

**2012 C L C 784**

**[Lahore]**

**Before Malik Shahzad Ahmad Khan, J**

**Mst. RASHEEDAN BIBI----Petitioner**

**versus**

**ADDITIONAL DISTRICT JUDGE and 2 others----Respondents**

Writ Petition No.26532 of 2010, decided on 9th December, 2011.

**(a) Guardians and Wards Act (VIII of 1890)---**

----Ss. 17 & 25---Custody of minors---Important factors requiring consideration by court---Scope---Mere entitlement of father as natural guardian of minors would not be sufficient to decide such question---Prime consideration while deciding custody of minors would be their welfare keeping in view character and capacity of their proposed guardian.

**(b) Guardians and Wards Act (VIII of 1890)----**

----Ss. 12, 17 & 25---Custody of minor son and daughter---Contest between minors' maternal grandmother and their father serving in Pakistan Rangers having second wife--Validity---While deciding question of custody of minors, prime consideration would be their welfare while keeping in view character and capacity of proposed guardian---Mere entitlement of father as natural guardian of minors would not be sufficient to decide such question---Minors had developed profound attachment with their grandmother as they were born in her house and had been living with her since death of their mother----

Father for serving in Pakistan Rangers had admitted to be visiting house with interval of 1-1/2 months---Minors in absence of father would be at mercy of step-mother, from whom good treatment towards them could not be expected---Lap of maternal grandmother for minors would be better than lap of step mother---Grandmother being of middle age was neither suffering from any ailment nor unable to look after minors properly---Father had filed guardian petition after coming to know about decree passed against him for recovery of maintenance of minors---Father had paid maintenance to minors after a considerable period and that too after issuance of warrants of his arrest in execution of such decree---Evidence on record showed that when one foot of minor son was to be operated, then father refused to pay his medical expenses on ground that there was no need for the same---Such earlier conduct of father would be a relevant factor for deciding question of custody and welfare of minors---Non-payment of maintenance to minors would be one of the factors requiring consideration while deciding question of welfare of minors---Father had not given reasonable justification for non-payment of maintenance to minors for a considerable long period---Non-payment of maintenance without any justification would be considered a valid ground to disentitle father from custody of minor children---Grandmother, if not having source of income, would not become disentitled to have custody of minor grand children as father was bound to maintain them wherever they might be living---Character and capacity of father in circumstances had disentitled him to have custody of minors---Maternal grandmother would be preferred over real father as interest of minors would be well saved in her custody---Father was refused custody of minors, but was allowed to have meeting with minors within court's premises on 1st Saturday of each month subject to furnishing surety bond and payment of Rs.500/- as traveling expenses for each meeting.

Bashir Ahmad v. Mst. Rehana 1978 SCMR 192; Mst. Saddam v. Muhammad Nawaz and another 1991 CLC 1238; Karim Bakhsh v. Muhammad Bakhsh 1997 CLC 316; Muhammad Iqbal v. Additional District Judge, Bhalwal and 2 others 2000 CLC 108; Sharifan Bibi v. Judge, Guardian Court, Daska and 3 others 2005 CLC 529; Mst. Jamila Bibi v. Shabbir Ahmad and 2 others 2006 CLC 207 and Mst. Rashida Bibi v. Muhammad Ismail 1981 SCMR 744 ref.

Bashir Ahmad v. Mst. Rehana 1978 SCMR 192; Karim Bakhsh v. Muhammad Bakhsh 1997 CLC 316; Zahoor Ahmad v. Mst. Rukhsana Kausar(?) and 4 others 2000 SCMR 707; Muhammad Iqbal v. Additional District Judge and 2 others 2000 CLC 1264; Muhammad Iqbal v. Additional District Judge, Bhalwal and 2 others 2000 CLC 108 and Mst. Saddam v. Muhammad Nawaz and another 1991 CLC 1238 rel.

**(c) Guardians and Wards Act (VIII of 1890)---**

---Ss. 17 & 25---Custody of minor children---Non-payment of maintenance to minors by father without reasonable justification---Effect---Such non-payment would be a valid ground to disentitle father from custody of minor children---Illustration.

Mst. Rashida Bibi v. Muhammad Ismail 1981 SCMR 744 ref.

Muhammad Iqbal v. Additional District Judge, Bhalwal and 2 others 2000 CLC 108 rel.

Mehr Khalid Meraj for Petitioner.

Chaudhry Masood Ahmad Zafar for Respondent No.3.

**ORDER**

**MALIK SHAHZAD AHMAD KHAN, J.**--- This writ petition has been filed against the order dated 19-4-2010, passed by learned Guardian Judge, Kasur, and against the judgment and decree dated 13-11-2010, passed by learned Additional District Judge, Kasur. Muhammad Ijaz (respondent No.3) moved an application under section 25 of the Guardians and Wards Act, 1890 for the custody of his minor children namely, Komal Bibi and Muhammad Zain Raza, before the learned Guardian Judge, Kasur. The said petition was accepted vide the above-mentioned order of the learned Guardian Judge, Kasur, whereas, appeal filed by the petitioner against the said order was dismissed by

the learned Additional District Judge, Kasur, vide impugned judgment and decree dated 13-11-2010.

2. As per brief facts emanated from the instant petition, the daughter of the petitioner namely, Mst. Kausar Bibi was married to Muhammad Ijaz (respondent No.3) on 23-8-2001 and from this wedlock, two children namely, Komal Bibi and Muhammad Zain Raza were born. Mst. Kausar Bibi unfortunately died on 15-1-2008. The above mentioned minors have been living with the petitioner, who is their maternal-grandmother. As per stance of the petitioner, after her daughter's death, respondent No.3 did not bother to maintain his children nor he paid even a single penny for their education and eventually the petitioner on 4-2-2008, filed a suit for recovery of maintenance allowance for the above mentioned minors. On coming to know regarding the filing of above mentioned suit, respondent No.3 also filed a Guardian Petition under section 25 of the Guardians and Wards Act, 1890 on 14-2-2008, which was contested by the petitioner by filing her written reply thereof.

3. In order to resolve the controversy between the parties, the learned Guardian Judge framed the following issues:---

### **ISSUES.**

(1) Whether the welfare of the minors Mst. Komal Bibi and Zain lies in custody of petitioner, father Muhammad Ijaz? OPD.

(2) Whether the petitioner has got no cause of action and locus standi to file this petition? OPR.

(3.) Relief.

After framing formal issues, the parties were directed by the learned trial court to produce their evidence in support of their respective claims.

Muhammad Ijaz (respondent No.3) himself appeared as A.W.1, and examined Muhammad Ali as A.W.2. He also produced documentary evidence in the shape of "Parchi" Pakistan Rangers Hospital, Lahore as Exh.A.1, entitlement certificate as Exh.A.2, school certificate of minors as Exh.A.3, photocopy of death of Kasur Bibi issued by Anmoul Hospital as Mark-A, report of Laboratory as Mark-B, photocopy of certificate Pakistan Rangers Lahore Mark-C, photocopy of Muslim Lab. test report as Mark-D, photocopy of Nikahnama as mark-E, photocopy of birth certificates of Komal Bibi as Mark-F, photocopy of birth certificates of Muhammad Zain as Mark- G.

In rebuttal thereto, the petitioner Rashidan Bibi appeared as R.W.1 and submitted documentary evidence i.e. school certificate of Komal Bibi as Exh.D.1, and school certificate of Muhammad Zain Raza as Exh.D.2.

The learned Guardian Judge, Kasur, after recording evidence and considering all the documents, accepted the Guardian Petition, filed by respondent No.3, vide impugned order dated 19-4-2010. The petitioner, being dissatisfied, filed an appeal against the said order but the same was also dismissed by the learned Additional District Judge, Kasur, vide impugned judgment and decree dated 13-11-2010.

4. The impugned order, as well as, impugned judgment and decree of the courts below have been impeached by the petitioner through the instant writ petition.

5. It is contended by the learned counsel for the petitioner that the minors have been living with the petitioner (maternal-grandmother) since their birth; that respondent No.3 (father of the minors) was a 'Ghardamad', who was also living in the house of the petitioner and because the minors have been living with the petitioner since their birth, therefore, they have developed profound attachment with their maternal- grandmother (the petitioner); that respondent No.3 has contracted a second marriage, and if custody of the minors is handed over to respondent No.3, then the minors will be left at the mercy of their step-mother; that it was admitted by respondent No.3 while appearing as A.W.1 that he was posted in Pakistan Rangers Headquarters, Lahore, and used to visit his home with the interval of about one and a half month; that in his absence, the

minors will be forced to live in the company of their step-mother, therefore, it will not be in the welfare of the minors to hand over their custody to respondent No.3; that it was established through evidence that neither respondent No.3 paid the expenses of the operation of his wife (deceased mother of the minors), nor he paid the maintenance allowance of the minors and warrants of arrest were issued against him in execution proceedings of decree for maintenance allowance, which shows that he has no interest in the minors and his conduct disentitles him to the custody of minors; that the impugned order, as well as, impugned judgment and decree may be set-aside and guardian petition filed by respondent No.3 may kindly be dismissed. In support of his above contentions, the learned counsel for the petitioner has placed reliance on the following case-law:---

(i) Bashir Ahmad v. Mst. Rehana (1978 SCMR 192);

(ii) Mst. Saddam v. Muhammad Nawaz and another (1991 CLC 1238 Lahore);

(iii) Karim Bakhsh v. Muhammad Bakhsh (1997 CLC 316 Lahore);

(iv) Muhammad Iqbal v. Additional District Judge, Bhalwal and 2 others (2000 CLC 108 Lahore);

(v) Sharifan Bibi v. Judge, Guardian Court, Daska and 3 others (2005 CLC 529 Lahore) and

(vi) Mst. Jamila Bibi v. Shabbir Ahmad and 2 others (2006 CLC 207 Lahore).

6. On the other hand, this petition has vehemently been opposed by the learned counsel appearing on behalf of respondent No.3, on the grounds that the petitioner is mother of five children, who are also living in the same house where the minors have been living; that it was established through evidence that the petitioner did not get the mother of the minors medically examined and this conduct disentitles her to the custody of minors; that there are concurrent findings of facts of the two courts-below in favour of

respondent No.3, which may not be disturbed in Constitutional jurisdiction; that the petitioner has no source of income and this fact is relevant for decision of the custody of minors; that mere non-payment of maintenance allowance for some period would not disentitle respondent No.3 from custody of the minors; that later on, maintenance allowance of the minors has been paid by respondent No.3. In support of his above contentions, the learned counsel for respondent No.3 has placed reliance on Mst. Rashida Bibi v. Muhammad Ismail (1981 SCMR 744).

7. Arguments heard and record perused.

8. The petitioner is real maternal-grandmother of minors namely, Komal Bibi and Muhammad Zain Raza, whereas, Muhammad Ijaz (respondent No.3) is their real father. The mother of minors Mst. Kausar Bibi had unfortunately died on 15-1-2008. Respondent No.3 claims that he is father and natural guardian of the minors, therefore, he is entitled to their custody. Mere this ground that respondent No.3 is real father of the minors, is not sufficient to decide the question of custody in his favour. Section 17 and 25 of the Guardians and Wards Act, 1890 provides that while deciding the issue of custody of minors, prime consideration is their welfare. Section 25 of the Act 'ibid' is reproduced hereunder:---

**"25. Title of guardian to custody of ward.---** (1) If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian."

Similarly, the other relevant provision to decide the question of custody of a minor is section 17 of the Act (supra), which reads as under:---

**"17. Matters to be considered by the Court in appointing guardian.---**(1) In appointing or declaring the guardian of the minor, the Court shall, subject to the

provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2). In considering what will be for the welfare of the minor the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

3. If the minor is old enough to form an intelligent preference, the Court may consider that preference."

It is, therefore, evident from the perusal of above mentioned provisions of law that prime consideration to decide the question of custody of a minor is his welfare. Welfare of the minor would overweigh against all other considerations. It is also manifest from bare reading of section 17(2) of the Act (ibid) that character and capacity of the proposed guardian is also an important factor to be considered while determining the welfare of a minor. As mentioned earlier, minors have been living with their maternal-grandmother since the death of their mother Mst. Kausar Bibi on 15-1-2008. Father of the minors namely, Muhammad Ijaz (respondent No.3) while appearing in the witness-box as AW.1 has admitted during his cross-examination that minor Muhammad Zain Raza had taken birth in the house of the petitioner. He has further admitted that after the death of their mother, both of the minors have been living with the petitioner. In the above circumstances, it is quite obvious that minors have developed profound attachment with the petitioner, because they are admittedly being brought up by her.

The father of minors, Muhammad Ijaz (respondent No.3) has admittedly contracted a second marriage. He has deposed during his cross-examination that he is posted at Pakistan Rangers Headquarters, Lahore. He has further admitted that at times he visits his house with the interval of one and a half month. It is evident from perusal of the said evidence that most of the time he is not available at his house and in his absences, minors will be at the mercy of their step-mother. Good treatment towards minors



cannot be expected from a step-mother. Lap of maternal-grandmother is better than the lap of step-mother.

The petitioner is a lady of middle age. Her age has been recorded as 45 years, when she appeared before the learned trial court as RW.1, on 29-1-2010. There is nothing on record that she has been suffering from any ailment or is unable to properly look after the minors. In view of the above stated facts, minor's welfare was not to live with their father, but their interest is well saved while in custody of their maternal- grandmother, who was there to look after them. Similar view was taken in number of other judgments passed by the Hon'ble Supreme Court of Pakistan, as well as, by different High Courts of the country, where maternal- grandmother was given preference over real father. Reference in this context is made to the cases of Bashir Ahmad v. Mst. Rehana (1978 SCMR 192), Karim Bakhsh v. Muhammad Bakhsh (1997 CLC 316 Lahore), Zahoor Ahmad v. Mst. Rukhsana Kausar and 4 others (2000 SCMR 707), and Muhammad Iqbal v. Additional District Judge and 2 others (2000 CLC 1264).

9. Another important factor for the decision of present petition is that admittedly minors were living with the petitioner after the death of their mother Mst. Kausar Bibi. Respondent No.3 himself mentioned in para-4 of his petition under section 25 of the Guardians and Wards Act, 1890 that minors had been living with the petitioner since 20-12-2007. The father of minors (respondent No.3) did not bother to provide maintenance allowance to his minor children and he did not pay a single penny for their education or livelihood and eventually the petitioner filed a suit for recovery of maintenance allowance of the minors on 4-2-2008. On coming to know about filing of the above mentioned suit, respondent No.3 filed a Guardian Petition for custody of minors on 14-2-2008. It appears that in order to avoid the payment of maintenance allowance of the minors, he had filed the said petition. The above mentioned suit for recovery of maintenance, allowance was decreed in favour of the minors but in spite of that respondent No.3 did not pay the maintenance allowance for a considerable long period and in this respect his warrants of arrest were also issued. Although respondent No.3, later on, had statedly paid the maintenance allowance, when his warrants of arrest were issued by the learned executing Court, but his earlier conduct is a relevant factor to

decide the issue of custody of minors and their welfare. It has also come on record in the statement of the petitioner while appearing as PW.1 that minor Zain Raza remained ill and she (the petitioner) had provided him the medical treatment. It has also come on record in her statement that one foot of the said minor was to be operated upon and when the petitioner demanded expenses of the operation from respondent No.3, he refused to pay the same on the ground that there was no need of it.

As discussed earlier, respondent No.3 has contracted a second marriage, he did not pay the maintenance allowance to his minor children for a considerable period, he even refused to pay the expenses of medical treatment/operation of his minor son Muhammad Zain Raza, thus, keeping in view his Character and Capacity, it will not be in the welfare of minors to hand them over in the custody of said respondent.

The learned counsel for respondent No.3 has argued that mere non-payment of maintenance allowance for some period would not disentitle respondent No.3 from custody of the minors. He has placed reliance on the case of Mst. Rashida Bibi v. Muhammad Ismail (1981 SCMR 744).

The facts of the case of "Mst. Rashida Bibi" (supra) are distinguishable from the facts of the present case. In the said case, it was held that mere non-payment of maintenance cannot be made a sole ground to disentitle the father from custody of his children, whereas, in the instant case, non-payment of maintenance allowance is not the sole ground, whereby respondent No.3 (father) has been held to be disentitled to the custody of minors. Non-payment of maintenance allowance is one of the factors, which has been considered while deciding the question of welfare of the minors. Respondent No.3 has not given any reasonable justification for non-payment of maintenance allowance to the minors for a considerable long period of time. In number of cases, non-payment of maintenance allowance without any justification was considered a valid ground to disentitle the father from the custody of his minor children. Reference in this respect may be made to the case of Muhammad Iqbal v. Additional District Judge, Bhalwal and 2 others (2000 CLC 108 Lahore).

10. The argument of the learned counsel for respondent No.3 that the petitioner has no source of income, therefore, she is not entitled to the custody of minors, is misconceived. The said ground by, itself, was not sufficient to deprive the maternal-grandmother (the petitioner) of her right of custody of her minor grand children. It is duty of the father to maintain his minor children, wherever they may be living. If maternal- grandmother of the minors has no source of income then it was for the father to provide maintenance for them. Similar view was taken by this Court in the case of Mst. Saddan v. Muhammad Nawaz and another (1991 CLC 1238 Lahore).

11. In view of the above discourse, the 'character' and 'capacity' of respondent No.3 disentitles him to the custody of minors. It will not be in the welfare of minors to hand over their custody to respondent No.3, therefore, this petition is allowed. Resultantly, the order dated 19-4-2010, passed by learned Guardian Judge, Kasur, and the judgment and decree dated 13-11-2010, passed by learned Additional District Judge, Kasur, are, hereby, set aside, and consequently the application filed by respondent No.3 under section 25 of the Guardians and Wards Act, 1890 for the custody of minors namely, Komal Bibi and Muhammad Zain Raza, is, hereby, dismissed. There will be no order as to costs.

12. However, before parting with this judgment, this Court feels expedient to make it clear that respondent No.3, father of minors, is entitled to have meeting with his minor children, therefore, it is directed that the petitioner will produce the above said minors on 1st Saturday of every month in the court of learned Guardian Judge, Kasur, and respondent No.3 will be entitled to meet the minors for two hours within the premises of said Court. Apart from this, respondent No.3 will execute a surety bond to the satisfaction of the learned Guardian Judge, Kasur and will also pay an amount of Rs.500/- for expenses of travelling for each meeting. It is further made clear that if respondent No.3 fails to pay the said amount or to meet with minors for three consecutive dates, he will loose his right of visitation.