5.2018** by a comprehensive judgment on merit. The Petitioner has not challenged the judgment dated **31.5.2018**. The execution was filed by Respondent No.1 in which the Petitioner has appeared before the executing Court. By order dated **15.8.2018** the executing Court has offered mediation for amicable settlement though in my humble view even such offer was beyond the jurisdiction of executing Court. Be that as it may, such mediation was refused by the Petitioner and finally an order was passed on **18.8.2018** by the executing Court. Since even it was a final order by executing Court, the remedy of an appeal against the order on the execution application could have been the remedy. The only ground for filing this constitutional petition that earlier constitutional petition against the interim order was also filed is not a justification against both the orders. It may be pointed out that even in the earlier constitution petition the Petitioner before coming to this Court has also challenged trial Court's order before the First Appellate Court i.e District and Sessions Judge and then approached this Court in constitutional jurisdiction against both the orders. In the present case neither an appeal was filed against the judgment of the main

Guardian and Ward application under **Section 25** of the G&W Act, 1890 nor any appeal against the order passed by the executing Court has been preferred. Though even after availing the remedy of appeal, the petition generally does not lie, but in the case in hand the Petitioner did not avail the remedy of appeal.

6. In view of above facts since the remedy available to the Petitioner has not been availed by him, this constitution petition was dismissed by short order dated **25.10.2018** being not maintainable and above are the reasons for the same.

JUDGE

Karachi  
Dated:15.11.2018

Ayaz Gul/P.A