

IN THE HIGH COURT OF SINDH AT KARACHI

C.P. No.S-411 of 2022

[Gul Mina Afridiv..... Rana Abdul Kareem & others]

Date of Hearing : 10.03.2023
Petitioner through : Mr. Raj Ali Wahid Kunwar, Advocate
Respondents through : Ms. Fouzia Muneer, Advocate for Respondent No.1

ORDER

Zulfiqar Ahmad Khan, J:- The petitioner has impugned the order dated 19.03.2022 passed by VIIth Additional District Judge (MCAC) Karachi South in Family Appeal No.212 of 2021.

2. Crux of the issue before this Court is that the petitioner filed application under Section 7 and 10 of the Guardian and Ward Act, 1890 for her appointment as guardian of the minor namely Eshal Abdul Kareem¹, which was allowed by the trial Court vide order dated 05.11.2021² and petitioner mother was appointed as guardian however only to manage affairs of the minor like education, health etc. and she was directed not to remove custody of the minor from the jurisdiction of the trial Court without prior permission. She was further restrained from engaging/involving the minor in modeling profession. Against these findings, petitioner preferred an appeal³ whereby her plea that minor is a blogger and not a model and has a right to enter into any lawful profession was allowed by the appellate Court, however restriction of seeking permission from the Court for the removal of the minor from outside jurisdiction of the Court was maintained by the appellate Court. Being aggrieved and dissatisfied, the petitioner has filed the instant petition.

¹ Born on 01.11.2011 in district Lancashire

² Passed in Guardian and Wards No.152 of 2021 by the Court of Family Judge Karachi South

³ Family Appeal No.2021

3. Learned counsel for the petitioner contended that the welfare and the wellbeing of the minor is with the petitioner being her mother as she belongs to a well-to-do family and had been appointed as guardian of the minor, therefore for the well-being, training, education, global exposure as well as welfare of the minor to make her an intentional citizen, she be permitted to travel abroad, with the minor. He further contended that the findings of both the courts below limiting minor's movement are not only unreasonable, but also unconstitutional, as these findings infringe fundamental rights of the minor guaranteed by the Constitution of Islamic Republic of Pakistan 1973 under Article 15 and that the guardianship certificate itself meant that the petitioner is primary caretaker of the minor hence the restriction on her movement makes her job-un-necessarily restrictive. Learned counsel by referring to PLD 2018 Sindh 377 contended that such a restriction will not serve the welfare of the minor, as there are ways and mechanism to regulate the movement, which is not achieved by restricting the movement, welfare of the minor includes her material, intellectual, moral, and spiritual well-being.

4. Learned counsel for the respondent No.1 on the other hand contended that petitioner will never return back to Pakistan if she is permitted to travel abroad with the minor, therefore, keeping in view the facts and circumstances of the case, the learned Appellate Court rightly imposed a restriction upon the petitioner. She further contended that the petitioner has deliberately provided wrong address of Respondent No.1, hence *ex parte* decision has been passed by the appellate Court without hearing Respondent No.1, which is against right of fair trial and she has challenged such findings any way.

5. Heard the parties and perused the record. A bare reading of section 26 of the Act as reproduced hereunder reveals that the said provision is a

mandatory requirement, failing which the guardian is to be penalized under section 44 of the said Act by imposing fine or imprisonment. However, the said section also mentions that exceptions exist within its legal framework as the Family Court under sub section 2 thereof is given the authority to grant either special or general leave.

Section 26

26. Removal of ward from jurisdiction. (1) A guardian of the person appointed or declared by the Court, unless he is the Collector or is a guardian appointed by will or other instrument, shall not without the leave of the Court by which he was appointed or declared, remove the ward from the limits of its jurisdiction except for such purposes as may be prescribed.

(2) The leave granted by the Court under sub-section (1) may be special or general, and may be denied by the order granting it.

6. For compliance of the requirement of section 26, indeed a guardian has to file an application for permission for removal of the minor from the limits of the jurisdiction of the Family Court that had issued the guardianship certificate, but compared to section 7 (guardianship) and section 25 (custody) which lay down the direction for the Family Court's to decide application under the said sections by looking at the welfare of the minor, section 26, on the contrary, in my humble view purposefully omits to mention the grounds on which the same could be allowed or denied.

7. It is common knowledge that an application under section 26 has to be decided, keeping in mind the welfare of the minor. Applying the rules of statutory interpretation, the whole and entirety of the G&W Act 1860 has to be taken into consideration (PLD 1997 SC 32) to determine the legislative intent behind enactment of section 26, a detailed examination of the G&W Act (sections 7, 10, 17, 24, 25) consistently directs the Family Court to keep the welfare of the minor as primary consideration while deciding matters under the same, which argument is also supported by the

dictum laid down by the Honorable Supreme Court in the judgment cited as PLD 1967 SC 402 where at page number 409 it provides that “..we are also of the view that in a proceeding under the Act the court should not lose sight of the fact that the overriding consideration is always the welfare of the minor. The Court in such cases is really exercising a parental jurisdiction as if it were in loco parentis to the minor. This is not a jurisdiction, therefore, in which there can, by its nature, be any scope for any undue adherence to the technicalities”. Considering the above, it appears to be plain and simple that applications under section 26 seeking permission/leave to travel abroad with minor are to be decided by considering if the removal of the minor is, *in fact*, facilitate the welfare of the minor. Thus after an assessment of the reasons behind the guardian seeking permission for travelling with minor, the Court, if satisfied, may grant or deny the said leave/permission.

8. Admittedly the world is a global village and countless people are migrating overseas for better opportunities for themselves and especially their children. While so far our legal jurisprudence has sparingly dealt with the situations where the minor was being removed from the jurisdiction of the court where the consideration remained the protection of the welfare of the minor⁴, however, considering the facts of the present case where the petitioner’s reason of seeking permission for international travel is for her daughter to have intentional exposure, the courts of law aligned with the international law, in my humble view, are bound to consider that while allowing/denying the permission, whether they are protecting the welfare of the minor or acting otherwise. This responsibility stems from the International Convention of the Rights of Child (“Convention”) which was ratified by Pakistan on 12 November 1990,

⁴ The following case law shall be considered but preferably affect the decision on the present case due to factual differences. Reference is made to PLD 1952 Pesh 77, 1981 CLC 1275, PLD 2012 Sindh 208 indicating that the purpose of the section 26 is to not keep the minor within the jurisdiction of the court but to see if the removal aids the welfare of the minor and to keep the child in safe hands.

where Article 3 reinforces the said responsibility in the following words as reproduced herein below:-

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

9. Pakistan is also a party to three other international instruments aiming at directly or indirectly improving the rights of the child, those being the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW), ratified in 1996; the Declaration and Agenda for Action adopted at the issue of the World Congress against Commercial Sexual Exploitation of Children, signed in 1996, and reaffirmed by the Yokohama Global Commitment in 2001, and the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Form of Child Labour Convention, ratified in 2001, all of which make the interest of the child of primary consideration and through which our Family Courts are bound to make decisions that do justice to the principle of welfare of the child.

10. Building on the above, I have taken the liberty to delve into the subcontinent's jurisprudence that supports the proposition that the rationale behind movement to different countries with the minor. Relying on a case from Indian Court of Law, Karnataka High Court titled WP No. 892 of 2023 Smt Rakshitha vs Sri C C Shashikumar on 19 January, 2023, the petitioner mother was allowed the permission on the grounds that the husband seemed indolent and uninvolved in the matters of upbringing of the child. Moreover, reliance is also placed on case law from the American jurisdiction where in the case of Watson v. Watson (Aug 03, 2004 | 2004 Neb. App. LEXIS 190), the trial court granted mother's motion to remove the minor children from Nebraska to pursue a job opportunity in Maryland. The court stated that final consideration is the best interests of the child

where the analysis showed that the positivity of the said decision aims to maintain a meaningful parent-child relationship. In determining whether removal to another jurisdiction is in the child's best interests, the trial court in the said case considered (1) each parent's motives for seeking or opposing the move; (2) the potential that the move holds for enhancing the quality of life for the child and the custodial parent. In *Luck v. Luck*, 92 Cal. 653, 655 [28 P. 787], the U.S. Supreme Court held the rule "thus. . . if he [the parent] is entitled to the custody of the children at all, he or she has the right to name any reasonable place in which they shall abide with them".

11. It is settled principle enunciated by the apex Court in matters of custody of minor(s) that welfare of the minor shall always be the paramount consideration, and Courts have to see where the wellbeing and welfare of the minor lies.

12. It may not be out of context to add here that Article 15 of the Constitution makes it abundantly clear that it is a fundamental right of every citizen to move freely throughout Pakistan. However, reasonable restriction can be imposed to further the public interest by law on the exercise of such right of free movement. Word 'reasonable' implies intelligent care and deliberation in the choice of a course, which reasons dictate. Concept of reasonableness is nothing but that of harmonizing individual right with collective interest. However, for the sake of determining reasonableness of a restriction so imposed, the basic principle must be kept in one's mind that the power to impose restriction granted under Constitution does not mean or include the power to destroy the very right, which is the subject matter of such regulatory dominion because the existence of right cannot be undone to nihility by way of authority to administer its exercise. Right is basic and fundamental

whereas the power to administer the same is auxiliary and supplemental. Right is independent whereas the power to regulate the same does not exist independently and always dependent and contingent to the right so attached with.⁵

13. In view of above, the instant petition is allowed. Restrictions on the moment of the minor are removed subject to intimation given to the Nazir of this Court in advance with copies of the travel documents and all addresses and contacts which may be used to contact the petitioner.

JUDGE

Aadil Arab/B-K Soomro

⁵ PLD 2022 Lahore 148.