

[Balochistan (Quetta Bench)]

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

Mst. FAHMIDA BIBI---Petitioner

Versus

ABDUL BARI and another---Respondents

C. P. No. 926 of 2017, decided on 9th October, 2017.

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

---S. 25---Custody of minors---Principles---Guardian application by the mother with prayer to direct the father to take custody of the minors from her---Marriage between the spouses was dissolved---Guardian judge dismissed the application of mother---Mother contended that she had soleminised nikah and rukhsati was going to be taken place and she would not be in position to look after the minors properly---Held, that while determining the custody of female ward, the question of chastity to be jealously guarded if the mother of female daughter had contracted second marriage with stranger, she had lost her right of hizanat---Father being natural guardian of his minor/minors, Court had to be satisfied about welfare of minor/minors while appointing the father as guardian---Admittedly, the mother had contracted second marriage and it was not possible for her to take the custody of minors with her and father of the minors being in good financial position could easily look after the minors properly rather than the mother---Mother was entitled to the custody of her male child until he had completed the age of seven years and of her female child until she had attained puberty and the right continued though she was divorced by the father of child unless she remarried, in which case the custody belonged to the father---High Court observed that, in the present case, the male minor was about 13 years old and after Nikah with a stranger the mother would loose her right of hizanat to the extent of female minor---Order passed by the Family Copurt was set aside, constitutional pettion was allowed accordingly.

Mst. Nazir v. Hafiz Ghulam Mustafa and others 1981 SCMR 200; Shabana Naz v. Muhammad Saleem 2014 SCMR 343 and para 352 of the Muhammadan Law ref.

Abid Ali Panezai for Petitioner.

Iqbal Hassan Kasi for Respondent No.1.

Date of hearing: 30th august, 2017.

## JUDGMENT

**ZAHEER-UD-DIN KAKAR, J.**---Through this Constitutional petition, the petitioner (mother) assailed the order dated 26.4.2016 (the impugned order) passed by the Additional Family Judge, Quetta (the trial Court), whereby the application for passing a direction to the respondent (father) to take custody of the minors Ahmedullah and Bibi Mariam from the petitioner, was dismissed.

2. Precisely stated facts of the case are that the petitioner filed a suit for dissolution of marriage, recovery of dower amount/dowry articles along with past and future maintenance allowance of plaintiff @ of Rs.5000/- since last three years till Iddat period and an amount of Rs.10,000/- for each minor since last three years and onward till their majority with 20% enhancement of present bank prevailing rate, before the trial Court. The suit was contested by the respondent No.1, issues were framed and both the parties led evidence of their own wishes. Resultantly, the trial Court partly decreed the suit of the plaintiff/ petitioner and the marriage tie between the spouses was dissolved on the basis of Khula, vide judgment and decree dated 30.3.2015. The operative portion whereof reads as under:

"The plaintiff failed to establish her claim for recovery of dowry as well as the maintenance allowance. The plaintiff is entitled to get the monthly maintenance for each minor at the rate of Rs.8000/-, prior to three years filing this suit and onwards with 5% annual increase."

3. Feeling aggrieved, the petitioner filed au appeal before the Court of Additional District

Judge-III, Quetta (the appellate Court), which was dismissed vide judgment and decree dated 30.6.2015.

4. Thereafter, the petitioner filed Guardian Application No.2 of 2016 before Additional Family Judge, Quetta with the prayer to direct the respondent to take the custody of minors because after dissolution of marriage with respondent, she got engaged with Muhammad Saleem. The Nikah was solemnized, but Rukhsati process is pending till the custody of minors to the respondent being their real father. She prayed that the respondent, being the real father of the minors, be directed to take the custody of the minors. The respondent contested the application by filing rejoinder and after hearing the learned counsel for the parties, the trial Court vide impugned order, dismissed the application.

5. Learned counsel for the petitioner contended that after dissolution of marriage, the petitioner just to save her future engaged with one Muhammad Saleem and Nikah was also solemnized, but the Rukhsati process is pending till the custody of minors handing to the respondent being real father; that the petitioner belongs to a poor family and she is not in position to look after the minors properly, whereas the respondent being real father of the minors as well being in good financial position can look-after the minors properly; that the trial Court in hasty and slipshod manner passed the impugned order while dismissing the application of the petitioner, which is liable to be set aside and directions be issued to respondent to take the custody of minors.

6. On the other hand, learned counsel for respondent No.1 vehemently opposed the petition, defended the impugned order and stated that as per order of the trial Court, the petitioner is regularly paying the maintenance allowance of the minors.

7. We have heard learned counsel for the parties and have gone through the available record. Admittedly, out of wedlock, two children Ahmedullah and Bibi Mariam were born and presently Ahmedullah is aged about thirteen (13) years while Bibi Mariam is aged about eight (8) years. However, unfortunately, the spouses have separated their ways and now none of them intend to retain custody of the minors with them, with the stance that the petitioner has contracted second Nikah while the respondent's stance is that he has already three wives and 9/10 children.

8. According to various judgments pronounced by the Courts of law, it has been held that while determining the question of custody of a female ward, the question of chastity to be jealously guarded, in case, if the lady contracts second marriage with stranger, she loses her right of hizanat. Reference is made to the judgment reported in case of Mst. Nazir v. Hafiz Ghulam Mustafa etc. [1981 SCMR 200], wherein it has been held that:

"It is conceded before us that after the divorce, the petitioner has married another husband and is living with him. In these circumstances it is obvious that the custody of minor daughter of the petitioner from her previous wedlock with Hafiz Ghulam Mustafa cannot be given to her because in the very context hereinbefore mentioned, it will amount to placing the minor in the custody of new husband of the petitioner who does not fall within a prohibited degree to the ward"

9. The aforesaid principle has been further elaborated in the case of Shabana Naz v. Muhammad Saleem [2014 SCMR 343], wherein it has been held that:

"11. Para 352 of the Muhammadan Law provides the mother is entitled to the custody (Hizanat) of her male child until he has completed the age of 7 years and of her female child until she has attained puberty and the right continues though she is divorced by the father of his child unless she marries a second husband in which case the custody belongs to the father.

12. Para 354 provides for disqualification of female from custody of the minor, which includes the mother and one of the instance laid down is that if she marries a person not related to the child within the prohibited degree e.g. a stranger but the right revives on the dissolution of marriage by death or divorce.

13. Thus, it is apparent from reading of the two paras of the Muhammadan Law that though the mother is entitled to the custody (Hizanat) of her minor child but such right discontinues when she takes second husband, who is not related to the child within the prohibited degree and is a stranger in which case the custody of minor child belongs to the father. It has been construed by the Courts in Pakistan that this may not be an absolute rule but it may be departed from, if there are exceptional circumstances to justify such departure and in making of such departure the only fact, which the Court

has to see where the welfare of minor lies and there may be a situation where despite second marriage of the mother, the welfare of minor may still lie in her custody."

10. It is an established principle of law that father is a natural guardian of his minor child/children, but indeed the Court has to be satisfied while appointing the father as a guardian that the welfare of minor lies in fact that he be appointed as a guardian and the custody of minor be delivered accordingly. In the instant case, admittedly, the petitioner contracted second marriage and it is not possible for her to take the custody of minors with her and the respondent being real father of the minors as well as being, in good financial position i.e. owner of well known City Center, Quetta can easily look after the minors properly rather than the petitioner. Further, para-352 of the Muhammadan Law provides the mother is entitled to the custody (Hizanat) of her male child until he has completed the age of seven years and of her female child until she has attained puberty and the right continues though she is divorced by the father of his child unless she marries a second husband in which case the custody belongs to the father. In the instant case, this para fully attracted because admittedly, the minor Ahmedullah is about 13 years old and after Nikah with a stranger she loses her right of Hizanat to the extent of minor Bibi Marium.

11. In view of what has been discussed above, the petition is accepted and the impugned order dated 24.4.2016 passed by the Additional Family Judge, Quetta in Guardian Application No.2 of 2016 is set aside. The respondent, being real father and natural guardian of the minors Ahmedullah and Bibi Marium, is directed to take the custody of the minors, and to keep them as required.

MQ/155/Bal.

Petition accepted.