

Order Sheet

IN THE HIGH COURT OF SINDH AT KARACHI

C. P. Nos. S–2568 of 2017 and S–2589 of 2018

Date	Order with signature of Judge
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Mr. Faisal Siddiqui, Advocate for the petitioner Sarem Muhammad Mukhtar.

Mr. Farooq H. Naek, Advocate for the respondent Mst. Sadia Aquil Ahmed.

Dates of hearing: 16.09.2021, 23.09.2021, 30.09.2021, 01.11.2021,
16.12.2021, 02.06.2022, 15.08.2022, 02.09.2022,
06.10.2022, 31.05.2023 and 06.02.2024.

ORDER

NADEEM AKHTAR, J. – C.P. No.S-2589/2018 has been filed by the petitioner Sarem Muhammad Mukhtar against the order passed on 10.07.2018 by the Family Judge whereby the application filed by him under Order VII Rule 11 CPC read with Sections 8 and 19 of the Guardians & Wards Act, 1890, (**'G&W Act'**) for rejection of the respondent's G&W Application No.1462/2017 was dismissed, and the judgment dated 24.11.2018 delivered by the appellate Court in Family Appeal No.78/2018 whereby his said appeal against the aforesaid order was dismissed ; and, C.P. No.S-2568/2017 has been filed by him praying that respondent No.1 therein be directed to return with the minor to the State of Washington, United States of America, and/or hand over custody of the minor to the United States Consulate in Karachi, and respondents 2 and 3 (I.G.P. Sindh and S.H.O. concerned) be directed to locate / recover / produce the minor and hand her over to the petitioner along with her passport. Since the parties, the subject matter i.e. the minor and the facts of both these petitions are common, they were heard together and are being decided through this common order.

2. Relevant facts of the case, as averred by the petitioner, are that the petitioner Sarem Muhammad Mukhtar and the respondent Sadia Aquil Ahmed got married on 07.03.2013 in Karachi whereafter they moved to the United States of America where the petitioner was permanently residing ; during the course of their marriage, the parties were blessed with a daughter Ayesha Sarem Mukhtar (**'minor'**) who was born in USA on 11.03.2016 ; subsequently, their marriage did not last and eventually a Divorce Deed was executed by the petitioner on 06.05.2016 and a Divorce Certificate was issued by the Arbitration Council concerned on 21.09.2016 and the 'Final Divorce Order' was passed by the Superior Court of Washington, County of King ; the said

Court also passed an 'Immediate Restraining Order' restraining the respondent from leaving its jurisdiction, and after finalization of the divorce, the same Court restrained the respondent from removing the minor from the State of Washington during pendency of the trial ; after some litigation, the parties executed a 'Parenting Plan' dated 09.05.2017 in USA regarding the custody of the minor and visitation, travel schedule, vacations, communication, and joint decision making regarding matters pertaining to the minor ; the said parenting plan was ratified by the competent Court in USA after enquiring from the parties whether the same was in the best interest of the minor to which the parties had responded under oath in the affirmative ; the parties also executed a document titled 'Findings and Conclusions about a Marriage' wherein the jurisdiction relating to the minor was determined to be the State of Washington as it was the home State of the minor ; while accepting and ratifying the said document, the aforesaid Court determined that the State of Washington was also the home State for the parties in addition to the minor ; the respondent executed a 'Child Custody Bond' in the sum of \$10,000.00 ; and, to ensure compliance of the Parenting Plan, the father of the respondent executed a personal guarantee in the sum of \$100,000.00 that the respondent shall not remove the minor from USA.

3. The petitioner has further averred that vide Clause 12 of the Parenting Plan, the parties had agreed to get the same ratified from the relevant Court at Karachi, Pakistan, to safeguard the interest of the minor during her visitation / travel to Karachi ; additionally, the parties also executed an agreement dated 09.05.2017 that the petitioner will file a Guardians and Wards Application before the competent Court at Karachi, and the Parenting Plan will be presented in the said proceedings in the shape of a compromise application so that the terms and conditions thereof could be implemented in letter and spirit during the visitation / travel of the minor to Karachi ; accordingly, the petitioner filed G&W Application No.904/2017 before the Family Court at Karachi, the draft whereof was approved by the respondent and her counsel according to the petitioner ; as the petitioner had to return to USA due to his professional commitments, he appointed an attorney to represent him in his aforesaid application ; the respondent did not appear before the Family Court due to which the settlement / ratification of the Parenting Plan by the Family Court at Karachi could not take place ; upon a motion filed by the petitioner and after hearing the parties, the learned Superior Court of Washington for King Court directed the parties to get the Parenting Plan ratified in Pakistan within thirty (30) days ; such ratification

could not take place due to persistent refusal by the respondent ; as per the Parenting Plan, the petitioner met with the minor on 08.09.2017, kept her overnight and returned her to the respondent on 09.09.2017 ; an email was received by the petitioner from the counsel of the respondent informing him that the respondent had left for Pakistan along with the minor due to her father's illness ; in response to the petitioner's notice dated 12.09.2017 seeking further information, the respondent's counsel informed him vide letter dated 13.09.2017 that the respondent had left USA on 09.09.2017 at 5:35 p.m. ; the petitioner was shocked by this news as he had handed over the minor to the respondent on the same day i.e. 09.09.2017 around 1:00 p.m., but the respondent did not inform him that she was about to leave USA with the minor some hours later; and, thereafter, a series of letters was exchanged by learned counsel for the parties whereby the petitioner was informed that the respondent will return to USA on or before 09.10.2017.

4. The petitioner has also averred that as the respondent did not return to USA, he was constrained to file a petition before the learned Superior Court of Washington, County of King, to 'Change the Parenting Plan, Residential Schedule or Custody Order', and also sought an order for the minor to be returned to the jurisdiction of the said Court ; the request of the petitioner was allowed by the said Court by directing the respondent to return the minor to the State of Washington on or before 03.11.2017, to produce her before the United States Consulate in Karachi and to hand her passport over to the petitioner which order was not complied with by the respondent ; her intention to not return to USA became apparent when she listed her house in USA for sale ; when this fact was brought to the notice of the said Court, it was directed by the said Court that the sale proceeds of her house should be deposited in a trust account which were to be released only upon return of the minor to the State of Washington ; since the respondent had pleaded before the said Court that she could not comply with the terms and conditions of the Parenting Plan as her conditional residency had expired on 25.09.2017, an opinion was sought by the said Court from an expert in the United States Immigration Law who submitted a sworn declaration that several options were available to the respondent for her return to USA, which declaration / opinion was not challenged by the respondent ; vide order dated 20.11.2017, the said Court held that the respondent had acted in bad faith by intentionally violating the Court's orders and was once again directed to return the custody of the minor to the State of Washington on or before 22.11.2017, or to arrange for a third party to do the needful if she was unable to do so, and was further

directed to produce the minor to the United States Consulate in Karachi and to handover her passport to the petitioner ; this order was also not complied with by the respondent and she continued to live in Karachi with the minor in violation of the Parenting Plan and the said Court's aforesaid orders without allowing the minor and the petitioner to have any communication or meeting ; the respondent filed G&W Application No.1462/2017 before the Family Court at Karachi praying that the Parenting Plan be set aside, and also that the minor should not be removed from Pakistan ; the petitioner filed an application under Order VII Rule 11 CPC read with Sections 8 and 19 of the G&W Act for rejection of the respondent's aforesaid G&W Application which was dismissed ; and, Family Appeal No.78/2018 filed by him against the dismissal of his said application was also dismissed. In this backdrop, the present petitions have been filed by the petitioners with the prayers noted above.

5. In her counter affidavits filed in response to the subject petitions, the respondent has challenged their maintainability, *inter alia*, on the ground that the petitioner had already invoked the jurisdiction of the Family Court in Karachi by filing G&W Application No.904/2017 and since he had an alternate remedy under the law, his C.P. No.S-2589/2018 (against the orders of the learned Courts below) is not maintainable on this ground and also on the ground that the same is barred under the doctrine of *res-subjudice* and *res-judicata* ; and, C.P. No.S-2568/2017 (Habeas Corpus) is not maintainable as the minor has not been forcibly or illegally removed from her permanent residence by the respondent, and the respondent, being the real mother of the minor, is entitled to have her custody and to bring her to Pakistan. In addition to the above, the respondent has alleged that both these petitions have been filed by the petitioner to harass, humiliate, pressurize and blackmail her ; both the parties as well as the minor are citizens of Pakistan, therefore, only the competent Court in Karachi has the jurisdiction in respect of the minor ; the respondent and the minor cannot be compelled to leave the territory of Pakistan and/or to go to the State of Washington without their consent ; the marriage between the parties was dissolved due to inappropriate and abusive behaviour of the petitioner ; the ex-parte orders restraining the respondent and the minor from leaving the State of Washington were obtained by the petitioner from the Court in Washington through misrepresentation ; the respondent was made to sign the parenting plan under duress and coercion ; as the parenting plan provides for unlawful and illegal restrictions on the respondent in relation to the custody of the minor, the same is un-Islamic and unlawful ; the respondent does not wish to bring up the minor against Islamic values in the western society and she also does not want to disassociate the minor from her maternal side of the family

and their family values ; by seeking a personal guarantee of US\$100,000 from the respondent's father and a personal bond from the respondent, the petitioner has waived / relinquished his right to custody of the minor under the illegal parenting plan ; the G&W application filed by the respondent in Karachi was maintainable as, according to the petitioner himself, the parties had agreed to get the parenting plan ratified from the Court in Karachi ; the petitioner is estopped from challenging the maintainability of the G&W application filed by the respondent as he had also filed a G&W application for rectification of the parenting plan ; the G&W application filed by the petitioner was dismissed on 15.08.2018 for non-prosecution where after he filed a restoration application which was allowed, however, he withdrew his said G&W application on 29.10.2018 ; the subsequent orders passed by the Court in Washington for production of the minor before the Consulate of USA in Karachi and then to produce her before the Court in Washington and to handover her custody and passport to the petitioner were obtained by the petitioner ex-parte and through misrepresentation ; the petitioner is mentally unfit to have the custody of the minor or to take care of her ; and, the impugned orders of the Family Court and Appellate Court are fully justified and do not require any interference by this Court.

6. It is contended by Mr. Faisal Siddiqui, learned counsel for the petitioner, that the purpose for executing the parenting plan by the parties was to settle the dispute regarding the custody of the minor, permanent rights of the parties and the minor and to regulate her visitation. Highlighting the salient feature of the parenting plan, he pointed out that the respondent was appointed as the custodian of the minor with the condition that her said appointment will not change or waive the parenting rights under the laws of either country and both the parties were to remain as the legal parents and guardians of the minor ; parenting time in terms of school schedule, summer schedule and holiday schedule was specifically agreed by the parties ; the respondent had agreed to inform the petitioner in advance in case of any relocation or movement of the minor, to which the petitioner had the right to object, and in case of breach of this condition, the respondent was to be liable to contempt of Court ; in case of travel to Pakistan by the respondent during vacations, the petitioner was entitled to have residential time pursuant to the residential schedule provided in the parenting plan ; it was agreed that the minor shall not go anywhere for more than thirty (30) days without seeing one or the other parent at any given time ; the minor, who was born in USA, shall have and retain a US passport ; when the minor was in Karachi, she was to be allowed to visit her paternal grandparents as per the schedule agreed in the parenting plan ; neither party was allowed to refuse or delay the visitation of the minor allowed to the other parent as per the agreed schedule ; telephonic and media communication with the minor was

provided in the parenting plan ; the jurisdiction in this matter was to remain with the King County, Superior Court of Washington, as long as one of the parties was residing in Washington ; the jurisdiction for enforcement of the parenting plan was also vested in the competent Court in Pakistan ; the parenting plan, signed by the Judge of the Superior Court of Washington, King County, was to be deemed to be the order of the said Court ; and, the parenting plan was to be enforced in Courts with the laws of other countries pursuant to The Hague Convention on the Civil Aspects of International Child Abduction.

7. It is further contended by Mr. Faisal Siddiqui that the respondent not only executed the parenting plan after agreeing to the terms and conditions stipulated therein, but also submitted to the jurisdiction of the learned Court in Washington ; and, in view of this admitted position she is estopped from questioning or challenging the parenting plan and/or the terms and conditions stipulated therein. It is also contended by him that by removing the minor from the jurisdiction of the said Court in Washington and bringing her to Karachi illegally, secretly and without the consent and/or knowledge of the petitioner, she deliberately and wilfully violated the terms and conditions of the parenting plan and the orders passed by the learned Court in Washington. He pointed out that in the contempt application filed by the petitioner, the learned Court in Washington held that the respondent had acted in bad faith. It is submitted by the learned counsel that it is well-settled that when the matter of custody of a child has already been decided by a foreign Court, the principle of judicial comity has to be kept in mind and applied as Pakistan is a responsible State and is a part of a civilised community of Nations ; if sanctity is attached to the orders and judgments passed by the Courts in Pakistan, the same legal status, sanctity and respect should be conferred and given to the orders passed by the Courts of foreign jurisdiction when such orders have been passed in the proper exercise of jurisdiction, especially when the delinquent party had surrendered to the jurisdiction of that foreign Court ; and, the orders passed by the foreign Courts are applicable and enforceable in Pakistan. In support of this submission, learned counsel placed reliance on *Louise Anne Fairley V/S Sajjad Ahmed Rana (PLD 2007 Lah. 300)*, *Abid Hussain V/S Rukhsana Munir and others (2020 YLR 1533)*, *Peggy Collin V/S Muhammad Ishfaq Malik (PLD 2010 Lah. 48)*, *Surya Vadanam V/S State of Tamil Nadu and others [(2015) 5 Supreme Court cases 450]*, *All England Law Reports [(1966) 1 All E.R. page 889]* and *Shilpa Aghgarwal (Ms) V/S Aviral Mittal and another [(2010) 1 Supreme Court Cases 591]*.

8. Justifying the filing of Habeas Corpus Petition No.2568/2017, Mr. Faisal Siddiqui submitted that the law is well-established that the writ of Habeas Corpus can be sought in appropriate cases where the minor has been illegally removed from the lawful custody of another person ; the jurisdiction of High Court in such cases is not barred under Section 491 Cr.P.C. on account of provisions of the G&W Act ; availability of another legal remedy is not a bar in such cases ; the remedy under the G&W Act for obtaining custody of the minor child is not a valid ground for refusing an application for Habeas Corpus filed by the parent or guardian of a minor who is entitled to his or her custody where the minor is in illegal detention of another person ; the Guardian / Family Court is the final arbiter to adjudicate the question of custody of children, however, where a parent holding lawful custody of a minor has been deprived of such custody, such parent cannot be deprived of a remedy to regain the custody while the matter is *subjudice* before a Guardian Court ; in exceptional circumstances where the High Court finds that the best interest or welfare of a minor demands that his/her custody be immediately restored to the person who was lawfully holding such custody before being deprived of the same, High Court is not denuded of jurisdiction to pass appropriate orders under Section 491 Cr.P.C. directing that custody be restored to that person as an interim measure pending final decision of the Guardian Court ; the two provisions of law viz. Section 491 Cr.P.C. and Section 25 of the G&W Act deal with two different situations, as such the question of ouster of jurisdiction of High Court on account of provision of Sections 12 or 25 of the G&W Act or pendency of proceedings under the said provisions does not arise ; there is no overlap between the aforesaid two provisions as both are meant to cater to different situations i.e. the first to cater to an emergent situation, while the later for a long term decision regarding the question relating to guardianship of minors keeping in view factors such as their best interest and welfare. In support his above submissions, learned counsel relied upon Muhammad Khalil-ur-Rehan V/S Shabana Rehan and another (PLD 1996 SC 633), Nisar Muhammad V/S Sultan Zarin (PLD 1997 SC 852), Mirjam Aberras Lehdeaho V/S SHO Police Station Ghung, Lahore and others (2018 SCMR 427), Roshni Desai V/S Jahanzeb Niazi (PLD 2011 Lah. 423), Josip Stimac and others V/S Melitta Syed Shah and others (PLD 2009 Lah. 393), Mariam Khan V/S Mehryar Salim & another (2008 YLR 2647), Surinder Kaur V/S Harbax Singh (AIR 1984 S.C. 1224), Elizabeth Dinshaw V/S Arvand M. Dinshaw (AIR 1987 SC 3), McKEE V/S McKEE [(1951) 1 All. E.R. 942], and V. Ravi Chandran (Dr.)(2) V/S Union of India and others [(2010) 1 SCC 174].

9. Regarding the maintainability of C.P. No.2589/2018, it was submitted by learned counsel for the petitioner that the Guardian Judge at Karachi did not have

the jurisdiction in respect thereof, and therefore, that application filed by the petitioner for rejecting it was fully competent and maintainable in law as well as on facts, and as such the same was wrongly rejected by the learned Courts below. In support his above submissions, learned counsel relied upon Faraz Alamgir V/S Additional District & Sessions Judge VIII and 2 others (2017 YLR 994), Malik Gul Raiz Awan V/S Mst. Asma Gul Raiz and others (2009 MLD 1274), Ejaz Naseem V/S Fareeha Ahmad and others (2009 SCMR 484) and Mst. Nasreen and another V/S Raja Muhammad Shahid Bashir and others (2019 CLC 1213).

10. In his reply, it was contended by Mr. Farooq H. Naek, learned counsel for the respondent, that the learned Courts below have been and this Court is being misled by the petitioner regarding the ordinary residence of the minor which is Karachi, Pakistan, and not Washington, USA, as claimed by him ; after her birth on 11.03.2016 in USA, the minor arrived in Pakistan in September 2017 and as such she lived in USA only for a period of sixteen (16) months, and since then she has been living in Pakistan. It is contended by him that even a few days' time is sufficient to constitute ordinary residence as held in Rafiq Ahmad V/S Judge Family Court, Khanewal and another (1996 CLC 1820). It was further contended by him that the minor was brought to Pakistan by the respondent and she is living with her who is admittedly her real mother, therefore, the petitioner is not justified in alleging that the custody of the minor with the respondent and/or any of the impugned actions taken by the latter were/are illegal. Regarding the Habeas Corpus Petition No.2568/2017 filed by the petitioner, it is contended by the learned counsel that the same is misconceived and not maintainable as the minor was not in the custody of the petitioner when she left USA and came to Pakistan, nor is she in illegal custody of the respondent at present ; and, the said petition is liable to be dismissed on this ground alone. As to C.P. No.2589/2018, it was contended by the learned counsel that the application filed by the petitioner before the Family Court for rejecting the respondent's G&W application was also misconceived and not maintainable as jurisdiction of the Pakistani Court had been explicitly agreed upon by the parties in the parenting plan which had been acknowledged by the Court at Washington ; moreover, prior to the filing of the G&W Application by the respondent, the petitioner himself had invoked the jurisdiction of the Family Court by filing a G&W application for ratification of the parenting plan ; and, in view of this admitted position, the petitioner cannot now claim that the Family Court in Karachi did not have jurisdiction in respect of the ordinary residence of the minor.

11. Without prejudice and in addition to his above submissions, it was contended by Mr. Naek that the parenting plan was not a conclusive or final order passed by

the King County Superior Court in the State of Washington ; the Courts can always modify the earlier arrangements or orders by looking at the welfare of the minor ; and even otherwise, it is trite law that consent between parties does not confer jurisdiction nor can such an order be deemed to be conclusive. In support of this contention, learned counsel placed reliance on Mst. Aneeta Tanveer V/S Muhammad Younus and others (2010 YLR 513). It was further contended by him that the order of the learned Court of Washington cannot operate as *res-judicata* in Pakistan even if the same subject matter is re-agitated ; and USA is not one of the reciprocating countries within the meaning of Section 44-A CPC. It was also contended by him that as paramount consideration in such cases should be the welfare of the minor, the Courts exercising parental jurisdiction are not required to consider ancillary aspects of the case while deciding the welfare of the minor. Learned counsel placed reliance on Malik Khizar Hayat Khan Tiwana and Malik Ghulam Muhammad Khan V/S Mst. Zainab Begum, Ch. Aziz Ahmad Waraich, District Judge, Lahore and Qazi Muhammad Dastgir, Guardian Judge, Lahore (PLD 1967 SC 402) in support of this contention.

12. I have heard learned counsel for the parties at length and with their able assistance have carefully examined the material available on record and the law cited at the bar. According to the petitioner, all matters pertaining to the custody, visitation, travel schedule, vacations, communication, and joint decision making regarding matters pertaining to the minor were/are to be governed by the parenting plan, duly ratified by the competent Court in USA after submission of declarations on oath by the parties that the same was in the best interest of the minor ; and, the said Court had also determined that the State of Washington was the “home State” of the minor and also that of the parties. Whereas, the respondent insists that the “ordinary residence” of the minor is Karachi, Pakistan and not Washington, USA as after her birth on 11.03.2016 in USA, she arrived in Pakistan in September 2017 and as such she lived in USA only for a period of sixteen (16) months, and since then she has been living in Pakistan. To my mind, this fundamental question about the Home State / ordinary residence of the minor needs to be addressed first as this question goes to the root of the case. In this context, I was fortunately able to locate an authority of the Hon’ble Supreme Court viz. Major Muhammad Khalid Karim V/S Mst. Saadia Yaqub and others (PLD 2012 SC 66) which not only was a source of guidance for me but has also set the question at hand at rest completely and effectually.

13. In the above-cited authority, the respondent / mother filed applications under Sections 25 and 12 of the G&W Act before the Guardian Judge at Lahore against

the petitioner / father for the guardianship and custody of her minor children. The father objected to the territorial jurisdiction of the said Court and pleaded that the competent Court in Multan had the territorial jurisdiction in the matter as the minors were permanently residing with him in Multan where he was posted and residing and the minors were also seeking education there in school. The Guardian Judge at Lahore held that the minors were residents of Multan and accordingly returned the applications of the mother for filing the same before the competent Court in Multan. The appeal filed by the mother against this order was dismissed by the appellate Court, however, the Constitution Petition filed by her before the learned Lahore High Court was allowed primarily by relying upon Muhammad Iqbal through Special Attorney Faiz Sultan V/S Parveen Iqbal (PLD 2005 SC 22). The appeal filed by the father was allowed and the orders of the learned Guardian Judge and Appellate Court for returning the applications of the mother were upheld by the Hon'ble Supreme Court by holding as under :

“11. Be that as it may, from the ratio of all the law cited above, the legal position, which emerges 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 Guardians and Wards Act 1890, 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 from the place where they were living with her (or vice versa for the 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 ; and 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 01.10.2002, if a Suit for dissolution of marriage joins other causes of action mentioned in the said proviso, such Suit shall also fall in the last category, otherwise not.*

12. The petitioner was/and is residing in Multan where the minors are residing with him, who are admitted in the schools there. It is not proved by the respondent that she had brought them to Lahore and was

deprived of their custody from Lahore on account of which the cause of action could arise in her favour at Lahore. It is also not established if before parting, the parties hereto were residing at Lahore so as to attract Rule 6(b) ibid.”

14. The facts in the above-cited authority and those of the instant case are strikingly similar as the minors in both the cases were residing at the same place where their fathers were residing and their mothers had initiated proceedings under the G&W Act before the Guardian Judge at the place where the mothers were residing whose territorial jurisdiction was challenged by the fathers. Admittedly, it is not the case of the respondent in the case at hand that she was deprived of the custody of the minor in Karachi, or that the minor was illegally and improperly removed or taken away from Karachi where she was living with her, or that before parting the parties resided or were residing at Karachi. In fact, it is an admitted position that the minor was born in USA and was residing in the State of Washington from where she was brought to Karachi, Pakistan by the respondent, and it was this act of the respondent that sparked the dispute involved in these petitions. In this context, the law laid down by the Hon’ble Supreme Court in Major Muhammad Khalid Karim (supra) is clear that (a) it is the Family Courts Act, 1964, and the rules framed thereunder which have to be taken into account for determining the ‘territorial jurisdiction’ of the Family Court and not the provisions of the G&W Act ; (b) according to Rule 6(a) of the Family Court Rules, 1965, in the custody or guardianship disputes if the minor was with the mother and he/she is illegally and improperly removed and taken away from the place where he/she was living with her (or vice versa for the 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 minor is residing ; and, (c) under Rule 6(b) of the Family Court Rules, 1965, the cause of action shall be deemed to have arisen where the parties reside or last resided.

15. In view of the admitted position discussed above, I hold that at the time when the dispute relating to the custody of the minor arose and G&W Application No.1462/2017 was filed at Karachi by the respondent, the Home State / ordinary residence of the minor was the State of Washington and not Karachi. By applying the principle laid down by the Hon’ble Supreme Court in Major Muhammad Khalid Karim (supra) to the instant case and in view of the admitted position that the minor was not illegally or improperly removed or taken away from the respondent’s custody at Karachi nor were the minor or the parties residing or last resided at Karachi, it is clear that the cause of action alleged by the respondent could not be

said or deemed to have arisen at Karachi, and accordingly the Guardian Judge at Karachi did not have the territorial jurisdiction to entertain her G&W Application No.1462/2017 seeking orders relating to the minor's custody. In such circumstances, the application filed by the petitioner under Order VII Rule 11 CPC read with Sections 8 and 19 of the G&W Act for rejection of the respondent's G&W Application No.1462/2017 was wrongly dismissed by the Guardian Judge, and accordingly the order of its dismissal impugned by the petitioner in C.P. No.S-2589/2018 is liable to be set aside.

16. In C.P. No.S-2568/2017 (Habeas Corpus), the petitioner has prayed that the respondent be directed to return with the minor to the State of Washington USA and/or hand over the custody of the minor to the United States Consulate in Karachi, and respondents 2 and 3 (I.G.P. Sindh and S.H.O. concerned) be directed to locate / recover / produce the minor and hand her over to the petitioner along with her passport. However, during the course of hearing, a categorical statement / request was made on behalf of the petitioner that the relief sought by him be moulded by directing the respondent to allow him to meet with the minor and to spend time with her during his visits to Karachi, and also to allow the minor to travel with him at his expense to USA temporarily on short visits during her vacations. He also offered to bear all air travel and other allied expenses of the respondent in case she decides to accompany the minor on such visits. It was stated that the petitioner does not wish to separate the minor at a tender age from her mother (respondent) and he feels that it would be in the interest and welfare of the minor if she remains with her mother and is not dislodged from her present setup. After seeking instructions from the respondent, her learned counsel made a statement that she was not ready to accept this request at any cost because of lack of trust between the parties and also as she apprehends that she will be arrested upon arrival in USA in execution of the arrest warrant issued by the Court in Washington on the petitioner's application. In response to this, an undertaking was given on behalf of the petitioner that in case an order is made in terms of his request, he shall immediately make an application to the Court in Washington for the discharge of the respondent's arrest warrant and for her satisfaction shall provide copies of his said application and the order of discharge passed thereon to her learned counsel. The respondent did not agree to this offer / undertaking also according to her learned counsel.

17. In view of this development, I am of the view that the parenting plan executed by the parties in USA cannot be enforced. Moreover, the questions whether the removal of the minor from her Home State / ordinary residence by the respondent without the knowledge and/or consent of the petitioner and the minor's custody with the respondent since then, have become inconsequential and as such need not be discussed or decided. Likewise, the law cited by learned counsel for the parties on these points also need not be discussed. However, it may be observed that the present situation / dispute would not have arisen if the respondent had not unilaterally removed the minor from her Home State / ordinary residence i.e. the State of Washington, and the parties would likely have still been following the parenting plan. The reason for noticing this aspect of the case is a number of reported cases cited by learned counsel for the petitioner, including *Louise Anne Fairley V/S Sajjad Ahmed Rana (PLD 2007 Lahore 300)*, wherein it was held, *inter alia*, by Hon'ble Mr. Justice Mian Saqib Nisar, as his lordship then was, that if much sanctity was attached to the order passed by the Court in Pakistan, then same legal status and sanctity should be conferred and given to orders passed by Court of foreign jurisdiction when such orders were passed in proper exercise of jurisdiction and especially when the delinquent party had surrendered to the jurisdiction of that foreign Court. In paragraph 14 of the cited report, it was held as under :

“ 14. According to Article 199(1)(b)(i), of the Constitution of the Islamic Republic of Pakistan, 1973, this Court has the power and the jurisdiction to satisfy itself, that the custody of a person is not being held by another "without lawful authority" or "in an unlawful manner". The above are the expressions of art and in spirit, it means that such a custody should not be against or unauthorized by law; in defiance of law, in disregard or disobedience of law, impermissible under the law, without excuse and justification of law. According to section 491 of Criminal Procedure Code, a habeas corpus order can be issued by this Court, if the custody of a person held by another is "illegal" or "improper"; thus the proposition which comes for direct consideration is whether respondent No.1 is holding the custody of the minor under the sanction of law or otherwise. The case of the petitioner is that there are interdict and residence orders passed by the Scottish court and also an undertaking has been given by the respondent No.1, not to remove the minor from the care and control of the petitioner and also the jurisdiction of that court, therefore, bringing the child over to Pakistan and retaining its custody in breach of the above, is thus "without lawful authority", "illegal" and "improper".”

18. I have already held that at the time when the dispute relating to the custody of the minor arose and G&W Application No.1462/2017 was filed at Karachi by the respondent, the Home State / ordinary residence of the minor was the State of

Washington and not Karachi ; that due to this reason, the Guardian Judge in Karachi did not have the territorial jurisdiction to entertain the said application filed by the respondent ; and, that the order passed by the Guardian Judge in G&W Application No.1462/2017 is liable to be set aside. Ordinarily in case of any dispute, the rights of the parties as to the visitation, custody and/or guardianship of their children are decided by the competent Guardian Court. However, in the peculiar facts and circumstances of the instant case and particularly when the minor was removed from her Home State / ordinary residence by the respondent in violation of the restraining orders passed by the competent Court in Washington and the parenting plan then in force, and also as G&W Application No.1462/2017 was filed by the respondent before the Guardian Judge in Karachi who did not have the territorial jurisdiction to entertain the same, it seems that the petitioner does not have any other adequate remedy to enforce his rights to visitation and temporary custody of the minor. Regarding G&W Application No.904/2017 filed by the petitioner before the Guardian Judge at Karachi, which was dismissed for non-prosecution, pleadings of the parties and the record reflects that the same was filed by the petitioner in terms of the parenting plan only for its ratification and settlement.

19. It need not be reiterated that the paramount consideration in cases of custody and guardianship of minors is their welfare. To my mind welfare of minors should be the sole consideration as they are not in a position to decide about their welfare and as such their welfare is decided by their parents and in their absence or in case of any dispute between them, it becomes the duty of the Court to make a decision regarding their welfare by exercising parental jurisdiction. In case of separation or divorce, it is common for the relationship between parents to become strained ; it is not uncommon for them to become unreasonable, obstinate and vindictive, particularly when it comes to visitation, custody and guardianship of their children. In such cases, they lose sight of the welfare of their children and prefer to take egoistic actions and decisions that suit their needs or expectations or would emotionally hurt the other party. Unfortunately, they do not realise that in such situations it is the child who suffers the most and the damage caused to the child's tender mind is irreparable due to which it becomes nearly impossible for the child to cope with different situations in life and to grow up as an emotionally stable and secure person. To bring a child in this world is far easier for the parents than to bringing them up as a healthy, balanced and mentally sound person which is possible for them only by providing him/her with a home filled with love and

affection, nurturing care, security, moral and family values, learning and education, etc. ; and, if the parents are unable to live together due to their separation or divorce, the least they can do is to ensure that their child still gets such an environment and home. These basic requirements are endorsed by child health and development experts, and even the World Health Organization in its ‘Nurturing Care Framework for Early Childhood Development.’

20. It must be kept in mind that the presence and company of both parents are equally important in the life of every child and it cannot be said or claimed by any one parent that he or she, as the case may be, is more important for the child or that he or she has a preferential right over the other parent in the upbringing of the child or in matters relating to or connected with the child. The place and role of a mother in a child’s life cannot be filled by the father, and likewise the place and role of a father cannot be filled by the mother. Both mothers and fathers have different and special roles and responsibilities in the upbringing of their children. If one of the parents passes away when their children are very young, of course the surviving parent would normally take over all the responsibilities of the deceased parent and would try to fill the latter’s place, but such a situation is an exception. It must also be kept in mind that according to reliable and recognized scientific evidence, parental divorce is classified as an ‘Adverse Childhood Experience,’ and children from divorced homes are greater risk of insecure attachment and relationships across their lifespans, externalising behaviours (such as defiance, aggression, hostility, normally labelled as being ‘difficult’), and other challenges and disadvantages due to their parents’ breakup and loss of a routine and stable, caring parent-child relationship. Parents of such children of tender age are duty-bound to give more attention, love, care and emotional security to them rather than dragging them to Court in cases pertaining to their visitation, custody or guardianship, and compelling them to witness their fight. Young children are in, what Developmental Science terms, ‘critical windows of development’, or ‘period of high sensitivity to external influences’, both positive and negative. To my mind, during such a critical and highly vulnerable stage, this trauma is far more serious and damaging than the initial trauma of parental divorce. Ideally speaking, parents of children whose relationships have ended must ensure that their children should have the benefit of love, affection, presence and company of both parents, and by keeping their differences and animosities aside, they must allow the parent who does not have the custody of the child to see and meet the child

frequently so that they are able to meet and fulfil their moral and legal duties as a parent, in addition to fulfilling their child's emotional, physical, psychological, social and other needs. The parents must also ensure that they do not do and say anything that may create hatred or hostility in the mind of their child against the other parent.

21. Coming back to the case at hand, the minor is indeed fortunate that both her parents are alive and healthy, but she is unfortunate that they cannot live as a family at one place for which the parents themselves are to be blamed. Thus, it is the duty of her parents to ensure that they do not leave any stone unturned in her upbringing so that she grows up into a physically, mentally and emotionally strong and stable person. It was specifically pointed out on behalf of the petitioner that the minor has not been allowed by the respondent to see or meet the petitioner and her paternal grandparents and other family members and/or to visit her paternal home since last many years.

22. The position that has emerged is that at present the minor is living in her maternal home with the respondent / mother in Karachi and is presumably seeking early education in Karachi ; the petitioner / father is settled in USA and cannot live permanently in Karachi, however, he frequently visits his parents / family in Karachi ; because she was born in USA, the minor is a USA national ; the respondent had initially prayed for recovery of the minor from the alleged illegal custody of the respondent, but has now stated that he does not wish to separate the minor at a tender age from the respondent and he feels that it would be in the interest and welfare of the minor if she remains with her mother and is not dislodged from her present setup ; he has prayed that the respondent be directed to allow him to meet with the minor and to spend time with her during his visits to Karachi, and also to allow the minor to travel with him at his expense to USA temporarily on short visits during her vacations ; he has offered to bear all air travel and other allied expenses of the respondent in case she decides to accompany the minor on such visits ; in view of the apprehension of her arrest in USA expressed by the respondent, the petitioner has undertaken that in case an order is made in terms of his request, he shall immediately make an application to the Court in Washington for the discharge of the respondent's arrest warrant and for her satisfaction shall provide copies of his said application and the order of discharge passed thereon to her learned counsel ; the above requests made by the petitioner have been opposed by the respondent and his undertaking has been rejected by her ; and, the minor has not been allowed by the respondent to see or

meet the petitioner and her paternal grandparents and other family members and/or to visit her paternal home since last many years.

23. Keeping in view the paramount consideration of the welfare of the minor, I am of the view that she cannot / should not be deprived of the love, affection, care, presence and company of her father under any circumstances ; and, the respondent cannot be the sole judge to decide when the minor should see or meet her father and grandparents and for how long or how frequently. Under the Shariah and the prevailing law in Pakistan, such right of the father and the minor cannot be denied or even curtailed. Accordingly, it is hereby ordered as under :

- A. During his visits to Karachi, the petitioner shall have the temporary custody of the minor every Sunday from 10:00 am to 05:00 pm ;
- B. The petitioner shall intimate the schedule / dates of his visits in writing to the respondent and her learned counsel at least fifteen (15) days prior to his visits, and the respondent shall ensure that the minor is available in Karachi on every Sunday during his visits ;
- C. The petitioner shall be responsible to pick the minor from the house of the respondent and also to drop her back at her house ;
- D. The minor shall not be removed by the petitioner from the territorial limits of Karachi ;
- E. During his visits to Karachi and before picking up the minor for the first time in each such visit, the petitioner shall deposit his original passport with the Nazir of this Court which shall be returned to him by the Nazir, without any further orders of this Court, after the last Sunday of each such visit ;
- F. The petitioner may at his expense take the minor with him to USA temporarily on short visits of not more than fifteen (15) days only during her vacations, but not earlier than six (06) months from the date of this order, and in such an event, shall inform the respondent and her learned counsel in writing at least sixty (60) days prior to the travel date ;
- G. In case the respondent decides to accompany the minor on such temporary visits to USA or she voluntarily decides to take the minor to USA independently on her own (without the petitioner) for such

temporary visits, the petitioner shall bear all her air travel and other allied expenses ; and,

- H. At least three (03) months before the first visit of the respondent to USA, copies of the application made by the petitioner to the Court in Washington for the discharge of the respondent's arrest warrant and the order of discharge passed thereon shall be provided by him to the petitioner and her learned counsel.

24. For the foregoing reasons, C.P. No.S-2589/2018 is allowed and resultantly the orders impugned therein passed by the Guardian Court and the Appellate Court are set aside and the application filed therein by the petitioner under Order VII Rule 11 CPC read with Sections 8 and 19 of the G&W Act is allowed ; and, C.P. No.S-2568/2017 is disposed of in the above terms. There shall be no order as to costs in any of the petitions.

J U D G E