

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.744/2019
Sana Aizad and others

Versus

Additional District Judge VII/Guardian Appellate Court,
Islamabad-West and others

Date of Hearing: 01.07.2019
Petitioners by: Mr. Mujtaba Haider Sherazi, Advocate.
Respondents by: Ms. Jamila J. Aslam, Advocate for
respondent No.3.

MIANGUL HASSAN AURANGZEB, J:- Through the instant writ petition, the petitioners impugn the order dated 20.02.2019, passed by the Court of the learned Additional District Judge, Islamabad, whereby their appeal against the consolidated judgment and decree dated 24.09.2018, passed by the learned Family Court, Islamabad, was dismissed. Vide the said consolidated judgment and decree, the learned Family Court dismissed the petition filed by petitioner No.1 for her appointment as the guardian of the minor Waliyaan Ahmad, and allowed respondent No.3's petition for the custody of the said minor in accordance with the terms of the compromise set out in the said judgment and decree.

2. The facts essential for the disposal of the instant petition are that respondent No.3 (Imtinan Ahmed) and petitioner No.1 (Sana Aizad) got married on 18.02.2010. The couple were blessed with a son, Waliyaan Ahmad, who is presently almost 08 years of age. The strained relations between the couple lead to their separation.

3. Petitioner No.1 has been awarded a degree of Master of Science in the Faculty of Life Sciences Computational Modicular Biology by the University of Manchester, United Kingdom. In the year 2015, petitioner No.1 was awarded a scholarship for a Ph.D program at the University of Derby, United Kingdom. Petitioner No.1 was unable to take Waliyaan along with her to the United Kingdom due to the rejection of his visa.

4. On 23.01.2016, petitioner No.1 filed a petition before the learned Guardian Judge for her appointment as Waliyaan's guardian. This petition was resisted by respondent No.3, who had

filed a petition, seeking Waliyaan's custody. On 10.09.2016, respondent No.3 recorded his statement to the effect that in the interests of Waliyaan's welfare, he would have no objection if petitioner No.1 were to take Waliyaan along with her to the United Kingdom provided she would care for Waliyaan in a befitting manner and would bring him to Pakistan on an annual basis to meet respondent No.3, and return to Pakistan upon completion of her course work. It was also recorded that petitioner No.1 would take Waliyaan as her dependant and in the event, Waliyaan was unable to get a visa for the United Kingdom, his custody would be handed over to respondent No.3.

5. Learned counsel for petitioner No.1 before the learned Guardian Judge also recorded his statement that petitioner No.1 would bring Waliyaan from the United Kingdom to meet with respondent No.3 on an annual basis; that respondent No.3 could meet Waliyaan in United Kingdom whenever he wanted; that petitioner No.1 would return to Pakistan on the completion of her course work; and that respondent No.3 would render assistance in obtaining Waliyaan's visa to United Kingdom.

6. After the recording of the above-mentioned statements, the learned Guardian Court, vide order dated 10.09.2016, disposed of petitioner No.1's guardianship petition and respondent No.3's custody petition in terms of the said statements.

7. Unfortunately, on 09.11.2016, Waliyaan's visa application was rejected and so was his review application. Petitioner No.1 had proceeded to United Kingdom without Waliyaan.

8. On 10.01.2017, respondent No.3 issued a divorce notice to petitioner No.1. The marriage between petitioner No.1 and respondent No.3 has ended.

9. On 09.03.2017, petitioner No.1 filed another guardianship petition before the learned Guardian Court, Islamabad seeking to be appointed as Waliyaan's guardian. Perusal of the said petition shows that it had been sent by petitioner No.1 from the United Kingdom. It was attested by the Consular Attache, High Commission for Pakistan, London. Since Waliyaan was left by petitioner No.1 with her parents, i.e., petitioners No.2 and 3 herein,

a petition seeking Waliyaan's custody was filed by respondent No.3 on 25.04.2017 before the learned Guardian Court, Islamabad. This petition was contested by petitioner No.1's parents by filing a written reply. These two petitions were consolidated, vide order dated 04.07.2017.

10. After the recording of evidence, the learned Guardian Court, vide judgment and decree dated 24.09.2018, dismissed petitioner No.1's guardianship petition and allowed respondent No.3's petition for Waliyaan's custody. The said judgment and decree was assailed by petitioner No.1 and her parents before the Court of the learned Additional District Judge, Islamabad. Vide judgment and decree dated 20.02.2019, the learned Appellate Court dismissed the said appeal. The said concurrent judgments and decrees passed by the learned Courts below have been assailed by the petitioners in the instant writ petition.

11. Learned counsel for the petitioners, after narrating the facts leading to the filing of the instant petition, submitted that the concurrent judgments and decrees of the learned Courts below are based on misreading and non-reading of the evidence on the record; that the learned Courts below erred by not appreciating that respondent No.3 had willfully abandoned Waliyaan; that during the subsistence of the marriage between petitioner No.1 and respondent No.3, the latter did not show any interest in Waliyaan's welfare; that until petitioner No.1 completes her Ph.D in the United Kingdom, Waliyaan can be taken care of by his maternal grandparents; that during the pendency of the proceedings before the learned Guardian Court and the learned Appellate Court, Waliyaan's custody had remained with his maternal grandparents, who were able enough to care for their grandchild's welfare; and that respondent No.3 has defaulted in paying Waliyaan's maintenance.

12. Learned counsel for the petitioners further submitted that petitioner No.1 had filed the earlier guardian petition in order to enable Waliyaan to obtain a visa so as to enable him to travel to the United Kingdom along with petitioner No.1; that earlier respondent No.3 had agreed to leave the minor with petitioner No.1; that in the

earlier round of litigation before the learned Guardian Court, respondent No.3 had agreed for Waliyaan to be with his maternal grandparents while petitioner No.1 was abroad; that Waliyaan's visa was rejected due to respondent No.3 not showing any cooperation in the matter; and that respondent No.3 had refused to give an affidavit which was an essential requirement for Waliyaan's visa. Learned counsel for the petitioners prayed for the writ petition to be allowed and for the concurrent judgments and decrees passed by the learned Courts below to be set-aside.

13. On the other hand, learned counsel for respondent No.3 submitted that in the earlier proceedings before the learned Guardian Court, respondent No.3 had agreed for Waliyaan to remain in petitioner No.1's custody provided the latter took Waliyaan along with her to the United Kingdom; that respondent No.3 did not create any obstacle in the grant of a visa to Waliyaan; that petitioner No.1's counsel had delayed the provision of the draft of the affidavit required to be sworn by respondent No.3; that respondent No.3 had never agreed to a situation where petitioner No.1 would be abroad and Waliyaan would be in his maternal grandparents' custody in Pakistan; that respondent No.3 had a priority over petitioners No.2 and 3 regarding Waliyaan's custody; that Waliyaan's welfare would be best served if his custody was handed over to respondent No.3, who works as a Consultant from home; that petitioners No.2 and 3 had resisted respondent No.3's attempts to meet with Waliyaan; and that the learned Courts below did not commit any jurisdictional irregularity so as to warrant interference in their concurrent judgments. Learned counsel for respondent No.3 prayed for the writ petition to be dismissed. In making her submissions, learned counsel for respondent No.3 placed reliance on the judgments of Mst. Zahida Kiani and another Vs. Capt. (Rtd.) Shahid Ali Khan (1993 SCMR 2303), Shabana Naz Vs. Muhammad Saleem (2014 SCMR 343), Ghulam Mustafa Vs. Shamim Akhtar and 2 others (2017 YLR Note 45) and Ganj Bibi Vs. Muhammad Younas and another (2011 CLC 1062).

14. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance.

15. The facts leading to the filing of the instant petition have been set out in sufficient detail in paragraphs 2 to 10 above, and need not be recapitulated.

16. It may be mentioned that during the course of the arguments, learned counsel for respondent No.3 handed over cheque No.57434393, dated 14.05.2019 for an amount of Rs.2,80,000/- drawn on Standard Chartered Bank, Islamabad in favour of petitioner No.1 to her learned counsel. According to the learned counsel for respondent No.3, this amount was being paid in discharge of respondent No.3's obligation to pay for Waliyaan's maintenance.

17. Presently, petitioner No.1 is in the United Kingdom, whereas Waliyaan is in the custody of his maternal grandparents i.e., petitioners No.2 and 3. It is an admitted position that Waliyaan's application for a visa to the United Kingdom was turned down.

18. During the pendency of the earlier guardianship petition filed by petitioner No.1 and the custody petition filed by respondent No.3, it was agreed that petitioner No.1 could retain Waliyaan's custody provided she took him along with her to the United Kingdom. The fact that Waliyaan's visa application was rejected and he is now in his maternal grandparents' custody has totally changed the circumstances in which respondent No.3 had agreed for Waliyaan's custody to remain with petitioner No.1. The changed circumstances in which petitioner No.1 was abroad while Waliyaan was in the custody of his maternal grandparents, justified respondent No.3 in seeking Waliyaan's custody. *Rebus sic stantibus* (Latin for "thing thus standing"), is the legal doctrine allowing for a contract or a treaty to become inapplicable because of a fundamental change of circumstances. It is my view that the said doctrine is attracted in the case at hand. No advantage could be taken by the petitioners from respondent No.3 pursuant to his statement agreeing before the learned Guardian Court on 10.09.2016 that Waliyaan's custody should remain with petitioner

No.1. Since Waliyaan was unable to proceed to the United Kingdom to join his mother/petitioner No.1, the judgments of the learned Courts below did not suffer from any irregularity in granting Waliyaan's custody to his father/respondent No.3.

19. The material on the record has not caused me to form a view that respondent No.3 is in any manner unable to care for his minor son. The learned Guardian Court has been mindful as to Waliyaan's grandparents' right to meet their grandchild. For this purpose, the learned Guardian Court has fixed an adequate visitation schedule. The learned Guardian Court, in an appreciable manner, has also held that petitioner No.1 would be entitled to Waliyaan's custody when visits Pakistan. As regards the learned Guardian Court's declaration that petitioner No.1 *"shall not be entitled for permanent custody in case of her return permanently to Pakistan"*, I cannot bring myself to agree with the same. The learned Guardian Court could not impose such an embargo on petitioner No.1 while determining a visitation schedule. In the event petitioner No.1 petitions a Guardian Court whenever she returns to Pakistan, it will be for such a Court to determine in the existing circumstances as to in whose custody Waliyaan's welfare would be best served.

20. In view of the above, the instant petition is partly allowed in that the declaration of the learned Guardian Court while fixing a visitation schedule that petitioner No.1 *"shall not be entitled for permanent custody in case of her return permanently to Pakistan"* is set-aside. The judgment of the learned Appellate Court, to the said extent is also set-aside. Other than this, the concurrent judgments of the learned Courts below are upheld. There shall be no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON ____/2019

(JUDGE)

Qamar Khan*

Approved for Reporting