

[Balochistan]

Before Mrs. Syeda Tahira Safdar and Zaheer-ud-Din Kakar, JJ

SALAM DIN---Petitioner

Versus

Mst. SAMEENA and 2 others---Respondents

Constitutional Petition No. 536 of 2016, decided on 18th December, 2017.

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

---Ss.17 & 25---Custody of minor---Application for custody of minor was filed by mother---Welfare of minor---Financial status of mother---Scope---Father contended that mother of the minors had not sufficient resources to look after the minors properly and both the courts below had wrongly granted custody of the minors to mother---Validity---Section 17 of the Guardians and Wards Act, 1890 stipulated that the right of custody of minor was not an absolute right, rather the same was always subject to the welfare of the minor---Record revealed that mother also filed an application for interim custody and during the proceedings the minors were produced before the Family Court where they stated that they loved their father and did not want to go to their mother because she was careless about them and used to beat them---Record also showed that during cross-examination of mother she admitted that after divorce she was living with her brothers and was dependant, having no independent source of income---High Court showed that mother was not able to look after the minors properly whereas Father was a Government Servant and was in a better position to look after the children who were getting education in a reputed school---High Court set aside impugned orders and judgments of the two courts below---Constitutional petition was accepted accordingly. [Paras. 6, 7, 8, 9 & 10 of the judgment]

Muhammad Usman Lasi for Petitioner.

Date of hearing: 30th November, 2017.

JUDGMENT

ZAHEER-UD-DIN KAKAR, J.---Through the instant petition, the petitioner has sought the following prayer:

"that this Hon'ble Court may be pleased to set aside the impugned judgment and decree

dated 08.02.2016 passed by the learned Family Judge, Hub and order dated 13th May, 2016 passed by the learned lower appellate Court of Additional District Judge, Lasbela at Hub and dismiss the guardian application of respondent in the best welfare of minors and dismiss the application under Section 25 of Guardians and Wards Act of respondent, accordingly in the interest of justice."

2. Precisely stated facts of the case are that respondent No.1 filed an application under Section 25 of the Guardians and Wards Act, 1890 before the Court of Family Judge, Hub. It is contended in the application that marriage between the spouses (applicant and respondent) was held on 10.09.2006. Out of wedlock, four children namely Maheen, Obaid Raza, Memoona and Laraib were born on 22.6.2007, 05.12.2008, 23.06.2010 and June 2011/2012, respectively. The relation between the parties remained cordial for a number of years, but after the birth of last baby Laraib in the year 2011/2012, the attitude of respondent (petitioner) towards the applicant (respondent) was humiliated and disgraced. On 15.01.2014, the respondent (petitioner) turned out the applicant (respondent) from the house with younger baby Laraib while the other three children remained with respondent (petitioner). Ultimately, the petitioner divorced the respondent on 15.08.2015. The application was contested by the petitioner (respondent) by filing rejoinder. The trial Court framed three issues and directed the parties to produce their evidence. After completion of evidence of both the parties and hearing the arguments, the trial Court accepted the application vide impugned judgment and decree dated 08.02.2016 and directed the petitioner (respondent) to handover the custody of minors Maheen, Obaid Raza and Memoona to the applicant and fixed the time of meeting of the respondent (petitioner) with the minors on 1st and 3rd Friday of each month from 9:00 a.m. to 12:00 noon, in the Court premises. Feeling aggrieved, the petitioner preferred Family Appeal No.02 of 2016 before the Court of Additional District Judge, Lasbela at Hub (the appellate Court) and after hearing the parties, the appellate Court dismissed the appeal vide order dated 13.05.2016, hence this petition.

3. Perusal of order sheet maintained for 06.06.2017 reflects that despite effecting service of notice on respondent No.2, she did not appear before the Court, therefore, she was proceeded against ex-parte.

4. Learned counsel for the petitioner contended that both the Courts below have failed to appreciate and discuss the evidence produced by the petitioner and passed judgment/order without considering the law and facts, as well as the paramount consideration of the ground for best welfare of the minors; that respondent No.1 was incompetent to maintain the minors, even otherwise, she is dependent on her brothers and unable to look after the children; that the petitioner is a Government servant and can maintain the minors properly, as the three minors have already been with the petitioner and living happily. Finally, prayed for setting aside of the both the judgment/order and decree passed by the Courts below and dismissed the Guardianship application of the respondent in the welfare of the minors.

5. We have heard learned counsel for the petitioner and have gone through the available record. For having true perception, we would like to reproduce Section 17 of the Guardians and Wards Act, 1890, which reads as under:

"S.17. Matter to be considered by the Court in appointing the guardian.

- (1) In appointing or declaring the guardian of a minor, the Court subject of 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 relation 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 of his property.
- (3) If the mirror is old enough to form an intelligent preference, the court may consider that preference.
- (4) -----
- (5) The Court shall not appoint or declare any person to be a guardian against his will.

6. A thorough perusal of above provision of law reveals that the right of custody of minor is not an absolute right, rather it is always subject to the welfare of the minor. The Court, in the light of law on the subject, facts and circumstances of each case considers the question of custody on the basis of welfare of minor and there can be no deviation from the settled principle of law that in the matter of custody of minor the paramount consideration is always the welfare of the minor. No doubt, general principle of Mohammadan Law is that a Muslim father being natural guardian of the minor has the right of custody of minor, if a male child exceeds the age of seven years and a female child attains puberty, but this rule is always subject to the welfare of minor which is the prime consideration and determination of question of custody or guardianship.

7. In the present case, we have carefully examined the record. It also reveals from the record that minors Maheen, Obaid Raza and Memoona are living with their father (petitioner). The petitioner admitted them in school and they are happy with him. The petitioner also placed on record school certificates. Further the petitioner is a Government Servant and have means to properly look after the minors. Perusal of the record reveals that the respondent (applicant) also filed an application for interim custody of the minors and during the proceedings on 09.09.2015 (page 172 of the petition), the minors Maheen, Obaid Raza and Memoona were produced before the trial Court where they stated that they love their father and do not want to go to their mother because she never cared about them and used to beat them. The said order also shows that the minors were reluctant to meet their mother and thereafter the trial Court

dismissed the application for interim custody.

8. Perusal of the record further reveals that during cross-examination in, reply to question Nos.1, 3, 4, 5, 6, 7 and 8, the respondent (applicant) admitted that:

(Underling provided by us for emphasis)

9. As mentioned in para supra that in the matter of custody of the minor, the paramount consideration is always the welfare of minors and as per section 25 of the Act, the Court should exercise its parental jurisdiction and should give due consideration to the fact as to the welfare of the minor(s). From statement of respondent No.1, it is crystal clear that she is not able to look after properly the minors because after divorce she is residing with her brothers and dependable on them exclusively, having no independent source of income. As far the petitioner is concerned admittedly, he is a Government Servant and is in a better position to look after his children, who are getting education in TCF Primary School, Hub.

10. In view of the above discussion, while accepting the instant petition, the impugned judgment and decree dated 08.02.2016 and order dated 13.05.2016 passed by the Courts below are set aside and the application under Section 25 of the Act, 1890 is dismissed. However, the respondent being mother has every right to meet the minors Maheen, Obaid Raza and Memoona, therefore, the meeting of the respondent (mother) with the minors is scheduled to take place on 1st and 3rd Sunday of each month from 10:00 a.m. to 4:00 p.m. at the place agreed between the parties.

MQ/4/Bal.

Petition allowed.