

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

Mr. Justice Qazi Faez Isa

Mr. Justice Mazhar Alam Khan Miankhel

CIVIL PETITION NO. 809-P OF 2018

*(Against the judgment dated 12.11.2018 of the
Peshawar High Court, Peshawar passed in
Writ Petition No. 1783-P of 2018)*

Mir Bat Khan.

... Petitioner

Versus

Mst. Sherin Bibi and others.

... Respondents

For the Petitioner:

Mr. M. Amin Khattak Lachi, ASC.
Mr. M. Tariq Khan, AOR (**absent**).
a/w Petitioner and Minor Girl.

For the Respondents:

Not represented.

On Court's Notice:

Mr. Zahid Yousaf Qureshi,
Addl. Advocate General, KP.

Date of Hearing:

08.02.2019.

ORDER

Qazi Faez Isa, J. This petition for leave to appeal assails the judgment dated 12th November, 2018 of the Peshawar High Court, Peshawar, which had set aside the judgment dated 14th March, 2018 of the learned District Judge, Hangu. The learned Chief Justice of the High Court through the impugned judgment had restored the judgment dated 18th December, 2017 of the learned Family Judge, Hangu and directed that the custody of the minor girl Saima, born in the year 2011 from the matrimonial union of the petitioner and the respondent No. 1, be handed over to her mother, the respondent No.1.

2. The learned counsel for the petitioner states that the District Judge, Hangu had noted that the child did not even recognize her mother and was not ready to go with her. He has also referred to a decision dated 13th May, 2016 of the *jirga* (Exhibit DW1/2). The *jirga* had decided that the custody of the child should remain with the petitioner, that the petitioner should divorce the respondent No. 1 and that the respondent No.1 should return her dower/dowry to the petitioner. The petitioner divorced the respondent No.1 pursuant to the *jirga's* decision therefore, the learned counsel contends, the respondent No.1 should also abide by the decision.

3. We sought certain information about the petitioner from the petitioner's learned counsel in the petitioner's presence and were told that the petitioner works as a labourer in Dubai and the child is looked after by her stepmother (Mst. Khalida) and a divorcee sister (Mst. Zohra) of the petitioner. The petitioner, we are informed, also has three children from Mst. Khalida. The learned counsel also confirmed that the respondent No. 1 had not married again after she was divorced by the petitioner.

4. The learned District Judge in setting aside the Judgment of learned Family Judge relied upon the fact that the, "*minor was interviewed in court and it was observed that she does not recognize her mother*". When the learned Judge interviewed the child she was six or seven years of age. The fact that the child did not recognize her real mother should have alerted the learned District Judge that the natural order had been disrupted. Instead, this was used as a reason to deprive the mother of her daughter and the daughter of the love and care of her mother. Another factor which persuaded the learned District Judge was that the respondent No.1 lived with her parents and was financially dependent on them, therefore, presumably not able to support the child. This reason too was contrary to law since the petitioner is legally obliged to maintain his child. In the case of *Razia Bibi* this Court had reiterated that, "*poverty on the part of a lady is no ground to disentitle her from the*

*custody of minor*¹. The learned Judge had also relied upon a so-called decision of a *jirga*. A *jirga* has no legal authority to decide the custody of children and in doing so it violated the law² and Islamic injunctions. The law³ and precedents of this Court have stressed the welfare of the minor as the paramount consideration⁴ in determining the custody of a minor and to abide by the principles of *hizanat* unless there are valid reasons not to do so⁵. A mother cannot be compelled to part with her child by a *jirga*. She cannot be called upon to barter the right to her child's custody⁶ to secure a divorce nor can a child be used to settle personal scores.

5. The learned District Judge disregarded the welfare of the minor and the precedents of this Court which have extensively elaborated upon this. Instead the learned District Judge relied on a so-called *decision* by a *jirga*. The High Court was therefore correct to set aside the judgment of the District Court which was based, as mentioned above, on untenable considerations. The petitioner's retention of Saima's custody is wholly unjustified, which he continues to retain by flouting the impugned judgment dated 12th November, 2018. The High Court had directed the, "*peaceful handing over of the minor to the mother*" but this direction has not been complied even after three months. Resultantly, an innocent child continues to be deprived of the love and care of her mother.

6. Since the petitioner has continued to illegally retain the custody of the child Saima we called upon the learned Additional Advocate General of the Khyber Pakhtunkhwa ("**the AAG**") to ensure that the impugned judgment of the High Court is implemented without further loss of time, and to save both Saima

¹ *Razia Bibi v Riaz Ahmad* (2004 SCMR 821, 823[A]).

² The Guardians and Wards Act, 1890.

³ Section 17 and 25 of The Guardians and Wards Act, 1890.

⁴ *Feroze Begum v Muhammad Hussain* (1978 SCMR 299, 302[A]) and *Khan Muhammad v Surayya Bibi* (2008 SCMR 480, 482[A]).

⁵ *Rubia Jilani v Zahoor Akhtar Raja* (1999 SCMR 1834, 1836[A]) and *Firdous Iqbal v Shifaat Ali* (2000 SCMR 838).

⁶ Al-Quran, surah Al-Baqarah (2) verse 233: "...no mother shall be treated unfairly on account of her child..."

and her mother further agony and harassment at the hands of the petitioner. The learned AAG states that there is a Social Welfare Department of the Provincial Government which amongst its different functions includes the care and welfare of women, children and underprivileged sections of society.

7. Therefore, whilst declining leave to appeal and dismissing this petition, we direct the petitioner to immediately and peacefully hand over the minor girl (Saima) to her mother (respondent No.1). In case he does not comply the Social Welfare Department is directed to ensure that the child Saima is handed over to her mother (respondent No.1) through a lady officer of the Department, and in case there is no lady officer through any other lady officer of the police / government. Copies of this order be sent to the learned AAG, the Secretary, Social Welfare Department, Government of Khyber Pakhtunkhwa, the learned Family Judge, Hangu and the District Police Officer, Hangu for information and compliance. Office to also send a copy of this order to the Registrar of the Peshawar High Court for placing it before the Hon'ble Chief Justice, Peshawar High Court.

Judge

Judge

Bench-VI
Islamabad:
08.02.2019

Approved for Reporting
(M. Tauseef)