

IN THE HIGH COURT OF SINDH AT KARACHI

C.P. No.S-415 of 2024

[Asim Farooqv.....Mst. Shaista Choudhry & others]

Date of Hearing : 05.04.2024
Petitioner through : Mr. Usman Tufail Shaikh, Advocate
Respondents through : N.R.

ORDER

Zulfiqar Ahmad Khan, J:- This petition challenges successive judgments in favour of respondent No.1 rendered by learned Family Judge-XIX, Karachi South in G&W Application No. 2357/2023 and Order dated 07.03.2024 passed by learned Additional District Judge-XII South Karachi in G&W Appeal No.20 of 2024.

2. Briefly stated, the respondent No.1 filed an application under the provisions of Section 25 of Guardians & Wards Act, 1980 for the custody of the minors namely Muhammad Ibrahim and Baby Ayat Fatima and pending disposal of the said application, the petitioner filed an application before the learned Family Court challenging the jurisdiction of the Family Court in Karachi on the ground that the minors are residing in Islamabad as well as studying too there which application of the petitioner was dismissed vide order dated 13.01.2024 and that the Family Court resumed the jurisdiction at Karachi. The petitioner impugned the said order of the learned Family Court by filing G&W Appeal No. 20 of 2024 and the said appeal of the petitioner was also dismissed vide order dated 07.03.2024, hence this petitioner before this Court under writ jurisdiction against the concurrent findings.

3. Learned counsel for the petitioner premised his case on the arguments that not only the petitioner but also the minors are residing in Islamabad as well as the minors too born in Islamabad, therefore, the jurisdiction of Court to adjudicate the custody issue lies in Islamabad.

4. Since this is a fresh petition and fixed before the Court in a category of "Fresh Case". I have heard learned counsel for the petitioner at length and have also scanned the available record. It is an admitted position that the petitioner admitted to have residence at Karachi which fact was also demonstrated by the learned Family Court in the order dated 13.01.2024 and it is considered expedient to reproduce the same here under:-

"I have considered the arguments of both sides and perusal of record reveals that the minors are studying at Rawalpindi Gulraiz Branch BEcon House School since 01.08.2022 but the respondent has failed to produce previous record of minors schooling. Further respondent admitted his residence at Karachi within the jurisdiction of this Court and applicant/mother is presently confined in Women jail at Karachi."

5. It is further unfurled from the record that the learned First Appellate Court too discussed the said fact in its impugned order where the petitioner has not taken any plea that he does not have residence at Karachi. It is deemed conducive to reproduce the relevant constituent of the learned First Appellate Court's edict hereunder:-

"Apparently, appellant had appeared before the XIXth Family Judge Karachi-South on service of notice of G&W application at Karachi and Appellant in his application under Section 9 of Guardian & Wards Act, 1890 has not taken any plea that he has no residence at Karachi or Bungalow No. 84/C, DHA Phase-7 does not belong to him, therefore, learned XIXth Family Judge

Karachi South was/is well in its jurisdiction to hold that Family Court has territorial jurisdiction to entertain the G&A Application filed by mother/respondent.”

6. It is gleaned from appraisal of the foregoing that the petitioner appeared before the learned lower fora which are concurrent on the ground that the petitioner has residence in Karachi, therefore, the Family Court in Karachi has jurisdiction to adjudicate the application under Section 25 of G&W Act, 1890. It is also a fact that the petitioner moved an application under Section 6 & 9 of the G&W Act, 1890, however, the issue concerning territorial jurisdiction in the custody/guardianship matter is regulated under West Pakistan Family Courts Act, 1964 and not under the Guardian & Wards Act, 1890. Section 5 of the West Pakistan Family Courts Act, 1964 deals with the jurisdiction subject to the provisions of Muslim Family Law Ordinance, 1964. The family Courts were entrusted with exclusive jurisdiction to entertain, hear and adjudicate the matters specified in part-1 of the schedule. Part-1 of the schedule in pursuance of Section 5 of the West Pakistan Family Courts Act, 1964 includes the subject of guardianship at serial No.6. Thus the provisions of West Pakistan Family Courts Act, 1964 have overriding effect over Guardian & Wards Act. The jurisdiction is thus regulated under Act of 1964 and the rules framed there-under. Rule 6 as framed under West Pakistan Family Courts Act, 1964 deals with the jurisdiction to try a suit within the local limits of which;

- (a) The cause of action wholly or in part has arisen
- (b) Where the parties reside or last resided together.

7. In subject clause (b) the word “parties” include “party”. A limited meaning to the word “parties” cannot be given, as the later

part of this sub-clause serves that purpose in a case where they (both) last resided together. So in case, if any of the party reside within the local limits of a Court or together resided has the jurisdiction. This is in addition to a jurisdiction where the cause of action wholly or in part has arisen. Even otherwise the advantage of Section 9 of the Guardian & Wards Act cannot be extended for the benefit of petitioner as he has already surrendered to the jurisdiction by admitting and accepting that he has residence at Karachi and is ordinarily residing within the local limits of the Court where the respondent No.1/mother is residing which entertained the application under section 25 of the Guardian & Wards Act.

8. In the case of Anne Zahra vs. Tahir Ali Khiilji & others reported in 2001 SCMR 2000 the issue of jurisdiction was summarized by the Hon'ble Supreme Court as under:

“--6.-----Rule 6 of the West Pakistan Family Courts Rules, 1965 framed under the West Pakistan Family Courts Act, 1964 provides that the Court which shall have jurisdiction to try a suit will be that within the local limits of which the cause of action wholly or in part has arisen or where the parties reside or last resided together, therefore, it was under the provisions of the said rules that the question of territorial jurisdiction of the Family Court was to be decided under the said Act and not under the provisions of the Guardian & Wards Act. The Guardian Judge as also the learned Additional District Judge, however, decided the question of territorial jurisdiction in this case by applying the provisions of the Guardian & Wards Act and not the West Pakistan Family Courts Act, 1964 and the rules framed thereunder which as held by the High Court in the impugned judgment was not correctly decided.

7.----- we are afraid, the argument is plainly unsound and cannot be accepted on any reason. As has been observed, the West Pakistan Family Courts Act, 1964 has overriding effect insofar as the matter included in Schedule, therefore,

initially it is the Family Court which has to be approached in respect of matters relating to custody of minor being one of the listed item in the Schedule and in determining as to which of the Family Court shall have jurisdiction to entertain such a petition shall have to be decided under the provisions of the said Act and the rules framed thereunder and once a Family Court is approached accordingly by a party considering that a particular Family Court was vested with the territorial jurisdiction to entertain the petition, for the purposes of the trial of the same, the procedure as prescribed under the said Act is not to be followed but the general procedure for the trial of suit under the Civil Procedure Code has to be followed which has no nexus or relevancy with the question of determination of the trial jurisdiction of the Court. By virtue of section 25 of the West Pakistan Family Courts Act, every Family Court under the said Act competently seized of a matter relating to matter of minors shall be deemed to be a District Court.-----”

9. The learned lower fora are concurrent on the point of jurisdiction as demonstrated above, therefore, recourse to writ jurisdiction challenging the concurrent findings in the family matter is not maintainable. Apart from this, it is settled law that the ambit of a writ petition is not that of a forum of appeal, nor does it automatically become such a forum in instances where no further appeal is provided¹, and is restricted inter alia to appreciate whether any manifest illegality is apparent from the order impugned. It is trite law² that where the fora of subordinate jurisdiction had exercised its discretion in one way and that discretion had been judicially exercised on sound principles the supervisory forum would not interfere with that discretion, unless same was contrary to law or

¹ *Per Ijaz ul Ahsan J in Gul Taiz Khan Marwat vs. Registrar Peshawar High Court reported as PLD 2021 Supreme Court 391.*

² *Per Faqir Muhammad Khokhar J. in Naheed Nusrat Hashmi vs. Secretary Education (Elementary) Punjab reported as PLD 2006 Supreme Court 1124; Naseer Ahmed Siddiqui vs. Aftab Alam reported as PLD 2013 Supreme Court 323*

usage having the force of law. The impugned judgments appear to be well-reasoned and no manifest infirmity is discernable therein or that they could not have been rested upon the rationale relied upon.

10. The Supreme Court has recently had occasion to revisit the issue of family matters being escalated in writ petitions, post exhaustion of the entire statutory remedial hierarchy, in *Hamad Hasan*³ and has deprecated such a tendency in no uncertain words. It has inter alia been illumined that in such matters the High Court does not ordinarily appraise, re-examine evidence or disturb findings of fact; cannot permit constitutional jurisdiction to be substituted for appellate / revisionary jurisdiction; ought not to lightly interfere with the conclusiveness ascribed to the final stage of proceedings in the statutory hierarchy as the same could be construed as defeating manifest legislative intent; and the Court may remain concerned primarily with any jurisdictional defect. Similar views were earlier expounded in *Arif Fareed*⁴.

11. In view of the rationale and deliberation delineated above, the petition at hand is dismissed alongwith pending application.

Karachi
Dated: 05.04.2024

JUDGE

Aadil Arab.

³ Per Ayesha A. Malik J in *M. Hamad Hassan v. Mst. Isma Bukhari & Others* reported as 2023 SCMR 1434.

⁴ Per Amin ud Din Ahmed J in *Arif Fareed vs. Bibi Sara & Others* reported as 2023 SCMR 413.