

Judgment Sheet
IN THE LAHORE HIGH COURT
MULTAN BENCH MULTAN
JUDICIAL DEPARTMENT

W.P. No.5637 of 2024

Dr. Muhammad Asif

Versus

ADJ Layyah, etc.

J U D G M E N T

Date of Hearing	15.05.2024
For the petitioner	Malik Sajjad Haider Maitla and Tahir Mehmood, Advocates with the petitioner and both minors.
For Respondent No.3	M/s Waseem Sarwar Khan and Miqdad Hassan Khan, Advocates with respondent No.3.

Raheel Kamran J:- The petitioner has invoked the jurisdiction of this Court under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 (‘Constitution’) to challenge the order dated 14.07.2023 passed by the Senior Civil Judge (Family Division), Layyah to the extent of meeting schedule chalked out in favour of respondent No.3 and the judgment dated 25.04.2024 passed by the Additional District Judge, Layyah whereby appeal preferred by respondent No.3 was accepted and consequently, her application for the custody of minors was allowed while outlining a visitation schedule for the petitioner.

2. The facts giving rise to this petition are that respondent No.3 being mother filed an application for the custody of minors Muhammad Hamza and Talah Asif aged about five years and four years respectively against the petitioner who contested by the same

by filing written reply. Out of divergent pleadings of the parties, two issues were framed and evidence of the parties was recorded. The Senior Civil Judge (Family Division), Layyah after consideration of the evidence, vide order dated 14.07.2023 dismissed the application of respondent No.3, however, formed a schedule for her meeting with the minors. Feeling aggrieved, both sides preferred separate appeals and the Additional District Judge, Layyah vide judgment dated 25.04.2024 accepted the appeal of respondent No.3 while allowing her application for the custody of minors whereas dismissed appeal of the petitioner, however, visitation schedule was chalked out in his favour.

3. Learned counsel for the petitioner contends that the impugned judgment passed by the Appellate Court is against the law and facts of the case as well as suffer from misreading and non-reading of evidence. He maintains that respondent No.3, during cross-examination, admitted that after few days of birth of Hamza (her first child) she had gone to college and had not breastfed him, hence, it is manifest that she was negligent towards upbringing of her child rather she preferred her career over welfare of her child. He further contends that respondent No.3 is a working lady who lives alone in Lahore, therefore, there will be no one there to look after the minors whereas the petitioner lives with his mother, sister and second wife who can properly look after the minors. According to him, minor Muhammad Hamza is properly getting his religious and worldly education. He adds that the petitioner being father has preferential right of custody of male children aged about seven years especially when they are more close and comfortable with him and even they have refused to recognize respondent No.3 who had willfully left them in their tender ages. According to him, the petitioner being himself a Child Specialist is properly taking care of the sick minor Talha Asif who as per report issued by *Apni Talash Human Development Centre* is gradually improving. He finally contends

that welfare of the minors lies with their father and sudden change in their custody might adversely affect their physical and mental growth, therefore, impugned judgment of the Appellate Court is unsustainable in law.

4. Conversely, learned counsel for respondent No.3 besides supporting the impugned judgment passed by the Appellate Court, contends that respondent No.3 had left the minor Muhammad Hamza after few days of his birth due to compelling circumstances that her education was still incomplete as she was student of the final year of MBBS, however, that could not be used as an excuse to permanently deprive her of the right to seek custody of the minors. He maintains that there was no delay on the part of respondent No.3 in seeking custody of minors as she was divorced in September, 2019 and she for the first time approached the Guardian Court, Dera Ghazi Khan on 21.11.2020 for that purpose. He further contends that respondent No.3 has been continuously making efforts to meet the minors but the petitioner created every possible hurdle in her way on one pretext or the other and she has been purposely kept away from meeting the minors. According to him, the minors have been brainwashed by the petitioner against their real mother (respondent No.3) and that is why the minor Muhammad Hamza has refused to recognize her. He adds that respondent No.3 is living in Lahore and can provide better treatment to minor Talha Asif as better facilities are available there. According to him, the petitioner has contracted second marriage and has one daughter out of the said wedlock, therefore, it is not expected from a stepmother to give such love, affection and attention as the real mother can. He further adds that respondent No.3 can properly take care of the minors at Lahore as she would admit the elder minor in school and would take the younger one to the office with her.

5. Heard. Record perused.

6. Bare reading of section 17 of the Guardian and Wards Act, 1890 reflects that welfare of the minor is the guiding factor in

deciding the matter of custody, of course, while giving due consideration to the age, gender and religion of the minor and character and capacity of the proposed guardian. The case in hands involves custody of two male children namely Muhammad Hamza and Talha Asif aged about seven years and six years respectively, as mentioned in the custody petition. As regards Talha Asif, the younger child, he is suffering from psychological disorder and as per cross-examination of petitioner (DW-1), he is receiving training in *Apni Talash Training Centre*. There is nothing available on record in the evidence that minor Talha Asif was born with such psychological disorder, therefore, it must have developed with the passage of time during his custody with the petitioner. Although petitioner is also a Child Specialist and has admitted in his cross-examination that the children with normal mental health are getting education in *Apni Talash Training Centre* and has denied the suggestion that minor Talha is suffering from Attention Deficit Hyperactivity Disorder (ADHD). Such training, as admitted by the petitioner, includes speech and psychological training. Without commenting on exact nature of the disorder that minor Talha may be suffering from, it is noticed by this Court that there exists one which is manifest from his behavior in the Court. The petitioner has further admitted in the cross-examination that he performs duty in DHQ Layyah and also carries on private practice in the evening. Therefore, the petitioner would not have much time to spend with his children who must have been brought up by their grandmother and aunt whereas respondent No.3 in her cross-examination, in response to a question on how will she take care of the minors in case their custody is handed over to her since she is also a working woman, she stated that she would admit the elder son in school and take the younger son along with her to school. Moreover, respondent No.3 (mother) is living in Lahore which, being a Metropolitan City and capital of the province has better facilities as compared to Layyah and minor Talha Asif can have better treatment at Lahore. In these

circumstances, this Court is of the view that minor Talha Asif needs more attention and care which can definitely be provided by his real mother as there is no substitute of the natural love, affection and care of the mother who is admittedly qualified as doctor.

7. So far as the elder minor Muhammad Hamza is concerned, although he is getting education in the school at Layyah and he has also refused to recognize respondent No.3 being his mother yet paramount consideration in custody cases is welfare of the minor and the other facts are subordinate to the same. It has been contended that respondent No.3 (PW-1) admitted during cross-examination that she had returned to college after 40 days of the birth of minor Muhammad Hamza and that she could not have breastfed the minors for longer period. The findings of the Appellate in response to the said assertion recorded in paragraph Nos.10 & 11 of the impugned judgment are quite justified and unexceptionable which are reproduced hereunder: -

“10..... However, to my observation, the said finding of the learned trial court is not based on well appreciated evidence of the parties as it is evident from the pleadings as well as evidence of both the parties that the appellant married with Dr. Muhammad Asif respondent on 25.01.2015, when she was student of MBBS 2nd year (as mentioned by the respondent Dr. Muhammad Asif in the written reply of the application of appellant for custody of minors in the court of learned Guardian Court Dera Ghazi Khan on 02.02.2021). However in cross-examination, the appellant has stated that her “Rukhsati” did not take place at the time of her “Niakh” and when she accompanied the respondent for matrimonial relationship, she was in fourth year of MBBS. She has further stated that she failed in one subject subsequently again she failed in final exams in one subject. She has stated that her elder son Muhammad Hamza was born on 07.05.2017 at Dera Ghazi Khan (the residence of parents of the appellant) while Talha Asif Ali was born on 09.08.2018. She had further stated that her degree was completed after the birth of Talha Asif alias Ali who too was born at Dera Ghazi Khan. She had further stated that she had done her house job in DHQ Hospital Dera Ghazi Khan in 2019 and at that time, the minors were with her. However, their (spouses) separation took place on 20.10.2019.

11. The above mentioned narration of the appellant clearly indicates that Dr. Muhammad Asif respondent and his family was well aware at the time of marriage as well as “Rukhsati” of Dr.

Sana Sattar appellant that she was still student of MBBS and it was not expressly settled down by the parties that she would discontinue her education (as nothing contrary available on the file). The appellant has not been suggested so, in her cross-examination, therefore, the production of the babies was joint considered decision of the spouses and Dr. Muhammad Asif being medical man should be knowing that how much time and consideration is required being medical student to complete her degree if he had opted to have birth during the education of the appellant. He was well aware of the fact that she would not be able to take personal care of the born child as normally in our society house wife, mother dedicates her life to the born child. If the appellant had left the minor after 40 days of the birth, it was not, due to least love care but due to the compelling circumstances i.e. incomplete education of the appellant.....”

8. The petitioner is father of the minors who is their natural guardian as well. However, law maintains a distinction between custody and guardianship and respective rights and obligations in that regard under the Guardian and Wards Act, 1890. 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 legal. The right of custody of minor is subordinate to the fundamental principle i.e. welfare of the minor. Maintaining the children is the duty of father which cannot be a decisive factor in custody of the minors. In support of above proposition, reliance is placed on judgments in the cases of Mst. Feroze Begum v. Lt-Col. Muhammad Hussain (1983 SCMR 606), Munawar Bibi v. Muhammad Amin (1995 SCMR 1206), Mst. Razia Bibi vs. Riaz Ahmad and another (2004 SCMR 821), Mst. Atia Waris vs. 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 vs. 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).

9. Admittedly, the petitioner has contracted second marriage and has one daughter by the second wife as admitted by him in the cross-examination. Unless established otherwise through cogent and reliable evidence, it cannot be presumed that a stepmother could be substitute for the real mother in the matter of upbringing of the minor. She is stranger to the minors born from respondent No.3. In the presence of her own child and presumably will have more children in future, she may have little care for the step-children, however, there may be exceptions to that which require proof which is not available in this case. On the other hand, respondent No.3 has not contracted second marriage and even she has stated in her examination in chief that she has no intention to do so.

10. The plea of the the petitioner that minor Muhammad Hamza has been residing with him since his birth and is emotionally attached with him since respondent No.3 left him at very tender age to complete her education and did not claim his custody for quite some time, is not a valid and sufficient consideration to deprive respondent No.3 of her entitlement to custody permanently. In this day and age, when pursuit of education and career does not attract any disqualification for a father to seek custody of minor, how a mother can be discriminated on that basis. Working mothers are a reality of the day and their participation in the professional life is essential for the progress of societies. It makes roles of women even harder, which needs to be recognized and appreciated rather than discouraged or made more onerous by attributing disqualifications *vis-à-vis* custody of the minors. This does not mean that the Courts

should become insensitive to the needs of the minors merely because their mother is a working woman. Welfare of the minor remains primary consideration for determining his or her custody. It is only recognition and adjustment of expectation from a working mother in comparison to a stay-at-home mother so that the former is not unreasonably put to any disadvantage.

11. The conduct of the petitioner in keeping her away from the minor is quite evident from the record which reflects that initially, respondent No.3 filed an application for custody of minors before the Guardian Court, Dera Ghazi Khan on 21.11.2020 wherein the petitioner took the plea of lack of jurisdiction as the minors were residing in Layyah. The said application of respondent No.3 was returned to her to be presented to the court of competent jurisdiction. Thereafter, respondent No.3 having remained unsuccessful before the Appellate Court and this Court, filed custody petition before the Guardian Court, Layyah, however, the petitioner in order to defeat her legal right shifted the minors from Layyah to Lahore upon which application of respondent No.3 was again returned to her for its presentation before the court having competent jurisdiction. The said order was challenged by her before the Additional District Judge, Layyah, which was accepted and the matter was remanded to the Guardian Court, Layyah for regular trial. However, the said judgment was challenged by the petitioner before this Court through W.P.No.3951 of 2022 wherein this Court vide an order dated 17.10.2022 in order to determine the ordinary place of residence of the minors at the time of filing of guardian petition, requisitioned the original record of the school concerned as well as summoned its responsible officer for 24.10.2022. Upon which, the said writ petition was withdrawn by the petitioner on 20.10.2022. In an order dated 11.05.2022 in the said writ petition, annexed with this petition, respondent No.3 stated before the Court that she was not allowed to meet the minors upon which petitioner was directed to produce them

before the Court. In this background, it is manifest that not only respondent No.3 has been intentionally kept away from the minor so that he might not have any interaction with his mother but he has been brainwashed too, which is reflected in the sense that he has refused to recognize respondent No.3 as his mother.

12. As regards plea that minor Muhammad Hamza wishes to reside with his father, it is observed that minor is not always the best judge of where his or her welfare lies, as held by the Supreme Court of Pakistan in the case of Mst. Aisha vs. Manzoor Hussain and others (PLD 1985 Supreme Court 436). Minor Muhammad Hamza is of the tender age of about seven years, hence, it is not appropriate to attach much weight to his choice in order to determine where his welfare in relation to his custody lies. Moreover, as discussed above the minor Muhammad Hamza has not been allowed to meet his mother for years, therefore, his mind is seemed to have been tutored. Refusal of the minor Hamza to recognize and meet his real mother indeed provides an evidence of improper child rearing. It establishes that contrary to his welfare, the petitioner failed to prevent his misbehavior towards his mother which highlights the value system being inculcated or allowed to be nurtured in the minor by his parent in custody.

13. Although Muhammad Hamza is being provided school education and religious teachings yet respondent No.3 being a doctor and serving as an officer in a Government Department enjoys somewhat equal status, therefore, there is no chance that the minor will be deprived of any of the facilities being provided to him at present. Even otherwise, there is no substitute of the natural love, affection and care of an educated mother.

14. For the foregoing reasons, this Court is of the considered view that welfare of both the minors lies in their custody with their mother and the Appellate Court rightly accepted the appeal of respondent No.3, hence, the impugned judgment does not call for

any interference by this Court in exercise of jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973. Accordingly this writ petition, being devoid of any merit, is **dismissed**.

(RAHEEL KAMRAN)
JUDGE

Announced in open Court on 24.05.2024.

JUDGE

APPROVED FOR REPORTING

JUDGE

Saeed Akhtar