

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, **ISLAMABAD**

WRIT PETITION NO.3950 OF 2019

Rashid Hussain

Vs.

Additional District Judge, Islamabad (East), etc

Petitioner by : Mr. Adil Aziz Qazi, Advocate.

Respondents by : Mr. Sarfraz Ahmad Qureshi, Advocate.

Date of hearing : 27.02.2020.

LUBNA SALEEM PERVEZ, J. Through instant writ petition, petitioner has assailed judgment dated 15.10.2019 whereby the appeal filed by Respondent No. 2 was allowed and judgment and decree dated 03.09.2019, passed by the learned Guardian Judge to the extent of custody of the minors was set aside, whereas, schedule of visitation was maintained.

2. The brief facts of the case are that the petitioner through petition filed u/s 25 of the Guardians and Wards Act, 1890, (hereinafter referred to as the Act, 1890,) claimed custody of his minor children from the maternal grandfather of his children. Learned Trial Court allowed Petitioner's petition, vide judgment dated 03.09.2019, observing that maternal grandfather cannot be treated in comparison with the petitioner and that under section 19 of the Act, 1890, no one else except father (if not disqualified) can be appointed as guardian of the minors till the minority is terminated. The petitioner can better provide livelihood and make good future of the minors. However, the minors were allowed meeting with their maternal grandparents by devising the visitation schedule. Against judgment dated 03.09.2019, Respondent No. 2 filed appeal u/s 47 of the Act, 1890, which was allowed, vide order dated 15.10.2019, and judgment dated 03.09.2019, was set aside and keeping in view the welfare of minors the custody of minors was handed over to Respondent No. 2. The Petitioner/father of the minors being dissatisfied with the judgment filed

present petition praying for setting aside the impugned judgment dated 30.09.2019 and handing over custody of the minor children to him.

3. Learned counsel for the Petitioner argued that father is the natural guardian and unless disqualified has a right to have the custody of the children. Learned counsel submitted that petitioner can better take care of the welfare and wellbeing of his minor children as he has a good job in Saudi Arabia and can bear the expenses of the minor children. Learned counsel in support of his contentions relied on the case law reported as Surraya Bibi vs. Abdur Rashid (1980 CLC 785), Mst. Maryam Mai vs. Judge Family Court (2004 SCMR 1382), Mst. Sardaran vs. District Judge & others (2016 MLD 801) and Sitara Aslam vs. Family Judge and others (2018 CLC 382).

4. Conversely, learned counsel for Respondent No. 2 vehemently controverted the arguments of learned counsel for petitioner and submitted that the deceased Kosar Naseem was murdered by the family of the Petitioner/father who at the time of murder was in Saudi Arabia. The learned counsel referred the evidence, statement and cross-examination of the Petitioner/father during trial and submitted that the Respondent No.2 even during the life time of deceased Kosar Naseem was bearing expenses of the minor children. Learned counsel pointed out the admission of petitioner that he used to send money for expenses to his father and not directly to his wife. Learned counsel contended that family of the petitioner has also faced charges of murder of Kosar Naseem (deceased wife) vide FIR No. 171/2017. Learned counsel further contended that the Petitioner has to return to Saudi Arabia on account of his job and the minor children, if given custody, would be at the mercy of their paternal grandparents and family members of the Petitioner which were nominated in the murder of mother of the minor children. Apart from the above, learned counsel also submitted that the writ petition is not maintainable as the facts ascertained during the trial as well as appellate stage cannot be reappraised by invoking the Writ Jurisdiction and urged that the petitioner has failed to point out any legal infirmity in the impugned judgment dated 03.09.2019. Learned counsel relied on judgments re: Mst. Shahista Naz vs. Muhammad Naeem Ahmed (2004 SCMR 990), Mehmood Akhtar vs. District Judge, Attock &

others (2004 SCMR 1839), Mst. Rasheedan Bibi vs. Additional District Judge & others (2012 CLC 784) and Sohail Yousaf & others vs. Yasir Riaz & others (2019 YLR 1284).

5. Arguments for the learned counsel for the parties have been heard and the documents placed on record have also been perused with their able assistance.

6. In the present case the petitioner who is father of minors claims custody of his minor children being natural guardian u/s 25 of the Act, 1890, by placing reliance on certain case law in this regard. There is no second opinion about the fact and law that father is the natural guardian and responsible for upbringing of the children, therefore, he has preferential rights over the custody of the minor children. Parameters for the purposes of deciding the appointment of guardian are provided in Section 17 of the Act, 1890, according to which the prime importance has to be given to the welfare of the minors. Therefore, the courts have always considered the welfare of the minors being the essential factor for awarding guardianship. The use of the word “welfare” in sub-section (2) of section 17 of the Act, 1890, is of great significance as it encompasses all aspects concerning the wellbeing of the minor i.e. a child’s health, education, physical, mental, and psychological development. Keeping these considerations in mind, record and evidence of the trial proceedings have been examined which reveals that father of the minors / present petitioner resides and works in Saudi Arabia, whereas, mother of the children has died of incident of burning allegedly by the parents and family members of the petitioner. Moreover, the parents of deceased mother were financially supporting her and minor children during her life time and the children were emotionally attached to their maternal grandparents. The record further reveals that nowhere in the entire evidence, paternal grandparents of the minor uttered a single word for taking responsibility of the minor children.

7. Hence, after giving due consideration to the facts and circumstances of the case as well as the law, I am of the view that right of the father being natural guardian is not the sole criteria for deciding the matter relating to custody of the minor rather the sole criteria u/s 17 read with section 25 of

the Act, 1890, is the welfare of the minor. In this regard reliance is placed on the judgment of Hon'ble Supreme Court titled as Mehmood Akhtar vss District Judge, Attock and 2 others (2004 SCMR 1839). .

8. In view of the above I am of the considered view that the petitioner has failed to point out any perversity or illegality in the impugned judgment dated 15.10.2019, which, rather is well reasoned and in accordance with the principles laid down by the Apex Court thus calls for no interference. The writ petition is, therefore, dismissed accordingly with listed application.

(LUBNA SALEEM PERVEZ)
JUDGE

Junaid Usman