

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, **ISLAMABAD**

WRIT PETITION NO.3378 OF 2019

RUQIYA KHATOON.

Vs.

MST. ZAKEEDA AND ANOTHER.

Petitioner by : Mr. Iftikhar Hussain Satti, Advocate.

Respondents by : Mr. Muzammil Hussain Shad, Advocate.

Date of hearing : 10.09.2020.

LUBNA SALEEM PERVEZ, J. Petitioner has invoked the constitutional jurisdiction of this Court by way of filing instant petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, with the following prayer:-

"It is, therefore, respectfully prayed that the instant writ petition may kindly be accepted and the impugned order dated 15.05.2019 passed by the Learned respondent No.2 may kindly be set-aside and the respondent No.1 (who is disable) be directed to come back with minor and reside at separate room specified for the respondent No.1 and minor at house of petitioner or otherwise she be directed to hand over the custody of minor to the petitioner because the future and education fo minor is being risked at the house of father of respondent no.1, the respondent No.1 will always be allowed to see and meet the minor whenever and wherever she wants.

Any other relief, which this Honourable Court deems just and proper, may also be granted."

2. Facts related to the present petition are that Respondent No.1 (who is deaf and dumb), is widow of late Muhammad Ismail, the real son of petitioner, who died on 10.02.2019, after almost 9 months from the death of petitioner's son on 02.10.2019, Respondent No.1 filed petition u/s 491 Cr.P.C. against petitioner and others on the grounds that family of her late husband Muhammad Ismail was very rude & harsh from very first day and after death of her husband, she was ousted from the house by snatching the minor daughter by present petitioner and other family members. Her Petition was allowed vide order dated 15.05.2019, by the

learned Additional District Judge and custody of minor daughter was handed over to the Respondent No.1 and petitioner were directed to approach the learned Guardian Judge for custody of the minor, if so advised. Now, the petitioner, the paternal grandmother of the minor has filed instant petition for setting aside order dated 15.05.2019, passed by the learned Additional District Judge allegedly stating therein that after the death of petitioner's son, Respondent No.1 on the instigation of her father tried to take the minor to her father's house but the petitioner restrained her due to the reason that the minor was studying in Unity School System at Alipur, Islamabad and there was apprehension of discontinuation of her studies. Respondent No.1 on instigation of her father filed a petition for custody of the minor u/s 491 Cr.P.C. which was accepted by the learned Additional Sessions Judge, Islamabad vide order dated 15.05.2019. However, Respondent No.1 after a long time came back to the house of petitioner and started residing in her separate room along with minor and the petitioner's family properly maintained them. But, once again on 16.09.2019, Respondent no.1 along with minor daughter shifted to her parents' house and did not come back. Hence, instant petition.

3. Learned counsel for the petitioner submitted that petitioner is paternal grandmother of the minor has nourished/ and took care of the minor since, her birth; that the petitioner is residing in a 7 Marlas house at Islamabad; that Respondent No.1 by removing the minor from Islamabad has risked the studies of minor; that Respondent No.1 is deaf and dumb and cannot properly take care of minor; that at the house of petitioner, the minor and Respondent No.1 were given separate room; that house of parents of Respondent No.2 is situated within hard rock mountains in Murree three kilometer from the cemented road which is a deprived area even from basic necessities of life and is not conducive for the

welfare of minor; that minor was admitted in Unity School System Alipur by petitioner, whereas, currently minor is not going to school; that father of Respondent No.1 has six daughters and two sons residing jointly, whereas, he does the work of constructing stone walls who off and on get work; that one brother of Respondent No.1 is also disabled and often caught beating the minor; that learned Additional District Court has failed to appreciate the real facts and apply his judicial mind while passing the impugned order dated 15.05.2019, which as such, is against the relevant law; that while living with Respondent no.1 at her parent's house, minor has been deprived from fundamental rights and healthy atmosphere and education which is against the welfare of minor. Learned counsel in support of his contentions placed reliance on the case law reported as *Shah Bano Vs. Station House Officer, P.S. Tandlianwala and another* (2007 PCrLJ 1928), *Mst. Nadia Perveen Vs. Mst. Almas Noreen and others* (PLD 2012 SC 758), *Mst.Laiba Sultan Vs. Muhammad Nawaz and others* (PLD 2018 SC 79), *Naziha Ali Mirza Vs. The State and another* (2001 SCMR 1782).

4. On the other hand, learned counsel for Respondent No.1 controverted the contentions of the learned counsel for petitioner and while supporting the impugned order passed by the learned Additional Judge, inter-alia, contended that the impugned order is well reasoned, just and proper and is in line with the relevant law; that the Respondent No.1 is real mother of the minor and no one else except mother can take care of the minor; that welfare of the minor as per law lies with the Respondent No.1. Learned counsel while referring the case law reported as *Asifa Babar Vs. Mumtaz Ali Khan 2 others* (2005 YLR 2414) and *Mst. Khalida Perveen Vs. Muhammad Sultan Mehmood and another* (PLJ 2004 SC 45) and prayed for dismissal of present petition.

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

6. Through the impugned order dated 15.05.2019, the learned Additional District Judge has granted custody of the minor girl child to minor's real mother / Respondent No.1 while deciding the petition u/s 491 Cr.P.C with the observation that the respondent (petitioner in the present case) may file application for obtaining custody of the minor.

7. The order dated 15.05.2019, which is impugned through instant petition has been passed in petitioner u/s 491 Cr.P.C. through which, for the time being, custody of the minor has been handed over to her real mother, holding that for custody of the minor the petitioner, if so desire, can approach the Guardian Judge under Sections 12 & 25 of the Guardians and Wards Act, 1890 by taking the same grounds as alleged through this petition.

8. Suffice to say that it is settled law that mother of a minor girl enjoys the right of "Hazarat" till attaining the age of puberty until and unless she is disqualified due to second marriage or otherwise. Except in absence of minor daughter's father and disqualification of the real mother, paternal grandparent of the minor have no right to custody of minor granddaughter. As far as the ground taken by the petitioner, that Respondent No.1 is deaf and dumb, is concerned it is admitted fact that minor daughter is living with her mother since, her birth and there is no denial to the fact that emotional attachment of the minor with her real parents/mother is natural which cannot be substituted by any other relation. Hence, there is no legal infirmity in the order passed by the learned Additional District Judge calling for interference by this Court.

9. Learned counsel for petitioner in his pleadings has contended that Respondent No.1 on the instigation of her father has left the house of the petitioner with the minor daughter, however, facts suggest otherwise as if the minor daughter was with the respondent, she did not have to proceed u/s 491 Cr.P.C for custody of her minor daughter. Moreover, the disability of mother does not disentitle her from the custody of her minor child. In the present case the father of minor/husband of Respondent No.1 has expired and according to para 352 of the Muhammadan Law the first right of custody of the minor child is with mother and as per para 353 ibid failing the mother the mother's mother has the preferential right of custody of the minor female child.

10. For the foregoing reasons, instant writ petition, being devoid of any merit, is hereby dismissed.

(LUBNA SALEEM PERVEZ)
JUDGE

ANNOUNCED IN OPEN COURT ON THIS 14 DAY OF SEPTEMBER, 2020.

JUDGE

Adnan/-