

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD,

JUDICIAL DEPARTMENT.

WRIT PETITION 4825 of 2010.

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Masroor Hussain

Versus.

Additional District Judge, Islamabad & 2 others.

Date of hearing: 09.02.2011.

Petitioner by: Ch. Afrasiab Khan, Advocate.

Respondent No.3 by: :Mr. Asad Abbas, Advocate.

MUHAMMAD ANWAR KHAN KASI. J: Brief

facts for disposal of this petition are that petitioner and respondent No.3 are spouses, married on 02.12.1999 and out of this wedlock, a son namely Mann Masroor was born on 01.11.2000. Thereafter family disputes arose and both the parties approached the Family Court.

2. The wife filed a suit for dissolution of marriage, recovery of dowry articles, maintenance allowance and custody of minor. The Family Court out of the pleadings of the parties framed five issues and after evidence and arguments decided the case vide judgment dated 23.07.2008, decreeing the suit of the plaintiff for the recovery of dowry articles by dismissing her suit for dissolution of marriage on the basis of cruelty. Suit for recovery of maintenance at



the rate of Rs.3000/-per month from January 2006 till she is legally debarred was also decreed. At the same time, her claim for the custody of minor was accepted and suit was decreed in her favour with the direction to the defendant / petitioner to hand over the custody of minor to the plaintiff / respondent No.3.

3. Both the parties challenged the judgment dated 23.07.2008 by filing separate appeals. The present petitioner challenged the judgment with regard to maintenance allowance, recovery of dowry articles and custody of minor, while the respondent No.3 prayed for the dissolution of marriage on the basis of cruelty through her appeal.

4. The learned appellate court consolidated the appeals and disposed of through a single judgment dated 12.03.2009. The appeal of the respondent No.3 for dissolution of marriage on the basis of cruelty was dismissed maintaining the order of learned Judge Family Court to the extent of dismissal of the suit on this issue, while appeal of the petitioner was partially accepted and maintenance at the rate of Rs.3000/-per month was reduced to that of Rs.2000/-per month. The judgment of the trial court regarding custody of minor and recovery of dowry articles was maintained.

5. The petitioner through this petition has now challenged both the judgments to the extent of findings adverse to the petitioner as being illegal and unconstitutional. The counsel for the petitioner stated that he had been condemned unheard as he was not given the right of cross-examination and the



custody of minor after the age of 7 years goes to father, while in the present case boy has attained the age of 10 years. Relying on 2007 SCMR 621, he submitted that under the constitutional jurisdiction the High Court can re-appraise and re-evaluate the entire evidence when findings are based on insufficient evidence, misreading of evidence and non-consideration of material evidence. The learned counsel in support of his contentions also relied upon case laws reported as; 1994 CLC 1216 Lahore, 1994 CLC 1242 Karachi, PLD 1988 Karachi 252, PLD 1988 Karachi 261, 1995 CLC 800 Lahore, 1995 CLC 813 Lahore, 1991 MLD 745 Lahore, 1991 MLD 756 Lahore.

6. Learned counsel appearing on behalf of respondent No.3 contested the petition on the ground that the disputed points of facts and evidence cannot be looked into under constitutional jurisdiction of Article 199. According to him, the courts below sifted the entire evidence and on the basis of available material passed the detailed judgment which cannot be interfered with at this stage. He further submitted that prime duty of the court is to safeguard the interest and welfare of the minor and in this regard age is of no consideration. He reiterated his arguments by stating that father in this case contracted a second marriage, and the child cannot be left at the mercy of step mother. It is further submitted that the respondent No.3 is highly educated and is earning a handsome amount i.e Rs.35,000/-per month through a project Job and, therefore, she is

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legally, morally and religiously entitled for the custody of minor. He relied upon a case reported in 2000 SCMR 838, where in it was held that right of father to claim the custody of minor son was not an absolute right and welfare of minor is always a paramount consideration. It was further held that father, on account of his conduct may disentitle himself for custody of child.

7. I have heard the arguments and perused the record with the assistance of learned counsels for the parties.

8. The very first objection of the petitioner is about closing of the right of cross-examination, but it is worth mentioning that the petitioner had challenged it through CP No.471/2008 before this court, which was dismissed on 18.06.2008 with the observation that if every order passed by learned Family Court is allowed to be challenged by way of writ petition, it may not only amount to abuse of constitutional jurisdiction, but also to defeat the purpose for which the Act was enacted therefore, now this ground cannot be re-agitated at this stage. There are concurrent findings on the issue of recovery of dowry articles and need no interference. The rate of the maintenance allowance has already been modified from Rs.3000/- per month to Rs.2000/- per month and in the circumstances of the present day, this petty amount cannot be again interfered with.

9. Now reverting to the custody of child, it is observed that the petitioner has entered into second

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marriage and the step mother by no stretch of imagination can be considered to be a sympathizer of step son. The minor can not be left at the mercy of a woman who is otherwise a stranger to the minor, while the father remains out of the home in connection with job. In any case, welfare of minor is supreme and his interests are to be taken care of in all the circumstances.

10. It is the duty of the courts to take care of minor's wellbeing and proper up-bringing. No doubt father has got a right over the custody of male child after seven years of age, but the fact remains that the conduct of father by remarrying and by not providing sufficient maintenance allowance to his real son disentitles him to the custody of minor. This view has been fortified by the judgment of Hon'ble Supreme Court referred earlier. The case laws cited by the learned counsel for the petitioner are not relevant, therefore, do not extend any support to him.

11. Keeping in view of the above, the petition being devoid of merits is dismissed with no order as to costs.

(MUHAMMAD ANWAR KHAN KASI)
JUDGE.

Amer Baig.

Announced in Open Court on 7. 3. /2011.

JUDGE

Blue slip added
Pl. issue
Judge
07.3.11
Issued
Dated 11-03-11.