

# HIGH COURT OF SINDH KARACHI

## C.P No.S-1223 of 2023

[Fatima Fahad Lodhi versus XX<sup>th</sup> Civil Judge & Judicial Magistrate Karachi South & Ors]

Petitioner : Through M/s Zara Sahar Vayani & Rameez  
Lalani advocates

Respondent No.2 : Through Mr. Manzoor Hameed Arain advocate  
Mr. Jan Muhammad Khuhro, Assistant A.G

Date of hearing : 18.12.2023

Date of decision : 22.04.2024

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### ORDER

**KAUSAR SULTANA HUSSAIN J.-** This petition is outcome of interlocutory/interim order(s) passed by learned XX<sup>th</sup> Family Judge Karachi South (**Trial Court**) in Family Suit No.2155 of 2022 [*Re: Fatima Fahad Lodhi versus M. Fahad Lodhi*].

2. Brief history of the case is that petitioner (mother) and private respondent No.2 (father) entered into a marriage; out of said marriage two daughters namely Ffayha Fahad Lodhi and Shazraay Lodhi were born, who are now aged about 12 and 08 years respectively. The said relationship of petitioner and respondent No.2 ended with dissolution of marriage by means of khula vide Order dated 02.11.2022 passed in Family Suit No.1711 of 2022 followed by Decree of even date. Thereafter petitioner (mother) approached the learned VII<sup>th</sup> Additional Sessions Judge Karachi South through Habeas Corpus Petition bearing No.1741 of 222 against the respondent No.2 on the allegation of forcible and illegal removal of custody of both minors, which was disposed of as withdrawn vide Order dated 01.08.2022 since the parties had settled their issues out of the Court. Finally petitioner (mother) filed Family Suit No.2155 of 2022 before learned trial Court under Guardian and Wards Act 1890 (**Act 1890**), which is still pending for adjudication, however as an interim relief vide Order dated 11.01.2023 passed on application under Section 12 of the Act 1890 the respondent (father) was directed to drop the minors at the house of applicant's parents on every Friday after school timings and pick them from there on Saturday at 08:00 pm. Thereafter petitioner (mother) filed an application for modification of the above Order, which was disposed of vide Order dated 13.04.2023 and Order dated 11.01.2023 was modified to the extent that petitioner (applicant) will take the minors from their school on every Friday after school timing while the respondent (father) will pick them on the same day (Friday) at 10:00 pm from the apartment of petitioner (mother). Thereafter respondent (father) moved an application under section 17 of the Act 1890 read with Section 151 CPC which was disposed of vide Order dated

17.10.2023 (**impugned Order**), thereby Order dated 13.04.2023 has been modified to the extent that respondent (father) will pick the minors from petitioner's house at 06:30 pm instead of 10:00 pm.

3. Learned counsel for the petitioner argued that respondent No.2 (father) has time and again made the petitioner's second marriage a valid reason to keep the minors away from her; that despite claim of the petitioner (mother) and admission of the minors that second husband of the petitioner (mother) has never been present during meeting of the minors with petitioner (mother), trial Court went on to decrease the timings of meeting. She finally argued that impugned Order has snatched away the right of meeting with minors from their real mother. In support she relied upon the case reported in (i) 2022 SCMR 2133, (ii) 2019 CLC 1478, (iii) 2020 CLC 1353, (iv) 2019 MLD 804, (v) 1989 CLC 1377, (vi) 2021 YLR 1299, (vii) 2021 YLR 1915, (viii) 2004 SCMR 1839 and (ix) 2022 CLC 762.

4. Contrary learned counsel for the respondent No.2 (father) contends that vide Order dated 11.01.2023 the custody of minors was handed over to petitioner (mother) on every Friday after school timings till Saturday at 08:00 pm, however, petitioner (mother) herself moved an application for modification of said order, which was accordingly modified vide Order 13.04.2023 thereby the custody of minors was handed over to petitioner (mother) on Friday after school hours till 10:00 pm (same day) and the said Order was not challenged by the petitioner (mother), however, through impugned Order only two and half hours of the meeting have been decreased keeping in view the second marriage of petitioner (mother) and statement of minors, but the petitioner (mother) has challenged the said interlocutory order just in order to linger on the proceedings of Guardian and Ward case. In support of his arguments he relied upon the cases reported in (i) 1996 CLC 1372, (ii) 2006 YLR 2604 Karachi, (iii) 2018 MLD 727 Sindh and (iv) 2023 SCMR 1434.

5. I have heard the learned counsel for the parties and have perused the material available on record.

6. Perusal of record shows that by means of interlocutory Order dated 11.01.2023 the custody of minors was handed over to petitioner (mother) on every Friday after school timings till Saturday at 08:00 pm but the petitioner (mother) herself got the said order modified by filing an application and accordingly vide Order dated 13.04.2023 the timing of meeting was decreased and was settled only for Friday after school hours till 10:00 pm of same day. The said order was not challenged by the petitioner (mother), meaning thereby she was agreed with reduction in timing of meeting. However, the Order dated 13.04.2023 was modified through impugned Order dated 17.10.2023 on the application of respondent (father) and thereby two and half hour from the meeting timing was

decreased viz: the respondent (father) was allowed to pick the minors from the house of petitioner (mother) at 06:30 pm instead of 10:00 pm, keeping in view the second marriage of petitioner (mother) and statement of minors.

7. Since the Family Suit bearing No.2155 of 2022, filed under the Act ibid for permanent custody of the minors, is still pending for adjudication, as such I restrain myself from giving any observation with regard to second marriage of petitioner (mother) and statement of minors recorded by learned trial Court. However, the heavy burden is on the petitioner (mother) to first satisfy as to how this Court can exercise any discretion under its Constitutional jurisdiction in a family matter, which too against interlocutory order. It is well settled law that jurisdiction of this Court under Article 199 of the Constitution cannot be invoked against interim or interlocutory orders as High Court, in exercise of its constitutional jurisdiction, is not a Court of Appeal or Revision. Further interlocutory order, if does not suffer from any illegality, malafide or is not passed in excess or lack of jurisdiction and/or is not based on misreading, misconstruing or discarding of evidence and material on record, cannot be challenged in constitutional jurisdiction.

8. Per settled law interlocutory orders of the Family Court cannot be assailed in constitutional jurisdiction, even though in some of cases they are harsh, whereas, the underlining legal principles to consider this legal aspect is the intention of the legislature, who has specifically prohibited filing of appeal against interim order, therefore, allowing constitutional petition would tantamount to defeating and diverting intent of the legislature. Reliance is placed on the cases reported in (i) 2021 CL C 644, (ii) 2020 CLC 131. Admittedly, captioned petition has been filed against interlocutory order(s) passed by the learned trial Court during pendency of the main lis, whereas, under the constitutional Jurisdiction, which otherwise is discretionary in nature, such orders cannot be impugned as a matter of right. Per settled law where the statute does not provide any right of appeal against an interim order, then it could not be by-passed by impugning it in Constitutional jurisdiction as it would defeat the intent of the legislature and the affected party must wait till it matures into a final order and then approach the Appellate forum created by the statute for examining the validity of the said order.

9. In view of hereinabove facts and circumstances of this case, no case for indulgence is made out, as such captioned petition is dismissed being not maintainable.

**JUDGE**

Faheem/PA