

Order Sheet  
**IN THE HIGH COURT OF SINDH,  
CIRCUIT COURT, HYDERABAD**

CP No. S- 1895 of 2017

Date of hearing  
& decision: 18.11.2019

Petitioner: Mst. Faiza Gul through Mr. Muhammad  
Saleem Hashmi Qureshi, Advocate.

Respondents 1: Zubaid Gul through Syed Babar Ali Kazmi,  
Advocate

Respondents 2&3: through Mr. Wali Muhammad Jamari, Asstt:  
A.G.

**ORDER**

**ADNAN-UL-KARIM MEMON, J:** - The petitioner through the instant petition has challenged the order dated 1.4.2017 passed by learned XII<sup>th</sup> Family Judge, Hyderabad in Guardian Application No. 48 of 2016 (re-Zubaid Gul v. Mst. Faiza Gul) whereby the visitation right of Father of Minor Baby Jaweria has been intact. The learned V-Additional District and Session Judge Hyderabad, has maintained the above findings vide judgment dated 15.8.2017 and dismissed the Guardian Family Appeal No.14 of 2017, filed by petitioner.

2. Brief facts given rise to the present proceedings are that the parties married with each other on 21.8.2013; out of the wedlock a baby girl namely Jaweria was born. Subsequently on 18.10.2015 the petitioner for unknown reasons left the house of respondent No.1 and filed Family Suit No. 1203 of 2015 in the Court of Civil / Family Judge VI, Hyderabad, for recovery of maintenance, dower, medical expenses and dowry articles. The respondent No.1 appeared in the suit and filed written statement denying the claim of petitioner with further prayer for restitution of conjugal rights. During pendency of the suit respondent No.1 tried to meet and see her minor daughter but he was threatened for dire consequences by the parents of petitioner hence he filed Guardian Application No. 48 of 2016 on the ground that the petitioner has no source of income, as such she cannot afford the education and other necessities of life of the minor hence is not fit for the custody of minor. Upon service of notice, petitioner appeared and filed objections denying the case of respondent No.1. It was further alleged that respondent No.1 has filed the guardianship application in order to pressurize her and

further he never sent maintenance or approached to see / meet the minor hence she prayed for dismissal of guardianship application. Learned Family Judge, Hyderabad after hearing the parties dismissed the guardianship application, allowing the respondent No.1 being real father and natural Guardian to meet with the minor in the Court premises on every 1<sup>st</sup> and 3<sup>rd</sup> Saturday of month from 11:00 a.m. to 1:00 p.m. with further direction to respondent No.1 to pay Rs.700/- to the petitioner as fare charges. The petitioner and respondent No.1 both being aggrieved by and dissatisfied with the decision of Family Judge preferred Guardian and Wards appeals. The said appeals were heard and dismissed by learned 5<sup>th</sup> Additional District Judge, Hyderabad, maintaining the order of Family Judge. Against the aforesaid orders the petitioner has filed the instant petition.

3. Learned counsel for the petitioner has argued that both the courts below while passing the impugned orders have wrongly exercised the jurisdiction not vested in them; that both the courts below have completely failed to appreciate the provisions of Family Laws of Pakistan including Guardian and Wards Act, 1980, and West Pakistan Family Court Act and Rules 1965, whereby the territorial jurisdiction of Family Court in such a situation has been clarified; that both the courts below have failed to consider that after filing of Family Suit No. 1203 of 2015, the petitioner along with baby Jaweria left Hyderabad and was residing with her brother at Karachi, hence the impugned orders passed without jurisdiction are nullity in the eyes of law and are liable to be set aside; learned Counsel however concedes that the petitioner is ready and willing to produce the minor in Court premises as per direction of learned Family Judge for meeting with respondent No.1 subject to payment of Rs.5000/- as travelling charges from Karachi to Hyderabad; that it is mandatory provision of law that guardian application shall be filed in the court in whose jurisdiction the minor resides but learned Family Judge erred in law by exercising jurisdiction and allowing the meeting of minor with respondent No.1 at Hyderabad. He lastly prayed for allowing the instant petition.

4. Conversely, learned counsel for respondent No.1 has raised the question of maintainability of the instant petition by arguing that the order passed by learned Appellate Court is just and proper, hence needs no interference by this court in writ jurisdiction. He prayed for dismissal of the instant petition.

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5. During the course of arguments, I inquired from learned counsel for the petitioner that whether depriving the father from meeting with his child, who is natural guardian of the minor is within the principle of natural justice? He replied that petitioner is ready to comply with the order of Family Judge but subject to payment of travelling charges from Karachi to Hyderabad. At this stage, learned counsel for respondent No.1 objected and pointed out that petitioner has neither taken this plea in her written statement nor disclosed the correct factum in her deposition rather she mentioned her residential address as H.No. E-26/212, Pashori Muhallah, Fakir Ka Pir, Police Station City Taluka District Hyderabad.

6. Heard the counsel for the parties and perused the material available on record.

7. To commence, I would address the question of jurisdiction of this Court with regard to maintainability of the petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973. I have noticed that in the present matter, the question of custody of the minor is involved, which is a pure question of law, thus, I am of the view that this Petition could be heard and decided on merits by this Court, while exercising its Constitutional jurisdiction.

8. Having decided on the point of maintainability of the instant Petition, which agitates the controversy at hand, is whether in the matter of custody of minor, the question of territorial jurisdiction to try such matter shall vest with the Guardian Court in whose jurisdiction the minor ordinarily or permanently resides? Before going into further discussion, it would be advantageous to discuss the relevant provisions of Guardians and Wards Act, 1890, West Pakistan Family Courts Act, 1964 and The West Pakistan Family Court Rules, 1965. Section 9 (1) of Guardian and Wards Act 1890 reads as under:

"9. Court having jurisdiction to entertain application. (1) If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides."

Section 25 of Guardian and Wards Act 1890 reads as under:

"25. Title of guardian to custody of ward. (1) If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian."

Section 5 and 26 of West Pakistan Family Courts Acts, 1964 reads as under:-

4. Jurisdiction. — Subject to the provisions of the Muslim Family Laws Ordinance, 1961, and the Conciliation Courts Ordinance, 1961, the Family Courts shall have exclusive jurisdiction to entertain, hear and adjudicate upon matters specified in the Schedule.

26. Power to make rules.—

(1) Government may, by notification in the official Gazette, make rules to carry into effect the provisions of this Act.

(2) Without prejudice to the generality of the provisions contained in sub-section (1), the rules so made may, among other matters, provide for the procedure, which shall not be inconsistent with the provisions of this Act, to be followed by the Family Courts.

SCHEDULE (see SECTION 5)

1. Dissolution of marriage.
2. Dower.
3. Maintenance.
4. Restitution of conjugal rights.
5. Custody of children.
6. Guardianship.
7. Jactitation of marriage.
8. Dowry.

Rule 6 of West Pakistan Family Court Rules 1965 reads as under:-

"6. The Court which shall have jurisdiction to try a suit will be that within the local limits of which (a) the cause of action wholly or in part has arisen, or (b) where the parties reside or last resided together: Provided that in suits for dissolution of marriage or dower, the Court within the local limits of which the wife ordinarily resides shall also have jurisdiction."

9. To elaborate further on the issue, in section 9(1), of Guardians and Wards Act, 1890 the emphasis is undoubtedly on the minor's 'ordinary' place of residence. Such place is to be determined by finding out as to where the minor was ordinarily residing and whether such residence would have continued in case of recent removal of the minor to a different place. The new place to which the minor may have gone or may have been removed to can become the ordinary residence of minor only after the minor has settled down at that place for a reasonably long period. Furthermore, in Section 9 (1) of Guardians and Wards Act, 1890, the phrase 'ordinarily resides' is used and not 'resides'. Secondly, the word 'ordinarily' has been intentionally used to bring into consideration other than that of mere factual residence. Thirdly, the word 'ordinarily' means 'more than mere temporary residence' and if this word is omitted, then mere temporary residence will also become residence within the meaning of clause under construction, which obviously cannot be the intention of the legislature on the subject. Fourthly, if it is assumed for the purposes of determining jurisdiction under Section 9(1), the minor's actual place of residence where he, in fact, is at the time of presentation of the application will be considered then it will

seriously affect those situations where the minor is shifted from place to place in order to defeat the process of law and the jurisdiction of Courts. My view is supported by the decisions rendered by Honorable Supreme Court in the case of Major Muhammad Khalid Karim vs. Mst. Saadia Yaqub and others. (PLD 2012 SC 66), Anne Zahra vs. Tahir Ali Khilji and 2 others ( 2001 SCMR 2000) and Mst. Shaista Bibi and another Vs. Superintendent, Central Jail, Mach and 2 others (PLD 2015 SC 15). The Honourable Supreme Court in the case of Anne Zahra (supra) has explained the provisions of West Pakistan Family Courts Act, 1964 and Rules (West Pakistan Family Court Rules 1965) made there under and it has over riding effect on Section 9 (1) of Guardians and Wards Act, 1890. The said case of Anne Zahra (supra) was subsequently endorsed by another judgment of Honorable Supreme Court in the case of Major Muhammad Khalid Karim (supra).

10. Reverting to the case in hand, it appears from the record that both the courts below while passing the orders have rightly exercised their jurisdiction by virtue of Rule 6 of West Pakistan Family Courts Rules, 1965, and the law laid down by Hon'ble Supreme Court of Pakistan in the above referred cases. The reasons assigned by learned Family Court while rejecting the application of petitioner for returning of Guardian application on 14.1.2017, cannot be lightly ignored at this stage, hence the impugned orders are sustainable in law.

11. I have noticed that Petitioner deposed in evidence that respondent No.1 never sent any gift or maintenance for minor or for her; that respondent No.1 or his family never came to take her back. Minor is residing with her since the day of her birth; that minor's welfare lies with her; that respondent No.1 is government employee and Tennis player at Hyderabad gymkhana and he remained at gymkhana from 05:00 p.m. to 10:00 p.m.; that she is ready to reside with respondent No.1 if he arranges separate residence; that she is willing to produce the minor if respondent No.1 pays travelling expenses to her; that prior to guardianship application she filed family suit. The aforesaid factual position explicitly shows that relationship between the parties is still strange and the issue of maintenance of minor is yet to be looked into by the competent forum and for an interim arrangement this court can pass an appropriate order in the intervening period, just in welfare of minor, which is paramount consideration.

12. Summing up the case in hand, I am of the considered view that father cannot be deprived from visiting her baby under the law. Since this court, vide order dated 29.8.2019 directed the petitioner to produce the minor before learned Guardian Court in order to meet the father upon payment of Rs.1,000/- to the petitioner as she comes from Karachi, but her stance has been seriously objected by the other side. However, the amount as disclosed supra is not sufficient to meet the travelling expenses which need to be a little bit enhanced to secure the ends of justice.

13. The upshot of the above is that the present petition is disposed of in the terms whereby the respondent No.1 being real father of the minor Baby Jaweria shall deposit an amount of Rs.1500/- (Fifteen hundred only) in the account of Mother of minor baby for traveling expenses. Respondent No.1 shall be entitled for visitation rights as per terms of order dated 1.4.2017 passed by learned Family Court in Guardian Application No. 48 of 2016, as well as vide order dated 29.8.2019 passed by the court in a conducive atmosphere, without any aspersions, however, subject to her good health and ancillary / travelling conditions from her house; that both the parties shall attempt to bury their hatchet and will endeavor for welfare of baby Jaweria.

14. Since the question of law has been answered accordingly; therefore, the above observation on the other points is tentative in nature which shall not prejudice the either party in their other family matter if any pending before the court of law which shall be decided independently in accordance with law.

15. Accordingly, this constitutional petition is disposed of along with listed application.

JUDGE