

Judgment Sheet
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

W.P. No.41017 of 2022

Saima Nazir
Versus
Guardian Judge (IV), Lahore and another

JUDGMENT

Date of Hearing	05.10.2022
For the petitioner	Ms. Aaminah Qadir, Advocate
For the Respondents	Rai Shahid Saleem Khan and Hamid Shabbir Azar, Additional Advocates General, Punjab. M/s Birjees Tahir, Ch. Shamshad Ullah Malhi and Bilal Awais, Assistant Advocates General, Punjab. Mr. Iftikhar Gull Khan, Advocate for respondent No.2.

Raheel Kamran J:- The petitioner has assailed the order dated 28.04.2022 passed by the learned Guardian Judge (IV), Lahore whereby application of the petitioner under section 12 of the Guardians and Wards Act, 1890 ('Act') to the extent of her minor daughter namely, Wania, suffering from mental disability has been returned for being not proceedable in view of the provisions of the Mental Health Ordinance, 2001 ('MHO 2001'). Additionally, her request for interim custody of minors Hareem Fatima and Meerab, who are in the custody of their father-respondent No.2, has been declined while allowing her visitation rights to meet the minors in terms of meeting schedule specified therein.

2. Learned counsel for the petitioner contends that findings of the learned Guardian Judge, Lahore are without lawful authority inasmuch as he has erroneously declined to exercise jurisdiction on the custody of minor Wania on the pretext of her mental disability and that such matters fell within the jurisdiction of Court of Protection under the

MHO 2001 whereas the Guardian Judge/Judge Family Court was clearly possessed of authority to decide all applications under section 12 and 25 of the Act. She adds that even with regard to other minors the impugned order is erroneous insofar as it finds their welfare to live with their father primarily on the ground that minors Hareem Fatima and Meerab are receiving education under the custody of their father.

3. While elaborating her arguments, learned counsel for the petitioner contends that sections 12 and 25 of the Act do not draw any distinction for the custody as well as guardianship of the minors between those who are hale and healthy as well as those suffering from any mental disability, therefore, the impugned order is manifestly unsustainable in law; that for the purpose of jurisdiction, the provisions of sections 12 and 25 of the Act are to be construed in conjunction with those of the Family Courts Act, 1964. She emphasizes that in terms of section 5(1) of the Family Courts Act, 1964 ('FCA 1964'), exclusive jurisdiction has been conferred upon the Family Court to entertain, hear and adjudicate upon the matters specified in Part-1 of the Schedule to the Act which include *custody of children and visitation rights of parents to meet them* in entry No.5 and *guardianship* in entry No.6; that the term "minor" has been defined in the Act to mean any person who has not attained the age of majority which is 18 years; that no exception for mentally, physically or otherwise disabled minors is made by the aforementioned sections; that in the case of Muhammad Khalid Karim v. Mst. Saadia Yagoob (PLD 2012 SC 66), the Hon'ble Supreme Court of Pakistan held that the jurisdiction conferred upon the Family Court to entertain, hear and adjudicate upon the matters concerning guardians and wards is exclusive for expeditious disposal of the matters, which were previously subject to delay by the civil courts; that the expression "exclusive jurisdiction" in section 5 of the FCA 1964 shall be rendered redundant if the matter of custody of minors is left to the Court of Protection constituted under the MHO

2001 while there is a presumption in law against legislative redundancy; that the MHO 2001 contains no specific provision conferring *exclusive jurisdiction* qua guardianship of the persons with mental disability; that the construction adopted by the Court below in the impugned order leads to an apparent conflict between the statutory regimes i.e. the Act read with FCA 1964 and the MHO 2001 and in order to avoid the same, provisions of the above statutes have to be harmoniously construed as far as possible and one such harmonious interpretation would be to allow the Court of Protection under the MHO 2001 to proceed with all matters contemplated under the said Ordinance in relation to citizens except those who fell within the exclusive jurisdiction of the Family Court under section 5 of the FCA 1964; that even otherwise, the object, purpose and policy of the two statutes is to be taken in account for the purposes of construction and resolving the conflict of jurisdiction.

4. As regards the other two minors, learned counsel for the petitioner contends that mere fact that minors Hareem Fatima and Meerab were receiving education under the custody of their father was not sufficient to decline the petitioner's application for interim custody of the minors. Even otherwise, she adds, the impugned order fails to provide any lawful justification for restricting their interaction with the mother (i.e the petitioner). Lastly, she emphasizes that the Family Court failed to facilitate a congenial and homely environment with a reasonable visitation schedule. She finally prays for the acceptance of the instant petition and setting aside of the impugned order.

5. Conversely, learned counsel for respondent No.2 has defended the impugned order for the reasons stated therein, which according to him are unexceptionable. He has questioned maintainability of the titled petition challenging the order qua interim custody. While referring to the order dated 31.08.2021 passed by this Court in W.P. No.51548 of 2021, he contends that the minors were produced before

this Court who stated that they were not in illegal confinement of their father (i.e. respondent No.2) as a result whereof the parties were directed to approach the Guardian Judge for final determination of their custody and visitation. According to him, statements of the minors before this Court were sufficient to entrust interim custody of the minors to their father i.e. respondent No.2. He has referred to the provisions of section 2(o) of the MHO 2001 to contend that “minor” has been defined in term identical to the definition of minor in the Act. He contends that even prior to promulgation of MHO 2001, the matters of custody have been referred to special court under Lunacy Act, 1912 for the purposes of guardian. Reliance in this regard has been placed on *Sabar Khan v. Amir Hussain and another (PLD 1995 Peshawar 14)*. While referring to the preamble states that Mental Health Ordinance, 2001 exhaustively deals with treatment of mentally disordered persons and matters to the capacity of the patient to manage his properties and affairs etc. leaving no room for the jurisdiction of other courts in that regard. According to him, section 7 of the MHO 2001 visualized community based mental health services set up for the care, guidance, education and rehabilitation regarding protection of mentally disordered persons, which casts an obligation on the Court of Protection to protect the rights of mentally disordered person in accordance with law. He adds that elaborate provisions have been enacted in sections 7 & 17 of the MHO 2001 for assessment or for treatment of the patients with mental disability. He maintains that section 32 of the MHO 2001 unambiguously provides that where a mentally disordered person is incapable of taking care of himself, the Court may appoint any suitable person as guardian or order him to be looked after in a psychiatric facility and order for his maintenance. Learned counsel relies on judgment of the Peshawar High Court in the case of *Aurangzeb v. Public at large (PLD 2006 Peshawar 116)* to contend that such provision could be invoked for decision on the

custody of minor who is a mentally disordered person. While referring to the provision of section 2(i) of the MHO 2001 he suggests that the requirement of “informed consent” of nearest relative or guardian for the assessment and treatment of mentally disordered person who is a minor, clearly indicate that the Ordinance deals with minors. He finally prays for dismissal of the titled writ petition.

6. Inasmuch as office of the Advocate General of the province has been assigned certain role and responsibilities in the provisions of the MHO 2001 such as the requirement of his consent in writing for the purpose of judicial proceedings, therefore, the case was fixed for hearing him. On his behalf, learned Law Officer for the province states that MHO 2001 has an overriding effect as manifest from the section 60 thereof. While referring to the preamble of MHO 2001 he adds that the said legislation applies to mentally disordered person and expression “person” includes minor. While referring to section 29 of the MHO 2001, he contends that the application of the said section is not confined to an order in relation to property of the mentally disordered person but also assessment as to whether such person is mentally disordered and is “incapable of managing himself”, his property and “his affairs”. While referring to section 32 of the Ordinance he maintains that the said provision deals with appointment of guardian which applies to any person who is incapable of taking care of himself and Court may appoint any suitable person as his guardian or order his look after. While referring to subsection (2) of section 51 of the MHO 2001, he states that consent of the minor through his nearest relative or guardian under the MHO 2001 is required for the purpose of investigation or treatment and not for appointment of the guardian, therefore, the said section cannot be given any restrictive interpretation. While referring to section 2(d) of MHO 2001, he adds that the Court of Protection has been defined to mean the District Court having jurisdiction under this Ordinance in the

matters specified herein and designated as such by the Government. He emphasizes that section 2(o) of MHO 2001 defines the “minor” to mean a child or adolescent not having attained the age of eighteen years whereas in the Act, a “ward” has been defined to mean a person having the care of the person of a minor or his property, or of both his person and property. He finally contends that being a special legislation namely MHO 2001 will apply to the case of guardianship of the minor Wania and proceedings before the Family Court under the Act have been rightly declined through the impugned order. In support of his above contention he placed reliance on the judgment passed by the learned Division Bench of this Court reported as *Yasmin Jang v. Advocate General, Punjab and others (PLD 2022 Lahore 495)*.

7. Arguments heard. Record perused.

8. The titled writ petition has been preferred against order passed on an application of the petitioner for the grant of interim custody of minors against which the remedy of appeal is not available in view of the provision of section 14(3) of the Family Courts Act, 1964, therefore, the same is maintainable. Reliance in this regard is placed on the judgment of this Court in the cases of *Zahida Tahir v. Javed Iqbal and others (2019 YLR 785)* and *Sarosh Sikander and others v. Guardian Judge, Lahore and others (2021 YLR 1989)*.

9. Law maintains a distinction between custody and guardianship and respective rights and obligations in that regard under the Act. The definition of ‘guardian’ in section 4(2) seems to include the concept of custody, unless the same has been exclusively awarded by the court to a party who is not the guardian of a minor. Custody under the Act involves a right to upbringing of a minor. On the other hand, guardianship entails the concept of taking care of the minor even in situations when the guardian does not have domain over the corpus of the child. A father is considered to be a natural guardian of a minor, since even after separation with the mother, and even when

the mother has been granted custody of a minor, he is obligated to provide financial assistance to the minor. The liability to maintain the minor is not only religious and moral but also is legal. The right of custody of father is subordinate to the fundamental principle i.e. welfare of the minor. Maintenance of child is the duty of father and the mother cannot be deprived of custody due to her inability to maintain the child for lack of resources. Reliance in this regard is placed on the cases of Mst. Feroze Begum vs. Lt-Col. Muhammad Hussain (1983 SCMR 606), Munawar Bibi vs. Muhammad Amin (1995 SCMR 1206), Mst. Razia Bibi vs. Riaz Ahmad and another (2004 SCMR 821), Mst. Atia Waris v. Sultan Ahmed Khan [PLD 1959 Lahore 205], Sultana Begum vs. Mir Afzal and others, (PLD 1988 Karachi 252), Mst. Kaneez Akhtar vs. Abdul Qadoos and 2 others (2005 MLD 828), Nazan Bibi vs. Additional District Judge, Jhang and others (2009 YLR 991), Habib-ur-Rehman vs. Hina Saeed (2010 MLD 544), Masroor Hussain vs. Additional District Judge, Islamabad (2011 CLC 851), Bushra Asghar v. Dr. Rehmat Ali and 3 others (2012 MLD 1755) and Ms. Shazia Akbar Ghalzai and another vs. Additional District Judge, Islamabad (East) and 2 others (2021 MLD 817).

10. As far as the matter of interim custody of minors Hareem Fatima and Meerab aged 16 years and 10 years respectively is concerned, in the impugned order, the petitioner has been disentitled to the custody of her minor daughters merely on the ground that they have been residing with respondent No.2 since his broken relationship with the petitioner and that Hareem Fatima and Meerab were getting education under his custody, therefore, it would not be appropriate for the welfare of the minors that their custody be disturbed. It is settled law that mother of minor girls is entitled to their custody unless there is anything available on record to disentitle her. Reliance in this regard is placed on the judgments of the apex Court in the cases of Mst. Tahira

v. Additional District Judge, Rawalpindi and others (1990 SCMR 852) and Mir Bat Khan v. Mst. Sherin Bibi and others (2019 SCMR 520).

The impugned order is sketchy and short of necessary tentative details, in addition to failure of the Court below to consider how could father of the minor girls (i.e. respondent No.2) adequately provide his daughters with the care and attention required of a mother keeping in view their ages. The impugned order is, therefore, unsustainable in law.

11. The impugned order has been passed on application of the petitioner under section 12 of the Act which enacts the power to make interlocutory order for production of minor and interim protection of person and property. Unless there is something repugnant in the subject or context, section 4 of the Act defines the 'Minor' to mean a person who, under the provisions of the Majority Act, 1875, is to be deemed not to have attained his Majority; the 'Guardian' to mean a person having the care of the person of a minor or his property, or of both his person and property and the 'Ward' to mean a minor for whose person or property or both there is guardian. As evident from its preamble, the FCA 1964 has been enacted for the establishment of Family Courts for expeditious settlement and disposal of disputes relating to marriage and family affairs and for matters connected therewith. Subject to the Muslim Family Laws Ordinance and the Conciliation Courts Ordinance, 1961, exclusive jurisdiction has been conferred upon the Family Courts to entertain, hear and adjudicate upon matters specified in Part I of the Schedule to the FCA 1964. These subject matters include *custody of children and the visitation rights of the parents to meet them* as specified in Entry No.5 of Part I of the said Schedule whereas the matters of *Guardianship* are also stipulated in Entry No.6 thereof. Section 25 of the FCA 1964 deems the Family Court to be a District Court for the purposes of Guardians and Wards Act, 1890. Barring a few exceptions specified in sub-

sections (4) and (5) of section 1 of the FCA 1964, jurisdiction of the Family Court over matters of custody is exclusive and no other Court including the Guardian Judge has any jurisdiction to deal with such matters. In the case of Anne Zahra v. Tahir Ali Khilji and 2 others (2001 SCMR 2000), it was observed by the apex Court:

“ ...as has been observed, the West Pakistan Family Courts Act, 1964 has overriding effect in so far as the matter included in the 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 items in the Schedule and in determining as to which of the Family Courts 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.... By virtue of section 25 of the West Pakistan Family Courts Act, every Family Court has been designated District Court, therefore, there is no Guardian Judge as such under the Guardians and Wards Act whereas Family Court under the said Act competently seized of the matter relating to matter of minors shall be deemed to be a District Court.”

12. Likewise, in the case of Muhammad Khalid Karim v. Mst. Saadia Yaqoob (PLD 2012 SC 66) it was observed by the apex Court in paragraph 8:

“8. From the above dictum, the relevant portions whereof, have been quoted in extenso, it is abundantly and unequivocally clear, that on the enforcement of the Act, 1964, the Family Court was vested with the exclusive jurisdiction to entertain, hear and adjudicate the matters covered by the Act, 1964 and no other Court. At this juncture, it may be also mentioned that the above view is also fortified from the provisions of subsections (4) & (5) of section 1 of the Act, 1964, because it only had saved those cases for the jurisdiction of the Guardian Court which were pending at the time when the Act, 1964 came into force, while all future matters which otherwise would have been within the jurisdiction of the Guardian and Wards Act were subjected to the jurisdiction of the Family Court.”

13. Now I take up the matter of custody of minor Wania who, from perusal of documents placed on record, is suffering from neurological disorder known as *cerebral palsy* since her birth which undisputedly

has adversely affected her physical and mental health such that even at the age of 13 years she cannot walk without the support of a walker, has to wear pampers at the age of 13 and needs constant care, medication and supervision. In order to decline its jurisdiction on application for the interim custody of minor Wania, the learned court below has made a cursory reference to the MHO 2001. Little assistance has been rendered on whether or not Wania's neurological condition of *cerebral palsy* falls within the definition of a mental disorder in terms of section 2(1)(m) of the MHO 2001. The court below passed the impugned order on the assumption that she is suffering from mental disorder whereas counsel for respondent No.2 has claimed that the condition of mental disability of the minor Wania has been admitted by the petitioner in her pleadings and conversely counsel for the petitioner has emphasized that Wania's even if disability falls within the definition of a mental disorder in terms of section 2(1)(m) of the MHO 2001, that is an irrelevant factor for the exercise of jurisdiction under the FCA 1964, which could not be declined on that pretext. Learned counsels for the parties have extensively referred to the provisions of the MHO 2001 while assailing and defending the impugned order in addition to relying on provisions of the FCA 1964.

14. It is noteworthy that the legislature is normally not presumed to have intended to keep two contradictory enactments on the statute book with the intention of repealing the one with the other, without expressing an intention to do so. Such an intention cannot be imputed to the legislature without strong reasons and unless that is inevitable. Before adopting the last-mentioned course, it is necessary for the courts to exhaust all possible and reasonable constructions which offer an escape from repeal by implication. Reliance in this regard is placed on the judgment of the Hon'ble Supreme Court of Pakistan in the case of Syed Mushahid Shah and others vs. Federal Investment Agency and others (2017 SCMR 1218). As noted herein above, on matters

relating to custody of minors and their guardianship, jurisdiction of the Family Courts under section 5 read with items No. 5 & 6 of the Schedule to the FCA 1964 is exclusive. Whether the provisions of MHO 2001 contradict and repeal the FCA 1964 to take away jurisdiction of the Family Court qua custody of minors who are suffering from any mental disability and vest the same in the Court of Protection?

15. The preamble of the MHO 2001 reveals that the said Ordinance was promulgated to consolidate and amend the law for persons with mental disorder with respect to their care, treatment, the management of their property and other related matters. Chapter No.3 of the said Ordinance relates to assessment and treatment and Chapter No.4 relates to leave and discharge, both of which relate to psychiatry, whereas Chapter No.5 thereof relates to judicial proceedings.

16. In the case of Yasmin Jang v. Advocate General, Punjab (PLD 2022 Lahore 495) where the matter related to validity of an application for the consent of Advocate General, it was observed by the learned Division Bench of this Court In paragraph No. 4 of the judgement :

"We are here concerned with Chapter-V of the Ordinance which deals with judicial proceedings for appointment of guardian of person and manager of the property of the mentally disordered... the legislature has prescribed a four-steps procedure for appointment of guardian of a person and manager of the property of the mentally disordered person. The first step is to apply for the consent of the Advocate General, Punjab. This may be called Consent Application step. According to Section 29 of the Ordinance there are four mandatory prerequisites for filing the Consent Application, and that is, it must be about a person who (i) possesses property, (ii) is alleged to be mentally disordered, (iii) resides within the jurisdiction of the Court, and (iv) it must be from any of the relatives of such person... The second step is to file a petition in the Court. Any relative who has obtained the consent of the Advocate General, Punjab may file a petition before the Court, on which the Court will, in the first instance, by order direct an inquiry, for the purpose of ascertaining whether a person, for whom the petition has been filed, is mentally disordered and

incapable of managing himself, his property and his affairs. In the third step, the Court, after assessing the mental capacity, shall proceed to determine the suitability of a person to be appointed as guardian/manager, and in this process, the Court will observe the principle of welfare of the mentally disordered person. And in the fourth and last step, the Court in respect of a mentally disordered person may under section 32 of the Ordinance appoint suitable person to be his guardian or order him to be looked after in a psychiatric facility and order for his maintenance, and for management of property of such person the Court under section 33 shall appoint manager....”

17. No doubt sections 32 and 33 of the MHO 2001 vest authority in the Court of Protection for the appointment of guardian of a mentally disordered person who is incapable of taking care of himself or the manager of his property when he is incapable of managing his property, however, judicial proceedings in that regard are governed by the provisions of sections 29 to 31. The requirements of possession of property by the person alleged to be mentally disordered and consent in writing of the Advocate General Punjab prescribed in section 29 *ibid* are mandatory prerequisites for judicial proceedings qua appointment of guardian and/or manager under the MHO 2001 whereas none of that is required for the assumption and exercise of jurisdiction by the Family Court under the FCA 1964 since no minor can be left without a guardian and custodian.

18. The main crux of the MHO 2001 essentially relates to psychiatric facility and management of property of the mentally disabled persons and appointment of guardian under the MHO 2001 is in that context. The dispute *inter se* parents of a minor for his or her custody and/or guardianship is manifestly not a subject matter of the MHO 2001, which falls within the exclusive domain of Family Court even when the minor suffers from any disability. Therefore, the provisions of MHO 2001 do not contradict and repeal the provisions of section 5 read with items No. 5 & 6 of the Schedule to the FCA 1964 to take away jurisdiction of the Family Court in disputes amongst

parents regarding guardianship and/or custody of minors who are suffering from any mental disability.

19. The overriding effect of the MHO 2001, as provided in section 60 thereof, is again limited to cases of conflict, which is not the case here since the dispute in the instant case involves custody of the minor amongst her parents and Wania is not claimed to be in possession of any property.

20. No doubt judgment of the learned Division Bench of this Court in the case of *Yasmin Jang* supra provides valuable guidelines for understanding the provisions of sections 29, 32 and 33 of the MHO 2021, however, it cannot be lost sight of that unlike the instant case there was no contest regarding any conflict of jurisdiction between the Court of Protection and the Family Court in the context of dispute amongst parents regarding custody or guardianship of a minor, therefore, the same is distinguishable on facts and reliance of the learned Law Officer in that regard is misconceived and not helpful.

21. For the foregoing reasons, this writ petition is allowed, the impugned order dated 28.04.2022 is set aside resultantly application of the petitioner for interim custody of the minor shall be deemed to be pending with the Family Court Lahore seized of the matter for decision afresh expeditiously in accordance with law. There shall be no order as to costs.

(RAHEEL KAMRAN)
JUDGE

Jamshed

Announced in open Court on 03.02.2023.

JUDGE

APPROVED FOR REPORTING

JUDGE