

IN THE HIGH COURT OF SINDH AT KARACHI

C.P. No.S-04 of 2017

Before: Mr. Justice Muhammad Shafi Siddiqui

Scherezade Jamali	-----	Petitioner
	Versus	
Hashim Gillani & others	-----	Respondents

<u>Date of Hearing:</u>	<u>07.02.2018</u>
Petitioner:	Through Mr. Sameer Ghazanfar Advocate
Respondent No.1:	Through Shahan Karimi, Advocate

J U D G M E N T

*No matter
how genuine the dispute would be between
husband and wife, the victim is always a ward.*

The petitioner and respondent No.1 solemnized marriage on 22.12.2004 at Karachi. Out of the wedlock the ward namely Hasan Gillani (hereinafter referred to as “ward”) was born in America on 21.5.2009. The parties are Canadian national and were settled in Kuwait. In pursuance of her rights under contract of Nikah, petitioner pronounced Talaq-e-Tafweez vide letter dated 12.3.2013 and a notice in pursuance thereof was sent to the respondent. On receipt of notice, the litigation commenced and the respondent/father filed a Guardian & Ward Application No.610/2013 on 22.5.2013 claiming custody of the ward. On receipt of notice/summons the petitioner/mother filed written statement and has given parawise reply to the contents of the application. Evidence of the parties i.e. petitioner and respondent were recorded and they were subjected to cross examination. The application

of the respondent for permanent custody of the ward was declined however the parties contesting the Guardian & Ward Application were directed not to remove the minor from the jurisdiction of the trial Court and were also directed to deposit the passport of the minor.

Aggrieved of a part of the judgment whereby the movement of the ward was restricted, petitioner/mother filed an appeal under section 14(1)(b) of the Family Court Act, 1964 read with Section 47 of Guardian & Wards Act, 1890. This too was dismissed maintaining the order of the Guardian Court which restricted the movement of the ward on the ground of welfare.

The respondent did not file any appeal against the order dismissing his application for permanent custody and for him the order of Guardian Judge was final. On account of dismissal of the appeal of petitioner/mother on the limited ground she preferred this petition.

The paramount argument of petitioner's Counsel while challenging the two impugned orders, which restricted the movement of the ward, was that the Guardian & Wards Court had no territorial jurisdiction as the ward was not ordinarily residing within the jurisdiction of the trial Court. Counsel for the petitioner submits that though there is no exact definition of the word "ordinary residence" in the Guardian & Wards Act itself however the superior Courts have interpreted the same at various occasions and marked a distinction between the "ordinary residence" and "temporary residence". He argued that entire structure on which the two Courts decided the application was based on the ground that the child was ordinary resident of Karachi. The residence of the ward within the jurisdiction of the Court can at the most be considered as temporary residence which does not allow the Guardian Court to assume jurisdiction hence in view of the established principle that the jurisdiction of the Court, ceases of the matter, had the essential obligation to determine, if it could exercise

such jurisdiction failing whereof it is only considered to be a judgment as “coram non iudice”. He submits that the ward being American national by birth and before coming to Pakistan was permanently and ordinarily residing in Kuwait with his parents and hence, the jurisdiction of trial Court does not extend, in such a situation, over the ward as he was here only for a visit and shall not be subjected to the laws of Pakistan.

In the alternate Counsel for petitioner further highlighted that under section 105 of the (UCCJAE) Uniform Child Custody Jurisdiction and Enforcement Act, 1997, any foreign country would be deemed to be a “State” when the same is read in-juxtaposition with definition in Section 102 subsection 15 *ibid*, hence any order passed by any foreign Court shall be considered to be a judgment passed by the American Courts and thus would be enforceable and hence the restriction in the movement of ward is not only illegal and unlawful but also deprives the ward of his movement right and also against the welfare of the ward.

Mr. Shahan Karimi learned Counsel appearing for respondent/ husband has argued that the ward was actually removed from the house of respondent in Kuwait by the petitioner on 12.3.2013. He argued that this is nothing but abduction as the ward was removed without permission of father. He submits that the respondent however soon realized when divorce papers were couriered to him in the end of March 2013 with its purchase stamp dated 28.12.2012. He argued that the divorce papers’ having stamp endorsed thereon shows that such planning started somewhere in December, 2012. He argued that numerous attempts were made by respondent for amicable resolution but all in vain and ultimately he had to file an application to obtain permanent custody of the ward by moving an application before the Guardian & Wards Court. Counsel submits that the reliance on section 9 of the

Guardian & Wards Act with submission that Karachi is not the ordinary residence of the minor is baseless. He submits that the petitioner in paragraph-6 of the written statement has conceded to the jurisdiction by saying that permanent residence of the ward is Karachi. In addition to the above in para-10 of her written statement the petitioner stated that the ward has been enrolled in a best school in Karachi. In para-16 it has been highlighted that the point regarding jurisdiction of the Court is not disputed. Learned Counsel for the respondent further highlighted that in an application filed by the petitioner/mother for permission to travel abroad though was declined but, inter alia, she stated that the ward is ordinarily residing at Karachi and there is no question of his removal from territorial jurisdiction of this Court. He further argued that since the Counsel was not satisfied with the conclusion of the trial Court and the appellate Court, this belated plea of jurisdiction, at this stage, is taken. He argued that the petitioner has filed Civil Miscellaneous Application No. 1854/2015 before Hon'ble Supreme Court which was dismissed on 27.5.2015 which concerns the transfer of case from Karachi to Islamabad. He further argued that the Hon'ble Supreme Court in para-3 of the judgment was pleased to observe as under:

“---In this petition, the petitioner stated that she was residing with the respondent in Kuwait and when the marriage was dissolved she “decided to return to Karachi to resume their permanent residency at the address supplied for in the title to the memo” and “that since March of 2013, the petitioners have been ordinarily residing at Karachi.---“

He argued that it is a well settled principle of law that the objection as to the jurisdiction should be taken at the earliest. Reliance is placed on the cases of Muhammad Sadiq vs. Nazar Muhammad & others reported 1995 SCMR 907 and Chaudhry Ghulam Nabi vs. Mirza Javaid Iqbal reported 1994 SCMR 1893. Without prejudice, he submits that even if this ground is allowed to be taken, the petitioner cannot

approbate and reprobate since she has conceded and surrendered to the jurisdiction as stated above. He argued that determination of ordinary jurisdiction is not only a question of law but a question of fact as well and could have been decided after recording evidence, had it been taken specifically in the written statement. Reliance is placed on Mst. Samina Saeed vs. Nayyer Nazir (1982 CLC 799), Khalid Mehmood vs. Mst. Ruqia & another (1999 CLC 1137), Muhammad Shafqat vs. Additional District Judge, Talagang & others (2004 YLR 325) and Asif Mowjee vs. Mst. Fatema A. Mowjee & another (PLD 1987 Karachi 239).

He argued that the question of territorial jurisdiction is to be regulated under the West Pakistan Family Courts Act, 1964 and not under Guardian & Wards Act, 1890. Reliance is placed on Rule 6 of the West Pakistan Family Court Rules, 1965 framed under West Pakistan Family Court Act, 1964 which provides that the Courts for jurisdiction to try subject 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. He argued that during five years approximately 160 visits were made by the respondent and he is very much willing to continue such visits to maintain his bond and emotional link with ward.

He argued that the right of hazanat of petitioner has ceased under the Islamic law as the ward turned almost nine years. He submits that ward is dual national and the Citizenship Act, 1951 allows a Pakistani to hold dual nationality and hence he is subjected to Pakistani laws. He argued that the movement of the ward is regulated under section 26 of the Guardian & Wards Act and hence such powers were exercised by the two Courts below lawfully. He submits that the restraining order was passed keeping in mind that the ward was initially removed from Kuwait without permission of father.

I have heard the learned Counsel and perused the material available on record.

The respondent/father along with his affidavit-in-evidence filed marriage certificate, birth certificate of ward and divorce deed which were not disputed. No other documents apart from these as referred in the examination-in-chief were filed by the father/respondent.

It is so unfortunate that the trial Court has not perused or relied upon or attempted to discuss the evidence that was recorded by the parties. The contention of the advocate was recorded by both Courts and on the basis of discussion the trial Court observed that no cogent reason available to disturb the “current setup” of the minor.

By fluke it may turn out to be a correct order but the trial Court was under obligation to discuss the evidence insofar as the welfare of the ward is concerned. While dismissing the application for permanent custody under section 25 of the Guardian & Wards Act both the parties were directed not to remove the ward from the jurisdiction of the trial Court and were further directed to deposit the passport of minor. Respondent/ father who stated to have been disturbed by sudden removal of ward from his house at Kuwait had not preferred any appeal insofar as the dismissal of his application for permanent custody is concerned. This raised my eyebrows. The respondent/father perhaps got satisfied in view of the restraining order for the removal of the ward. The appeal was however preferred by the petitioner/ mother on the limited ground that pertains to removal of child from the jurisdiction of the trial Court. There is not much in the judgment of the appellate Court as well insofar as the reasoning is concerned. The appeal pertains to injunctive order concerning removal of the child therefore the appellate Court ought to have formulated reasons and justification for maintaining the order or even if it would have been reversed. The appellate Court found the judgment of the trial Court as not interferable as in case the child is removed from the jurisdiction of the trial Court,

the father would be deprived of visitation rights and he (father) would be seriously prejudiced and hence the appeal was dismissed.

The primary object of the Guardian & Ward Court or for that matter appellate Court was to discover as to where the welfare of the ward lies and how such welfare can be effectively achieved and maintained and should not have concerned with the visitation rights of father.

- *Does the welfare lie in visitation rights of father/mother by restricting movement of child from jurisdiction of the trial Court?*
- *Does it lie independent of above, in restricting the movement of the ward?*

I am sure at times such restraining orders may justify a situation insofar as the welfare of the ward is concerned but in the instant matter that I am dealing with, it was never discussed and remained a mystery for two Courts below as to whether such restraining order would really serve as welfare of the ward or otherwise. The reasoning assigned by the trial Court in passing restraining order was the “visitation rights of father”.

An interlinked issue with this issue is the point of jurisdiction.

Before deciding core issues, the primary objection of jurisdiction is relevant and to be discussed first while I leave the current discussion of movement of ward for later part. The above background is necessary for reaching a just and fair conclusion.

Jurisdiction Issue

The child may be an American national by birth and he may have been permanently residing in Kuwait with parents but he is a dual national. When the respondent/ father surrendered to the jurisdiction of the trial Court by moving an application under section 25 of the Guardian & Wards Act, it was promptly responded and replied by filing written statement and jurisdiction conceded by petitioner. When an application as Civil Miscellaneous Application No.1854/2015 was filed

before Hon'ble Supreme Court it was dismissed in terms of para-3 of the judgment and the Hon'ble Supreme Court observed that in the petition No.1460/2013 petitioner stated that she returned to Karachi to resume their permanent residency at the address mentioned in the title and that they were ordinarily residing at Karachi. It was further observed that petitioner/mother disclosed that child had been admitted in the Convent of Jesus and Marry at Karachi. Thus her own pleading before the High Court shows that petitioner is permanently residing at Karachi along with child and on this count the transfer of the case from Karachi to Islamabad was declined by Hon'ble Supreme Court.

Perusal of written statement shows that mother/petitioner who is now attempting to challenge the jurisdiction, has actually acquiesced to the jurisdiction of trial Court. In para-1 petitioner stated that the child is residing in Karachi. In paras-6 and 10 of the written statement she categorically admitted the jurisdiction of the trial Court and also denied forced removal of ward. Thus if there was any one to challenge the jurisdiction of the trial Court, it was father/respondent who himself surrendered to the trial Court. Once petitioner acquiesced to the jurisdiction, she cannot approbate and reprobate at the same time. The question of jurisdiction even if made dependant on ordinary residence of ward, it may not be a pure question of law that can be assailed at any forum or at any time. For that it has to be specifically pleaded so that the facts in this regard be brought to the notice of the Court. It is, thus, not a simple question of law rather a mixed question of law and facts which requires determination through evidence. Reliance is placed on the cases of:

1. Mst. Samina Saeed vs. Nayyer Nazir & others (1982 CLC 799)
2. 1982 CLC 799, Khalid Mehmood vs. Mst. Ruqia & another
3. (1999 CLC 1137), Muhammad Shafqat vs. Additional District Judge, Talagang & others
4. (2004 YLR 325) Asif Mowjee vs. Mst. Fatema A. Mowjee & another

5. Asif Mowjee vs. Mst. Fatema A. Mowjee & another (PLD 1987 Karachi 239).

The objection regarding jurisdiction had to be taken at the earliest and reliance is placed on the cases of:

1. Muhammad Sadiq vs. Nazar Muhammad & others (1995 SCMR 907)
2. Chaudhry Ghulam Nabi vs. Mirza Javaid Iqbal (1994 SCMR 1893)

However the issue concerning territorial jurisdiction in the custody/ guardianship matter is regulated under West Pakistan Family Courts Act, 1964 and not under the Guardian & Wards Act, 1890. Section 5 of the West Pakistan Family Courts Act, 1964 deals with the jurisdiction subject to the provisions of Muslim Family Law Ordinance, 1964. The family Courts were entrusted with exclusive jurisdiction to entertain, hear and adjudicate the matters specified in part-1 of the schedule. Part-1 of the schedule in pursuance of Section 5 of the West Pakistan Family Courts Act, 1964 includes the subject of guardianship at serial No.6. Thus the provisions of West Pakistan Family Courts Act, 1964 have overriding effect over Guardian & Wards Act. The jurisdiction is thus regulated under Act of 1964 and the rules framed there-under. Rule 6 as framed under West Pakistan Family Courts Act, 1964 deals with the jurisdiction to try a suit within the local limits of which;

- (a) The cause of action wholly or in part has arisen
- (b) Where the parties reside or last resided together.

In subject clause (b) the word “parties” include “party”. A limited meaning to the word “parties” cannot be given, as the later part of this sub-clause serves that purpose in a case where they (both) last resided together. So in case, if any of the party reside within the local limits of a Court or together resided has the jurisdiction. This is in addition to a jurisdiction where the cause of action wholly or in part has arisen. Even otherwise the advantage of Section 9 of the

Guardian & Wards Act cannot be extended for the benefit of petitioner/mother as she has already surrendered to the jurisdiction by admitting and accepting that the minor is ordinarily residing within the local limits of the Court where she was/is residing which entertained the application under section 25 of the Guardian & Wards Act.

In the case of Anne Zahra vs. Tahir Ali Khiilji & others reported in 2001 SCMR 2000 the issue of jurisdiction was summarized by the Hon'ble Supreme Court as under:

“--6.-----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 rules 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 Guardian & 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 Guardian & 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.

7.----- we are afraid, the argument is plainly unsound and cannot be accepted on any reason. As has been observed, the West Pakistan Family Courts Act, 1964 has overriding effect insofar as the matter included in Schedule, therefore, initially it is the Family Court which has to be approached in respect of matters relating to custody of minor being one of the listed item in the Schedule and in determining as to which of 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 under the said Act competently seized of a matter relating to matter of minors shall be deemed to be a District Court.-----”

Although it is stated by respondent No.1/father that the ward was forcibly removed from his house in Kuwait whereafter he lodged complaint before the authorities however there is nothing in the shape of any complaint to any authority on record. I am also mindful of the fact that in para-5 of written statement such allegation was denied.

Hence I would score off the point of jurisdiction in ousting the respondent from approaching the Guardian Court at Karachi.

Movement or Restriction in Movement of ward

Now the core issue which is also impugned here is the restriction in the movement of the ward and whether it would serve as a benefit for the ward. This issue cannot be simply answered as done by the two Courts below on the count of visitation right of respondents.

In a dispute between husband and wife, a ward is being penalized for what his parents might have done. If there is a best educational institute in any part of the world including Pakistan, why a ward/child be deprived of such when he is privileged to have access to such institute. Will any visiting right of father or mother alone would serve as a welfare of child. Why this psychological trauma be given to ward that he cannot move around even beyond territorial jurisdiction of a Senior Civil Judge comprising of few Police Stations and in fact few kilometers. Both the parents here are Canadian nationals whereas child is American national as well apart from being Pakistani national. Both parents claimed to be foreign qualified. The mother and father before their relationship got strained were working in Kuwait. 160 visiting rights of father/respondent is only a part that plays a role in the welfare and well being of the child but does not form entire ingredient or composition in the upbringing and grooming of a child. The ward belongs to a family which can afford a better upbringing, education and environment either in Pakistan or anywhere in the world which was restricted and curtailed by restriction in his movement.

The Courts below should not have seen welfare only from the angle that the father/respondent must not miss his opportunity to see his child but it must also be seen from the angle as to whether a ward who is capable of studying abroad, in case the opportunities are available to him, should he be deprived of on account of the fact that father must not miss a visiting opportunity?

The father/respondent who was so enthusiastic for having the custody of the ward when he filed application under section 25 of the Guardian & Wards Act lost all such desire and venom when the restraining orders in respect of movement of the ward was passed. The trial Court and the appellate Court dealing with the Guardian & Ward cases do not enjoy the jurisdiction for the sake of jurisdiction but they enjoy jurisdiction to ascertain where the welfare of the ward can be served at its best. The trial Court as well as the appellate Court has not provided any reasoning as to why the ward should not get an opportunity to study abroad when the father/respondent himself surrendered in having custody of the ward on permanent basis as there is no appeal against the order dismissing his application for permanent custody.

Is it welfare of the child that his movement be restricted to the jurisdiction of the trial Court so that father may visit him once in 15 days?

Is it welfare of the child that his passport be surrendered to the trial Court and the ward be restricted to move and that too in a situation where both parents are Canadian nationals and child being American national? In such a situation he would be compelled to grow-up in an atmosphere where his movement is restricted. This dual national Pakistani citizen would carry this image throughout in his mind.

Can a ward be good Mathematician, Engineer, Doctor, Physicist, Chemist, Astronaut, business entrepreneur etc on account of such

visitation rights of his father alone once in 15 days and that too within the limits of civil/family Court's jurisdiction?

In any other case it would have been the welfare considering the situation of the ward while being at Karachi and only Pakistani national but the situation here is different as the child is privileged to have access to any educational institution around the world including Pakistan. An educational institute or an environment for which most of the children could only dream for. Every child has its own peculiar circumstances and the welfare demands may vary. The restriction in the movement in the present case appeared to be a tool to settle score with mother/petitioner but it will not serve as the welfare of the child. The father/respondent who had raised serious allegations against the mother/petitioner as he claimed that she is not fit to take care of ward yet is not serious in having the custody of the ward, although none of them stands proved in evidence. There are ways and mechanism to regulate the movement which is not achieved by of restricting the movement.

In cross examination of mother conducted by Mr. Kazim Hassan Advocate, as against some of the questions, the mother/petitioner kept quit though in my view some of the questions were very relevant. In the cross examination of mother, not a single question as to serious allegations raised in para-8 onward of the application, was raised. The cross examination was limited to personal accomplishment of the petitioner/mother however as against the welfare of the ward material questions are missing. Insofar as the cross examination of father/respondent is concerned as conducted by the petitioner's Counsel, though most of the suggestions of petitioner's Counsel were denied but it remains an admitted fact that he attended business trips in different countries. He remained in USA for a business conference for about six weeks. The father/respondent however denied a suggestion

that respondent wanted to move Canada with ward Hassan for education after her divorce. Respondent denied the suggestion that he wanted the custody of ward Hassan only to move to Kuwait.

Welfare of the minor includes his material, intellectual, moral and spiritual well being. In accomplishment of such object it becomes the duty of the Court to take care of the ward's welfare and shall ensure that the litigating parents are not disputing to settle their own score or to satisfy vanity or even to soothe his/her craving of love and affection for minor as it could only be done if the welfare of the ward demands. Guardian Courts are sometime loses sight of the welfare of the ward when love and affection is demonstrated by parents which is considered as overriding effect. True love of mother and father no doubt is important but what is more important is the welfare of the ward and it should not be limited to any one's right of custody, but a larger view is to be taken from ward's point of view.

No doubt father is a natural guardian and any decision that concerns material, intellectual, moral or spiritual well being is always a father's prerogative, but such can always be maintained and achieved in case the custody remains with mother. There are occasions when both parents or at times even the environment that they have is not considered as conducive for ward, custody and supervision may be entrusted to foster parents.

On the basis of cumulative effect of all facts discussed above, I would thus attempt to dispose of this petition as under:

1. That the restriction in movement of the ward is set aside and passport be returned to the ward.
2. The ward is at liberty to travel and to be admitted in any best available educational institution, be it in Pakistan or in America, as desired by mother. However the selection of any educational institution shall be subject to approval and permission of father.

3. The father shall not be unreasonable in issuing no objection to the admission of the ward to any prestigious school, college or university as deem fit and proper.
4. As mother is desirous of taking the ward to America for education, any movement of the ward away from America for educational benefit or change of school and college etc, within or outside USA, shall be subject to permission of respondent/father as being natural guardian, however he shall not be unreasonable in considering such request of change of institute and will not withhold such permission in case it is meant for the welfare of the ward.
5. The respondent/father is at liberty to visit the ward at least once in 15 days as per Court order and/or as many days as agreed between the parents.
6. Insofar as the winter or summer vacations are concerned, father has a right to be with his son and father may travel to him, if he so desires to spend vacation for any period, which may not exceed 30 days during summer vacation as per Court order and 15 days of winter vacation, or the parties may set a schedule annually on such terms and conditions as they deem fit and proper.

The petition stands disposed of the in the above terms.

Dated:____.3.3018

Judge