

JUDGMENT SHEET.
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD.

W.P. No. 2918 of 2016

Maham Shabbir and another

Versus

Additional District Judge (West), Islamabad and others

Petitioners By : M/s Muhammad Munir Paracha and
Nauman Munir Paracha, Advocates

Respondents By : Sardar Muhammad Latif Khan Khosa,
Sardar Shahbaz Ali Khan Khosa, Malik
Javed Iqbal Wains and Naz Gul Shah,
Advocates

Date of hearing : 19.09.2017.

AAMER FAROOQ, J. - Through the instant petition, under Article 199 of the Constitution of Pakistan 1973, the petitioners seek setting-aside of the judgment dated 14.06.2016, passed by respondent No.1.

2. The facts leading to filing of the instant petition are that petitioner No.1 contracted marriage with respondent No.3 on 01.05.2001. Out of the wedlock, two children were born i.e. Riyana Suleman who was born on 09.04.2005 and Ibrahim Sulaman born on 12.01.2009. Petitioner No. 1 filed a suit for dissolution of marriage and an ex-parte decree was passed in her favour on 19.05.2011. Respondent No.3 filed a petition under section 25 of the Guardian and Wards Acts, 1890 for the custody of minor children. Petitioner No.2, who is maternal grandmother of the children, was not impleaded as a party in the referred application. Petitioner No.1 filed reply to the application and contested the same. Out of pleadings of the parties, following issues were framed:-

- 1. Whether the petitioner has cause of action? OPA**
- 2. What is the financial and social status of parties? OPA/OPR**
- 3. With whom the welfare of the minors lies? OPA/ OPR**
- 4. Relief.**

The parties led their evidence in which respondent No. 3 filed his affidavit as Ex. A-1. On behalf of respondent No.3 Fasahat Jabeen also appeared as a witness. Petitioner No.1 was the sole witness in support of her defence. The learned trial Court dismissed the application filed by respondent No.3 vide order dated 25.05.2015. Respondent No.3 filed an appeal before respondent No.1 which was allowed vide judgment dated 14.06.2016.

3. Learned counsel for the petitioners, *inter alia*, contended that petitioner No.2 was a proper and necessary party however, she was not impleaded as such hence, has interest in the matter and can assail the impugned judgment. Reliance was placed on case reported as "Saleema Bibi vs. Sharif Hussain" (**1979 Law Notes (Lahore) 344**). It was further contended that the learned trial Court i.e. respondent No.2 has rightly dismissed the application filed by respondent No. 3 while placing reliance on case reported as "Mst. Farah Mehzan and others vs. Safeer Hussain Jaffar and others" (**2013 CLC 235**).

4. Learned counsel for respondent No.3, *inter alia*, contended that there is no misreading or non-reading of evidence and the impugned judgment is not perverse in any way, hence, there is no reason to interfere with the same. It was further contended that the judgment passed by respondent No.1 is based on the facts and circumstances of the case and does not suffer from any illegality; that the prime consideration, in passing of order for custody, is the welfare of minors, which respondent No.1 while passing the impugned judgment, has kept in view. In support of his contentions, learned counsel for respondent No. 3 placed reliance on cases reported as "Mrs. Seema Chaudhry and another vs. Ahsan Ashraf Sheikh and others" (**PLD 2003 SC 877**), "Shabana Naz vs. Muhammad Saleem" (**2014 SCMR 343**), "Riasat Mehmood vs. Mst. Nadia Parveen and another" (**2014 MLD 374**), "Mst. Ammara Waseem vs. Syed Khawar Hussain and another" (**2011 SCMR 148**), "Mst. Ayisha Bibi vs. Safdar Ali Shah and another" (**2005 CLC 894**) and "Dr. Ruqia Shaukat vs. Addl. District and Sessions Judge and others" (**2003 CLC 1310**).

5. The facts leading to the filing of instant petition have been mentioned in detail hereinabove, therefore, need not be reproduced. The petitioners are aggrieved of awarding custody of the minor children Riyana Suleman and Ibrahim Suleman to respondent No. 3 by respondent No.1. The thrust of the arguments by the learned counsel for the petitioners was that in case, the mother loses her right of Hizanat on second marriage, the maternal grandmother i.e. Petitioner No.2 is the appropriate person to grant custody of the minor children. It was also contended that welfare of the minor is of prime consideration. There is no cavil with the proposition that while considering the question as to whom the custody of minor children of the estranged and/ or divorced parents be given, the welfare of the minors is of prime consideration. In this regard, case law relied by the learned counsel for respondent No.3 is instructive. In case reported as "Mrs. Seema Chaudhry and another vs. Ahsan Ashraf Sheikh and others" (**PLD 2003 SC 877**), where the divorced mother had contracted second marriage and had given birth to a child from the second marriage while the father had not married again, it was observed that welfare of the minors from the broken wedlock is of prime consideration. The august apex Court observed as follows:-

"Notwithstanding the right of the mother or father for the custody of male or female child under the personal law, the predominant consideration in determining the question of custody of minor is always the welfare of the minor. High Court in the present case had given cogent reasons for not giving the custody of minor to the mother who having contracted second marriage had also given birth to a child from her second husband. The mere consideration of love and affection of the mother with the child would be conducive to the welfare of the minor to give him in the custody of stepfather in the presence of real father who admittedly had not gone for second marriage. The father having sufficient sources of income was well off. He was living in a posh area and was capable of maintaining the minor in better manner and providing him proper education and thus he being real father of his minor and the natural guardian could not be deprived of the custody of his minor son of the age of more than 8 years on any other ground except the welfare of minor. The scanning of the facts pleaded by the parties would bring to the irresistible

conclusion that it would not be in the interest and welfare of the minor to allow to the mother to keep the child in her custody in the house of his stepfather.

Special feature of the case and the law on the subject would not suggest that welfare of minor would be in giving his custody to the mother and not to the father. Certainly the general rule that mother on contracting second marriage forfeits her rights of custody of child was not absolute and if the interest of child required that custody should be retained by the mother, the Court may, in the interest of the welfare of minor, allow the mother to retain the custody of minor but to determine the question of interest of minor, weight must be given to the circumstances to be considered for holding whether the welfare of minor would be in living with the mother or with the father. There was nothing on record to suggest that the minor in the present case was attached with the stepfather or that it was in the welfare of minor to live with stepfather in preference to the real father. It is always the duty of the Court to search out the welfare of the minor by considering the essential factors relating to his welfare and should not confine only to the consideration that the mother or father has more love and affection for the minor or that the minor is more associated with the mother or father. The primary consideration for determining the question of custody is always the welfare of the minor and there could not be an absolute rule and fixed criteria to determine the question of welfare in the same manner in each case rather it being a mixed question of law and fact is decided in the facts of each case and consequently the factors having only social importance or the desirability of the father or mother to retain the custody of minor, would not overwrite the consideration of welfare in determining the question of custody. The economic and social status of the father would suggest that it was in the welfare of the child that he should be brought up in the house of his father and welfare of the minor would demand to give him in the custody of father and consequently no exception could be taken to the view of the High Court that the welfare of the minor would not permit to allow the mother to retain his custody. The High Court had not committed any illegality in determining the question of welfare of minor and the impugned judgment being not suffering from any legal infirmity would not call for interference of Supreme Court. However, while keeping in view the fact that minor constantly remained in the custody of mother since the separation of his parents and was studying in a school in the different area Supreme Court directed that during summer and winter vacations in the school, the minor shall spend the Sunday holiday once a fortnight, his birthday and Eid-ul-Fitr with his mother. In addition to the above arrangement the minor may visit to the home of his mother and also spend the casual holidays with her with the consent of father. The mother and father may with mutual understanding and consent make a proper arrangement of the meeting of the child with the mother at her residence.

The father shall not disturb the studies of the minor or shift him from the school without taking the mother into confidence."

Similarly, in "Shabana Naz vs. Muhammad Saleem" (**2014 SCMR 343**), in the circumstances similar to the instant case, it was observed as follow:-

"It may be noted that in terms of section 7 of the Guardians and Wards Act, 1890 (the Act), the paramount consideration for the Court in making the order of appointment of guardian of minor is that it should be satisfied that it is for the welfare of minor. Although it is an established law that father is a natural guardian of his minor child/ children but indeed the Court has to be satisfied while appointing the father as a guardian that the welfare of minor lies in the fact that he be appointed as guardian and the custody of minor be delivered accordingly. There are many factors, which may not entitle the father to the custody of minor and some of the factors could be, where the father is habitually involved in crimes or is a drug or alcohol addict, maltreats his child/children, does not have a capacity or means to maintain and provide for the healthy bringing up of his child/ children or where the father deliberately omits and fails in meeting his obligation to maintain his child/children. The factors noted above are not exhaustive and they may also not be considered as conclusive for that each case has to be decided on its own merit in keeping with the only and only paramount consideration of welfare of minor....

Thus, it is apparent from reading of the two paras of the Muhammdan 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.

In "Mst. Ammara Waseem vs. Syed Khawar Hussain and another" (**2011 SCMR 148**), the Hon'ble Supreme Court followed the earlier judgment reported as **PLD 2003 SC 877** supra. In "Mst. Nazir vs. Hafiz Ghulam Mustafa, etc" (**1981 SCMR 200**), the august apex Court observed that the custody of minor daughter cannot be given to the mother who has contracted second marriage after divorce as it amounts to placing the minors in custody of mother's new husband. The Hon'ble Lahore High

Court in cases reported as (**2014 MLD 374**), (**2005 CLC 894**) and (**2003 CLC 1310**) followed the above mentioned view of the apex Court.

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. Learned counsel for the petitioners was unable to point out any misreading or non-reading of evidence on part of the appellate Court. Even otherwise, there is no illegality or jurisdictional error in the impugned judgment. Contentions on behalf of the learned counsel for the petitioners that Petitioner No. 2 is proper and necessary party where the mother i.e. Petitioner No.1 loses her right of Hizanat, is without substance inasmuch as where the father is capable of looking after the minors being their natural guardian, there is no justification or basis for handing over the custody of children to the maternal mother i.e. Petitioner No.2.

7. For the foregoing reasons, the instant petition is devoid of merits and is accordingly **dismissed**.

(AAMER FAROOQ)
JUDGE

Announced in Open Court on /10/2017.

JUDGE

M.Shah/.