

# HIGH COURT OF SINDH AT KARACHI

C.P. No.S-525 of 2015

## J U D G M E N T

Date of hearing: 10.11.2015.

Petitioner: Dil Faraz through Mr. Shamsul Hadi, Advocate .

Res. No.1&2: VIIth Family Judge, Malir, and District Judge Malir.

Res. No 3: Mst. Sajida through Mr. Hakim Ali, Advocate .

IRFAN SAADAT KHAN, J. The instant constitutional petition has been filed with the following prayer:

*“It is therefore, respectfully prayed that this Honourable Court may kindly be pleased to call R&Ps of G&W application No.86/2014 from the Hon’ble 7<sup>th</sup> Family Judge, Malir at Karachi and Family Appeal No.44/2014 from the Hon’ble Court of District Judge, Malir at Karachi, and after perusal of the records and proceedings and hearing of the parties, the impugned order dated 17.03.2015 passed by the District Judge, Malir at Karachi/Respondent No.2 in Family Appeal No.44/2014 may kindly be set aside and direction may be given to the Respondent No.2 /District Judge to decide the appeal No.44/2014 on its own merits accordingly to law and equity. Prayed accordingly in the interest of justice”.*

2. Briefly stated the facts of the case are that the petitioner was married to respondent No.3 on 07.03.1999 and thereafter three children, namely, Maqadas, Sadaf and Bilal were born to them. Since as per the respondent, the attitude of the petitioner was not good with her, she filed a Family Suit No.48/2004 before the Vth Family Judge, Malir, Karachi for dissolution of marriage by way of khula, maintenance and recovery of dowry articles. Matter proceeded before the learned Judge and through a consent order dated 28.07.2004 marriage was dissolved by way of khula. It was also agreed through a compromise that the girls, namely, Muqadas and Sadaf will remain in the custody of the petitioner whereas minor Bilal will remain

in the custody of the respondent up till the age of 7 years. It was also agreed between the parties that the petitioner will pay a sum of Rs.800/- per month with 10% increase every year as maintenance of the minor till the custody of the said minor is with the respondent. It is the claim of the petitioner that he sent the amounts of maintenance of his son Bilal to the respondent through money orders but since the respondent had changed her residence without intimating him the said money orders returned back.

3. That the petitioner filed an Application No.86/2014 under Section 25 of G & W Act with the prayer that custody of the minor may be handed over to the petitioner since his son Bilal is now more than 10 years of age. The matter proceeded before the learned Judge and after hearing the matter at some length the learned VIIth Family Judge vide order dated 10.11.2014 allowed the said application filed by the petitioner by directing the respondent to hand over the custody of master Bilal to him within one month. Being aggrieved with the said order an appeal was preferred before the Sessions Judge, Malir and the learned Judge in the G&W Appeal No.44/2014 after hearing the parties passed an interim order that since the maintenance of the minor, as promised by the petitioner has not been paid by him directed him to pay the maintenance of the minor as per the compromise dated 28.7.2004 on the next date of hearing, and thereafter adjourned the matter. It is against this an interim order that the present petition has been filed.

4. Mr. Shamsul Hadi, advocate has appeared on behalf of the petitioner and submits that the petitioner had sent maintenance amounts to the respondent through money orders but the same were returned back since the respondent had remarried and no current address of her was available with the petitioner hence no maintenance could be sent to the respondent. He, submitted that no default in this regard was committed by the petitioner hence the appellate Court was not justified in giving specific directions to the petitioner to pay the maintenance amount on the next date of hearing. He submitted that the order of the trial Court is in his favour, which has not been complied with by the respondent and the custody of the minor Bilal has not been handed over to him and the petitioner does not know whether

his son Bilal/minor is alive or not. He, therefore, prayed that the interim order passed by the Appellant Court may be set aside.

5. Mr. Hakim Ali Khan advocate has appeared on behalf of the respondent No.3 and has vehemently refuted the submissions of the learned counsel for the petitioner. He submitted that it was incumbent upon the petitioner to have complied with the compromise entered between the petitioner and the respondent No.3. He invited my attention to the order/decreed dated 28.07.2004 passed by the Vth Civil Judge & Judicial Magistrate, Malir, wherein it has categorically been mentioned that the petitioner will pay a sum of Rs.800/- p.m. with 10% annual increase until the attainment of the age of 7 years by minor Bilal. He submitted that not a single penny has ever been paid by the petitioner to the respondent as maintenance of Bilal by the petitioner, which proves his mala fide. He further submitted that the petitioner has approached this Court with unclean hands as on the one hand order of the G & W Court has not been complied with whereas on the other hand the petitioner has failed to fulfill the terms of the compromise. He therefore submits that the order passed in G&W Appeal is in accordance with law. Learned counsel further submitted that since the petitioner has not complied with the interim order he is not entitled for any relief whatsoever. In support of his above contentions, the learned counsel has placed reliance on the following decisions:

1. *Mst. Ali Begum and others Vs. Sabir Hussain and 13 others* [1991 SCMR 365]
2. *Muhammad Saeed Vs. Mst. Sakina Bibi* [1988 CLC 665]

6. I have heard both the learned counsel at considerable length and have perused the record as well as decisions relied up by the learned counsel for the respondent.

7. It is an admitted position that the petitioner and the respondent entered into a compromise that the custody of the girls would be handed over to the petitioner whereas custody of minor Bilal, who at that time was suckling baby, would remain with the respondent and as per the compromise made by the petitioner a sum of Rs.800/- p.m. with 10% annual increase would be paid by him. Petitioner claims that he is willing to pay the amount and has never denied the fact that he has any financial

constraint to pay the said amount of Rs.800/- p.m. with 10% annual increase. Hence a question would arise that if the petitioner claims that he tried his level best to send the amounts to the respondent what is hampering him to pay the said amount to the respondent after a categorical promise in the shape of compromise in my view the compromise dated 28.07.2004 is still holding the field and if the petitioner is willing to pay there should be no hindrance or impediment to pay the amount even today if he claims himself to be a willing person who is ready to abide by the compromise made by him dated 28.7.2004.

8. In my view if the petitioner wants the respondent to abide by her compromise of handing over the custody of minor as per the compromise he should also abide by the said compromise. In the decision given in the case of Muhammad Saeed (supra) it was observed by a learned Judge that if the petitioner fails to abide by the directions of a Court he exposed himself to be liable being proceeded against for disobedience of a lawful order passed by the Appellate Court. Hence in my view the learned District Judge was quite justified in giving the directions to the petitioner to deposit the maintenance amount in terms of the compromise and no illegality appears in the said order which is hereby upheld, and the instant petition is dismissed along with the listed application.

Above are the reasons of my short order dated 10.11.2015.

JUDGE