

Judgment Sheet
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

W.P. No.23024 of 2022

Mirza Waqar Ahmad etc.

Versus

Ayesha Zeeshan, etc.

J U D G M E N T

Date of Hearing	08.03.2023
For the petitioners	Barrister Javed Zahid Warraich with minors.
For Respondent No.1	Syed Muhammad Mehdi Shah, Advocate with respondent No.1 in person.

Raheel Kamran J:- The petitioners Mirza Waqar Ahmad, Zahida alias Zubaida Begum and Zishan Mirza are grandfather, grandmother and father respectively while respondent No.1 Ayesha Zeeshan is mother of four minors namely Abdur Rehman (son), Fatima Zeeshan (daughter), Wajeeha Zeeshan (daughter) and Abdur Raheem (son). Respondent No.1 filed an application for custody of the minors, which was dismissed by the learned Senior Civil Judge (Family Division), Gujrat vide order dated 02.11.2021. Respondent No.1 preferred an appeal, which was partly allowed to entrust her custody of the minor daughters, however, order of the trial court was maintained to the extent of custody of the minor sons vide judgment dated 26.03.2022 passed by the learned Additional District Judge, Gujrat impugned herein.

2. In the impugned judgement, the learned Additional District Judge recorded relevant findings in the following terms:

“16. In the instant matter, through their written reply, the respondents have not alleged that the appellant/petitioner has been

divorced by the respondent No.3. Even through affidavits Ex.R-1 and Ex.R-2, both DW-1 and DW-2 have not deposed about pronouncing of divorce by the respondent No.3 to the appellant/petitioner. Even during the cross-examination of the appellant/petitioner, the question has not been put to her that she has been divorced by the respondent No.3 on 29.08.2019 as depicted through photocopy of notice of divorce Mark-DC, whereas during her cross-examination, the appellant/petitioner/AW-1 has denied the suggestion about her separation from her husband at the occasion of estrangement of her relations with her husband two years before recording of her cross-examination dated 16.06.2021. Thus keeping in view available record, as the appellant/petitioner, who is mother of the minors has not contracted a second marriage as no oral or written proof thereto has been produced, therefore, without dilating upon the question of her alleged divorce, which has not to be resolved through this appeal, her right to custody (Hizanat) of the minors is to be determined.

17. As per record, there are four minor kids of the appellant/petitioner and respondent No.3, out of whom two are daughters and two are sons. According to the contention of the appellant/petitioner as taken up in para No.2 of the main petition, read with her documentary evidence Mark A to D, at present Mirza Abdul Rehman is aged about 14 years, two months and 24 days, Mirza Abdur Raheem is aged about six years and 8 months, Fatima Zeshan is aged about 12 years and 7 months and 13 days and Wajeeha Zeshan is aged about 9 years, 8 months and 8 days. Meaning thereby both the minor daughters have not yet attained the age of puberty, whereas one son is quite young and the other son is about to complete his seven years of age, thus, making the appellant/petitioner disentitled for the custody of her sons as keeping in view their ages, their welfare does not lie with their mother/appellant/petitioner as only male can properly look after them whereas the minor daughters at this age require the care and custody of their mother/ because no one can be a better guardian and custodian of a minor girl than the real mother and in such a situation as laid down in 2015 CLC 1260 [Lahore], financial status of the father does not give him any preference over the mother as father is sole responsible to cater the needs of his children irrespective of their place of residence or custody. In my view the needs of the minors include their lodging, boarding, food and education.

18. Moreover, in my view, as per stance of the respondents if the atmosphere of house of parents of the appellant/petitioner is not conducive or the same is too little to cater of a large family of parents of the appellant/petitioner, then the respondent No.3, who is father of the minors, having sound financial position, can manage a separate house for the minors girls under the custody of their mother of an acceptable atmosphere with all the facilities, but merely due to small house of parents of the appellant/petitioner, her legal right to the custody of her minor daughters cannot be denied to her.

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24. *As a result of above observations, this appeal to the extent of two minor daughters is partly accepted and to the extent of two minor sons is partly dismissed. The impugned order to the extent of two minor daughters is partly set-aside and to the extent of minor sons is partly maintained. The application for custody of minors to the extent of two minor daughters is partly accepted and to the extent of two minor sons is partly dismissed. The respondents are directed to hand over the custody of two minor daughters to the appellant/petitioner forthwith. The parties shall abide by the schedule of meeting chalked out by the learned trial Court vice versa.....”*

3. It has been argued by the learned counsel for the petitioners that all the four minors have been residing with the petitioners since the year 2017 hence they are emotionally attached with them; that the learned Appellate Court in the impugned judgment has ignored the wishes and willingness of the minor daughters; that the minors are being provided best facilities of education, religious teachings and other necessities of life and if the custody of minor daughters is handed over to respondent No.1 then they shall be deprived of the same; that separating the minor daughters from their sibling would cast a bad impact on their mental growth and thus, cause an irreparable loss to their personality, therefore, by setting aside the impugned judgment, custody of the minor daughters be also retained with the petitioners.

4. Conversely, learned counsel for respondent No.1 has supported the impugned judgment for the reasons stated therein.

5. Heard. Record perused.

6. Section 17 of the Guardian and Wards Act, 1890 requires the Court to consider welfare of the minor while appointing a guardian keeping in view the age, gender and religion of the minor. Undisputedly, the parties and the minors in the instant case are Muslims by faith. In Muhammadan Law, the mother is entitled to the custody (Hizanat) of her female children until they

attain puberty. In the case of Mst Shaista Naz v. Muhammad Nadeem Admed (2004 SCMR 990), the Supreme Court of Pakistan held that the right of Hizanat having the force of Injunction of Islam is an accepted principle of Islamic Law and a female, on account of re-marriage may be disqualified to exercise this right, but a mother on account of remarriage is not absolutely disqualified to be entrusted the custody of a minor child rather she may lose her preferential right of custody. In the instant case, the mother (i.e. respondent No.1) does not suffer from any legal disability that may deprive her of her legal right to have custody of her minor daughters. The minor daughters are in tender ages who require proper care and attention of their mother. The Supreme Court of Pakistan, while emphasizing the status of mothers in Islam and her entitlement to custody even with any physical disability, in the case of Mst. Beena vs. Raja Muhammad and others (PLD 2020 Supreme Court 508), held that:

“11. If a child is taken away from the mother, deprived of her love and the benefit of her upbringing the mother and the child’s relationship is fragmented.

12. Another of the principles provides that Muslims must be enabled to live their lives in accordance with the fundamental principles and basic concepts of Islam and to promote unity and the observance of the Islamic moral standards. The religion of Islam gives a high status to expectant ladies and mothers. When performing the Hajj and Umrah pilgrimages, Muslims run between the mounts of Safa and Marwah (Sa’ee) in the footsteps of the lady Haajar to emulate her when she desperately searched for water for her child, Ismail (peace be upon him). Haajar the esteemed mother is commemorated in perpetuity by incorporating her actions as an integral component in the performance of Hajj and Umrah of the Islamic Faith. A mother-child bond and a mother’s agony instituted a religious obligation, a rare if not the only example, in world religions. The mother of Islam’s progeny, lady Haajar is buried next to her son, the Prophet Ismail (peace be upon him), in the Hateem, the crescent shaped enclosure adjacent to one of the walls of the Holy Ka’ba, also known as Hijr Ismail, the shelter constructed by Prophet Ibrahim (peace be upon him) for his wife and child. Pilgrims from all over the world circumambulate the Holy Ka’ba, including the Hijr/Hateem.

13. The high status of motherhood is reflected in the naming of a chapter of the Holy Qu’ran after Maryam (Mary), peace be upon her, the only chapter named after a woman. Almighty Allah recalls her qualities and bestows on her a number of titles: a purified (tahharaki)

and chosen (istafagi) one, a sin (ayatan) of God, truthful (siddiqatun) and devoutly obedient (qanitina). The lady Maryam (peace be upon her) is mentioned 34 times in the Holy Qur'an. The mother of the Prophet Isa (peace be upon him) faced the pangs of childbirth alone. She, like the lady Haajar, overcame formidable odds to care for her child. These great ladies are acknowledged and incorporated into the Faith, enriching Islam's glorious tradition. It is for believers to ponder and reflect upon their lives, and to derive lessons from it. To be financially underprivileged, to be weighed down with a child, to give birth or to have a disability is not something to be derided. For a mother to bear the pain of childbirth, the greatest human natural pain, but then to have her child wrested away from her on the pretext that she is incapable of taking care of the child is insensitive in the extreme, and may also be characterized as hypocritical."

7. Petitioners No.1 & 2 are grandparents of the minors who have no preferential right to custody of the minors over and above the real mother of the minors (i.e. respondent No.1) particularly when she is not suffering from any disqualification in law. Therefore, their claim as to custody of the minors is worthy of little consideration.

8. Petitioner No.3 is father of the minors who is their natural guardian as well. However, law maintains a distinction between custody and guardianship and respective rights and obligations in that regard under the Guardian and Wards Act, 1890. The definition of 'guardian' in section 4(2) appears to include the concept of custody, unless the same has been exclusively awarded by the court to a party who is not the guardian of a minor. Custody under the Act involves a right to upbringing of a minor. On the other hand, guardianship entails the concept of taking care of the minor even in situations when the guardian does not have domain over the corpus of the child. A father is considered to be a natural guardian of a minor, since even after separation with the mother, and even when the mother has been granted custody of a minor, he is obligated to provide financial assistance to the minor. The liability to maintain the minor is not only religious and moral but legal. The right of custody of minor is subordinate to the fundamental principle i.e. welfare of the minor. Maintenance of child is the duty of father and the mother cannot be

deprived of custody due to her inability to maintain the child for lack of resources. Reliance in this regard is placed on the cases of Mst. Feroze Begum vs. Lt-Col. Muhammad Hussain (1983 SCMR 606), Munawar Bibi vs. Muhammad Amin (1995 SCMR 1206), Mst. Razia Bibi vs. Riaz Ahmad and another (2004 SCMR 821) and Mst. Beena vs. Raja Muhammad and others (PLD 2020 Supreme Court 508).

9. In the instant case, findings of the Appellate Court that father of the minors i.e. petitioner No.3 has contracted second marriage with a foreign national of Moroccan origin who is residing with her in Italy are not under challenge in any of the grounds taken in the titled petition. Although it has been verbally asserted before this Court by the learned counsel for the petitioners that father of the minors runs the business of property in Pakistan yet no proof of his any business or his income tax return has been produced in evidence. Quite contrary to the said assertion, affidavits of Mirza Waqar Ahmad (grandfather of the minors) Ex.R-1 and Mst. Zubeda Begum (grandmother of the minors) Ex.R-2 clearly show that their entire family is settled in Italy to earn their livelihood. It is thus clearly established that father of the minors is permanently residing in Italy whereas the minors are living with their grandparents in Pakistan and mother of the minors has yet not contracted second marriage. Undisputedly, father of the minors has better financial means and resources than their mother (i.e. respondent No.1) since he is settled in Italy, however, that is not the determining factor in law to adjudicate upon custody of the minors. It is noteworthy that father of the minors in this case did not personally appear in the witness box to oppose claim of respondent No.1 and to establish how entrustment of custody to him was indeed in the welfare of the minors. Mother of the minors, on the other hand, despite meagre resources available to her has been relentlessly pursuing her claim for the custody of the minors for a number of years. It has been aptly noted by the Appellate Court that the minor daughters in this case are at such

tender ages where they require the care and custody of their mother because no one can be a better custodian of a minor girl than the real mother. It is settled law that mother of the minor girls is entitled to their custody unless there is anything available on record to disentitle her. Reliance in this regard is placed on judgements in the cases of Mst. Tahira vs. Additional District Judge, Rawalpindi and others (1990 SCMR 852) and Mir Bat Khan vs. Mst. Shirin Bibi and others (2019 SCMR 520). The impugned judgment of the Appellate Court is, therefore, quite in accordance with the law.

10. Plea of the petitioners that all the four minors have been residing with the petitioners since long hence they are emotionally attached with them is not a valid and sufficient consideration to deny respondent No.1 of her entitlement to custody of the minor girls in their tender ages. Needless to add that such entrustment of custody does not place any restriction on the minor boys to meet their sisters frequently.

As regards plea of the petitioners that learned Appellate Court in the impugned judgment has ignored the wishes and willingness of the minor daughters, suffice it to observe that minor is not always the best judge of where his or her welfare lies, as held by the Supreme Court of Pakistan in the case of Mst. Aisha vs. Manzoor Hussain and others (PLD 1985 Supreme Court 436). Minor girls in the instant case are in their impressionable and tender ages, therefore, it would not be appropriate to attach much weight to their wishes in order to determine where their welfare in relation to their custody lies. Even otherwise, it is to be seen how confident in forming opinion and expressive they are without any influence. Undisputedly, the minors have been residing with the petitioners for quite some time and not with their mother. The minor girls are present in this Court. I asked the elder minor namely Fatima Zeeshan aged 14 years a few questions regarding last visit of her father to Pakistan, the date of his departure from Pakistan, her last overnight stay with her mother, her father's business in Pakistan,

however, she could not provide correct answers leaving behind the impression that she is not confident in forming opinion and expressive without any influence, therefore, her choice, if any, could not be attached much weight for decision on her custody.

The petitioners' plea that the minors are being provided best facilities of education, religious teachings and other necessities of life and if the custody of minor daughters is handed over to respondent No.1 then they shall be deprived of the same, is without merit. There is no substitute of the natural love, affection and care of the mother which the minor girls shall be missing if they are not entrusted in the custody of their mother. On the other hand the proposal in paragraph No.18 of the impugned judgment, reproduced herein above, provides a viable solution to facilitate congenial educational environment at the expense of their resourceful father who has legal, moral and religious obligation in that regard.

Finally, as regards plea that separating the minor daughters from their sibling would cast a bad impact on their mental growth and thus cause an irreparable loss to their personality, suffice it to observe that if the minor daughters are deprived of the love, affection and care of their real mother, the quantum of loss of their psychological and emotional development shall be phenomenally higher in comparison to limiting interaction with their brothers, which can be mitigated by frequent meetings inter se the minors.

11. It is, therefore, in the best interest and welfare of the minor daughters that their custody is handed over to their real mother forthwith. The impugned judgment of the Appellate Court does not suffer from any illegality or jurisdictional error, therefore, the same is unexceptionable in so far as custody of the minor girls is concerned. Furthermore, it is established that the minor boys are residing with their grandparents and not with their father, however, since respondent No.1 has not challenged the impugned judgment seeking custody of

her minor sons, therefore, I do not deem it appropriate to comment any further on that. As far as lack of financial resources with the mother are concerned, as observed supra it is obligation of the father to maintain his children and respondent No.1 may approach the learned Judge Family Court for maintenance of the minors to meet their expenses of schooling, lodging, etc. of the minors.

12. During the course of hearing of the titled writ petition on 29.09.2022, in the apprehension that the minors might be removed from Pakistan by the petitioners who admittedly have permanent resident visas of Italy, this Court ordered that the minors shall not be removed from the territorial jurisdiction of this Court and directed the petitioners to deposit their passports with the Deputy Registrar (Judicial) of this Court, which order was complied with on 01.10.2022. Subsequently, through Civil Misc. No.01 of 2023, the petitioners have prayed for permission to allow the minors to travel to Italy according to the proposed tickets to save their permanent resident visas from expiration in order to secure the ends of justice.

13. In the impugned judgment, custody of minor daughters has been awarded to respondent No.1 whereas custody of minor boys is to be retained by the father/petitioner No.3 with corresponding visitation rights. It has been held by the Supreme Court of Pakistan in the case of Muhammad Nadeem Qadir v. Additional District Judge, Lahore and others (2012 SCMR 609) that where children are removed to a place outside the jurisdiction of the Court by one parent, such conduct amounts to depriving the other parent of exercising his or her visiting rights. There is an imminent danger of removal of minors from the territorial limits of Pakistan inasmuch as petitioner No.3 is admittedly residing and working in Italy and the minors also have Italian residence visas. Removal of the minors from the territorial limits carries the risk of irreversibly compromising or destroying right of the mother to custody of the minor girls and visiting rights of the minor boys. In these facts and circumstances, the petitioners cannot be

allowed to remove the minors out of the territorial limits of Pakistan without leave of the Court, particularly when the same is opposed by their mother. For that purpose, names of the minors are also required to be placed in the Exit from Pakistan Control List maintained by the Government of Pakistan. Before this Court, mother of the minors i.e. respondent No.1 has opposed travel of the minors outside Pakistan. The Deputy Registrar (Judicial) of this Court shall send a copy of this judgment to the Secretary Ministry of Interior for placement of names of the minors in this case on the Exit Control List. Passports of the minor boys shall be returned to their father and those of the minor girls to their mother by the Deputy Registrar (Judicial) after placement of the minors' names in the Exit Control List. C.M.No.01 of 2023 is disposed of accordingly.

14. For the foregoing reasons, this writ petition is **dismissed** being devoid of any merit. The petitioners shall hand over the custody of the minor daughters peacefully within two weeks and in case they do not comply with the same, the Social Welfare Department, Government of the Punjab shall ensure that the minor girls are handed over to their mother through an officer of the Department.

(RAHEEL KAMRAN)
JUDGE

APPROVED FOR REPORTING

JUDGE