

## IN THE HIGH COURT OF SINDH, KARACHI

C.P. NO. S-1014 / 2016

**PRESENT:****MR. JUSTICE ARSHAD HUSSAIN KHAN*****Faraz Alamgir vs. Addl. District Judge Karachi (South) and others***

Petitioner	Faraz Alamgir, Through Mr. Mohsin Shahwani, Advocate.
Respondents 1&2	Through Ms. Yasmin Sultana, Advocate.
Respondent No.3	Nemo for Respondent No.3
Date of hearing	28.11.2016
Date of judgment	21.12.2016

**JUDGMENT**

**ARSHAD HUSSAIN KHAN, J.** The petitioner through the instant constitutional petition has challenged the order dated 24.05.2016 passed by the learned Additional District and Session Judge Karachi (South) whereby while dismissing the family Appeal bearing No.47 of 2016 filed by petitioner upheld the order dated 16.05.2016 passed by learned Family Judge Karachi (South) in G & W Application No. Nil of 2016; returned the application under section 25 of the Guardian and Wards Act 1980, under order VII Rule 10, CPC.

2. Brief facts leading to the filing of the present petition as averred therein are that petitioner is a well educated having foreign qualifications, citizen of Pakistan and also a British passport holder being dual national. In the year 2006, during professional education the Petitioner fell in love with respondent No.3, who is an Indian National. The petitioner and respondent No.3 entered into wedlock, solemnized in Karachi on 17.02.2007. Out of said wedlock one male child namely Master Yousef Alamgir was born on 29.11.2012. The said minor though is a Pakistan national yet he also holds British passport. It is also averred that petitioner and respondent No.3 along with minor resided in Karachi being not only a place of their domicile but ordinary residence as happily married couple. The petitioner provided best possible comfort to respondent No.3 and maintained the minor. It is also averred that respondent No.3 is a patient of temperamental imbalance and was being treated by the well-known doctors of Karachi. As a consequence,

the duties of minor were largely neglected by respondent No.3 and almost completely handled by the petitioner's mother. It is further averred that minor resided with the petitioner and respondent No.3 along with his paternal grandparents in Karachi with utmost love and care with a high standard of living being admitted to one of the best pre-schools in Karachi. It is also averred that on 18.12.2014, respondent No.3 along with the minor, left for India to meet her parents with the assurance to return in two (2) weeks at the time of starting of new session of child's pre-school. However, when respondent No.3 did not come as per the schedule and instead started complaining about her illness, the petitioner travelled to India and after spending some time with respondent No.3 and his child came back to Karachi upon the assurance given by the respondent No.3 that she along with minor would soon re-joining him in Karachi. However, respondent No.3 failed to kept her promises upon which the petitioner sent various emails and talked to her over phone but respondent No.3 not only avoided to come back but she has also denied the petitioner's right to talk with his minor son. The petitioner also talked with the father of respondent No.3, he not only misbehaved with the petitioner but also threatened dire consequences in the event the petitioner travelled to India again. The petitioner faced with such a situation filed an application under Section 25 of the Guardian and Wards Act 1980 before the learned family Judge, Karachi (South). The said application was returned by the learned family judge vide order dated 16.05.2016 for want territorial jurisdiction. The petitioner, against the said order, preferred Family Appeal bearing No. 47/2016 before the learned court of VIIIth Addl. District Judge, Karachi (South), however, the said appeal was also dismissed. The petitioner having no alternate remedy available to him has filed present petition.

3. Notice of the present case has been served upon respondent No.3 through courier as well as through Pakistan High Commission in India, consequently this court on 14.11.2016 held the service good upon respondent No.3. The record of the present case transpires that respondent No.3 despite having notice of the present case has chosen to remain absent.

4. Learned counsel for the petitioner during the course of his arguments has contended that the learned courts below while passing the impugned orders have failed to exercise jurisdiction vested in the family court, causing serious miscarriage of justice. He further contended that respondents No.1 and 2, completely over looked and failed to appreciate the provisions of Family Laws of Pakistan including Guardian and Wards Act 1980 and West Pakistan Family Court Act and Rules 1965, whereby the territorial jurisdiction of the family court in such a situation has been clarified. It is also

contended that learned respondents No. 1 and 2 also ignored the case law cited by the petitioner. Further contended that learned respondents No. 1 and 2 while passing the impugned orders have failed to consider the fact that not only cause of action has arisen at Karachi, as the minor was deceitfully and unlawfully removed from the territorial jurisdiction of the family court but both the petitioner and respondent No.3 last resided in Karachi and respondent matrimonial home is also Karachi being still in Petitioner's wedlock. Further contended that minor is as good as refugee in India being a British Pakistani born in Pakistan having a local domicile and passport will be deprived of basic fundamental rights in India with the apprehension of facing sense of insecurity, inequality, hatred being Pakistani Muslim. He further contended that the minor is currently residing in India on temporary visa which will eventually expire making him illegal immigrant, as the minor is not entitled to Indian citizenship being born Pakistani, such facts have been completely ignored by respondents No.1 and 2 while passing the impugned orders, rendering the impugned orders are a nullity in the eyes of law and liable to be set aside. Leaned counsel for the petitioner in support of his stance in the case has relied upon following case law:

- (i) **PLD 2012 SC 66** Major Muhammad Khalid Karim Vs. Mst. Saadia Yaqub and others.
- (ii) **2001 SCMR 2000** Anne Zahra vs. Tahir Ali Khilji and 2 others.
- (iii) **PLD 2015 SC 15** Mst. Shahista Bibi and another Vs. Superintendent, Central Jail, Mach and 2 others.

5. Heard the learned counsel for the petitioner and also perused the available record and the law applicable to the present case.

6. The record reveals that upon the petitioner's application the learned family judge Karachi (South) vide its order dated 16.05.2016 returned the application/plaint of the petitioner under Order VII Rule 10 of CPC. Relevant portion of the said order is reproduced as under:

*"5. I have taken the guidance from the case law produced by the learned counsel for the applicant and I am of the humble view that the reliance placed by the learned advocate for the applicant is distinguished from the facts of the instant application. The abovementioned circumstances, of the case are sufficient facts to oust the jurisdiction of this court entertaining the application under Section 25 of the Guardian & Wards Act 1890. I am of the humble view that this instant application is not maintainable for want of territorial jurisdiction because it is a matter of record that the minor is not living within the jurisdiction of this court as he has already*

*been removed by the respondent from jurisdiction of this court before presentation of this instant application by the applicant before this Court. As such, keeping in view the above material the plaint is hereby returned to applicant. The applicant is at liberty to file the same before the Court having jurisdiction to try the same and for getting his application entertained accordingly. The plaint was presented before this Court on 13<sup>th</sup> May 2016 and returned to the applicant on 16<sup>th</sup> May 2016 due to lack of jurisdiction.”*

The said order was challenged by the petitioner before the VIIIth Additional District and Session Judge Karachi (South) in Family Appeal No. 47 of 2016. The said Family Appeal was dismissed by the learned ADJ vide its order dated 24.05.2016. Relevant portion of the said order is reproduced as under:-

*“The main argument of the learned counsel for the appellant is that since minor was residing in Karachi within the territorial jurisdiction of the trial court but the learned trial court completely ignored the provision of family law of Pakistan including Guardian and Wards Act 1890 as well as the case law cited before it passed an illegal order by returning the plaint and same is liable to be set aside. On scrutiny of the record it is revealed that as per own showing of the appellant on 18.12.2014 the respondent along with minor left for India for 02 weeks. From the content of Guardian and Ward application it is depicted quite clearly that the minor child named above left along with respondent for India with the consent appellant without any force. It is pertinent to mention here that before filing Guardian and Ward application the appellant has filed W.P. (CRL) 78/2016 and CRL MA 448/2016 before High Court of Dehli at New Dehli which was dismissed vide order dated 15.02.2016 for want of jurisdiction on the ground that the respondent is residing in Kolkata. In view of the above circumstances I find no reason to interfere in the impugned order passed by the learned Family Court as law and prevailing circumstances of the case. The case law PLD 2012 Supreme Court 66 relied upon by the learned counsel for the appellant distinguishable on the ground the appellant has not stated that the minor was taken away to India by force.*

*For the reason recorded above instant appeal stand dismissed limine.”*

7. Before going into further discussion it would be advantageous to discuss relevant provisions of the Guardians and Wards Act, 1890, West Pakistan Family Courts Act, 1964 and The West Pakistan Family Court Rules, 1965.

**Section 9 (1)** of Guardian and Wards Act 1890 reads as under:

**“9. Court having jurisdiction to entertain application. (1)** If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides.”

**Section 25** of Guardian and Wards Act 1890 reads as under:

“**25. Title of guardian to custody of ward.** (1) If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.

**Section 5 and 26** of West Pakistan Family Courts Acts, 1964

“**5. Jurisdiction.**— Subject to the provisions of the Muslim Family Laws Ordinance, 1961, and the Conciliation Courts Ordinance, 1961, the Family Courts shall have exclusive jurisdiction to entertain, hear and adjudicate upon matters specified in the Schedule.

**26. Power to make rules.**— (1) Government may, by notification in the official Gazette, make rules to carry into effect the provisions of this Act.

(2) Without prejudice to the generality of the provisions contained in sub-section (1), the rules so made may, among other matters, provide for the procedure, which shall not be inconsistent with the provisions of this Act, to be followed by the Family Courts.

**SCHEDULE** [see SECTION 5]

**1.** Dissolution of marriage. **2.** Dower. **3.** Maintenance. **4.** Restitution of conjugal rights. **5.** Custody of children. **6.** Guardianship. **7.** Jactitation of marriage. **8.** Dowry.

**Rule 6 of West Pakistan Family Court Rules 1965** reads as under:

“**6.** The Court which shall have jurisdiction to try a suit will be that within the local limits of which

(a) the cause of action wholly or in part has arisen, or

(b) where the parties reside or last resided together:

**Provided** that in suits for dissolution of marriage or dower, the Court within the local limits of which the wife ordinarily resides shall also have jurisdiction.”

[Underlining is to add emphasis]

8. In section 9(1), of Guardians and Wards Act, 1890 the emphasis is undoubtedly on the minor's "ordinary" place of residence. Such a place is to be determined by finding out as to where the minor was ordinarily residing and whether such residence would have continued in case of recent removal of the minor to a different place. The new place to which the minor may have gone or may have been removed to, can become the ordinary residence of the minor only after the minor has settled down at that place for a reasonably long period. Furthermore, in section 9 (1) of Guardians and Wards Act, 1890,

the phrase used is not where the minor "resides", but where he "ordinarily resides". Secondly, the word "ordinarily" has been intentionally used to bring in a consideration other than that of mere factual residence. Thirdly, the word "ordinarily", means more than mere temporary residences and if this word is omitted, then mere temporary residences will also become residences within the meaning of the clause under construction which, it is obvious, cannot be the intention of the Legislature on the subject. Fourthly, if it is assumed for the purposes of determining jurisdiction under Section 9(1), the minor's actual place of residence where he, in fact, is at the time of presenting the application will be considered then it will seriously affect those situations where a minor is removed from place to place in order to defeat the process of law and the jurisdiction of Courts. In the present case it appears from the record that learned courts below overlooked these fact that respondent no.3 is still in the wedlock of the petitioner and both the respondent no.3 and minor are Pakistani nationals holding CNIC and NADRA registration respectively. It also appears from the record that the custody of minor was removed from the territorial jurisdiction of this Country in a deceitful manner as both respondent no.3 and minor having Pakistani nationality travelled to India on a temporary visa.

9. The Honourable Supreme Court in the case of Anne Zahra (supra) has expounded the provisions of West Pakistan Family Courts Act, 1964 and Rules (West Pakistan Family Court Rules 1965) made there under and it's over riding effect on S.9 (1) of Guardians and Wards Act, 1890. It would be advantageous to reproduce the relevant portions of the reported decision as under:

“4. The question for determination which arose in this case was as to which Family Court had the territorial jurisdiction to entertain application under section 25 of the Guardians and Wards Act and whether such a question should be determined in the light of the provisions of the Guardians and Wards Act or the West Pakistan Family Courts Act, 1964 and the rules framed thereunder.

5. There is no doubt that prior to promulgation and coming into force of West Pakistan Family Courts Act, 1964, the matter regarding territorial jurisdiction of the Guardian Judge constituted under the said Act and the procedure to be followed after entertainment of the applications thereunder as also the filing of appeals and revision petitions against the orders passed by the Guardian Judge were governed and regulated by the Guardians and Wards Act, 1890. The Guardian Judge was the District Court which was to be designated through notification under the said Act. Family Courts under the West Pakistan Family Courts Act, 1964 were created and vested with the exclusive jurisdiction to entertain and decide all the suits and other matters included in the

schedule attached to the said Act. A perusal of the said schedule shows that the matters relating to appointment of guardians of the minors and their properties and custody are included in it. Section 5 of the said Act provides that in respect of all matters included in the schedule, the Family Court shall have the exclusive jurisdiction to entertain suits or applications with regard thereto and decide the same. Under section 25 (ibid), a Family Court, thus seized of a matter brought before it in respect of any matter included in the schedule was deemed to be a Court a District Judge for the purposes of Guardians and Wards Act and notwithstanding anything contained in the Family Courts Act would, in dealing with the matters specified in this Act, follow the procedure prescribed in the Guardians and Wards Act, 1890.

6. It is manifestly clear from the express provisions of the Family Courts Act that it is the Family Court under the said Act which has to be approached in the cases relating to custody of minors which Act has overriding effect over the Guardians and Wards Act, therefore, the question of territorial jurisdiction is to be decided under the said Act and the rules framed thereunder and the Guardians and Wards Act for that matter has no relevancy. Rule 6 of the West Pakistan Family Courts Rules, 1965, framed under the West Pakistan Family Courts Act, 1964, provides that the Court which shall have jurisdiction to try a suit will be that within the local limits of which the cause of action wholly or in part has arisen or where the parties reside or last resided together, therefore, it was under the provisions of the said rule that the question of territorial jurisdiction of the Family Court was to be decided under the said Act and not under the provisions of the Guardians and Wards Act. The Guardian Judge as also the learned Additional District Judge, however, decided the question of territorial jurisdiction in this case by applying the provisions of the Guardians and Wards Act and not the West Pakistan Family Courts Act, 1964 and the rules framed thereunder which as held by the High Court in the impugned judgment was not correctly decided.

[Underlining is to add emphasis]

The said case of *Anne Zahra (supra)* was subsequently endorsed by another judgment of Honourable Supreme Court in the case of *Major Muhammad Khalid Karim (supra)* for the sake of ready reference the relevant portions of the said judgment is reproduced as under:-

“7. In order to comprehend the ratio of the case *Anne Zehra (supra)*, reference to which has also been made in the order of this Court dated 7-10-2009), the facts thereof needs to be mentioned: the minor/son of the divorced parents was perhaps abroad with his mother (*Anne Zehra*) when the father (*Tahir Ali Khilji*) initiated guardianship and custody proceedings by moving an application under sections 12 and 25 of the Guardians and Wards Act before the Guardian Judge, Lahore, who without calling for any reply from Mr. Khilji returned the application for presentation before the appropriate Court, as the learned Guardian Judge was of the view that he was not vested with the jurisdiction to try the matter. The appeal of the

father before the Additional District Judge also could not succeed, but his challenge to both these orders before the High Court turned fruitful and by setting aside the orders, the case was sent back to the Guardian Court to decide the applications afresh. It is in the above factual backdrop, the matter came before this Court wherein after considering the relevant provisions of both the statutes it was held: "under section 25 (ibid), a Family Court, thus seized of a matter brought before it in respect of any matter included in the schedule was deemed to be a Court of a District Judge for the purposes of Guardians and Wards Act and notwithstanding anything contained in the Family Courts Act would, in dealing with the matters specified in this Act, follow the procedure prescribed in the Guardians and Wards Act, 1890"..... Para 6: "It is manifestly clear from the express provisions of the Family Courts Act that it is the Family Court under the said Act which has to be approached in the cases relating to custody of minors, which Act has overriding effect over the Guardians and Wards Act, therefore, the question of territorial jurisdiction is to be decided under the said Act and the rules framed thereunder and the Guardians and Wards Act for that matter has no relevancy (emphasis supplied). Rule 6 of the West Pakistan Family Court Rules, 1965, framed under the West Pakistan Family Courts Act, 1964 provides that the Court which shall have jurisdiction to try a suit will be that within the local limits of which the cause of action wholly or in part has arisen or where the parties reside or last resided together, therefore, it was under the provisions of the said rule that the question of territorial jurisdiction of the Family Court was to be decided under the said Act and not under the provisions of the Guardians and Wards Act. The Guardian Judge as also the learned Additional District Judge, however, decided the question of territorial jurisdiction in this case by applying the provisions of the Guardians and Wards Act and not the West Pakistan Family Courts Act, 1964 and the rules framed thereunder which as held by the High Court in the impugned judgment was not correctly decided". About the plea raised in that case, that "territorial jurisdiction" is a procedural question therefore should be settled under the Guardians and Wards Act, the Court held to contend that the question of forum being a matter of procedure, therefore, should have been decided in view of the provisions of the Guardians and Wards Act. We are afraid, the argument is plainly unsound and cannot be accepted on any reason". It was further held "the Family Court shall have jurisdiction to entertain such a petition shall have to be decided under the provisions of the said Act and the rules framed thereunder and once a Family Court is approached accordingly by a party considering that a particular Family Court was vested with the territorial jurisdiction to entertain the petition, for the purposes of the trial of the same, the procedure as prescribed under the said Act is not to be followed but the general procedure for the trial of suit under the Civil Procedure Code has to be followed which has no nexus or relevancy with the question of determination of the Trial Jurisdiction of the Court. By virtue of section 25 of the West Pakistan Family Courts Act, every Family Court has been designated as the District Court, therefore, there is no Guardian Judge as such under the Guardians and Wards Act whereas the Family Court under the said Act competently seized of a matter relating to matter of



minors shall be deemed to be a District Court"....Moreover, "it has been rightly held by the High Court, therefore, that the Family Court/District Judge in which Court the present petition for custody of minor was filed should decide the question of territorial jurisdiction in the light of the rules framed under the Family Courts Act after giving opportunities to the parties to prove their respective contentions in respect thereof after recording evidence to the effect whether requirements of Rule 6 (ibid) are satisfied in order to attract the jurisdiction of the said Court".

In the said case of Major Muhammad Khalid Karim (supra) it is also observed as under: -

“11. Be that as it may, from the ratio of all the law cited above, the legal position, which emerge is as under:-

(a) Under section 5 of the Act 1964, the Family Court has the exclusive jurisdiction to entertain, hear and adjudicate (emphasis supplied) all the matters which fall within the first schedule to the Act; this admittedly includes the custody and guardianship matter.

(b) For the purposes of determining the 'territorial jurisdiction' of the Family Court, it is Act 1964, and the rules framed thereunder which shall be taken into account and not the provision of the Guardian and Wards Act 1980, even as per force of section 25 of the Act 1964.

(c) According to Rule 6 (a) of the Family Court Rules 1965, there are three factual eventualities which are relevant for the purposes of the determination of the 'territorial jurisdiction' of the Family Court; firstly, where the cause of action wholly or in part has arisen, meaning thereby, in the custody or guardianship disputes if the minors were with the mother and they have been illegally and improperly removed and taken away that from the place where they were living with her (or vice versa for father as well), the cause of action shall be said to have arisen at such place, otherwise the cause of action shall be deemed to have arisen where the minors are residing; secondly, under Rule 6(b) where the parties reside or last resided; thirdly as per proviso to Rule 6, in a suit for dissolution of marriage or dower where the wife ordinarily resided. And in view of the addition of proviso to section 7(2) of the Act 1964, which was introduced on 1-10-2002 if in a suit for the dissolution of marriage join other causes of action mentioned in the said proviso, such suit shall also fall in the last category, otherwise not.”

[Underlining is to add emphasis]

10. Reverting back to the case in hand, it appears from the perusal of impugned orders that both the learned courts below while passing the impugned orders have erred in refusing to exercise their jurisdiction on a wrong assumption that they did not have the same which, in fact, they have by virtue of Rule 6 of West Pakistan Family Courts Rules, 1965, and the law laid down by the Hon'ble Supreme Court of Pakistan in the above referred case law, hence the impugned orders are not sustainable in law.

11. It is now a well established that Article 199 of the Constitution casts an obligation on the High Court to act in the aid of law and protects the rights within the frame work of Constitution, and if there is any error on the point of law committed by the courts below or the tribunal or their decision takes no notice of any pertinent provision of law, then obviously this court may exercise Constitutional jurisdiction subject to the non-availability of any alternate remedy under the law. This extra ordinary jurisdiction of High Court may be invoked to encounter and collide with extraordinary situation. This Constitutional jurisdiction is limited to the exercise of powers in the aid of curing or making correction and rectification in the order of the courts or tribunals below passed in violation of any provision of law or as a result of exceeding their authority and jurisdiction or due to exercising jurisdiction not vested in them or non-exercise of jurisdiction vested in them. The jurisdiction conferred under Article 199 of the Constitution is discretionary with the objects to foster justice in aid of justice and not to perpetuate injustice. However, if it is found that substantial justice has been done between the parties then this discretion may not be exercised. So far as the exercise of the discretionary powers in upsetting the order passed by the court below is concerned, this court has to comprehend what illegality or irregularity and or violation of law has been committed by the courts below which caused miscarriage of justice. Reliance is placed on the case Muslim Commercial Bank Ltd. through Attorney v. Abdul Waheed Abro and 2 others (2015 PLC 259).

12. The upshot of the above is that I dispose of the present constitutional petition in the following manner:

- i) Order dated 16.05.2016 passed by the leaned Family Judge Karachi (South) in G & W Application No. nil of 2016 and Order dated 24.05.2016 passed by the learned VIIIth Additional District and Session Judge Karachi (South) in family Appeal bearing No.47 of 2016, both impugned herein, are hereby set aside.
- ii) The learned Family Judge Karachi (South) is directed to rehear the case of the petitioner and decide the question of territorial jurisdiction afresh, inter alia, in the light of Rules framed under the Family Courts Act, 1964 and after giving opportunities to the parties to prove their respective contentions, without being influenced about any findings of this order, considering the same of a tentative nature.

Accordingly, this constitutional petition is disposed of along with listed application.

JUDGE

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