

JUDGMENT SHEET
ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT

W.P. No.3492/2018

Mst. Nasreen & another

versus

Raja Muhammad Shahid Bashir, etc.

Petitioners by: Malik Atif Raza Kalwar, Advocate.

Respondent No.3 by: Mr. Muhammad Kowkab Iqbal, Advocate.

Date of Decision: 18.01.2019.

MOHSIN AKHTAR KAYANI, J: Through this writ petition, the petitioners have assailed the concurrent findings passed by the learned Judge Guardian Court vide judgment and decree dated 21.03.2018 and learned Additional District Judge (West), Islamabad vide judgment and decree dated 24.07.2018, whereby the Guardian Court ex-parte decided the custody petition U/S 25 of the Guardians & Wards Act, 1890 and appeal of the petitioners against the said ex-parte judgment and decree was dismissed by learned Additional District Judge (West), Islamabad.

2. Brief facts referred in the captioned writ petition are that, Mst. Nasreen/petitioner No.1 was married to Raja Muhammad Shahid Bashir/ respondent No.3 on 04.04.2004 against the dower of Rs.50,000/- and during the subsistence of marriage, Muhammad Sarim (son)/petitioner No.2 was born on 27.05.2006, who is presently in custody of petitioner No.1 at Karachi. Respondent No.3/father filed a custody petition U/S 25 of the Guardians & Wards Act, 1890 on 09.05.2017 at Islamabad and Mst. Nasreen/petitioner No.1 deserted him in the first week of August, 2008 and she by removing the minor from legal guardianship took away the minor son to Karachi to her parents' house when respondent No.3/father was allegedly performing his duties at Naval Hospital PNS Hafeez, Islamabad. The custody

petition was ex-parte decided in favour of respondent No.3/father vide judgment and decree dated 21.03.2018 by the Guardian Judge (West), Islamabad as petitioners failed to appear before the Court. Feeling aggrieved whereby, petitioners filed Appeal No.7/2018, which was dismissed by the learned Additional District Judge (West), Islamabad vide judgment and decree dated 24.07.2018. Hence, the instant writ petition.

3. Learned counsel for petitioner contended that both the courts below neither appreciated the law on subject nor the facts which were brought on record at the appellate stage, whereby it was specifically contended that the custody matter was settled through consolidated judgment dated 06.11.2013 passed by the learned Judge Family Court, XVI, Karachi South passed in Family Suit No.384/2011 and Guardian Petition No.428/2011, whereby the custody application filed by respondent No.3/father was dismissed and he was granted a visitation schedule to meet the minor on first and third Saturday from 10 am to 12 noon of each calendar month in Court premises with direction to pay Rs.5,000/- as conveyance charges. The said order was upheld by the learned Additional District Judge (VII), Karachi South vide order dated 21.10.2015, whereas the Sindh High Court vide order dated 01.04.2016 dismissed *in limine* the C.P. No.S-1198/2015 of respondent No.3/father, but all these facts have been concealed by respondent No.3/father and even the same were not appreciated by the learned Additional District Judge, Islamabad, hence, the impugned judgments are contrary to law and against the settled principles of the judgments passed by the superior Courts; that minor is studying in Army Public School, Malir, Karachi and at present he is 13 years old and respondent No.3/father has not paid due maintenance despite the decree passed against him and as such, he

is neither entitled for any relief nor custody should be handed over to him in these circumstances as welfare of minor lies with the mother.

4. Conversely, learned counsel for respondent No.3 contends that minor was removed from Islamabad in the first week of August, 2008 and as such, this Court has jurisdiction to entertain the matter and the petitioner mother never allowed the visitation despite the fact that respondent No.3 has paid maintenance in the Family Court, Karachi, which was received by petitioner No.1/mother; that petitioners intentionally failed to appear before the trial Court at Islamabad, which resulted into issuance of ex-parte decree, which was further upheld by the first Appellate Court and constitutional courts cannot interfere into concurrent findings.

5. Arguments heard, record perused.

6. From the perusal of record, it has been observed that Raja Muhammad Shahid Bashir/respondent No.3 was married to Mst. Nasreen/petitioner No.1 on 04.04.2004 and during the subsistence of marriage, Muhammad Sarim/petitioner No.2 was born on 27.05.2006 and due to acute disparity amongst the parties, the relationship ended on divorce, which was executed by respondent No.3, who later on also filed custody application U/S 25 of Guardian & Wards Act, 1890 at Islamabad and claimed custody of the minor on the basis of following two paragraphs of the petition:

4. *That in the first week of August 2008, the Respondent deserted the petitioner and took away his said minor son with her at Karachi, where her parents live, the said minor was removed from the legal Guardianship of the petitioner by the Respondent, while the petitioner was on duty in the Naval Hospital P.N.S. Hafeez at Islamabad.*
5.
6.
7.
8. *That the cause of action arose in the first week of 2008 when the minor was removed by the Respondent from the legal guardianship of the petitioner and is continuing with each passing day with denial by the Respondent of giving*

the custody of the minor to the petitioner, therefore, the petitioner is within time.

7. The above referred custody petition was filed on 09.05.2017 before the Guardian Court, Islamabad, however the said petition was proceeded and decided ex-parte, vide judgment and decree dated 21.03.2018, which was upheld by the first Appellate Court vide judgment and decree dated 24.07.2018. Hence, this writ petition.

8. At the first instance, I have gone through the pleadings of respondent No.3/father, wherein he has not mentioned the reasons as to why he approached the Guardian Court at Islamabad on 09.05.2017 when his son, who was born on 27.05.2006, was removed in the first week of August, 2008 by petitioner No.1/mother and he kept silent for nine (09) long years and even he has not referred any other document or reference or proceedings in his petition for custody. However, the record further reveals that petitioner No.1/mother filed application on 09.12.2017 for rejection of guardian application along with her affidavit in which she has categorically referred the proceedings of the Guardian Court at Karachi, which was earlier decided in favour of petitioner No.1/mother and custody application of respondent No.3/father was dismissed concurrently up to the Sindh High Court and the judgment passed by the Guardian Court (South), Karachi dated 06.11.2013 in Guardian Application No.428/2011 was placed on record. The judgment in appeal dated 21.10.2015 passed by learned Additional District Judge-VII Karachi South and judgment of the Sindh High Court passed in C.P. No.S-1998/2015 dated 29.03.2016, whereby findings of the Guardian Court in favour of petitioner No.1/mother were upheld and writ petition filed by respondent No.3/father was dismissed *in limine*. But despite availability of all these judgments, the Guardian Judge at Islamabad has not considered all

these previous proceedings and proceeded against petitioner No.1/mother through ex-parte judgment and the said application for rejection of guardian application was also dismissed vide order dated 16.03.2018 on the strength of reported judgment PLD 2012 SC 66 (Major Muhammad Khalid Karim vs. Sadia Yaqoob).

9. In order to resolve the controversy, I have gone through the said judgment of the apex Court, wherein the following principles have been settled:

10. *Anyhow, in order to settle the proposition in hand, in view of the provisions of the law quoted above and the preponderance of the view set out in the judicial pronouncements, we do not find ourselves in a position to form an opinion different from the judgments of the Peshawar and Lahore High Courts and this Court (supra), holding that Section 5 of the Act, 1964 confer exclusive jurisdiction upon the Family Court to hear the matters/disputes covered by the items mentioned in the schedule. In Anne Zehra's case (supra), it has been made clear that the question of 'territorial jurisdiction' is not purely a procedural question and, therefore, would not be settled on account of the provisions of Act, 1890, as per force of section 25 of the Act 1964 and this is the correct exposition of law. It seems that this Court was not properly assisted in the case Muhammad Iqbal supra, because we have endeavoured to examine the entire law on the subject, as has been amended from time to time and are unable to locate any amendment introduced, as a proviso to subsection (2) of section 7 of the Act, 1964 by virtue of which the jurisdiction for the purposes of the guardianship/custody disputes was/is conferred upon the Family Court, where the wife resides. The proviso to which reference perhaps is intended in Muhammad Iqbal's case supra, reads as:--*

"Provided that a plaint for dissolution of marriage may contain all claims relating to dower, maintenance, dower, personal property and belongings of the wife, custody of the children and visitation rights of the parents to meet their children"

The said proviso only permits the joinder of different causes of action in one suit, whereas the determination of 'territorial jurisdiction' still remains to be regulated by Rule 6 of the Family Courts Rules, 1965 (reproduced above). The proviso does not envisage that if such a composite suit is either filed or if any one of the claims covered by that is separately initiated, the Family Court where the wife resides would have the jurisdiction in the matter, rather it is Rule 6 ibid which shall provide the answer in the given situation; it seems that on account of lack of proper legal assistance, the said judgment is per incuriam.

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

- (a) Under section 5 of the Act 1964, the Family Court has the exclusive jurisdiction to entertain, hear and adjudicate (emphasis supplied) all the matters which fall within the first schedule to the Act; this admittedly includes the custody and guardianship matter.
- (b) For the purposes of determining the 'territorial jurisdiction' of the Family Court, it is Act 1964, and the rules framed thereunder which shall be taken into account and not the provision of the Guardian and Wards Act 1980, even as per force of section 25 of the Act 1964.
- (c) According to Rule 6 (a) of the Family Court Rules 1965, there are three factual eventualities which are relevant for the purposes of the determination of the 'territorial jurisdiction' of the Family Court; firstly, where the cause of action wholly or in part has arisen, meaning thereby, in the custody or guardianship disputes if the minors were with the mother and they have been illegally and improperly removed and taken away that from the place where they were living with her (or vice versa for father as well), the cause of action shall be said to have arisen at such place, otherwise the cause of action shall be deemed to have arisen where the minors are residing; secondly, under Rule 6(b) where the parties reside or last resided; thirdly as per proviso to Rule 6, in a suit for dissolution of marriage or dower where the wife ordinarily resided. And in view of the addition of proviso to section 7(2) of the Act 1964, which was introduced on 1-10-2002 if in a suit for the dissolution of marriage join other causes of action mentioned in the said proviso, such suit shall also fall in the last category, otherwise not.

10. As a matter of fact, I am in full agreement with the above settled principles, however, the abovementioned case of *Major Muhammad Khalid Karim supra*, if applied in present situation, there are other exceptions which were not considered by the Courts below and the concurrent findings given by the learned Guardian Court and learned first Appellate Court could not be appreciated, although important factors were available, therefore, the abovementioned case law has to be seen in the light of those factors which are given below for the just conclusion of the case, such factors are as under:

- i. Raja Muhammad Shahid Bashir/Respondent No.3 kept silent for 9 long years for filing of Guardian petition U/S 25 of

Guardian & Wards Act, 1890 and as such, he has not given any specific reasons for this delay.

- ii. Respondent No.3/father has not mentioned any specific stance or factors which precluded him to agitate the matter in nine (09) years at Islamabad. The pleadings are silent to that extent.
- iii. The pleadings of respondent No.3/father, if read in conjunction with application for rejection filed by petitioner No.1/mother with all the details of decisions made by Guardian Judge (South), Karachi as well as first Appellate Court and the Sindh High Court, respondent No.3/father not merely concealed all these factors for consideration of the Court but also remained silent about the proceedings of Guardian Court, Karachi initiated by him in which the question of welfare of minor has already been settled.
- iv. Respondent No.3/father himself chose to file a custody petition U/S 25 of Guardian & Wards Act, 1890 at Karachi after having conscious knowledge that his minor son was living with petitioner No.1/mother at Karachi and the minor was sterling in Karachi, hence, by filing Guardian Petition No.428/2011 at Karachi, he conceded to the jurisdiction of Guardian Court (South), Karachi, therefore, he was estopped by his words and conduct to again challenge a similar question on previous cause of action at Islamabad, especially when he himself not agitated the matter at Islamabad at the very first instance.
- v. The question of welfare of minor was already adjudicated up to the Sindh High Court in favour of petitioner No.1/mother,

which has never been agitated to the apex Court and the custody attained finality in favour of petitioner No.1/mother, whereas the visitation schedule was already given by Guardian Court vide order dated 06.11.2013.

- vi. Respondent No.3/father conceded before this Court that he regularly paid the maintenance of the minor up till 09.01.2016, and the amount so deposited by him w.e.f. 20.09.2011 till 09.01.2016 is Rs.180,000/- in the Nazarat Branch of District and Sessions Court, Karachi South in Family Suit No.384/2011 was received by petitioner No.1/mother and in this regard, he placed certified record of the withdrawal of amount, which further confirms that he conceded to the jurisdiction of Family Court at Karachi and satisfied the decree of the Family Court as well as of the Guardian Court partly, but after his non-payment of maintenance w.e.f. 09.01.2016, he has not visited the minor in last three years, which shows his defiance of Court's decree passed against him and minor was not paid his due maintenance.
- vii. Respondent No.3/father also conceded before the Court that at the time of filing of his custody petition, he was posted at Karachi and after 2008, he has never been to Islamabad and his last 10 years service was in Karachi and Gawadar, in which he appeared before the Guardian Court and Family Court South Karachi on different occasions in the custody petition and he never came to Islamabad.

11. While considering the above referred reasons and factors, this Court is of the view that respondent No.3/father himself is in defiance of the maintenance decree of petitioner No.2/minor and not paying the maintenance from the last three years, hence the question of welfare of minor, which was already adjudicated and settled by the Guardian Court at Karachi and the same was upheld up to the Sindh High Court, infers the jurisdiction of Karachi, which is in the knowledge of respondent No.3/father, who concealed all these factors from the Guardian Court at Islamabad and re-agitated the matter at Islamabad at old cause of action pertaining to the year 2008 and as such, it is not permissible to do so and his case does not fall within the purview of case of *Major Muhammad Khalid Karim (PLD 2012 SC 66)* *supra*. Even otherwise, the person, who is guilty of misstatement, misrepresentation of facts and concealing previous proceedings, is not entitled for any relief as he was estopped by his words and conduct, whereas, respondent No.3 being father is under lawful obligation to regularly pay the maintenance despite the fact that the Guardian Court at Islamabad as well as learned Additional District Judge passed concurrent findings in his favour but this does not absolve him from the payment of maintenance unless the custody of minor is actually handed over to him, hence, respondent No.3/father is not entitled for the custody of minor.

12. Besides the above referred findings, I am surprised to see the findings of both the Courts below, who have not given due consideration to the conduct of respondent No.3/father and even not interpreted the law in its true perspective, especially the first Appellate Court, which is under obligation to decide the questions on a legal point, rather the order was

passed in a mechanical fashion or otherwise as the matter was decided in the following way:

“7.Consequently, the said application was dismissed and the learned trial Court decided the guardianship application in favour of the petitioner in the light of ex-parte evidence of the respondent Raja Muhammad Shahid Bashir. Even no attested copy of any decision about guardianship in her favour could be brought on the file during the pendency of the instant appeal, therefore, this Court is also left with no option but to dismiss the appeal in hand as the impugned order has been passed on the basis of ex-parte unrebutted evidence of the respondent and it does not suffer with any illegality or irregularity or misreading and non-reading of record and there is no need to interfere in it.”

13. The first Appellate Court in the above referred findings neither discussed the evidence of respondent No.3/father nor considered the judgments of the Sindh High Court as well as of the Guardian Court at Karachi and the first Appellate Court at Karachi, where respondent No.3/father failed to make out his case, even the first Appellate Court at Islamabad has not considered it appropriate to ask respondent No.3/father and confirm all those factors, which clearly reflected on record.

14. I have also gone through the affidavit of evidence Exh.A1 of respondent No.3/father filed before the Guardian Court at Islamabad, who himself referred his address as *“presently residing at P.N.S. Muhaffiz, at PN Dockyard, Karachi”* and referred certain important facts regarding previous proceeding in ambiguous situation.

“ That the said Mst. Nasreen Rafiq didn't allow the deponent to meet his said son (Muhammad Sarim). The deponent filed a petition U/S 25 of Guardian & Wards Act, 1925 to get the custody of his said son and was succeeded in getting order of meeting with the minor in the Court, but later on his main petition for getting the custody of his said son was dismissed by the Guardian Judge on the ground that the said minor was at that

time of tender age and the learned guardian judge told the deponent to wait, so that the minor grows up.

That the deponent has now filed the above petition for getting the custody of his minor son after long wait of about 5 years, the minor is now more than 11 years old.

That the said Mst. Nasreen Rafiq has not allowed the deponent even to see the face of his said son and has deprived him from meeting his son.

That the said act of Mst. Nasreen Rafiq of not allowing the deponent even to see the face of his said son is against the interest and welfare of the said minor, who has been deprived of the love and affection of the deponent who is his real father.

That the said minor would hardly recognized the deponent, when the deponent will have a chance to see him and in this way the said Mst. Nasreen Rafiq is committing great callousness and cruelty on both the son and the father.

(Underlining is provided for emphasis)

15. The above referred stance in evidence of respondent No.3/father is of great importance which was not taken into account by the Guardian Court as well as by the first Appellate Court in which respondent No.3 has not referred any reasons for agitating the matter at Islamabad despite the fact that he himself referred that his son is at Karachi with petitioner No.1/mother, even he has not mentioned a single fact that he is regularly paying the maintenance and he referred that petitioner No.1/mother is not allowing him to see the face of his son but all these eventualities place a heavy burden upon the Guardian Court as well as on the first Appellate Court to probe and consider these important factors while deciding guardian petition as petitioner No.1/mother admittedly shifted to Karachi in the year 2008 along with the minor and the explanation of delay in filing the second custody petition by respondent No.3 at Islamabad is not available on record, therefore, in my humble view, the cause of action qua the territorial jurisdiction of Islamabad and Karachi has not been considered for all practical reasons.

16. This Court is of the view that petitioner No.1/mother has the right to shift from one jurisdiction to another jurisdiction along with minor on the reasons of security, job, or to look after her parents as she is the best judge to decide such factors and no court can put a clog in her right of free movement as every citizen of Pakistan has been ensured with the protection provided in the constitution in which the right of free movement or to enter into any lawful profession or trade has been guaranteed, even otherwise, the law does not deprive the mother or a wife from shifting from one place to another for all these factors referred above and in such eventuality, if a reasonable time has already been elapsed, especially in this case when 9 years has been passed, then the cause of action within territorial jurisdiction of Islamabad ceased to exist and respondent No.3/father has to approach the Guardian Court at Karachi for his grievances, if any.

17. Keeping in view the above background, this Court while exercising the powers of *in loco parentis* and to safeguard the interest of minor, called petitioner No.1/mother and petitioner No.2/minor son for resolution of this issue once and for all, however both the petitioners could not appear before this Court despite the order dated 06.11.2018 as they had to travel from Karachi and the learned counsel for petitioners showed his inability and contended that due to financial implications of mother/petitioner, she could not bear any further cost of traveling and even the schooling of minor may affect, hence, by exercising the powers available to this Court vide order dated 21.12.2018, I.T Department was directed to arrange Video call, in compliance thereof, petitioner No.1/mother as well as Muhammad Sarim/minor were taken on video conference link in the open Court today,

whereby Muhammad Sarim/minor has been interviewed, during which the following questions and answers have been recorded:

سوال: آپ کا نام کیا ہے؟	جواب: محمد صارم
سوال: آپ کی کیا عمر ہے؟	جواب: میری عمر اس وقت 13 سال ہے۔
سوال: آپ کونسی کلاس میں پڑھتے ہیں؟	جواب: 6 th کلاس میں۔
سوال: آپ کے سکول کا نام کیا ہے؟	جواب: اے پی ایس، ملیر، کراچی۔
سوال: سکول کہاں پر واقع ہے؟	جواب: ملیر کینٹ کراچی۔
سوال: آپ کو سکول کی پڑھائی سے لیکر گھر کے تمام کام میں کون مدد کرتا ہے؟	جواب: میری والدہ مجھے خود پڑھاتی ہے اور میرا خیال رکھتی ہے اور میں ان کے ساتھ بہت خوش ہوں۔
سوال: والد صاحب سے آخری بار کب ملے تھے؟	جواب: مجھے یاد نہیں۔
سوال: آپ اسلام آباد کب آئے تھے؟	جواب: کبھی بھی نہیں آیا۔
سوال: آپ کے والد صاحب کہاں رہتے ہیں؟	جواب: کراچی میں رہتے ہیں۔
سوال: کیا آپ والد صاحب کے ساتھ رہنا چاہتے ہیں؟	جواب: میں اپنی والدہ کے ساتھ بہت خوش ہوں اور میں انہی کے ساتھ رہنا چاہتا ہوں البتہ مجھے والد سے ملاقات پر کوئی اعتراض نہیں۔

Similarly, this Court also put certain questions to petitioner No.1/mother, in response to which she answered in the following manner:

سوال: اس وقت آپ کے سابقہ شوہر کہاں ہوتے ہیں؟	جواب: کراچی میں۔
سوال: آپ کے سابقہ شوہر کی تعیناتی اس وقت کہاں پر ہے؟	جواب: پاکستان نیوی کراچی میں ہی تعینات ہیں۔
سوال: آپ نے بچے کے والد کو بچے سے کب ملوایا تھا؟	جواب: میں بمطابق حکم گارڈین جج کراچی مقرر تاریخ پر نابالغ کو ملوانے کیلئے ضلع ساؤتھ جاتی ہوں مگر چھلے 3 سال سے راجہ محمد شاہد بشیر والد نابالغ بچے کو ملنے نہ آئے ہیں کیونکہ اس نے نابالغ کی نان نفقہ کی ڈگری کی رقم جنوری 2016 سے آج تک ادا نہ کی ہے۔
سوال: بچہ اپنے والد سے ملاقات کرے تو آپ کو کوئی اعتراض تو نہیں؟	جواب: جی نہیں۔ میں ہر وقت بچے کو اس کے والد کے متعلق بتاتی ہوں اور محمد صارم نابالغ کی اپنے والد سے ملاقات پر کوئی اعتراض نہ ہے مگر مسول علیہ راجہ محمد راجہ بشیر ہمیں تنگ کرنے کیلئے اسلام آباد میں جا کر مقدمہ بازی شروع کر دی ہے تاکہ میں اور نابالغ بچہ ذہنی اذیت سے دو چار ہو جائے اور وہ ہم سے اپنی مرضی کی بات منوا سکے حالانکہ مسول علیہ خود اپنی فیملی کے ساتھ کراچی میں مستقل طور پر رہائش پذیر ہے۔

سوال: آپ کیا کام کرتی ہیں؟	جواب: میں ایک سکول ٹیچر ہوں اور کراچی پبلک سکول میں ملازمت کرتی ہوں۔
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18. The minor has recorded his version and in my humble view, the minor fully understands the nature and questions put forward to him by this Court and he has expressed his intention in unequivocal terms that he is living in Karachi, studying in Army Public School, Malir, Karachi Cantt. and he has no objection to meet his father at Karachi, especially when his father is also residing in Karachi, however he is not willing to leave his mother in any circumstances as he is happily living with his mother.

19. While considering the above referred details, the will of child is the most important factor in addition to other parameters of welfare of the child, whereas in this case, a boy of 13 years, who fully understands the issues and dispute of his parents, when expressed his willingness to live with his mother then there is no other occasion left to disturb the custody in any manner.

20. Besides the above referred details, I have also perused the record of this Court and observed that the service report submitted by the office reveals that respondent No.3 is not living at the address provided by him in the learned Trial Court i.e. House No.12/5-B, Street No.110, Sector G-7/4, Islamabad, whereas the residents of the said street confirmed that respondent No.3 is not a resident of the said address, which also shows that the address mentioned by respondent No.3 in order to justify his cause of action within the territorial jurisdiction of this Court is based upon misrepresentation and by concealing the facts as referred in Para-9 of the petition U/S 25 of the Guardians & Wards Act, 1890 as no cause of action of respondent No.3 proved to be within the territorial jurisdiction of Islamabad. This demeanor of respondent No.3 led this Court to the conclusion that this case is the classic example of abuse on the part of respondent No.3 by filing the custody

petition at Islamabad to frustrate petitioner No.1/mother, therefore, the following directions are required to be observed in such like matters:

- (a) All the Guardian/Family Judges, Islamabad are under obligation to verify the address of mother/wife as well as of the minor independently in the learned Trial Court with the intention to provide due protection to mother and the minor from unnecessary harassment and financial constraints of traveling cost.
- (b) In case, the mother or a wife as well as minor, is living in any other part of the country, other than the district in which the family suit or a guardian petition has been filed by the father or husband, in such eventuality, the Guardian Judge/Family Judge shall record the statement of the mother, child (minor) or a wife, as the case may be, through a video link in order to facilitate the mother/wife or a minor from unnecessary hardship of traveling, whereas the video link conferencing calls shall be arranged by the District and Sessions Judges of the district, in such eventuality, this on the other hand will also increase the performance of the courts and avoid unnecessary adjournments.
- (c) The statement of minors should be given preference along with other factors while deciding the question of welfare of minor.

21. At last, respondent No.3 has failed to justify and defend the concurrent findings in his favour on all legal points and as such, the very filing of custody petition U/S 25 of the Guardians & Wards Act, 1890 is not justified, the same is hit by principle of estoppel, concealment of facts as well as

misrepresentation on the part of Raja Muhammad Shahid Bashir/respondent No.3, therefore, the instant writ petition is ALLOWED and both the judgments and decrees of the Guardian Judge as well as of the first Appellate are hereby SET ASIDE as the same are based on misreading of evidence and not maintainable.

22. Before parting with this judgment, the conduct of respondent No.3 confined this Court to impose penalty on him, therefore, respondent No.3 is burdened with cost of Rs.100,000/- for causing unnecessary litigation at Islamabad and also for causing undue hardship to the petitioner/mother. Respondent No.3/father is, therefore, directed to pay the said amount within a period of two (02) months directly to the petitioner No.1/mother through banking channel and he is advised to approach the Guardian Court at Karachi for any of his grievance with respect to visitation.

(MOHSIN AKHTAR KAYANI)
JUDGE

APPROVED FOR REPORTING.

Khalid Z.

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