

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

WRIT PETITION NO.4000 OF 2019

MST. MALIHA NAZIR.
Vs.
MUHAMMAD BAKAR FAROOQ AND ANOTHER.

Petitioner: **Ch. Fayyaz Ahmad Padana, Advocate.**

Respondent No.1: **Mr. Amir Naeem Khan, Advocate.**

Date of Hearing: **02.09.2020**

LUBNA SALEEM PERVEZ, J. Petitioner has invoked the constitutional jurisdiction of this court by way of filing instant writ petition under Article 199 of the Constitution of Islamic Republic of Pakistan, seeking setting aside of judgment dated 14.10.2019, passed by learned Additional District Judge-West (MCAC), Islamabad, whereby appeal of Respondents No. 1 filed u/s 25 of the Guardian and Wards Act, 1890 for custody of minor daughter was allowed and judgment and decree dated 11.02.2019, passed by the learned Family Judge/Guardian Judge-West, Islamabad was set aside.

2. Brief facts of the case are that marriage between the petitioner and Respondent No.1 was solemnized according to Shariah-e-Muhammadi on 03.11.2007, from of the wedlock a daughter namely Rohma Farooq was born on 27.12.2008, who is now studying in Class-V in Allied School System, G-10 Campus, Islamabad. The relation between the spouses became sour and on 07.04.2013, the petitioner left the house of Respondent No.1 along with her minor daughter and statedly shifted to Islamabad. Father of Respondent No.1 lodged an FIR No. 125/13 u/s 363, 365-B and 380 PPC in P.S. Sundar Lahore on 08.04.2013. The petitioner after seeking *Khula* from the competent court of law at Chiniot, contracted second marriage and started living with her second husband namely Shahzad Aslam. From second wedlock, two daughters were

born to petitioner. Respondent No.1 filed petition u/s 25 of Guardian and Wards Act, 1890, for the custody of minor daughter which was dismissed on 11.02.2019, by the learned Judge Family Court (West), Islamabad holding that the petitioner is entitled for custody of minor daughter being real mother, whereas, respondent No.1 was granted visitation rights being the real father. Respondent No.1 assailed the said judgment through an appeal which was allowed by the learned Additional District Judge (West), Islamabad and judgment and decree dated 11.02.2019, was set aside, vide judgment dated 14.10.2019. Hence, instant petition has been preferred by the petitioner.

3. Learned counsel for the petitioner, inter-alia, submitted that the impugned judgment has been passed in a slipshod manner without proper appraisal of evidence which, as such, suffers from misreading and non-reading of material facts on record; that the sole ground on which the judgment is mainly based for allowing the appeal of Respondent No. 1 is the allegation of immoral character of the petitioner, which actually is the misreading and non-reading of the evidence and statement of the witnesses; that key factors for granting custody of minor is her welfare i.e. age, health, brilliant performance/results of education, environment provided to the minor, that attachment of the minor to the mother has not been given due weightage while passing the impugned judgment and minor who is of 11 years of age has been detached from her real mother; that the minor who is intelligent enough to express her opinion before the court to live with her mother has also not been sought; that Respondent No.1 has also contracted second marriage and has three minor children which fact has been ignored while passing the impugned order; that Respondent No.1 never followed the visitation schedule in its true perspective while the minor was with petitioner rather the proceedings before the court were mostly attended by the grandfather of the minor; that Respondent No.1 has also failed to pay interim maintenance to the minor as per orders of the learned Trial Court and after coercive measures adopted by the Court during execution proceedings an amount of Rs. 20,000/- was deposited, whereas, balance amount of Rs. 1,09,500/- is still outstanding.

Learned counsel, to strengthen his arguments, referred the case re: *Munawar Bibi Vs. Muhammad Amin and another* (1995 SCMR 1206) and prayed for setting aside impugned judgment dated 14.10.2019.

4. On the other hand, learned counsel for Respondent No.1 supported the impugned judgment being justified as well as lawful by stating that same is result of application of proper judicial mind, based on proper appreciation of material available on record as well as relevant law and deserves to be protected; that petitioner has contracted second marriage with a person who is not related to the minor daughter within the prohibited degree; that petitioner left the house of the Respondent No.1 along with minor and fled away with her second husband and a criminal case in this regard has also been registered against them; that petitioner lived with person not related to her during subsistence of her marriage with the Respondent No.1; that father of the petitioner has also deposed against her; that petitioner has contracted second marriage thus, she has become disentitled for custody of minor girl as per relevant law. Learned Counsel in support of his contentions placed reliance on the case law reported as *Mst. Zainab Vs. Urooj Ahmed and 2 others* (2019 CLC Note 47), *Maham Shabbir and another Vs. Additional District Judge, West, Islamabad and 2 others* (2018 CLC 452 Islamabad), *Mst. Fahmida Bibi Vs. Abdul Bari and another* (2018 MLD 591), *Muhammad Alam V. Nazish Qazi and 2 others* (2018 YLR 1771), *Shabana Naz Vs. Muhammad Saleem* (2014 SCMR 343), *Mst. Ammara Waseem Vs. Syed Khawar Hussain and another* (2011 SCMR 148), *Mst. Munira Bibi Vs. Additional District Judge, Sheikhpura and others* (2007 CLC 1612 Lahore), *Mst. Ayisha Bibi Vs. Safdar Ali Shah and another* (2005 CLC 894 Lahore), *Muhammad Naeem Ahmad Vs. Asgeeri* (2002 YLR 2854 Karachi) and *Mst. Shamshad Parveen* (1994 CLC 525 Lahore) and prayed for dismissal of instant writ petition.

5. I have heard the learned counsel for the parties and have also perused the impugned judgment as well as available record.

6. The impugned judgment dated 14.10.2019, as well as judgment dated 11.02.2019, have been carefully examined keeping in view the peculiar facts and controversy over custody of the minor girl who is in her tender and sensitive age. The learned Appellate Court has allowed the appeal filed by Father of the minor mainly for the reason that the mother of the minor being of immoral character cannot retain the custody of minor female. This view of the learned Appellate Court is based on the evidence of AW-3 who is the real father of the petitioner and on the peculiar facts of the case i.e. she got married with the man who has been alleged in the FIR No. 125/2013, as abductor of the petitioner. The evidence of the AW-1, 2 & 3 as well as the petitioner who was DW-1 before the trial Court, have also been examined and it has been noticed that AW-1 & AW-2 have nowhere in their statements have alleged the petitioner as a characterless lady rather it has been stated that the person nominated in the FIR has abducted the petitioner. However, the statement of father of the petitioner / AW-3, shows uncertain view that she might left the house of her husband on her own will or on the instigation of Shahzad Aslam whom she subsequently married. He denied any contact with petitioner after she left the house of Respondent No.1. Prima facie, the statement of the father is also based on circumstances and events as no documentary proof was produced during trial to substantiate that the petitioner and Shahzad Aslam were living together before Nikkah. Whereas, the statement of the petitioner shows that she has contacted her parents who forced her to go back to her husband's house. As per her statement she married Shahbaz Aslam in May, 2014, after obtaining Khula decree on 14.10.2013, and whereafter they started living together. Therefore, the reasons given by the Appellate Court regarding character of the petitioner are found to be not in line with the evidence available on record as there is no documentary evidence available on record to substantiate that the petitioner resided with Shahzad Aslam/her second husband after leaving the Respondent No.1's house and before contracting second marriage. Moreover, the authenticity of the contents of the said FIR is to be established after the conclusion of the trial in the said case stated to be pending with the concerned

trial court. Thus, from perusal of the record it cannot be ascertained that the petitioner had lived with Shahzad Aslam during period of subsistence of her marriage with Respondent No.1 or before her Nikkah with said person and, therefore, the observations of the learned appellate Court to that extent are ill founded and are expunged.

7. So far as the custody of the minor female is concerned, the governing principle in this regard is at para 353 of the Muhammadan Law, and the principle has been settled by the superior courts that when mother after obtaining divorce/khulla from the husband enters into a second marriage with a person who is not related to the female child within the prohibited degree and a complete stranger to her then in that case the mother loses the right of Hizanat and cannot retain the custody of the minor female child as in that case welfare of the minor would lie with her real father. In this regard reliance is placed on the following judgments:

Shabana Naz v. Muhammad Saleem (2014 SCMR 343):

13. Thus, it is apparent from reading of the two paras of the Muhammadan Law that though the mother is entitled to the custody (Hizanat) of her minor child but such right discontinues when she takes second husband, who is not related to the child within the prohibited degree and is a stranger in which case the custody of minor child belongs to the father... It has been construed by the Courts in Pakistan that this may not be an absolute rule but it may be departed from, if there are exceptional circumstances to justify such departure and in making of such departure the only fact, which the Court has to see where the welfare of minor lies and there may be a situation where despite second marriage of the mother, the welfare of minor may still lie in her custody.

Maham Shabbir and another vs. Additional (2018 CLC 452):

6. In the instant case, petitioner No.1 has contracted second marriage and the minor daughter i.e. Riyana Suleman is almost reaching the age of puberty hence, under the circumstances and in view of the above pronouncements of the august apex Court, she loses her right of Hizanat. Even otherwise, respondent No.1, while allowing appeal of respondent No.3, has discussed the evidence led by the parties in detail and has rightly come to the conclusion that in the facts and circumstances of the case, the welfare of children is that they should live with their father i.e. respondent No.3.

Muhammad Alam V. Nazish Qazi and 2 others (2018 YLR 1771):

9. We have heard, the learned counsel for the parties and have gone through the available record. On perusal of the record, we are of the considered opinion that the provisions of Muhammadan Law is personal law, which apply for the purposes of determining the custody of the minor, while the course of law have always consider the welfare of the minor to be the paramount consideration for deciding as to whether the hizanat of the minor to

be entrusted to the father or to remain with the mother. Father is the natural guardian and there is no need of appointment of father as guardian of the minor. The issue is of custody of minor. Their lordships of the Hon'ble Supreme Court in various judgments have considered this aspect of the matter and while determining the facts to be considered under Section 17 of the Guardians and Wards Act, had laid down the criteria, which is reported in the case of Mst. Akbar Bibi v. Shoukat Ali (1981 CLC 78 Lahore). Furthermore, according to various judgments pronounced by the Courts of law, it has been held that while determining the question of custody of a female ward, the question of chastity to be jealously guarded, in case, if the lady contracts second marriage with stranger, she loses her right of hizanat. Reference is made to the judgment reported in case of Mst. Nazir v. Hafiz Ghulam Mustafa and others (1981 SCMR 2000).....".

8. For what has been discussed above, judgment passed by the learned appellate Court is partially modified as observations recorded regarding character of the petitioner are hereby expunged as being contrary to facts and evidence produced by the parties. However, its decision regarding custody of the minor daughter to Respondent No.1 is upheld.
9. Instant petition stands dismissed in the above terms.

(LUBNA SALEEM PERVEZ)
JUDGE

Announced in open Court on this 22nd day of September, 2020.

JUDGE

*Adnan/**