

**JUDGMENT SHEET**  
**ISLAMABAD HIGH COURT, ISLAMABAD,**  
**JUDICIAL DEPARTMENT**

**W.P. No.3420/2018**  
Mansoor Umar Khan  
*versus*  
Khadija Abbasi & 2 others.

Petitioner by: Sardar Muhammad Hafeez Khan, Advocate.

Respondent No.1: Mr. Khizar Hayat Khan, Advocate.

Date of Hearing: 30.10.2019.

**MOHSIN AKHTAR KAYANI, J:** Through the instant writ petition, the petitioner has impugned the order dated 31.07.2018 of the learned District Judge (West), Islamabad, whereby appeal filed by the petitioner against order dated 02.07.2018 of the learned Guardian Judge (West), Islamabad has been dismissed.

2. Brief facts referred in the instant writ petition are that Mansoor Umar Khan/Petitioner and Khadija Abbasi/Respondent No.1 were married and having one son namely Sufyan Khan, born on 15.02.2012, aged about 7 ½ years. However, due to strained relationship between the spouses, the petitioner pronounced divorce to Respondent No.1 leaving the custody of said minor with Respondent No.1. Later on, Respondent No.1 filed an application under Section 7 read with 17 of the Guardians and Wards Act, 1890 for guardianship of minor, which was decided ex-parte against the petitioner vide judgment dated 21.12.2016. Feeling aggrieved thereby, the petitioner filed an application, which was accepted vide order dated 21.07.2017 and earlier ex-parte judgment of the Family Court dated 21.12.2016 was set-aside. Consequently, the failure on the part of Respondent No.1 in producing the minor before the Court resulted into issuance of warrant of arrest against Respondent No.1, against which Respondent No.1 filed application seeking cancellation of the same, which was allowed by the learned Judge Family Court, Islamabad vide order dated

02.07.2018. The petitioner with the agony that the learned Judge Family Court, Islamabad has meted out Respondent No.1 with needless leniency assailed the said order in appeal, which was dismissed vide impugned order dated 31.07.2018. Hence, the instant writ petition.

3. Learned counsel for petitioner contended that the learned first Appellate Court erroneously passed the judgment whereby the eligibility to visit the minor was denied despite the fact that the learned Guardian Court passed successive order on affidavit given by special attorney for respondent No.1 to produce the minor, and as such, the conduct of respondent No.1 before the learned Trial Court attained finality, which could not be brushed aside without producing the minor in the Court; that the reasons and findings recorded by the learned first Appellate Court are far extraneous to the point of law applicable under the given circumstances, therefore, the impugned order may be set-aside and direction to the learned Family Court/Guardian Court may be issued to proceed against the respondents and its surety strictly in accordance with law.

4. Conversely, learned counsel for respondent No.1 opposed the instant writ petition and contended that the moment ex-parte judgment remained no more in the field, the liability of surety also went away with it as no right of the petitioner was infringed; that the learned first Appellate Court has rightly appreciated the record and passed the impugned order, therefore, the instant writ petition may be dismissed having no merits.

5. Arguments heard, record perused.

6. Perusal of record reveals that petitioner and respondent No.1 tied the knot vide Nikahnama dated 01.12.2010 and they were blessed with minor son namely Sufyan Khan on 15.02.2012, aged about 7 ½ years, but later on the petitioner divorced respondent No.1 on 06.11.2015. The minor son remained in custody of respondent No.1, who before shifting to Kingdom of Saudi Arabia (KSA),

applied for guardianship of minor in terms of Section 7 read with 17 of the Guardians & Wards Act, 1890 with intention to take the minor abroad. The said application was decided ex-parte by the learned Judge Family Court/Guardian Court (West), Islamabad vide judgment dated 21.12.2016 and guardianship certificate dated 18.01.2017 was issued to respondent No.1 on the following reasons:

*"You are hereby appointed as Guardian of the person of the minor only, for his welfare, betterment and education. You are also authorized to take the minor along with you wherever and whenever you want to move."*

7. The petitioner filed an application for setting aside the aforesaid judgment on the ground that he was not duly served and the ex-parte judgment was obtained without giving him proper opportunity of hearing. The said application of petitioner was allowed by the Judge Family Court/Guardian Court (West), Islamabad vide order dated 21.07.2017, whereafter the petitioner has filed an application seeking restitution in terms of Section 144 of the CPC and production of the minor before the Court or in the alternative an order for visitation rights and schedule. However, during proceedings of the said application the special attorney of respondent No.1 recorded different statements before the Court through his counsel that minor would be produced before the Court and in this regard different opportunities were sought, though the minor had never been produced as he was living with his mother i.e. respondent No.1 in KSA, which constrained the learned Guardian Court in issuing show cause notices to the surety of respondent No.1 as well as a warrant of arrest at later stage, but all these proceedings have not been carried out and finally an order dated 02.07.2018 was passed cancelling the warrant of arrest issued against the surety of respondent No.1, in which a direction was issued to surety on his own undertaking that he will produce the minor after obtaining necessary instructions from respondent No.1 on the next date of hearing.

8. The petitioner feeling aggrieved thereof that a lenient view has been taken against respondent No.1 and surety filed an appeal before the learned District Judge, which was dismissed vide impugned order dated 31.07.2018, whereby the learned first Appellate Court declared the entire proceedings against the surety as nullity in the eyes of law.

9. The entire background of this case reveals that petitioner has assailed the order dated 02.07.2018 of the learned Family Court/Guardian Court, which is interlocutory order and as such, the main application filed in terms of Section 7 read with 17 of the Guardians & Wards Act, 1890 is still pending, therefore, the constitutional jurisdiction could not be invoked as the matter has neither attained finality nor any final order has been passed. It is trite law that interim order could not be assailed in constitutional jurisdiction as held in 2017 YLR 622 Islamabad (Shahida Fazil vs. Mst. Hina Tahir, etc.), 2017 YLR 870 Islamabad (Minhaaj Saqib vs. Najm-us-Saqib, etc.) and PLD 2011 SC 181 (Waqar Ali, etc. The State through Prosecutor/Advocate General Peshawar, etc.).

10. On the other hand, during pendency of the instant writ petition, the parties have amicably come up with a certain solution to resolve the controversy of visitation of minor as the minor is residing with his mother i.e. respondent No.1 in KSA, who was settled in the said country after seeking guardianship order from the Guardian Court at Islamabad, which was a legal authority to deal with the affairs of minor at that time, although the same was assailed by the present petitioner and as such, the question is yet to be determined by the learned Guardian Court, therefore, respondent No.1 has given her undertaking through her special attorney before this Court, which is made part of the record and reproduced as under:

*I, Khadiji Abbasi daughter of Abdul Latif Abbasi presently resident of Jeddah Kingdom of Saudi Arabia through my special attorney Abdul Aziz*

*Abbasi resident of House No.409, Street No.56, Sector I-8/3, Islamabad, do here by do undertake as under:-*

- 1. That minor is residing with me in Kingdom of Saudi Arabia and studying in Jeddah and the father of minor (petitioner) also is the resident of KSA, therefore, he may visit the minor at any reasonable time during his stay in KSA at every weekend.*
- 2. That I am also ready to travel to Pakistan in the Summer Vacation, however the petitioner is man of means can sponsor the return tickets, hence if the petitioner sponsors the return tickets to minor and me I am ready to bring the minor in Pakistan during the vacation period, however this commitment will be subject to the ensurance of petitioner regarding the safe return of minor to KSA.*
- 3. That the petitioner, through his father, has also filed a petition before the **HUMAN RIGHTS COUNCIL** in KSA and I have also put my appearance before the Council and gave my consent regarding the visitation of minor but now the petitioner is avoiding to appear before the Council.*

**KHADIJI ABBASI**

*through*

*Special attorney Abdul Aziz Abbasi*

11. The above said undertaking was confronted to the petitioner side, whereby the petitioner along with his counsel has taken the pleas that due to certain medical conditions the petitioner is unable to travel to KSA and as such, the minor has been unlawfully removed from the territorial jurisdiction of this Court, therefore, order of visitation has to be complied with within the territorial jurisdiction of this Court. The above said position clearly reveals that parties are not interested to settle the matter through reconciliation hence, this Court compels to decide the matter on the basis of available record and law.

12. The minor was, though, removed from Islamabad after obtaining ex-parte certificate of guardianship from the competent court in accordance with law and the said order was no more in field as the guardian application is still pending after setting aside of the ex-parte order, therefore, the only question left for determination of this Court is the role of surety, who is still contesting the matter on behalf of respondent No.1/mother and as such, the guardianship in terms of Section 7 read with 17 of the Guardian & Wards Act, 1890 is for the purpose of the welfare of minor, which does not put any conditions upon the surety to

produce the minor in the Court as the surety has not undertook to produce the minor before the Court through the said surety bond, although he has given different statements before the learned Trial Court in the proceedings that he will produce the minor under the instructions of respondent No.1 and as such, he is unable to procure the attendance of minor.

13. The role of the surety has to be seen in the light of order passed by the learned Guardian Court, whereby respondent No.1/mother was appointed as guardian of person for his *welfare, betterment and education*, but not of his property, and she was also granted permission to take the minor abroad as reflected from guardianship certificate, therefore, in case of anything contrary on the part of respondent No.1 with reference to welfare, betterment and education, the same should be considered as a factor for removal of guardianship of respondent No.1. However, the question is yet to be adjudicated upon by the court of law in pending proceedings.

14. The role of surety has not exclusively been defined in the Guardian & Wards Act, 1890, however Section 26 as well as Section 44 of the said Act deals with concept of removal of ward from jurisdiction and penalty for removal of ward from the said jurisdiction for which guardian was appointed. As per the said provision, a fine should be imposed or a person has to be awarded with civil imprisonment for a term which may extend to 06 months, if the ward is removed from jurisdiction of the Court in contravention of the provisions of Section 6 of the Guardian & Wards Act, 1890. Whereas, the instant matter does not fall under the said provisions as the surety is only liable if the welfare of the minor has not been catered by the guardian. Section 45 of the Guardian & Wards Act, 1890 also deals with situation where minor has not been produced in compliance of the direction of the Court, but the said order has to be passed in terms of Section 12 or 25 of the Guardian & Wards Act, 1890, whereas no such order has been passed

till date, therefore, the ordinary concept of surety has to be seen in the light of general law i.e. Section 145 of the CPC (Enforcement of Liability of Surety), which provides the concept of surety in the following manner:

- (a) *for the performance of any decree or any part thereof,*
- (b) *for the restitution of any property taken in exercise of a decree, or,*
- (c) *for the payment of any money, or for the fulfillment of any condition imposed on any person, under an order of the court in any suit or in any proceedings consequent thereupon.*

The above said provision discloses that surety is one who takes upon himself guarantee or obligation which rests entirely upon another. Ordinarily the liability of surety is enforceable by means of suit, but Section 145 of the CPC provides additional summary remedy and execution proceedings may be initiated against the surety, although his name has not been mentioned in the decree. However, all these concepts are attached with execution of decree in Civil Procedure Code. The personal liability of the surety can be executed by way of attachment or sale of property, where the property charged and personal liability is not undertaken. A surety is only liable to the extent up to which he is bound, however certain acts could not be done beyond the scope of surety bond, which is beyond his capacity, especially in this case, where surety is only liable to the extent of his surety amount as provided in the ex-parte judgment dated 21.12.2016, whereby guardianship certificate was given to respondent No.1 subject to furnishing surety to the tune of Rs.1 Million, but the surety has to ensure that the guardian of the person (minor) shall take care of the minor and minor shall be properly maintained, however no such evidence has yet been recorded, therefore, the surety bond submitted in compliance with the decree by respondent No.1 could not be enforced at this stage for the purpose of production of minor, which is a separate concept available in terms of Sections 12 and 25 of the Guardian & Wards Act, 1890.

15. In view of above, the order passed by the learned District Judge (West), Islamabad is in accordance with law and no illegality has been observed, therefore, the instant writ petition is not maintainable and same is hereby **DISMISSED**.

(MOHSIN AKHTAR KAYANI)  
JUDGE

Announced in open Court on: 19.11.2019.

JUDGE

Khalid Z.