

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:

MR. JUSTICE MAQBOOL BAQAR

MR. JUSTICE SAYYED MAZAHAR ALI AKBAR NAQVI

CIVIL PETITION NO.1665 OF 2020

(Against the judgment dated 27.02.2020 of the Islamabad High Court, Islamabad passed in Writ Petition No.3950 of 2019)

Rashid Hussain

...Petitioner(s)

VERSUS

Additional District Judge, Islamabad (East) and others

...Respondent(s)

For the Petitioner(s): Agha Muhammad Ali Khan, ASC a/w
Petitioner in person

For the Respondent(s): Syed Nayab Hassan Gardezi, ASC a/w
Respondents No.2 to 5 in person

Date of Hearing: 02.11.2021

JUDGMENT

SAYYED MAZAHAR ALI AKBAR NAQVI, J.- Through this petition under Article 185(3) of the Constitution of the Islamic Republic of Pakistan, 1973, the petitioner seeks leave to appeal against the judgment dated 27.02.2020 passed by the Islamabad High Court, Islamabad whereby Writ Petition No.3950/2019 filed by him was dismissed.

2. The brief facts of the case are that the petitioner is working abroad in Saudi Arabia as a Cab Driver and as such the instant petition was filed through his father on the basis of the power of attorney executed by him. The petitioner got married with one Mst. Kausar Naseem (since dead) and during their wedlock respondents No.3 to 5 were born. It is claimed by the petitioner that he was enjoying happy matrimonial life but unfortunately on 06.11.2015 his wife sustained burns in an accident and she was admitted in the hospital. On 19.08.2016 when the wife of the petitioner was still in the hospital, respondent No.2 took away the minor children of the petitioner and as such they are in the custody of respondent No.2 till filing of the instant petition. The tragic episode

of the matter is that wife of the petitioner passed away on 03.09.2016. The petitioner claimed that he made several attempts to get back the children but the efforts made by him proved futile. Hence the petitioner had no other option except to file petition under Section 25 of the Guardian and Wards Act, 1890 claiming custody of the minor children from the maternal grandfather on the basis of preferential right. The Family Court after recording of evidence accepted the petition vide judgment dated 03.09.2019 and declared that under Section 19 of the said Act, the father has preferential right to custody of minor children, however, the maternal grandparents were allowed to have meetings with the minors and in this regard a visitation schedule was chalked out. The judgment of the Family Court was assailed through appeal under Section 47 of the Guardian and Wards Act, 1890, before the Appellate Court, which was allowed vide judgment dated 15.10.2019 by setting aside the judgment of the Family Court dated 03.09.2019 whereas the visitation schedule was kept intact. The petitioner being dissatisfied with the judgment of the Appellate Court approached the High Court in its constitutional jurisdiction but it also met the same fate vide judgment dated 27.02.2020. The crux of the judgment passed by the High Court was that the petitioner resides and works in Saudi Arabia, whereas the wife of the petitioner had died on account of incident of burning and the allegation was made against in-laws, though it ended into their acquittal but still it is not appropriate to handover the custody to the petitioner or his parents which may impair personality flaws with minors. Further it was observed by the High Court that during the course of proceedings the parents of the petitioner never showed any inclination to take the responsibility of the minor children whereas the sole criterion to decide the petition under Section 17 read with Section 25 of the Guardian and Wards Act, 1890 is meant for "welfare of the minor", which is sine qua non of proceedings before the court of competent jurisdiction.

3. Learned counsel for the petitioner tried to persuade us on the ground that the petitioner being the natural guardian has preferential right to enjoy the custody of the minors and in the presence of the petitioner the custody of the minor children cannot be handed over to maternal grandfather. Contends that the petitioner

was residing abroad but now he has placed an affidavit on the record to take care of the minor children and that he would relinquish his stay in Saudi Arabia and will reside with the minor children in Pakistan. Further contends that the Family Court has passed the judgment in favour of the petitioner, however, the Appellate Court as well as the High Court had given contrary findings resulting into handing over of custody of the minor children to maternal grandfather against the law. Lastly, it has been contended that the petitioner has sound financial antecedents and as such he can bear the expenses of the minor children for their brought up. Thus prays for acceptance of the instant petition.

4. *On the other hand, the learned counsel appearing on behalf of the maternal grandfather has vehemently opposed the contentions raised by the learned counsel for the petitioner. The crux of the arguments advanced by the learned counsel for the respondents is that in ordinary circumstances there is no denial to this fact that the petitioner has the preferential right to retain the custody of the minor children but the purpose of the legislature qua Guardian and Wards Act is "welfare of the minor". He has referred the statement of the petitioner before the Court which was read before us in detail. Lastly, contended that the preferential right of handing over of the custody of the minors to the father is not absolute in nature especially when he has re-married and there is a daughter born out of the wedlock. At the end it is argued that this Court has ample powers to take a contrary view in the spirit of law.*

5. *We have heard the learned counsel for the parties and gone through the record.*

The framers of the law relating to Guardians and Wards Act, 1890 legislated it as a special enactment with an intent to secure the interest and welfare of the minors living within the jurisdiction while highlighting the degree of preference to establish guardianship. The sole criterion which depicts the intent of the legislature is nothing except welfare of the minors as grundnorm of the enactment. As a general principle the degree of preference is confined to relationship depending upon the order of preference due to closeness of blood relationship and other aspects which are essential in upbringing of the minors within four corners of law. Any deviation from the general principle, where the blood relationship

has to be departed, there should be very strong and compelling reasons to have a contrary view which includes upbringing, education, healthcare, congenial domestic atmosphere, physical and psychological advantages, sect, religion, character and capacity of the claimant to whom if it is assigned to take care of the minors. In short words, while ignoring/bypassing the general principle there must be very strong and exceptional circumstances which could be brought forth with reference to the intent of the legislature regarding the sole purpose of "welfare of minor". As in the instant case, the ordinary order of preference is under question, keeping in view the facts and circumstances wherein the petitioner being the real father of all the three minors, namely, Muhammad Haseeb Ullah, Iraj Noor and Muhammad Shahmir, all aged about 06 to 09 years, claiming guardianship on the basis of the preferential right, a detailed scrutiny of the aforesaid facts and circumstances are to be adjudged in the spirit of the law relating to guardianship. The background of the instant petition is that the petitioner entered into wedlock with the deceased mother of the minors. He was a cab driver in Saudi Arabia and all the three minor children were born out of the wedlock. On 06.11.2015, the wife of the petitioner was burnt; she remained hospitalized in a critical condition and subsequently died of the said injuries. In this regard, a case bearing FIR No.171 dated 24.6.2017 under Section 302/34 PPC was registered at Police Station Sihala, Islamabad against the parents of the petitioner with an allegation that petitioner's wife was intentionally burnt to death by the parents of the petitioner. The petitioner alleges that his wife was still in the hospital when his minor children were removed from the lawful custody and taken over by the maternal grandfather. The petitioner has not lodged any report in this regard to police though it is a criminal act, rather he preferred to file a petition under the Guardians and Wards Act, 1890. During the course of the proceedings before this Court, learned counsel for the respondents read before us the statement of the petitioner, Rashid Hussain (PW-1) recorded before the Family Court. The relevant portion of which reads as under:-

"میں گاڑی چلاتا ہوں۔ طائب سے جدہ۔ میں تقریباً چار سال سے زائد عرصے بعد پاکستان واپس آیا ہوں۔ یہ درست ہے کہ جب دعویٰ دائر ہوا تو میں پاکستان میں نہ تھا..... میری بیوی حافظ قرآن تھی اور دین کا علم باخوبی رکھتی تھی اور نماز و روزہ کی بھی پابند تھی۔ جس وقت میری بیوی کا قتل ہوا

ہے میں اُس وقت پاکستان میں موجود نہ تھا۔ دعوے کے اندر جو کچھ لکھا ہے وہ میں نے خود لکھا ہے۔ جب میری بیوی کو ہسپتال لے کر گئے تھے میں اُس وقت بھی سعودی عرب میں تھا۔ مجھے علم نہ ہے کہ میرے بچے کو کب سکول میں داخل ہوا تھا۔ از خود کہا کہ بچہ اپنے نانا کی حضانت میں تھا۔ ابھی مجھے معلوم نہ ہے کہ بچہ کس کلاس میں پڑھ رہا ہے کیونکہ بچہ انہی کی حضانت میں ہے۔ مسول علیہ نمبر 2 کی تاریخ پیدائش 01-02-2015 ہے۔ بیٹی بھی انہی کی حضانت میں ہے اور مجھے علم نہ ہے کہ وہ کونسی کلاس میں پڑھتی ہے۔ مجھے علم نہ ہے کہ مسول علیہ نمبر 2 سال 2013 سے مسول علیہ نمبر 1 کی حضانت میں ہے۔ جب سے نابغان مسول علیہ نمبر 01 کی حضانت میں ہیں میں نے کوئی خرچہ وغیرہ نہ دیا۔ مجھے علم نہ ہے کہ میرا بیٹا باشعور اور سمجھ دار ہے۔ یہ درست ہے کہ میں اپنے والدین کو سعودی عرب سے خرچہ وغیرہ بھیجتا تھا، میں نے اپنی بیوی کو سعودی عرب سے براہ راست کوئی خرچہ نہیں بھیجا....."

A bare perusal of the statement of the petitioner (PW-1) clearly reflects that the petitioner had not discharged his duties as father in any manner towards the minor children or his deceased wife. It appears that he was most reluctant to take care of his wife or minor children because they were under the patronage of maternal grandfather and he thought it an opportunity just to skip moral, legal or religious duty bestowed towards him. The provisions of Section 17 of the Guardians and Wards Act, 1890 expressly reflect consideration by the court for appointing guardian. It has been clearly mentioned that welfare of the minor is of paramount consideration with reference to so many other aspects narrated above. To evaluate the contents of the provisions of Section 17, it seems advantageous to reproduce the relevant provisions which read as under:-

"17. Matters to be considered by the Court in appointing guardian.- (1) In appointing or declaring the guardian of a 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."

The bare language of sub-section (2) of Section 17 reveals that for considering the welfare of the minor the Court has to keep in mind age, sex, and religion of the minor and the character and capacity of the proposed guardian and his nearness of kin to the minor. At the same time, the Court has to look at the wishes of a deceased parent, if any, and any existing or previous relations of the proposed guardian with the minor or his property. Sub-section (3) of Section 17 postulates that if the minor is old enough to form an intelligent preference, the Court may consider that preference. In the judgment reported as Khalid Mehmood Vs. Additional District Judge, Islamabad and 2 others (2011 CLC 889), it was held "In appointing the guardian of the minor paramount consideration for the court should be welfare of the minor. Court must see as to who was the most likely to contribute to the well being of the minor and who would be in better position to look after and take care of the minor". Similarly, in the judgment reported as Mst. Rasheedan Bibi Vs. Additional District Judge and 2 others (2012 CLC 784), it was held "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". Today, the minor children were present in the Court. They were brought before the Court under the orders and they were very well dressed up showing mature manners and they plainly refused to accompany their own father, rather they categorically stated to reside with the maternal grandparents. It is not a matter of surprise that their body language clearly demonstrated a sign of hatred towards him. It only happened because the father of the minor children has not performed his legal, moral and religious obligation in the manner as it is provided in an Islamic society. Though there is no denial of this fact that the petitioner has remarried and there is a daughter born out of the wedlock but this aspect cannot be considered as a valid ground to defeat the preferential right of the

father, rather it can have only persuasive value with respect to other aspects which compel deviation, if any, as per the dictates of justice and "welfare of the minor". Further, Articles 2 and 2A of the Constitution of the Islamic Republic of Pakistan, 1973 clearly envisage that Islamic social order has to be observed while leading life within the four corners of the law. In an Islamic culture, the father has been bestowed with so many responsibilities towards his children. Even the mother of the children can claim compensation of breast feeding from her husband which is well within the tenants of Islamic fiqh. Where this responsibility has been ignored, how a father while forgetting his obligations towards minor children and that too at a belated stage, can claim the guardianship on the basis of bald claims. As an abundance of caution, we have asked the maternal grandfather about his worth to which he stated that he is the owner of 19 acres of agricultural land which is sufficient to bear the expenses of the minor children and they are already enjoying reasonable living status in the custody of their maternal grandfather. Another aspect of this case is that the children are well aware of the fact that their mother died due to unnatural consequences which must be in the back of the mind of the children that it was their father who was involved in that episode. At this stage any adventure by this Court to dislodge the custody and handover the same to the father would be instrumental into impairment of the mental faculty of the minor children which could imprint negative impact on their personality in future and that would squarely be against the dictates of "welfare of the minor" which is an attire of Guardian and Wards Act, 1890.

6. *In view of the facts and circumstances narrated above, this petition is dismissed. However, the visitation schedule made by the Family Court for the grandparents shall be considered to be made for the petitioner and the same shall be followed.*

JUDGE

JUDGE

Islamabad, the
2nd of November, 2021
Approved for reporting
Waqas Naseer/*