

IN THE HIGH COURT OF SINDH AT KARACHI

Constitution Petition No.S-712 of 2020

<u>DATE</u>	<u>ORDER WITH SIGNATURE OF JUDGE</u>
Petitioner	: <u>Kashif Ejaz Khan son of Ejaz Ahmed Khan, through Mr. Altaf Ahmed Sahar, Advocate.</u>
Respondent No.1	: <u>Learned XIth Additional District & Session Judge Karachi (East)</u>
Respondent No.2	: <u>Mst. Maham Sajjad Qureshi wife of Noman Mehmood, through Mr. Farjad Ali Khan, Advocate.</u>
Minor	: <u>Baby Hoorain aged about 5 years</u>
Date of hearing	: <u>19.10.2020</u>
Date of decision	: <u>19.10.2020</u>

ORDER

Abdul Maalik Gaddi, J. Through this Constitutional Petition, the petitioner has assailed the legality and propriety of the order dated 19.09.2020 passed by the learned XIth Additional District Judge, Karachi (East) in Guardian and Wards Appeal No.98 of 2020 [Re. Kashif Ejaz Khan v. Mst. Maham Sajjad Qureshi], whereby learned Appellate Court refused to suspend the order dated 08.09.2020 passed by the Civil Judge and Judicial Magistrate/Consumer Protection Court at Karachi (Korangi) in Guardian and Wards Case No.2004 of 2018.

2. The brief facts leading to the instant petition are that the petitioner filed guardian and ward application under Section 25 of the Guardian and Ward Act 1890 before the Civil Judge/Judicial Magistrate for custody of baby Hoorain aged about five years, which was already in custody of mother/respondent No.2. The said case was contested by filing written statement by the respondent No.2 (Mst. Maham Sajjad); that during pendency of the case, for further adjudication party have entered in to family settlement dated 11.01.2020 copy of which is also annexed and it was mutually decided that since respondent No.2 has contracted second marriage, the custody of the minor baby Hoorain handed over to the petitioner for one month and it was alleged that after one month if the minor/ward namely Hoorain shall remain cordial

with the father, then permanent custody will be given to him; it has alleged that respondent No.2 after the lapse of one and half month filed application under Section 491, Cr.P.C. before the District and Sessions Judge Multan which was dismissed on 27.02.2020 and after dismissal of such application, the respondent No.2 remained silent for almost five months, thereafter, filed application under Section 100, Cr.P.C. before the trial Court for production of minor before the Court and same was objected by the petitioner by filing objection and so also application for withdrawal of the case. Although, the applications were disposed of vide consolidated order dated 08.09.2020 whereby application filed by the respondent No.2 (Mst. Maham Sajjad) was disposed of with directions to petitioner to produce the minor on 12.09.2020 at 09:30 a.m. before the trial Court and peacefully hand over physical custody to the respondent, thereby restoring the case at the position prior to family settlement dated 08.01.2020. Hence, this petition.

3. Being aggrieved and dissatisfied with the order dated 08.09.2020 passed by the Civil Judge/Consumer and Protection Court whereby application under Section 100, Cr.P.C. filed by the respondent No.2 was allowed and directed the petitioner to produce the minor and application for withdrawal of the case filed by the petitioner was dismissed. Thereafter, the petitioner has preferred appeal as stated *supra*.

4. Learned Counsel for petitioner during the course of arguments has reiterated the same facts and grounds, which he has agitated in the memo of petition and has prayed that this petition may be allowed as the baby was voluntarily handed over to the petitioner by the respondent No.2 through family settlement.

5. Learned Counsel for respondent No.2 has filed objections to the main petition, whereas, Counsel for petitioner has filed affidavit-in-rejoinder to the objections. Counsel for respondent No.2 stated that this petition is not maintainable as the same has been filed against the interlocutory order passed by the appellate Court. Besides this, he has taken the plea that family settlement though was made and the custody was handed over to the petitioner for one month and thereafter, custody was not produced

before the trial Court by petitioner, therefore, respondent No.2 filed application under Section 100, Cr.P.C., which was allowed. Under the circumstances, learned Counsel for respondent No.2 was of the view that appellate Court has passed the interim order, which otherwise appears to be in accordance with law, hence, this petition may be dismissed.

6. Heard the parties at a considerable length and record perused as both the parties have reiterated their case and claims as agitated in the memo of petition as well as in the objections.

7. It is noted that the controversy agitated through this constitution petition revolves around the orders passed by the learned Civil Judge/Judicial Magistrate dated 08.09.2020, which was challenged before the Ist Appellate Court and learned Appellate Court while refusing the interim order in favour of petitioner passed the following orders:-

“Heard both the advocates and perused the impugned order in which the appellant has been claim to produce the Custody of minor of which has been handed over to him by the Respondent through Family Settlement. The appellant has challenged the order through the appeal and prayed for suspension of order. From perusal of Family Settlement it transpires that the custody of minor was given for one month only, thereafter it would have been decided about the future of the minor if she have good news with the appellant. the appellant has returned the custody even after one month of the agreement and as per adv. of respondent minor has not met the mother since then. In the interest of Justice and for the welfare of minor, the appellant is directed to comply the order of Guardian Court dated 08.09.2020 and Guardian Judge is directed to proceed as per law.

Let the matter be fix for filing objection on main appeal and it implicated on next date. The prayer about interim stay is declined accordingly.”

Perusal of above order, it reveals that the appeal is pending adjudication wherein notices have been issued to the respondents and objections are awaited from the other sides, thus, it appears that said appeal has still not decided and if at this stage merits of the case is discussed, certainly, either party would be prejudiced. Even otherwise, in this constitution petition, serious disputed questions of facts has been alleged with regard to family settlement in between the parties in respect of custody of baby Hoorain aged about five years, which cannot be resolved through this writ

jurisdiction. In constitutional jurisdiction this Court refrain to discuss the merits of the case. during the course of arguments, I have specifically asked the question from learned Counsel for the petitioner to point out any illegality in the impugned order, which appears to be interim in nature, he has no satisfactory answer with him.

8. As observed above, the appeal is pending, therefore, the petitioner has appropriate and efficacious remedy available to him for redressal of his grievance under the law before appellate forum. It is settled law that if remedy available to a person for redressal of his grievance then constitution petition would not lie.

9. In view of the above, I find no merits in this Constitution Petition which is accordingly **dismissed** along with listed application.

10. Since there is a dispute between the parties with regard to custody of minor/ward baby Hoorain, therefore, Appellate Court is directed to decide the appeal as per law, preferably, within thirty working days after receipt of this order. Office is directed to send copy of this order to appellate Court for information and compliance.

11. This petition was dismissed by me on 19.10.2020 through short order and these are the detailed reasons thereof.

12. Before parting with this order, I would like to make it clear that observations, if any, made herein above are tentative in nature and shall not effect the merits of the case of either party.

JUDGE

*Faizan/PA**