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JUDGMENT SHEET
LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

Writ Petition No.6959 of 2022

Amraf Butt Versus **Imran Bashir, etc.**

J U D G M E N T

Date of Hearing:	09.03.2023
Petitioner by:	Rai Abdul Basit, Advocate.
Respondent No.1 by:	Mr. Irfan Ahmad Khichi, Advocate.

Anwaar Hussain, J. Briefly stated facts of the case are that respondent No.1 (“**the respondent**”) filed a guardian petition under Section 25 of the Guardians & Wards Act, 1890 seeking permanent custody of his minor son, namely, Khidar Imran (**‘the minor’**) born from the wedlock with the petitioner who also filed a separate guardian petition. On 11.05.2019, visitation schedule was chalked out and consolidated issues were framed. During the pendency of the said guardian petitions, the learned Guardian Judge accepted an application of the respondent, *vide* order dated 11.05.2019, whereby direction to the petitioner was sought to facilitate appearance of the minor before the authority concerned for issuance of American passport of the minor. However, subsequently, the respondent moved an application for withdrawal of his guardian petition, which was accordingly allowed, *vide* order dated 24.05.2021 and the guardian petition of the respondent was dismissed as withdrawn. After withdrawal of the guardian petition, the respondent moved an application for issuance of *Robkar* and implementation/execution of order dated 11.05.2019. The learned Guardian Judge, Lahore, *vide* order dated 28.10.2021, directed the petitioner to comply with order dated 11.05.2019. Feeling aggrieved, the petitioner preferred an appeal, which was dismissed by the learned Appellate Court below, *vide* order dated 24.01.2022, hence, the present constitutional petition has been filed.

2. Learned counsel for the petitioner maintains that the impugned order was passed without providing an opportunity of hearing to the petitioner. He further states that the guardian petition filed by the respondent was dismissed as withdrawn, *vide* order dated 24.05.2021, therefore, the interim order dated 11.05.2019 earlier passed merged into the final order of withdrawal and ceased to have any effect. Adds that resultantly, order dated 11.05.2019 is not holding the field on account of doctrine of merger, therefore, the same cannot be implemented and the learned Courts below without keeping in view this factual and legal position has directed the petitioner to comply with order dated 11.05.2019 that is an error apparent on the record and merits interference by this Court.

3. Conversely, learned counsel for the respondent submits that guardian petition filed by the respondent was withdrawn for the time being only in view of the fact that the minor is of tender age and requires attention of the petitioner, being the real mother. Adds that prior to the withdrawal of the guardian petition, order dated 11.05.2019 was passed by the learned Guardian Judge directing the petitioner to facilitate the issuance of the American passport of the minor and said order, after it was upheld in appeal, was also assailed by the petitioner before this Court by filing constitutional petition bearing Writ Petition No.64803/2019 which was dismissed on 18.01.2021. As order dated 18.01.2021 passed by this Court is holding the field, the matter cannot be reopened before this Court. When confronted, learned counsel for the petitioner, in rebuttal, submits that order dated 18.01.2021 of this Court has been challenged before the Supreme Court of Pakistan by filing Civil Petition for Leave to Appear (“CPLA”), however, he candidly concedes that the said order has not been suspended so far. Adds that the CPLA has also become infructuous because the guardian petition filed by the respondent has been withdrawn by the respondent.

4. Arguments heard. Record perused.

5. The legal questions that require opinion of this Court are articulated as under:

(i) Whether the interim order, passed in a guardian petition filed by the respondent which was consolidated with the guardian petition filed by the petitioner, holds the field after the guardian petition filed by the respondent was dismissed as withdrawn?

(ii) If the above referred interim order dated 11.05.2019 directing the petitioner to ensure presence of the minor before the US Embassy for preparation of passport of the latter is holding the field, whether the same is required to be implemented being in welfare of the minor?

6. At the outset, it is observed that the argument of the petitioner as to interim order dated 11.05.2019 dissipating in the air on account of withdrawal of the main *lis* i.e., the guardian petition filed by the respondent is misconceived, to say the least, on two counts. Firstly, the order dated 11.05.2019 directing the petitioner to facilitate the presence of the minor before the US Embassy for issuance of the American passport to the minor as a measure for the welfare of the minor in his future endeavours in general and pursuit of education in particular has been upheld up to the level of this Court and in the meanwhile the guardian petition filed by the respondent was withdrawn. Contention of the respondent that he has not pressed his guardian petition realizing that the minor is of tender age and the petitioner who is real mother should be given preference and that the respondent felt satisfied and contended in the interest and well-being of the minor with the visitation schedule chalked out by the learned Trial Court needs appreciation as it is not so common practice in our society as the parents get carried away by the egos and prejudices in litigation, at the cost of the welfare of the minor, and its concomitant psychological toll on the minor. It is

also imperative to observe that withdrawal of guardian petition filed by the respondent does not mean that an interim order passed therein directing the petitioner to facilitate the issuance of American passport of the minor ceased to have effect as this would amount to preferring technicalities over the welfare of the minor that is supposed to be of paramount consideration and is an on-going phenomenon that cannot be circumscribed by some mathematical calculation or hyper-technicalities of civil procedure as the welfare of the minor cannot be sacrificed at the altar of procedural niceties. More so, when the said interim order was admittedly assailed by the petitioner by filing constitutional petition bearing Writ Petition No.64803/2019 and the order dated 11.05.2019 was upheld by this Court on 18.01.2021 well before the withdrawal of the guardian petition on 24.05.2021. Therefore, even if the doctrine of merger is to be applied to the facts of the present case, interim order dated 11.05.2019 upheld *vide* order dated 12.07.2019 by the learned Appellate Court below merged into order dated 18.01.2021 of this Court passed in constitutional petition No.64803/2019 and the subsequent withdrawal of the guardian petition for the reasons mentioned hereinabove does not affect the execution and implementation of order dated 11.05.2019 and the same does not render the order dated 11.05.2019 non-existent.

7. Secondly, it is matter of record that the petitioner's guardian petition was subsequent in time and was consolidated with the guardian petition of the respondent that was already pending. Admittedly, when the interim visitation schedule was chalked out on 11.05.2019, both the petitions were also consolidated and the issues were accordingly framed and on the same date interim order directing the petitioner to facilitate presence of the minor before US Embassy was passed. Meaning thereby that subsequent to the framing of the consolidated issues, both guardian petitions were heard together. Order dated 11.05.2019 on the application of the respondent seeking direction to the petitioner to facilitate issuance of the American passport by all means

was passed in consolidated proceedings and withdrawal of one guardian petition (of the respondent) does not mean that the entire matter came to an end and the order of withdrawal had the attire of the final order when admittedly the connected guardian petition of the petitioner remained pending. Therefore, this Court is of considered opinion that the interim order directing the petitioner to facilitate the minor in getting American passport does not cease to have effect by mere withdrawal of guardian petition filed by the respondent once the proceedings were admittedly consolidated in nature and same benefited the petitioner to keep the permanent custody of the minor as her guardian petition remained pending.

8. Adverting to the second question, it is imperative to note that in the matters emanating from the guardianship proceedings welfare of the minor is to be taken as the most important/paramount factor. This aspect of the case has been examined by this Court in order dated 18.01.2021 passed in Writ Petition No.64803/2019, operative part thereof is reproduced as under:

“5.....*There is no dispute that respondent No.3 is U.S. citizen and he wants to apply for the passport of his minor son before change in the policy of U.S. Government.* Admittedly the minor is also a Pakistani citizen, therefore, after obtaining U.S. passport, his status will be of a dual national, which is permissible under law. *The U.S. passport for the minor does not appear to be against the welfare of the minor rather it will be helpful for his future education and job prospects as argued by learned counsel for the respondent No.3. So far as the apprehension of the petitioner that respondent No.3 may misuse the passport for taking the minor out of country is concerned, suffice it to note that learned Guardian Judge has already taken care of this apprehension by directing the respondent No.3, that the passport shall remain in custody of the petitioner mother or the person who shall be entitled for the guardianship of the minor as per law.*”

(Emphasis provided)

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This Court while upholding the interim order dated 11.05.2019 has held the direction to the petitioner to facilitate issuance of American passport of the minor to be in welfare of the minor and acceptance of the present petition amounts to review of order dated 18.01.2021 quoted hereinabove, which is not permissible under the law.

9. In view of above discussion, the present petition is misconceived and hence, **dismissed**. No order as to costs.

(ANWAAR HUSSAIN)
Judge

Approved from reporting

Judge

Maqsood