*HCJDA-38*

# JUDGMENT SHEET

## IN THE LAHORE HIGH COURT, LAHORE

### JUDICIAL DEPARTMENT

*Writ Petition No. 27113 of 2024*

*Saadia Khalil*

***Vs.***

*Learned Addl. District Judge, Lahore and 2 Others*

## ***JUDGMENT***

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| *Date of hearing* | *15.08.2024.* |
| *Petitioner by* | *Barrister Syeda Maqsooma Zahra Bokhari, Mr. Mubashar Hussain and Ms. Iqra Liaqat, learned Advocates.* |
| *Amicus Curiae* | *Barrister Marryam Hayyat* |
| *Respondent No. 3* | *Ex-parte vide order dated 05.06.2024.* |

***SULTAN TANVIR AHMAD, J***:- The petitioner filed an application, under section 25 of the Guardians and Wards Act, 1890 (the '***Act of 1890***'), for the custody of minor Rayyan Muhammad Yamin (the '***minor***') born on 28.10.2015 in United States of America ('***USA***'). Respondent No. 3 / father was proceeded against *ex-parte* due to his failure to pursue the case and thereafter, vide *ex-parte* judgment dated 21.03.2024 the application was allowed and the petitioner was held entitled for the custody of the *minor*, however, learned Judge Family / Guardian, Model Town, Lahore (the '***Guardian Court***') refused the general leave to take the *minor* abroad and rather a condition has been imposed on shifting the *minor* beyond territorial jurisdiction. Being aggrieved, the petitioner

approached the learned Appellate Court through Guardian Appeal No. 38/24. Nevertheless, to the extent of above said refusal or condition the prayer of the petitioner was turned down, hence, this petition.

2. Barrister Syeda Maqsooma Zahra Bokhari (learned counsel for the petitioner) has argued that learned two Courts below have not considered that the *minor* was not just born in *USA* but he also has his education institution in *USA*, therefore the *minor* cannot be restrained from returning to his place of birth and to resume his education; that the restriction in section 26 of the *Act of 1890* comes into effect when there is a reason or some application from a non-custodial parent who wishes the *minor* to be close for meeting(s) or adherence of schedule framed by the learned *Guardian Court*, however, in the present case the respondent-father despite knowledge of the proceedings up-till now has failed to take any interest in the Court proceedings or to observe the visitation schedule or for that matter to take any step for the welfare of the *minor*. Learned counsel for the petitioner has also argued that the law has already been settled by the learned Sindh High Court in cases titled *"Dr. Aisha Yousuf Versus Khalid Muneer and 2 Others"* (**PLD 2012 Sindh 166**) and *"Scherazade Jamali Versus Hisham Gillani and Others"* (**PLD 2018 Sindh 377**) but somehow the learned Appellate Court, instead of following the principle settled or being persuaded from the observations made therein, has refused adhering to the same for the reason that these judgments have not declared section 26 of the *Act of 1890* as *ultra vires* and this approach adopted by the learned Appellate Court is not tenable. Added that even otherwise, the learned Appellate Court should have granted general leave to the take the *minor* to *USA* for

educational purposes.

3. Barrister Maryyam Hayat, learned *Amicus Curiae* has stated that in case titled *"Mst. Sidra Asif Versus Additional District Judge and 2 Others"* (**2019 YLR 2692**) it has already been observed that in guardianship cases, the Courts exercise parental jurisdiction and stand in *loco parentis*, thus, the jurisdiction could not be hampered with undue interference of technicalities. Therefore, the Court must perform its legal duties to regulate the custody of the minor in order to ensure his well-being and welfare which should be paramount and dominant consideration. She further stated that it was held in the case titled *"Raja Muhammad Owais Versus Mst. Nazia Jabeen and Others"* (**2022 SCMR 2123**) that Court's jurisdiction in custody cases is in the form of parental jurisdiction which means that the Courts should not only consider all factors including physical and emotional needs, medical care but also relevant is the parent's ability to provide a safe and secure home where the quality of the relationship between the child and each parent is comfortable for the child, however, the learned *Guardian Court* has ignored the same. It is further stated that the intent of the legislature behind section 26 of the *Act of 1890* is to protect interest of the non-custodial parent by imposing limits on removing children from jurisdiction; that the said section is not applicable here as the respondent-father was proceeded against ex-parte in both the forums below, which essentially shows that the respondent-father is not interested in meeting the *minor*, thus, the protection of section 26 of the *Act of 1890* is not applicable. She has further stated that the respondent-father is resident of *USA* and does not even reside within the local limits of the Court, therefore, the apprehensions disclosed by the

learned Courts below are not rational and judicious. She has apprised that the *minor* can have better education and financial conditions in *USA.*

4. Heard. Record perused.

5. In *"Scherazade Jamali"* case (*supra*) the learned Sindh High Court resolved the issue as to the restriction on the movement of a ward out of the jurisdiction, as contained in section 26 of the *Act of 1890,* while observing that the ward cannot be penalized for the dispute between the parents and if better education facilities or institutions are available in any part of the world including Pakistan, there is no justifiable reason that the ward should be deprived to have access to such institutions or facilities. The same is categorized as psychological trauma to the ward, while further observing that the Courts below should not view the welfare only from the angle that father must not miss the opportunity to see his child but at the same time it should be seen as to whether the child is capable of studying abroad. The Court in the said case concluded as follows:-

> "*…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 he done if the welfare of the ward demands****. Guardian Courts sometime lose sight of the welfare of the ward when love and affection is demonstrated by parentswhich 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…."*
>
> *(Emphasis supplied)*

6. In the present case, respondent-father has not shown any interest in the visitation schedule framed by the learned *Guardian Court.* It has been apprised that no concern is being demonstrated by the respondent-father in contributing towards the welfare of the *minor.* Throughout the case before the learned *Guardian Court*, learned Appellate Court or this Court the respondent-father has not even joined the proceedings. In *"Dr. Aisha Yousuf"* case (*supra*) the custodial parent / mother obtained job in Dubai and she requested the learned Court to permit her to take the ward to Dubai. The learned Court found the request reasonable and permitted her to take the ward out of the jurisdiction, while allowing the Constitution Petition. It will be beneficial to reproduce paragraph No. 12 of the said judgment:-

> *"12. In the present case two Court below have concurrently held that the custody shall remain with the mother and father has not challenged such findings. Therefore, as far as question of custody of the minor is concerned there does not appear to be any dispute between the parties. Regarding visitation rights the two Courts below have concurrently held that from 6-00 p.m. of alternate Saturday to 6-00 p.m. of following Sunday baby girl will be with the father. It is*

*stated by learned counsel for the petitioner that mother is doctor by profession and she has obtained a job in Dubai and therefore prayed that she be allowed to take the baby to Dubai. The requests seems to be perfectly reasonable. Just as a father cannot be asked to abandon his career if he wants custody of a child, a mother cannot be asked to forsake her career if she wants custody of the child. In these days a woman is equally entitled to pursue a fruitful rewarding and satisfying career. Gone are the day when social norms used to be that a woman is expected to remain within four walls of a house and bring up children and father was free to roam the world in search of livelihood. Mandate' of the Constitution as contained in Article 25 is that the State can make law for the protection and welfare of women and children. The Supreme Court has in Shrin Munir and others v. Government of Punjab through Secretary Health, Lahore and another, PLD 1990 SC (sic) held that while it is permissible to practice discrimination in favour of women and children but it is forbidden against them. Therefore spirit underlining all the legislation has to be that if anything the Court should lean in favour of weaker sections of society and it does not need any sophistry of arguments to see that women in this society, besides others, are certainly weaker section. Therefore, a female has as much right to roam in search of career and livelihood wherever she finds it more apt and she cannot be deprived of custody of the children for mere reason that she wants to serve abroad. Therefore, in my opinion it would be fair and reasonable to permit the mother to take the child out of Pakistan along with her when she goes to Dubai for her employment."*

*(Underlining is added)*

7. In C.P. No. S-411 of 2022 titled *"Gul Mina Afridi Versus Rana Abdul Kareem & Others"* the Sindh High Court referred to a judgment of Karnataka High Court in WP No. 892 of 2023 titled *SmtRakshitha vs Sri C C Shashikumar* passed on 19 January, 2023, where the

permission was granted to mother on the ground that father was indolent and he was uninvolved in the matters of upbringing of the ward. Reliance in the said case was also placed upon the American jurisprudence and case titled *Watson V. Watson* (Aug 03, 2004 I 2004 Neb. App. LEXIS 190) in which the Court granted mother's motion to remove minor children from Nebraska to pursue her job opportunity in Maryland. Here, I would like to reproduce paragraphs No. 8 and 9 of the said judgment:-

> *"8. Admittedly the world is a global village and countless people are migrating overseas for better opportunities for themselves and especially their children. While so far our legal jurisprudence has sparingly dealt with the situations where the minor was being removed from the jurisdiction of the court where the consideration remained the protection of the welfare of the minor, however, considering the facts of the present case where the petitioner's reason of seeking permission for international travel is for her daughter to have intentional exposure, the courts of law aligned with the international law, in my humble view, are bound to consider that while allowing/denying the permission, whether they are protecting the welfare of the minor or acting otherwise. This responsibility stems from the International Convention of the Rights of Child ("Convention") which was ratified by Pakistan on 12 November 1990, where Article 3 reinforces the said responsibility in the following words as reproduced herein below:*
>
> *Article 3*
>
> *1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best Interests of the child shall be a primary consideration.*
>
> *9. Pakistan is also a party to three other international instruments aiming at directly or indirectly Improving the rights of the child,*

> *those being the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW), ratified in 1996; the Declaration and Agenda for Action adopted at the issue of the World Congress against Commercial Sexual Exploitation of Children, signed in 1996, and reaffirmed by the Yokohama Global Commitment in 2001, and the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Form of Child Labour Convention, ratified in 2001, all of which make the Interest of the child of primary consideration and through which our Family Courts are bound to make decisions that do justice to the principle of welfare of the child.*

8. Now coming to the reasoning given by the learned Appellate Court for not being persuaded from the judgments in cases titled *"Dr. Aisha Yousuf"* and *"Scherazade Jamali"* (*supra*) or withholding permission to take the *minor* abroad. The learned Appellate Court has observed that in these judgments section 26 of the *Act of 1890* has not been declared as *ultra vires.* Section 26 of the *Act of 1890* reads as under:-

> "*26. Removal of ward from jurisdiction.*---
>
> *(1) A guardian of the person appointed or declared by the Court, unless he is the Collector or is a guardian appointed by will or other instrument,* ***shall not without the leave of the Court by which he was appointed or declared, remove the ward from the limits of its jurisdiction*** *except for such purposes as may be prescribed.*
>
> *(2)The* ***leave granted by the Court under sub-section (1) may be special or general****, and may be denied by the order granting it.*"
>
> *(Emphasis supplied)*

From a plain reading of above, I do not see any intention of the legislature to place complete embargo on

granting permission to restrict ward within jurisdiction. Otherwise, the Courts would not have been empowered to grant leave to take the ward out of the territorial jurisdiction. Sub-section 2 of the above permits the Courts to grant special or general leave and to deny the leave. The learned Appellate Court is correct in its decision that the above provisions are holding the field; however, ignored that the requirement of leave before removing is also for the wellbeing of the ward and protecting the interest of the ward as well as the non-custodial parents. Such leave can be granted, on case to case basis, when welfare of the ward so demands and being exceedingly cautious in using this power. I agree with Barrister Marryam Hayat (the learned *Amicus Curiae*) who stated that the learned Appellate Court should have proceeded to give findings on merits of the case by considering the request to permit the petitioner-mother to take the *minor* to *USA* for education purposes, instead of making the mother or the *minor* to go through further rigors. The learned counsel for the petitioner has submitted that already harm to the education of the *minor* has been caused and referring the matter by learned Appellate Court to the learned *Guardian Court* can further results into damage and / or loss of an academic year.

9. After carefully going through the available documents and hearing the arguments, I am of the opinion that the learned Appellate Court has not exercised the jurisdiction conferred by law to properly consider the request of the petitioner. It has been ignored that the respondent-father is not taking any interest or contributing for the welfare of the *minor* and his complete failure in observing the visitation schedule, framed by the learned *Guardian Court*. I do not consider it in the welfare of the

*minor* to deprive him from joining his educational institution in *USA*, restricting him within the territorial jurisdiction of the learned *Guardian Court*, in the circumstances of the case. It is considered appropriate to permit the custodial-parent / mother to take the *minor* to *USA* for education purposes. Barrister Syeda Maqsooma Zahra has submitted that the petitioner-mother undertakes that prior to change of residential address or educational institution, information of the same in such eventuality shall be given to the learned *Guardian Court.*

10. In view of the above, the petitioner-mother is allowed to take the *minor* to *USA* for educational purposes and the judgment of the learned Appellate Court to this extent is modified. In case of breach of undertaking or any other relevant condition imposed by learned *Guardian Court*, respondent-father can approach the learned *Guardian Court* for cancellation of the permission granted. Petitioner to appear before the learned *Guardian Court* for intimation about her present residence address and name as well as address of educational institution of the *minor* in *USA.*

11. ***Allowed in the above terms***.

***(Sultan Tanvir Ahmad)***
***Judge***

*Approved for reporting*
*Signed on 27.08.2024*

***Judge***

***Hashmi****