

ORDER SHEET
THE HIGH COURT OF SINDH, KARACHI
C.P. No. S-145 of 2020

Dated: Order with signature of Judge(s)

1. For Orders on CMA No. 3938 of 2023
2. For Orders on CMA No. 3938 of 2023
3. For Orders on CMA No. 3940 of 2023
4. For hearing of Main Case.

Date of Hearing : 29 May 2023.

Petitioner : Younas Ilyas in person.

Respondent No.1: : Nemo

Respondent No. 2 : Nemo

Respondent No. 3 : Shugufta in person

ORDER

MOHAMMAD ABDUR RAHMAN, J. This Petition has been maintained by the Petitioner under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 as against an order dated 6 January 2020 passed by the Vth Additional District and Sessions Judge (MCAC) Karachi (West) in a *lis* entitled Civil Revision Application No. 92 of 2019 that had been preferred by the Petitioner as against an order dated 12 December 2019 passed by the VIIIth Civil Judge Karachi (West) on an application under Section 151 of the Code of Civil Procedure, 1908 in Guardian and Ward Application No. 654 of 2019 and which had been dismissed by that Court.

2. The facts determining the relationship as between the Petitioner and the Respondent are protracted and disputed. The Respondent No. 3 alleges that she was married to the Petitioner on 22 July 2006 and from which wedlock she had six children. She contends that she is a Muslim and was married in accordance with the injunction of Islam and that there is a Nikahnama which evidences her marriage to the Respondent No. 3 but which she contends the Petitioner is deliberately suppressing. She further contends that the Petitioner had concealed the fact that the Petitioner was

in fact a Christian and was also married to two other persons and which eventually led to the breakdown of her marriage with the Petitioner. The Respondent contends that she thereafter maintained Family Suit No. 2692 of 2018 before the VIIIth Civil and Family Judge Karachi (West) for dissolution of her marriage from the Petitioner and for maintenance but which was withdrawn by the Respondent no. 3 on 12 November 2019.

3. The Petitioner conversely claims that the Petitioner and the Respondent no. 3 were both Christians and were married in accordance with Christian personal law and from which wedlock they had six children. He states that the Respondent No. 3 had left the matrimonial home with the children and thereafter there was much acrimony as between the parties which led to criminal charges being pressed by the Respondent No. 3 as against the Petitioner. He states that he thereafter maintained Family Suit No. 2767 of 2019 before the XIIIth Family Judge Karachi (West) for restitution of Conjugal Rights and which was dismissed on 22 October 2022. Apparently no appeal has been maintained against the dismissal of that *lis*.

4. The Petitioner further avers that he had filed Guardian and Ward Application No. 654 of 2019 before the VIIIth Civil & Family Judge Karachi (West) and in which an order was passed on an application under Section 12 of the Guardian And Wards Act, 1890 on 7 August 2019 whereby the Petitioner was given a right to meet his children in court ever fortnight for an hour as against an amount of Rs 1,500 that was payable by him for conveyance charges.

5. The Petitioner thereafter preferred an Application under Section 151 in of the Code of Civil Procedure, 1908 being Guardian and Ward Application No. 654 of 2019 requesting that the Minors should be relocated to a hostel as the Respondent was brainwashing the Minors as against the Petitioner to the extent that the Minors are stating that they would rather

commit suicide then meet the Petitioner. The Application was heard by the VIIIth Civil & Family Judge Karachi (West) who on 12 December 2019 dismissed the same as requiring evidence.

6. The Petitioner preferred to file an application entitled Civil Revision No 92 of 2019 before the Vth Additional District and Sessions Judge (MCAC) Karachi (West) as against the order dated 12 December 2019 that was passed by the VIIIth Civil & Family Judge Karachi (West) in Guardian and Ward Application No. 654 of 2019 and which was dismissed by that court as not being maintainable.

7. The Petitioner now prefers this petition as against the order dated 6 January 2020 passed by the Vth Additional District and Sessions Judge (MCAC) Karachi (West) in Civil Revision Application No. 92 of 2019 seeking to set aside that order and the order dated 12 December 2019 passed by the VIIIth Civil Judge Karachi (West) on his application under Section 151 of the Code of Civil Procedure, 1908 and for the grant of the Application.

8. The Petitioner appeared in person and contended that he had been estranged from the Respondent and that he was being deprived access to his children. Notices was issued to the Respondent No. 3 who also appeared in person and contended that she had been married to the Petitioner when she was still a minor and that she had 6 children with him. She said that when able, she left the Petitioner and is now residing with her six children and is constantly being harassed by the Petitioner. Needless to say neither of them were able to argue any point of law.

9. I have heard the Petitioner and the Respondent No. 3 and have perused the record. The Petitioner had maintained an application under Section 151 of the Code of Civil Procedure, 1908 seeking to amend an order passed under Section 12 of the Guardians and Wards Act, 1890 regarding

the interim custody of the Minors and is requesting that the six minors be removed from the custody of the Respondent No. 3 and admitted into a hostel. The Application while not maintainable as an application under Section 151 of the Code of Civil Procedure, 1908 can be treated as an application under Section 12 of the Guardians and Wards Act, 1890 the provisions of which read as under:

“ ... 12. *Power to make interlocutory order for production of minor and interim protection of person and property.*

(1) *The Court may direct that the person, if any, having the custody of the minor shall produce him or cause him to be produced at such place and time and before such person as it appoints, and may make such order for the temporary custody and protection of the person or property of the minor as it thinks proper.*

(2) *If the minor is a female who ought not to be compelled to appear in public, the direction under subsection (1) for her production shall require her to be produced in accordance with the customs and manners of the country.*

(3) *Nothing in this section shall authorize:*

(a) *the Court to place a female minor in the temporary custody of a person claiming to be her guardian on the ground of his being her husband, unless she is already in his custody with the consent of her parents, if any; or*

(b) *any person to whom the temporary custody and protection of the property of a minor is entrusted to dispossess otherwise than by due course of law any person in possession of any of the property.”*

The scope of the jurisdiction of the Family Court to order interim custody of a Minor is regulated by Section 12 of the Guardians and Wards Act, 1890. Where an application is placed before the Family Court, that Court has the power to direct a person in whose custody the Minors are to be found to either produce the Minor by themselves or cause them to be produced in accordance with directions to be issued by the Court before the Court itself or before a person who the Court appoints. The Court can independently or conjunctively also make an order for the temporary “custody” for the protection of the “person” or the “property” of the minor as it deems fit. I am clearly of the opinion that while making an order for the protection of the person of the Minor, the scope of the powers conferred under Sub-Section (1) of Section 12 of the Guardians and Wards Act, 1890 are not limited to simply the physical well-being of the person of the Minor but also as to the

mental well-being of the Minor and where it is found that the Minors mental well-being is required to be secured, it would be incumbent on the Family Court to pass an order to ensure that the mental well-being of the Minor is also secured.

10. The facts on the basis of which this Application is premised i.e. that the Minors are being brainwashed is an application which would attempt to secure the mental well-being of the minor pending the adjudication of the main application for guardianship to my mind must be entertained as long as there was cogent evidence to substantiate such a risk. The Application maintained by the Petitioner to my mind did not achieve this. A simpliciter statement made by the Petitioner alleging that a Minor has stated to him that he would rather commit suicide than meet with his father while shocking must be examined in the context of the relief that was being sought i.e. to remove six minors from the custody of their mother and to relocate them into the custody of a hostel neither under the control of their mother or their father. This is in fact a very drastic measure and which cannot be entertained as clearly the mental consequences that would follow on the Minors being disconnected from their care giver would be detrimental to the minor's mental well-being. To my mind an application to the Family Court under Sub-Section (1) of Section 12 of the Guardians and Wards Act, 1890 to seek the intervention of a child psychologist to meet with the Minor under the supervision of a court would be more welcome and from whom the Family Court could seek a report before passing any order. The Petitioners application to attempt to remove the Minor from the custody of the Respondent No. 3 shows the obvious *mala fide* on the part of the Petitioner, as the focus of the Petitioner is obviously to extricate the Minors from the custody the Respondent No. 3 as opposed to securing the mental well-being of the Minor. The application to my mind as framed was therefore not maintainable and while dismissed by the order dated 12 December 2019 passed by the VIIIth Civil Judge Karachi (West) in Guardian

and Ward Application No. 654 of 2019 was clearly premised on the wrong findings.

11. While the Petitioner has preferred to maintain an application entitled Civil Revision Application No. 92 of 2019 before the Vth Additional District and Sessions Judge (MCAC) Karachi (West) and which clearly is not maintainable as a revision application as a right to revise an order is not a substantive right granted under the provisions of the Family Courts Act, 1964, I am inclined to consider the application as an appeal under Section 14 of the Family Courts Act, 1964 as against a “decision” of the Family Court and which prima facie may be maintainable¹ keeping in mind that it was filed within a period of 30 days from the passing of the order dated 12 December 2019 by the VIIIth Civil Judge Karachi (West) also warranted consideration and while correctly dismissed was regrettably also not properly premised on the correct rationale.

12. For the foregoing reasons, I am of the considered opinion that the Application filed by the Petitioner under Section 151 of the Code of Civil Procedure, 1908 (being treated as an application under Section 12 of the Guardians and Wards Act, 1890) seeking the relocation of the Minors into a hostel was misconceived and which while correctly dismissed by the order dated 12 December 2019 passed by the VIIIth Civil Judge Karachi (West) in Guardian and Ward Application No. 654 of 2019 and which dismissal while correctly sustained by an order dated 6 January 2020 passed by the Vth Additional District and Sessions Judge (MCAC) Karachi (West) in Civil Revision Application No. 92 of 2019 were both not properly premised on the correct rationale. Nevertheless, as stated above the application under Section 151 of the Code of Civil Procedure, 1908 (being treated as an application under Section 12 of the Guardians and Wards Act, 1890) was clearly misconceived rendering this Petition as not being

¹ See ***Syed Shamim Ahmad vs. Mst. Riaz Fatima*** PLD 1975 Khi 448;

maintainable and which is consequentially dismissed along with all listed applications with no order as to costs. The office is directed to return the Record and Proceedings of both Family Suit No. 2692 of 2018 and Family Suit No. 2767 of 2019 to their respective courts.

JUDGE

Karachi dated 28 August 2023