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Judgment Sheet
LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

W.P No.15564/2023

Kamran Saeed Vs. Additional District Judge etc.

J U D G M E N T

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| Dates of Hearing: | 07.03.2023, 26.04.2023, 24.05.2023, 22.06.2023, 31.07.2023, 09.08.2023 and 13.09.2023. |
| Petitioner By: | Major (R) Muhammad Adeel Hussain, Advocate alongwith petitioner in person. |
| Respondent No.2 By: | Mr. Muhammad Shahzad Khan Kakar, Advocate alongwith respondent No.2 in person as well as the minor. |

Anwaar Hussain J. Kamran Saeed (“the petitioner”) is real father whereas Nazima Noreen Niazi (“the respondent”) is the real mother of Hareem Fatima (“the minor”). The contest between the petitioner and the respondent is regarding permanent custody of the minor. The marriage between the parties was dissolved on 12.04.2021. The petitioner is serving in Pakistan Army as Colonel whereas the respondent is a doctor by profession and is also employed.

2. As it happens in most of the cases after dissolution of the marriage, it is the ego of the parties which has taken precedence over the welfare of the minor that they are actively litigating to get the permanent custody of the minor for which the petitioner filed a guardian petition before Judge Guardian Court, Rawalpindi that was later on transferred to Mianwali by the order of this Court. Through order dated 23.05.2022, learned Guardian Judge, Mianwali, allowed the guardian petition of the petitioner keeping in view the preference of the minor, in favor of the petitioner, and also chalked out a comprehensive visitation schedule, enabling the respondent to meet the minor. Order dated 23.05.2022 was challenged by the respondent by preferring appeal. The learned Additional

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District Judge, Mianwali, *vide* judgment dated 11.02.2023, allowed the appeal and reversed the findings of the learned Guardian Judge, Mianwali. Comprehensive meeting schedule chalked out by the learned Guardian Judge was held to be applicable to the petitioner, *mutatis mutandis*, as non-custodial parent, hence, this constitutional petition.

3. Learned counsel for the petitioner submits that judgments of the learned Courts below are at variance and it is for this Court to opine as to which judgment is sustainable. Adds that the learned Trial Court passed a well-reasoned judgment that has been upended by the learned Appellate Court below without appreciating the welfare of the minor in general, and more particularly the preference recorded by the minor, in favor of the petitioner, before the learned Trial Court. Further contends that even the learned Appellate Court below itself has recorded that the respondent is a working lady, being a qualified doctor and the minor remained with the petitioner/father most of the time in the early days of the minor and hence, has developed strong parental bonding with him than with the respondent but has not given any weightage to the said factual aspect of the matter, therefore, same merits interference by this Court.

4. Conversely, learned counsel for the respondent submits that the sole ground on the basis of which the learned Trial Court granted the custody of the minor to the petitioner was preference of the minor who is naive and does not understand her welfare. Adds that since the petitioner has contracted second marriage, therefore, the minor cannot be left at the mercy of a step mother. Further contends that the respondent is still unmarried and committed to the welfare of the minor, therefore, being a mother, the respondent has a preferential right. Concludes that the second marriage of the petitioner was concealed before the learned Trial Court, therefore, the petitioner is not entitled to any discretionary/equitable relief from this Court.

5. Arguments heard. Record perused.

6. It is unfortunate to note that the children are tossed like balls in between the belligerent parents, due to their self-nurtured ego, after their

separation and/or divorce. It is growing as a social problem in our society. Needless to mention that a minor is entitled to have father's love and attention as well as mother's care and affection and the parents have got no right to interfere with the said inherent right of the children. However, what is happening in the society, for one reason or the other, is that the parents get separated, depriving the child of the normal love and affection and caring of the parents.

7. In some cases, like one in hand, it also becomes difficult for the Court, if not impossible, to weigh as to exactly where welfare of the minor lies. On the one hand there is the respondent (mother), who is well educated and committed to better upbringing of the minor by imparting good education as depicted from various certificates given to the minor by her school and produced before this Court during the course of hearing and on the other hand, there is petitioner (father), who though has contracted second marriage but his love and care for the minor is exemplary inasmuch as the minor is equally attached to the petitioner, if not more than the respondent and the said love and bonding clearly has been exhibited before this Court during multiple hearings and the minor's inclination towards the petitioner has also been noticed by this Court. It appears that the preference given by the minor, in favor of the petitioner, before the Trial Court was with her free will. This Court has also questioned the minor not only in open Court but also extended hearing in the chambers and she has not complained anything about the step mother.

8. In view of above analysis of factual matrix of the case, the only question that requires determination by this Court is to opine whether preference of the minor can be the sole criterion for depriving the mother, who has not moved forward in her life except for the pursuit of earning her livelihood and has no other family obligations, except looking after the minor, as opposed to the petitioner who has re-married having another daughter from the second marriage. In such eventuality, a mother has more right over the child in case of separation unless she re-marries, although second marriage of the mother in itself is not an impediment. The Appellate Court

while ruling in favor of the respondent has encapsulated the controversy in the following words:

“6. Admittedly, the appellant is a doctor by profession and respondent is serving as Lieutenant Colonel in Pakistan Army. It is evident from the record that the appellant did her house job and FCPS after marriage. It is also evident from the record that the minor mostly lived with her father after her birth because the appellant/mother had to go Services Hospital, Lahore, in connection with her job. It is evident from the record that the appellant left the job for 03 years for the sake of minor because she could not be transferred at the place of posting of respondent. Admittedly, during the pendency of application respondent contracted second marriage on 01.11.2021 and he has also a daughter from his second marriage. The fact of second marriage was neither raised nor discussed before the learned trial court. The appellant produced marriage certificate Exh.R4 pertaining to second marriage of respondent as additional evidence before this court. The minor is studying in City School, Mianwali Campus, which is one of the best schools of District, Mianwali. There is nothing in the record which suggests that the appellant has any disqualification for the custody of the minor.”

9. Keeping in mind the above analysis as to how custody issue is to be decided while considering the choice of the minor as also the reasoning of the learned Appellate Court, reproduced hereinabove and before rendering the opinion, it is imperative to note that both the petitioner and the respondent are well educated persons and they attended the proceedings before this Court on all dates of hearing along with the minor. In all fairness, this Court noticed that on most of the said dates of hearings the minor leaned in favor of the petitioner. This Court also sensed that the minor had fear of losing the respondent's love as she responded to one of the queries by this Court that she wants to permanently stay with the petitioner but want to meet the respondent as and when she wants and while stating so, the demeanor of the minor also exhibited the effect of stress she had been facing and the emotional trauma that she was passing through because of the legal battle that her

parents have been fighting to get her permanent custody. At the same time, it has been also noted that the petitioner as also the respondent appears to well understand the sensitivity of the issue and are equally concerned about the welfare of the minor who have a tilted heart towards the petitioner and has shown her preference to be with him. In this regard, it is worth mentioning that, on 09.08.2023, when the case was heard and it was the respondent's turn to take the minor with her, during the summer vacations, the minor showed extreme emotions to be with the petitioner and reluctance to accompany the respondent, the latter unhesitatingly allowed her to accompany the petitioner to ease out the emotional stress of the minor, on the said date. Similarly, the petitioner who well knew about the preference of the minor, in his favor, also persuaded the minor to go with the respondent as per the visitation schedule in field after attending the hearing on 13.09.2023, although the minor again remained reluctant. Here it is also imperative to mention that the respondent while praying for the dismissal of the petition also volunteered that she has no objections if the visitation schedule is made more conducive, in favor of the petitioner, allowing the latter to have the custody over the long weekends and shown her willingness to fully cooperate. These gestures on part of both the parents are appreciated as such approach is generally absent rather subdued by the personal egos and hostility sharpened by prejudices of the parties at play, while contesting a guardian case.

10. Adverting to the nub of the matter, this Court is guided by the dicta laid down in case reported as "*Mst. Aisha v. Manzoor Hussain and others*" (**PLD 1985 SC 436**) where the Supreme Court of Pakistan held that the minor is not the best judge for his/her own welfare and his/her choice will only be considered if it is in the best interest of the minor. Therefore, it is for the Guardian Court to carefully determine as to how much preference and importance should be given to the choice of the minor. Suffice to note that no two cases are exactly the same. Each case has to be individually assessed on the basis of its peculiar facts and

circumstances to see what would be in the best interest of the minor, which is of overriding importance and the Superior Courts in this country have even held that the mother's remarriage does not necessitate her removal from guardianship since the minor's welfare may still be to remain with her. In case reported as "Abdul Razzaque and 3 others v. Dr. Rehana Shaheen and another" (**PLD 2005 Karachi 610**), the Sindh High Court held the minors therein to be unfit to decide where their welfare lies when the fight for the custody was between the paternal grandmother and the mother and the minors in the said case showed their disinclination towards the mother.

11. This Court is also cognizant of the fact that a custody matter is a societal and human problem involving one of the most delicate aspects of the human life and is required to be adjudicated with humane touch. In this regard, while analyzing the facts of the case, the Court may not confine itself to the technical juggleries and/or the niceties of evidence, procedure or the precedents. What is paramount is the welfare and well-being of the minor. While exercising *parens patriae* jurisdiction, the Courts are expected, nay bound, to give due weight to minor's health and education as well as intellectual and emotional development. On the top of it is moral and ethical values that cannot be ignored and the same are equal, or may be, even more important, essential and indispensable considerations while deciding the custody matters.

12. In addition to the other factors, if the minor is old enough, his/her opinion, rather to be precise, intelligent preference, does matter in deciding the custody. However, it is imperative to note that the word used in Section 17 of the Guardians and Wards Act, 1890 ("the Act") in considering preference of the minor is 'may' and not 'shall'. Section 17 of the Act also contemplates as to how to analyze the minor's preference. The Court must consider the age and maturity of the child as also the reason for the preference while analyzing the preference. The preference is sometimes based on as to how a minor feel at the moment when the preference is given, changes in his/her life or a reaction to

something, for instance, being disciplined by the custodial parent. Therefore, preference of a minor does not debar the Court to appreciate the attending circumstances as to determine whether the preference of the minor is intelligent at all. There is possibility that behind the facade of preference lies the wishful intention of the minor to wriggle out of the disciplinary control of the custodial parent. For instance, disciplinary control by custodial parent by inculcating habits such as going to bed early or ensuring concentration in studies may instill some feeling in the minor that non-custodial parent is more entertaining as compared to the custodial parent. Suffice to note that the older and more mature the minor is, the more weight is to be given to the preference/choice. In a nutshell, it is the welfare of the minor that includes the minor's physical, mental and emotional well-being that is to be weighed in while keeping in view the preference given by the minor in favor of the petitioner.

13. In view of the above legal position in relation to preference of the minor, this Court is of the opinion that the preference shown by the minor, in favor of the petitioner, in the instant case, cannot be taken by this Court to be the sole criterion in determining the welfare of the minor who, as of today, is approximately ten and half years old female child, and one cannot lose sight of a very germane biological aspect of the matter concerning the puberty and the privacy of the minor. The care and concern, on part of a custodial parent, needed by a minor girl of her age is of pivotal importance in this case. Had the minor been a male child and exhibited the preference, which the minor in the instant case has shown before this Court, in favor of the petitioner, this Court would have not hesitated to grant the permanent custody of the minor to the petitioner, however, in the instant case, the minor is a daughter and this Court is of the opinion that a female child between the age of ten (10) to fifteen (15) years face such biological changes that, at the said age, she would need her natural mother the most, as oppose to any other person including father and/or the step mother or a grandmother, more particularly when there is nothing on record to establish that the

respondent has any disability like contracting second marriage etc., on account of which she might be deprived of the permanent custody of the minor although second marriage of the mother, as observed earlier, is also not the sole ground to deprive a mother from the custody of the minor. Instead, the fact that the respondent is a professional doctor makes her even more suitable to have the custody of the minor at such a crucial age/stage of the minor, which this Court expects from the petitioner to realize, with a more balanced frame of mind.

14. In view of the above, this Court is of the opinion that the impugned judgment, dated 11.02.2023, passed by the learned Appellate Court is well reasoned and does not merit any interference. As a natural corollary, the present petition fails and is **dismissed**. However, since the respondent has shown good gesture in the terms that she has no objection allowing the petitioner to have extended stay of the minor over the long weekends, it is expected that she will facilitate the petitioner and the minor for such extended meetings, as per her undertaking before this Court.

(ANWAAR HUSSAIN)
JUDGE

Approved for reporting

Judge

*Allah Baksh**