

**JUDGMENT SHEET**  
**PESHAWAR HIGH COURT, PESHAWAR**  
**JUDICIAL DEPARTMENT**

**W.P No.502-P of 2024**

Mst Sadia

Vs.

Ubaid Afridi and others

Date of hearing **08.03.2024**

Petitioner(s) by: **Mr. Sufian Malik and Mr. Ilyas Orakzai,  
Advocates.**

Respondent(s) by: **Muhammad Ziaullah, Advocate.**

\*\*\*\*\*

**JUDGMENT**

\*\*\*\*\*

**IJAZ ANWAR, J.** This writ petition has been filed under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, with the following prayer: -

*"It is, therefore, most respectfully prayed that on acceptance of instant writ petition, the impugned judgments/orders of both the learned sub-ordinate Courts may kindly be declared as illegal, unlawful, without lawful authority and ineffective upon right of the petitioner.*

*Secondly impugned judgments/orders of both the learned sub-ordinate Courts may graciously be set-aside and consequently, interim custody of minor be restored to petitioner for safe administration of justice.*

*Or*

*Any other remedy deemed fit and appropriate in the circumstance of the case may also be granted to petitioner."*

2. In essence, petitioner instituted her application under Section 25 of the Guardian and Wards Act before the Judge Family Court against the respondent/husband for the custody of her minor daughter Miss. Ahlam Afridi aged about four years. She also moved an application for interim custody of the minor. Both the applications were contested by the respondent by filing his written statements. The learned Judge Family Court, after hearing both the parties dismissed the application for interim custody. Being aggrieved petitioner filed an appeal before the District & Sessions Judge Khyber, which was also dismissed vide the impugned judgment and order dated 17.01.2024. Hence the instant writ petition.

3. Arguments heard and record perused.

4. Perusal of the record reveals that suit was filed by the present petitioner for the custody of minor namely Ahlam Afridi, aged about four years. The Judge Family Court vide order dated 02.11.2023 dismissed the application for interim custody and it was ordered that the custody of the minor would remain with respondent No.1. It appears that appeal thereagainst before the learned District Judge Khyber was also dismissed vide order dated 17.01.2024 on the ground that appeal is not maintainable.

5. I have heard both the learned counsel for the parties at length both mainly argued the matter pertaining to the interim custody and welfare of minor and also relied

upon certain judgments of the Superior Courts, however, to my understanding the main issue that cropped up from the order of the learned District Judge is that as to whether appeal under Section 14 of the Family Courts Act 1964 would be maintainable against the order of the Guardian Judge/Family Court refusing interim custody and what would be the effect of Section 47 of the Guardians and Wards Act, 1890, which provides different orders to be appealable before the appellate Court/High Court.

6. Now it is to be seen that in case it is held that appeal before the District Court as provided under Section 14 of the Family Courts Act 1964 is not maintainable only then the merit of the case and maintainability of the writ petition against interim order will be deliberated.

7. Section 14 of the Family Courts Act being relevant in the matter is reproduced as below:-

***"14. Appeals.— [(1) Notwithstanding anything provided in any other law for the time being in force, a decision given or a decree passed by a Family Court shall be appealable—***

***(a) to the High Court, where the Family Court is presided over by a District Judge, an Additional District Judge or a person notified by Government to be of the rank and status of a District Judge or an Additional District Judge; and***

***(b) to the District Court, in any other case.]***

***(2) No appeal shall lie from a decree passed by Family Court—***

***(a) for dissolution of marriage, except in the case of dissolution for reasons specified in clause (d)***

*of item (viii) of section 2 of the Dissolution of Muslim Marriages Act, 1939;*

*(b) for dower [or dowry] not exceeding rupees [thirty thousand];*

*(c) for maintenance of rupees [One thousand] or less per month.*

*Punjab amendment:*

*Subsection (2) in clause (b) for the word "thirty thousand" the words "one hundred thousand" substituted and (b) "one thousands" the words "five thousand" substituted by Family Courts (Amendment) Act 2015 (XI of 2015)*

*(3) No appeal or revision shall lie against an interim order passed by a Family Court.*

*(4) The appellate Court referred to in sub-section (1) shall dispose of the appeal within a period of four months..]"*

8. Similarly, Section 25 of the Family Courts Act 1964 provides as follows:-

*"25. Family Court deemed to be a District Court for purposes of the Guardians and Wards Act, 1890.— A Family Court shall be deemed to be a District Court for the purposes of the Guardians and Wards Act, 1890, and notwithstanding anything contained in this Act, shall, in dealing with matters specified in that Act, follow the procedure prescribed in that Act".*

9. While Section 4(5) of the Guardians and Wards Act, 1890 defines "the Court" as follows:-

*"S.4(5) "the Court" means:— (a) the District Court having jurisdiction to entertain an application under this Act for an order appointing or declaring a person to be a guardian; or*

*(b) where a guardian has been appointed or declared in pursuance of any such application—*

- (i) the Court which, or the Court of the Officer who, appointed or declared the guardian or is under this Act deemed to have appointed or declared the guardian; or*
- (ii) in any matter relating to the person of the ward the District Court having jurisdiction in the place where the ward for the time being ordinarily resides; or*
- (c) in respect of any proceeding transferred under section 4A, the Court of the officer to whom such proceeding has been transferred.]”*

10. Section 47 of the Guardians and Wards Act provides for orders that can be appealed against, it being relevant is also reproduced as under:-

*“47. Orders appealable. An appeal shall lie to the High Court from an order made by a [\*\*\*]Court,—*

- (a) under section 7, appointing or declaring or refusing to appoint or declare a guardian; or*
- (b) under section 9, sub-section (3), returning an application ; or,*
- (c) under section 25, making or refusing to make an order for the return of a ward to the custody of his guardian; or,*
- (d) under section 26, refusing leave for the removal of a ward from the limits of the jurisdiction of the Court, or imposing conditions with respect thereto; or,*
- (e) under section 28 or section 29, refusing permission to a guardian to do an act referred to in the section; or,*
- (f) under section 32, defining, restricting or extending the powers of a guardian; or,*
- (g) under section 39, removing a guardian; or,*
- (h) under section 40, refusing to discharge a guardian; or,*

*(i) under section 43 regulating the conduct or proceedings of a guardian or settling a matter in difference between joint guardians, or enforcing the order; or,*

*(j) under section 44 or section 45, imposing a penalty:*

*[provided that, where the order from which an appeal is preferred is passed by an officer subordinate to a District Court, the appeal shall lie to the District Court.]”*

11. In the instant case, the learned Family/Guardian Court has declined interim custody of minor to the mother/petitioner and ordered that she has to remain in the custody of father/respondent vide order dated 02.11.2023. Though Section 14 (3) of the Family Courts Act provides that interlocutory orders/interim orders passed by the Family Court cannot be made a subject of appeal or revision, however, Section 14(1) provides that “a decision given or a decree passed by a Family Court shall be appealable”. In the case titled “Ms. Quratulain Aleem Vs Muhammad Rehan Khan and another” (2006 YLR 2604 Karachi), it was held as under:-

“..... Section 14 of Family Courts Act refers to two categories of orders i.e. “decision given” or “decree passed”. By using these two terms in the section legislature intends two different meanings of them. Normally, decision means the conclusion of Court proceedings, but where two words i.e. “decision given” or “decree passed” are used in a statute requiring a liberal construction the term “decision given” would mean a declaration which is to be followed in subsequent proceedings of a case. Therefore, the term “decision given” does not qualify with any such word as final. Hence, an order under section 12 of Guardians and Ward Act being of introductory nature will fall under

the category of "decision given". Same like views were expressed in PLD 1975 Karachi 448 and in 1987 MLD 2563 that:

*"Expression "decision given" in section 14 of West Pakistan Family Courts Act is not qualified by word "final" order by Guardian Judge under section 14 Guardian Ward Act--- Appeal able to District Court under section 14."*

*Even otherwise; while inserting clause (3) in section 14 of Family Courts Act no amendment has been made in clause (1) of it and the term "decision given" or "decree passed" are still without any changing position to an order under section 12 of Guardians and Ward Act made on an interlocutory application moved to invoke provisional or interlocutory relied, rather than a final judgment and thus the remedy lies in filing appeal before District Judge in case an order is passed by Civil/Family Judge.*

*Learned counsel for petitioner has also referred certain authorities in support that Constitution petition against an order passed under section 12 of Guardians and Wards Act is maintainable but in the decision referred the point under discussion about the maintainability of constitution petition against an interlocutory order was not the issue and those petitions were entertained in different circumstances which are not appearing in the matter".*

12. The same question came up before a Division Bench of the Hon'ble Lahore High Court in case titled "Mst. Shabeena Younas Vs Additional District Judge, Lahore and 3 others" (PLD 2023, Lahore 453), while relying upon the judgment of the superior Courts the Hon'ble Lahore High Court held as under:-

*"6. The question of original order passed on Application under section 12 of the Guardians and Wards Act, 1890 being appealable or not came up for consideration in judgments reported as 1987 MLD 2563 Mst. Lali v. Muhammad Raheem Bakhsh and another, 2006 YLR 2604 (Ms. Quratulain Aleem v. Muhammad Rehan Khan), 2012 YLR 2266 (Shazia Akbar v. Maqsood Ahmed and another) and 1987 CLC 1630 (Mst. HafeezaBarohi v. Guardian*

Judge/Family Judge and another), which judgments on the basis of section 14(1) of the Family Courts Act, 1964 have declared the order passed on application under section 12 of the Guardians and Wards Act, 1890 whereby custody of minor is changed as appealable. For reference the relevant portion of Hafeeza Barohi's case (supra) is reproduced below: -

"4. The learned counsel submits that as the impugned order is not appealable, therefore, no appeal could be filed. Further contends that section 12 of the Guardians and Wards Act is not appealable by virtue of section 47 of the same Act. As the matter essentially falls within the purview of West Pakistan Family Courts Act 1964, therefore, by virtue of section 14 of the said Act, it does become appealable. The opening words of section 14 of the Family Courts Act 1964 read "Notwithstanding anything provided in any other law for the time being in force". The effect of these words is to exclude any provision of the Guardians and Wards Act which may be in conflict with section 14. Reliance is placed on Mst. Zaibun Nisa v. Muhammad Mozammil PLD 1972 Kar. 410. The same question also came before the Supreme Court wherein their Lordships have in Sakhawat Ali and another v. Mst. Shui Khelay PLD 1981 SC 454 held that section 14 does provide appeal which would lie to the District Judge. Therefore, this petition is not maintainable as alternate remedy is available.

Even otherwise also the present petition has been filed challenging an interlocutory order. The main case under section 25 of the Guardians and Wards Act with regard to the custody of the minor is still pending, therefore, this Court would not interfere in writ jurisdiction. As has been held in Mst. Kaniz Fatima and 3 others v. Member (Revenue), Board of Revenue, Punjab, Lahore and 5 others PLD 1973 Lahore 495 writ petition would not lie to impugn or impeach order of interim nature. For the reasons discussed above, I find no force in this petition which is dismissed in limine."



13. The effect of Section 47 of the Guardians and Wards Act, 1890 *vis-a-vis* Section 14 of the Family Courts Act was taken up in the case titled **"Mst. Eram Raza and 2 others Vs Syed Mutaqi Muhammad Ali and another"** **(2018 MLD 727)**, the relevant paras of which is reproduced as under:-

*"7. The instant case may be seen from another angle. As discussed above, the interim order is passed in the instant case is under Section 12 of G & W Act and now, it is to be seen whether the same is appealable or not. The Guardian Judge partially allowed the application filed under Section 12 of G & W Act and during summer vacation overnight custody of the minor girls was handed over to the respondent No. 1, who is the real father of the minors. The learned counsel for the petitioner No. 1 much emphasis upon filing of the Constitution Petition on the ground that the impugned order is not appealable. By quoting the case of Irfan Ahmed (supra), he considers that the matter pertaining to the guardianship issues shall be governed by the Family Courts Act and under section 14(3), there is a restriction upon filing an appeal against an interim order. However, the position is considerably different as the interim order is passed under Guardians and Wards Act and the same is required to be seen under this context. No doubt, section 12 of G & W Act is not mentioned under appealable orders as provided within section 47 of the G & W Act, but after insertion of the word 'Guardianship' in the First Schedule of Family Courts Act, the provision of appeal is available against an order under Section 12 of G & W Act before the District Judge or Additional District Judge as per the provision of Section 14 of the Family Courts Act, which is reproduced as under: --*

*"Appeals. --(1) Notwithstanding anything provided in any other law for the time being in force, a decision given or a decree passed by a Family Court shall be appealable-..... in subsection (1) shall dispose of the appeal within a period of four months."*

*8. As per the provision of Section 47 of G & W Act, an order under Section 12 of the said Act is apparently seems to be not appealable but in fact it is not so. Actually, the provisions of G & W Act cannot be read in isolation after bringing the matter pertaining to 'guardianship' under the*

*jurisdiction of the Family Courts by the Legislature. Now all the matters pertaining to guardianship shall be exclusively triable by the Family Courts created under the Family Courts Act, which is a later enactment comparing to G & W Act. It is the settled principle of interpretation that the statute later in time shall prevail to the earlier. In this respect, I would like to take reliance from the cases of Apex Court reported as Aley Nabi and others v. Chairman, Sindh Labour Court and another (1993 SCMR 328); Messrs Mehraj Flour Mills and others v. Provincial Government and others (2001 SCMR 1806) and Suo Motu Case No.13 of 2007 (PLD 2009 SC 217).*

*9. Now, it is clear from the plain reading of subsection 1 of Section 14 of the Family Courts Act, according to which 'notwithstanding anything provided in any other law for the time being in force, a decision given or a decree passed by a Family Court shall be 'appealable'. Meaning thereby that in spite of the fact that section 12 is not mentioned under section 47 of G & W Act, an appeal can be filed against an order passed under Section 12 being a 'decision' given by a Family Court, and the same does not hit by subsection 3 of Section 14 of the Family Courts Act. It is also obvious from the bare perusal of the aforesaid statutory provision, that appeal shall be filed before the District Court, if the Family Court is not presided by a District Judge or an Additional District Judge."*

14. It is pertinent to mention here that the effect of the provision of the Guardians and Wards Act, 1890 vis-a-vis the provisions of the Family Courts Act 1964 was also taken up in the case titled "Shazia Akbar Vs Maqsood Ahmad and another" (2012 YLR 2266 Sindh), wherein, it

was held as under:-

*"9. The Family Court would not only have exclusive jurisdiction to decide the matters relating to the custody of children and guardianship etc., but would also be deemed to be a District Court for the purposes of Guardian and Wards Act, 1890 and that an appeal against the order passed by a Family Court would lie to District Judge under section 14 of the West Pakistan Family Courts Act, 1964 when Family Court was presided over by a Judge subordinate to a District Judge and that would be an end of the matter. Aggrieved*

*person could file Constitutional Petition in the High Court, and that too when finding of District Judge was based on misreading and non-reading of evidence, erroneous assumption of law and fact or was founded on considerations which was extraneous to the record.*

*10. In respect of the family disputes cropped up between the parties as well as custody of the minor, what does law say, is as under: --*

*"(1) Custody of minor - Forum of suit. Provisions of W.P. Family Courts Act, 1964 has overriding effect insofar as the matters fall within the ambit of Schedule. Family Court is the forum which has to be approached in respect of matters relating to custody of minor being one listed item in the Schedule attached to Family Courts Act, 1964.*

*(2) Form of appeal. For appeal against judgment and order of Family Court, provisions of Guardians and Wards Act, 1890 are applicable only to the extent of following the procedure for the trial of such matters and not as regards substantial right of appeal."*

*11. Bare reading of above quoted provisions of law clearly shows that this Court has no jurisdiction whether in cases dealt under the Family Courts Act or those dealt under the Guardians and Wards Act by virtue of section 25 of the Family Courts Act. Section 14 providing for the appeals continues and will continue to cover the field of remedy, of course, apart from the Constitutional remedy".*

15. In view of the above, despite the fact that the order passed under Section 12 of the Guardians and Wards Act, 1890 has not been mentioned to be appealable order as provided within Section 47 of the Guardians and Wards Act, 1890, however, this point has also further been elaborated in case titled "Tassadaq Nawaz Vs Masood Iqbal Usmani and others"(PLD 2018 Lahore 830) in the following words:-

*"6. The interim order passed in the instant case is under section 12 of the Guardian and Wards Act, 1890 and now it is to be seen whether the same is appealable or not. The learned Guardian Judge*

partially allowed the application and the petitioner has been allowed to meet his son namely Danial only twice in a month on second and fourth Saturday of every month in the Court premises. The learned counsel for the petitioner has stressed upon filing of the constitution petition on the ground that the impugned order is not appealable as the matters pertaining to the guardianship issues shall be governed by the Family Courts Act, 1964 and under section 14(3) there is a restraint upon filing an appeal against an interim order. No doubt, order passed under section 12 of the Guardian and Wards Act, 1890 is not mentioned under appealable orders as provided within section 47 of the Act, 1890 but after insertion of the word "Guardianship" in the First Schedule of Family Courts Act, 1964, the provision of appeal is available against an order under section 12 of the Act, 1890 before the District Judge or Additional District Judge as per the provision of Section 14 of the Family Courts Act, 1964. In actual, the provisions of Guardian and Wards Act cannot be read in isolation after bringing the matter pertaining to 'guardianship' under the jurisdiction of the Family Courts by the Legislature. All the matters, now, pertaining to guardianship shall be exclusively triable by the Family Courts created under the Family Courts Act, 1964, which is a later enactment comparing to Guardian and Wards Act, 1890, because it is the settled principle of interpretation that the statute later in time shall prevail to the earlier; reliance is placed on *Aley Nabi and others v. Chairman, Sindh Labour Court and another* (1993 SCMR 328), *Messrs Mehraj Flour Mills and others v. Provincial Government and others* (2001 SCMR 1806) and *Suo Motu Case No.13 of 2007 (PLD 2008 SC 217)*.

7. So far as the argument that section 14(3) of the Family Courts Act, 1964 bars appeal before the District Court in the matter in hand is concerned, plain reading of the language of section 14 of the Act, 1964 makes it vivid that notwithstanding anything provided in any other law for the time being in force a decision given or a decree shall be appealable. The only exclusion is with regard to an interim order. While dealing with the similar situation earlier it was pronounced that such like order falls within the purview of 'decision given' and is appealable under section 14 of the West Pakistan Family Courts Act, 1964. In this regard reliance is placed on *Mst. Zaibun Nisa v. Muhammad Mozammil* PLD 1972 Karachi 410, *Syed Shamim Ahmad v. Mst. Riaz Fatima* PLD 1975 Karachi 448, *Mst. Akbar Jan v. Mst. Bibi Nasim and 4 others* 2000 YLB/2652-Peshawar, *Memoona Ilyas v. Additional District Judge and*

*others 2017 CLC 1747-Lahore and Mst. Eram Raza and 2 others v. Syed Mutaqi Muhammad Ali and another 2018 MLD 727-Sindh.*

16. In light of the above, it follows that the order passed under Section 12 of the Guardians and Wards Act allowing or refusing interim custody of the minor is appealable under Section 14 of the Family Courts Act, which provides appeal against decision as well. While in terms of Section 4(5) of the Guardians and Wards Act, the "Court" means the "District Court" having jurisdiction to entertain an application under the Act and the later statute Family Courts Act specifically provides under Section 25 that Family Court deemed to be a District Court for the purpose of Guardians and Wards Act, 1890. Though under Section 47 of the Guardians and Wards Act details of the eventualities were given under which appeal can only be filed before the High Court against the orders passed by the Guardian Court, and as stated above, an order passed under Section 12 of the Guardians and Wards Act is not covered under Section 47 of the Act *ibid*, albeit, Section 14 of the Family Courts Act has been given an overriding effect when it starts from words "*Notwithstanding anything provided in any other law for the time being in force*". Thus, the order of the learned District Judge refusing to exercise his appellate jurisdiction is not sustainable under the law, it is accordingly struck down.

17. Though much emphasis was made for the custody of minor to the mother, however, since it is held

that the appeal is maintainable in the matter, as such, in the event of the availability of adequate and efficacious remedy the constitutional jurisdiction cannot be exercised, as such, the impugned order of the District Judge Khyber is set aside and the appeal of the petitioner shall be deemed as pending and it shall be decided strictly in accordance with law. Being a matter relates to the custody of minor, as such, it is expected that the appeal be decided expeditiously. Parties are to appear before the learned District Judge, Khyber on 14.03.2024 for further proceedings in the matter.

**Announced**  
**Dt:08.03.2024**

  
JUDGE

**(DB) Hon'ble Mr. Justice Ijaz Anwar**

**\*Amir Shehzad\***