

IN THE HIGH COURT OF SINDH AT KARACHI

C.P. NO.S-721/2020

Petitioner : Muhammad Omer Soomro
through Salahuddin Ahmed, advocate,
Mr. Saifullah Abbasi and Mr. Danish Nayyar,
advocates.

Respondents : 1. XII Additional District & Sessions Judge (South).
2. Mst. Erum Butt d/o Waqar Haider Butt.
through Mr. Muhammad Vawda, advocate

Date of hearing : 03rd November 2020.
Date of Order : 03rd November 2020.

J U D G M E N T

SALAHUDDIN PANHWAR, J: Through instant petition, the petitioner has assailed the order dated 26.09.2020 passed by learned XII-Additional District Judge Karachi South in G&W Appeal No.25/2020, whereby learned Appellate Court set aside the order dated 13.01.2020 passed by learned Trial court in G&W Case No.1896/2019 and directed the petitioner to handover the custody of minor Abdul Ahad forthwith to the respondent with visitation rights.

2. Precisely the relevant facts of the case are that petitioner filed G&W Application under section 25 of the G&W Act 1890 for permanent custody of the minors Abdul Ahad and Myra Soomro. Along with said application, the petitioner filed an application under section 12 of the Act for temporary custody of the minors, which was contested by the respondent by filing written statement and counter affidavit and after hearing the learned counsel for the parties, learned trial Court disposed of the said application vide order dated 13.01.2020, whereby custody of minor Abdul Ahad was handed over to the petitioner and allowed visitation rights to the respondent further visitation rights to meet his daughter Myra Soomro were also allowed to the petitioner, which order was assailed by the respondent before Appellate Court, who after hearing the parties, set aside the said order with direction to the petitioner to handed over custody of the minor Abdul Ahad to the respondent mother.

Hence this petition, which came up for hearing on 03rd November, 2020 and vide short order was decided as under:

“For reasons to be recorded later on, instant petition is allowed; impugned order is set aside. However, order passed by the trial Court is modified to the extent that same is with regard to interim custody and that is subject to final decision of the pending petition before the trial Court.”

4. Heard learned counsel for the respective parties and perused record.

5. *At the outset*, learned counsel for the petitioner, inter alia, contended that impugned order dated 26.09.2020 passed in G & W Appeal No. 25 of 2020 is illegal, improper and without jurisdiction; that the Appeal filed against the interim order passed by learned trial Court on an application under Section 12 of the Act, was not maintainable in terms of bar contained under Section 14(3) of the Family Court Act, 1964 and was thus learned Additional District Judge was not competent to entertain the appeal and set aside the order passed by the trial Court. Learned counsel has referred paragraph Nos. 6 and 10 of order dated 13.01.2020 passed by the trial Court, which are reproduced as under:-

“6. It is important to note that both minors remained present before this Court on two dates of hearings. They both appeared to be intelligent enough to form their opinions. Therefore, during course of hearing on 07.01.2020 and 09.01.2020 both of the parents were sent out from the Court room and chamber and one by one both minors were asked to disclose their preference, minor namely Abdul Ahad Soomro in clear and specific words chosen to live with his father, they disclosed about their schooling and other daily routine and repeatedly expressed his wish to live with his father and spend day time with his mother as he will be more happy to buildup strong relationship with both parents. He further disclosed that my father will never stop me or put the restrictions on me to meet with the mother, as my father is very polite and loving. Thereafter, the minor namely Mayra Soomro disclosed in clear and specific words chosen to live with her mother and disclosed that she doesn't want to her father to pick and drop from school, she wants to visit or spend night with father but whenever she wants. The minor namely Abdul Ahad Soomro, who is age of 14 years studying in class 9T and the other Myra Soomro, age of 12 years studying in same school of Karachi Grammer School. They both appeared to be healthy and confident in their appearance and conduct and on questions put by the Court they replied intelligently.

10. Resultantly, I am of the view that at this stage welfare of minor No.1 lies with the present applicant. Applicant Muhammad Omer Soomro is in educated person (barrister) and minor namely Abdul Ahad Soomro is in growing age of 14 years and he needs

proper assistance from his father for mental nourishment and get awareness from custom and face the difficulties and problems of society issues and may capable to solve them property and also for his bright future. Hence, I consider after looking above mentioned significant reasons, applicant is entitled for the custody of minor no.1 namely Abdul Ahad Soomro and visitation rights of minor no.2, therefore, respondent/mother is directed to handover the custody of the minor no.1 namely Abdul Ahad Soomro with his all belongings to the applicant/father without fail before 16.01.2020.

6. He further contended that under the Muslim Law after a male child attains the age of seven years, the father is entitled to have his custody; that the minor Abdul Ahad is aged about 15 ½ years and right of *hazanat* lies in favour of father, besides learned trial Court considered the desire of the minor; that learned trial Court rightly passed the order of interim custody but the same was set aside by the learned Appellate Court through impugned judgment in a slipshod manner. In support of his contentions, he has relied upon the cases reported as 2020 CLC 1353, 2017 MLD 485, 2014 CLC 330, 2018 YLR 649, 2020 YLR 401, 1987 MLD 3311, 2018 CLC 50, 2019 CLC 1352, 2020 CLC 1489, 2020 SCMR 260, 2019 YLR 700 SINDH, 2018 CLC 50 SINDH & 2018 CLC 54.

7. Learned counsel for the respondent No.2 in contra contended that under Sections 12 of the Guardian & Wards Act, 1890, Family Judge was not competent to handover the custody to the father and all case laws relied by learned counsel for the petitioner depict that custody to father was denied and always to protect the minors, the mother has been rescued by the Court; that desire of minor was considered in other cases by the superior Courts while deciding the issue finally not at the stage of application under Section 12 of the Act; that regarding maintainability of appeal before the appellate Court, he argued that under Section 14 of the Family Court Act, 1964, an appeal is maintainable against an order passed under Section 12 of the Act and learned appellate Court rightly decided the issue of maintainability of the appeal against an order of interim custody; that paragraph No.10, which is operative part is not reflecting any nexus with paragraph No.6 of order passed by the trial Court; that in earlier litigation, which was ended in compromise, at that time minor Abdul Ahad was aged about ten years and both parties consented that minors will continue their living with mother, hence, fresh proceedings are even barred under the law; that in the said judgment though terms and conditions were settled by the parties, but trial Court categorically mentioned that father (petitioner) failed to establish his case with regard

to custody of minors; that learned Appellate Court rightly set aside the order of interim custody of the minor as the petitioner in his application has failed to point out anything against the respondent, which justify to have custody of the minor Abdul Ahad with the petitioner; that learned trial Court passed the order of interim custody on flimsy grounds without taking into consideration the fact that minor Abdul Ahad remained in the custody of his mother and in absence of any substance, the order of handing over custody of minor Abdul Ahad to the petitioner was untenable under the law. In support of his submissions, he has relied upon the cases reported as 2000 SCMR 707, 2000 SCMR 838, 2003 MLD 54 Lahore, 2004 SCMR 1839, 2007 P.Cr.L.J 1928, PLD 2018 Balochistan 44, 2020 CLC 1353, PLD 2004 Lahore 395, 2009 CLC 717 [Lahore], 1997 MLD 543 [Lahore], 2014 MLD 1579 [Lahore], 2017 MLD 785 [Sindh] and 2014 CLC 330 [Islamabad].

8. I have examined complete record while keeping in view the arguments raised by the learned counsel for the respective parties.

9. Before responding to the *technical* grounds, so raised, I am left with no option but to add that in all matters relating to custody of child (ward) whether it be for *permanent* custody or for *interim* custody the welfare of the *minor* shall always be the *prime* consideration. Law does recognize competence of the *Guardians Court* to pass an interlocutory order if it (Guardians Court) considers it so justifies, which, *too*, must be for '*protection/welfare*' of the minor *only*. If the *Guardians Court* is considered as incompetent to pass such an *interlocutory* order then it would mean to make it (*Guardian Court*) as *toothless* which shall have to let the custody of minor with *improper* person till final determination. The final determination, I have to admit, is not possible within days because of legal system as well delaying tactics which the party, at advantages, would apply. If such interpretation is believed the same would *even* leave a mother, *too*, from staying away from a minor child *even* who seriously needs her lap. This, I shall insist, had never been the intention of legislature nor can be said to be objective of deliberate insertion of section 12 in the Act, therefore, the provision of section 12 of Act has its applicability and *importance* which, however, is not to be exercised unless there is *legal* justification rather need for *immediate* protection/welfare of minor.

10. Without prejudice to above, I shall insist that a child / minor is not to be taken as *ping pong ball* between two legitimate persons i.e 'mother & father' even because constant changes of custody of the minor from one hand to other hand may effect upon the *immature (innocent)* mind. In the instant matter, it is an *undisputed* position that main petition is pending before the trial Court for hearing of final arguments and judgment. Admittedly custody of minor Abdul Ahad, aged about 15 ½ years, was handed over by the Family Judge to the father (petitioner) on the plea that minor appeared before the Family Judge twice and shown his willingness to join him while on willingness of *girl* to remain with her mother, she (minor girl) was allowed to continue with her mother. Since, last six months minor boy has been residing with his father and *prima facie* no question of any harm to minor is there. Thus, if following *undeniable* facts are appreciated i.e:-

- i) minor himself chosen her father;
- ii) minor boy is with his father;
- iii) minor boy has been residing with his father for last six months;
- iv) the impugned order is *purely* interim one;
- v) the case has concluded and is fixed at *final stage*;

then propriety demands that the custody of children be not disturbed *again* for a very short span of time i.e hearing of final arguments and pronouncement of judgment which *legally* is not dependent upon *interim* order; hence it would be in all fairness to leave things open for the competent *Guardian Court* to pass a legal final judgment onto matter of fitness of contesting parties to have custody of minors.

11. In consequence to what has been discussed above, impugned order - which allowed shifting of custody of minor Abdul Ahad, aged about 15 ½ years, from father to mother, against his wish, forcibly or by using compelling measure, for a temporary period knowingly that neither this order nor that of the trial Court is final - is hereby set aside and the custody shall remain with father as ordered by the trial Court. However, the order of the trial Court is modified to the extent that same is with regard to interim custody and that is subject to final decision of the pending *lis*, which shall be decided by the trial Court within 15 days, from the date of receipt of this order, without being influenced by earlier observations/findings recorded by it but must be in line with the law and precedents of this Court as well Apex Court which have stressed the

welfare of the minor as the paramount consideration in determining the custody of a minor and to abide by the principles of *hizanat* unless there are valid reasons not to do so. Petition stands allowed. These are the reasons of the short order.

JUDGE

Karachi

Dated: 05th November 2020

SAJID