

Judgment Sheet
IN THE LAHORE HIGH COURT, LAHORE.
JUDICIAL DEPARTMENT

WP No.103773/2017

Sitara Aslam vs Family Judge etc.

JUDGMENT

Date of hearing	21.11.2017
Petitioner By	Mr. Zahid Manzoor Awan, Advocate.
Respondents By	Mr. Nazim Ali Awan, Advocate.

JAWAD HASSAN, J. Through this constitutional petition, the Petitioner has called in question judgment and decree dated 27.05.2017 passed by Senior Civil Judge (Guardian), Sialkot, whereby he allowed the petition of the Respondent No.3 and appeal preferred against the same by the Petitioner before the learned Additional District Judge, Sialkot was dismissed vide judgment and decree dated 13.10.2017. These concurrent findings of facts have been assailed through this constitutional petition.

2. Succinctly, the facts for the disposal of this constitutional petition are that Respondent No.3, filed an application for the custody of two minors, namely Muhammad Rehan and Muhammad Ramiz with the averments that the Nikah between the Petitioner and the Respondent No.3 was solemnized on 18.12.2007 according to the Muslim Rites. Out of this wedlock, the minors Muhammad Rehan and Muhammad Ramiz were born. Thereafter, separation took place inter-se the parties. Subsequently, the Petitioner contracted second

marriage with one Muhammad Amin alias Mithu. The learned Guardian Judge accepted the petition for the custody of the Respondent No.3 vide judgment and decree dated 27.05.2017. Feeling aggrieved, the Petitioner preferred an appeal before the learned Additional District Judge, Sialkot, who dismissed the same vide judgment and decree dated 13.10.2017. These concurrent findings of facts have been assailed through this constitutional petition.

3. The learned counsel for the Petitioner has argued that judgments passed by two courts below are result of misreading and non-reading of evidence. He has further argued that the Respondent No.3 is a careless father because he firstly filed application for custody of minors after lapse of 3 ½ years of separation, which was a counterblast to the suit for maintenance, which was decreed against the Respondent No.3. He has further argued that both the courts below have failed to appreciate the dictum laid down by the Apex Court that the welfare of minor lies with the mother. He has placed reliance upon **Mehmood Akhtar VS District Judge Attock and 2 others (2004 SCMR 1839)**, **Mst. Rabia Bibi vs Abdul Qadir and otherws (2016 CLC 1460)** and **Muhammad Ayub vs Mst. Nasim Begum and another (PLJ 1996 SC (AJK) 230)**. While relying upon the above said judgments the learned counsel for the Petitioner has argued and laid much emphasis that there is no substitute to real mother, the lap of mother was cradle of God, remarriage of the mother ipso facto would not disentitle her from retaining the custody of the minors and the poverty of mother was no ground to disentitle her from the custody of the minors and the Islamic law was subservient to the

welfare of the minor. Lastly, he prayed for acceptance of the writ petition and setting aside of the impugned judgments and decrees.

4. Conversely, the learned counsel for the Respondent No.3 has supported the impugned judgments and decrees by contending that both the courts below have correctly appreciated as well as evaluated the evidence on record in its true perspective, therefore, no exception can be taken to it in constitutional jurisdiction. He has further argued that the Respondent No.3 is entitled to get the custody of the minors because the Petitioner has contracted second marriage with one Muhammad Amin alias Mithu and she has failed to provide conducive atmosphere to the minors, who are living with their maternal mother and maternal father and not with the Petitioner, whereas the Respondent No.3 being natural guardian/father is entitled to get custody of the minors who will provide better maintenance to them. In support of his contentions, he has placed reliance upon **Ghulam Mustafa vs. Shamim Shamim Akhtar and 2 others** (2017 YLR Note 45) and **Shabana Naz vs Muhammad Saleem** (2014 SCMR 343). Lastly, he prayed for dismissal of the writ petition.

5. Arguments pro and contra have been heard and record perused.

6. It is reflected from perusal of record that in the matter of custody of minors, the paramount consideration is welfare of the minors and the courts have to adjudge that out of father and mother who is the best suited for the custody of minors. Under Muslim Personal Law, mother is entitled to the custody of daughter even after she has attained the age of puberty and until she is married, whereas the father can claim custody of his male child after seven years. The welfare of the minors is to be determined while keeping in view their

mental, intellectual, moral and spiritual wellbeing. The Guardian Court has also to look into qualification of parents, the age, gender, religion of minor, the character and capacity of the purposed guardian and his/her nearness of kin to the minor as provided under Section 17 of the Guardian and Wards Act, 1890 (the “Act”). The welfare of minor in all cases is to be prevailed as the supreme consideration for deciding the issue of her or his custody. It has come on record through cogent and confidence inspiring evidence that as a consequence of suit for maintenance, the maintenance was provided by Respondent No.3 during execution proceedings. Both the learned courts below have rightly appreciated the law as well as evidence that the Petitioner has contracted second marriage with one Muhammad Amin alias Mithu and out of the said wedlock one daughter has born. The petitioner’s second husband has also two children from his first wife, but the Respondent No.3 did not remarry for the sake of minors (as stated by him before the court in evidence). Regarding education of minors, the Petitioner has adduced in evidence the certificate of Ideal School System (Sehansra Goraya), but during cross-examination, she admitted that minors are getting their education while living at Kot Ghumman. It is evident that the RW-2 father of the Petitioner admitted in his cross-examination that at the time of second marriage of the Petitioner, the minors were getting their education from City Bright School, Mianapura, Sialkot, but no school leaving certificate was adduced during evidence by the Petitioner. All this reflects strong contradiction in evidence pertaining to the education of the minors. It has rightly been observed by both the learned Courts below that the Petitioner who is living with her second husband is blessed with a

daughter, who (husband) has liability of two other children from his first wife. So far as the Respondent No.3 is concerned, as per general Muslim rule father being natural guardian of minors has preferential right of custody of the minors especially in the circumstances when the minors are male and are above age of 07 years. In order to challenge this preferential right of the father, the mother was bound to establish some exceptional circumstances which could lead the court to come to a conclusion that the welfare of the minor lies with their mother.

7. On the other hand, the Respondent No.3 is a young man of about 34 years and is doing a job. Since filing of execution of decree of maintenance of the minors, the Respondent No.3 had paid all the maintenance allowance due against him. He by leaving his job as well not contracting second marriage has devoted his life for his children. The Respondent No.3 is living in city area in a joint family system with grand-parents of the minors, who can look-after the minors well. **Almost the same position** as in the present case has been discussed in judicial pronouncement titled **“SHABANA NAZ Versus MUHAMMAD SALEEM” (2014 S C M R 343)**, wherein it has been held as under:-

“4. It may be noted as admitted fact that after divorce with respondent No.1, the appellant contracted another marriage with Haji Syed Wali and changed her residence from Quetta to Rawalpindi, where she took with her the minor Najla Bugti. The respondent No.1 also got married by taking another wife from whom it is stated that he has three children. Inter alia the ground asserted in the application for appointing as a guardian

by respondent No.1 was that the appellant has married Haji Syed Wali, who is not related to the minor Najla Bugti and on this account she has lost the right of Hizanat of the minor.”

Muhamaddan Law in this respect very explicitly provides as under:-

“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.”

“14. In the present case nothing has been shown to us nor any fact cited, which may disentitle respondent No.1

from custody of his minor daughter Najla Bugti in the wake of the fact that the mother has contracted second marriage with a person, who admittedly is a total stranger to the minor and is not within a prohibited degree and no exceptional circumstances whatsoever have been argued before us, which may entitle the appellant to have custody of the minor Najla Bugti. In this regard reference is made to the case of Mst. Nazir v. Hafiz Ghulam Mustafa etc. (1981 SCMR 200)’’.

In the said scenario it has been held in **Mst.AMMARA WASEEM Versus Syed KHAWAR HUSSAIN etc** (2011 SCMR 148) as under:-

“Divorced mother of a minor, had contracted second marriage with a person residing in United States of America, and had left Pakistan, leaving the minor in Pakistan with his maternal parents, palpably, to join her second husband in USA and she had even maneuvered to obtain immigration visa for the minor seemingly for no purpose other than taking him away for his superintendence to a place far flung from the one of the father, for which, no plausible reason could be offered. Father had not remarried. Mother, who was on family way, from her second marriage, in circumstances, was not entitled to the custody of minor and the father of the minor was entitled to have the custody in the larger interest and welfare of the minor which was always predominating condition in such-like cases.”

In case titled **“KHALID MEHMOOD Versus ADDITIONAL DISTRICT JUDGE, ISLAMABAD etc”** (2011 C L C 889) [Islamabad] it has been held as under:-

“Appeal filed by the father of the minor against judgment of the Trial Court had been dismissed by the Appellate Court. Validity. Marriage between father and mother of the minor had been dissolved on the ground of Khula and

mother after dissolution of marriage had contracted second marriage, whereas father had not. Female minor aged 10 years was a 'special person' and also had kidney problem. Treatment of minor required huge expenses; and mother of minor neither herself nor her parents, were in a position to provide for medical expenses of the minor. Minor was in the custody of her father, who had been providing her all medical facilities. 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. In the present case, father had been providing special care to her minor daughter; and he was in a position to bear the expenses as well. Concern which the father had shown had proved that he loved his daughter and would definitely look after the minor in a much better way than the mother. Mother of the minor who had contracted second marriage with a stranger, would remain dependent upon her second husband, who could not provide maintenance and care to the minor. No reasons existed to disentitle the father for custody of the minor. Judgments of the two courts below were set aside and father, who was natural guardian of the minor, was declared as entitled to the custody of minor."

8. In view of the above facts and circumstances the courts below have rightly analyzed that the welfare of the minors no doubt lies in their custody with their father despite the fact that the children have opted to live with their mother but the courts as per settled proposition of law should act as a wise parent of the minors and in this case, the

welfare, coaching and education of the minors would be given preference over their own will and wish.

9. It is evident that the concurrent findings of facts have been passed against the Petitioner. It is settled proposition of law that this Court should not interfere with the findings of facts arrived at by the primary Courts when it is satisfied that the findings of both the learned Courts below are reasonable and were not arrived at by disregarding any of the provisions of law or any accepted principle concerning appreciation of evidence. Learned counsel for the Petitioner could not point out that the findings of fact recorded by both the learned Courts below, on the face of it, are against evidence or were patently improper or perverse that to accept it could amount to perpetuating a grave miscarriage of justice. The constitutional jurisdiction is ordinarily discretionary in character. There is no cavil to the proposition that notwithstanding the right of the mother or father for the custody of male or female child under the personal law, the predominant consideration in determining the question of custody of minor is always the welfare of the minor. After scanning the facts and evaluating the evidence of the parties and considering the established principle of law that welfare of minors is the paramount consideration for determining their custody, which outweighs against all other considerations, I hereby concur with the findings of two courts below that the Respondent No.3 has succeeded in establishing his claim for the custody of minors. However, to enable the minors to meet their mother, a visitation schedule is chalked out as under: -

(i) The Petitioner/mother shall leave both the minors at the residence of mother on every Saturday at 4.00 P.M and pick them on the next day (Sunday) at the same time.

(ii) The mother shall be entitled to have the minors for first half of every summer/winter/spring vacations.

(iii) The minors shall spend second day of both Eids with their mother.

10. The concurrent findings of fact recorded by both the learned Courts below cannot be interfered by this Court in view of the latest pronouncement of Hon'ble Supreme Court in case titled "**Waqar Haider Butt vs Judge Family Court and others**" (2009 SCMR **1243**). No infirmity or illegality has been pointed out in both the impugned judgments of the learned Courts below, which are in accordance with law and the same are hereby maintained.

In view of the above, the petition in hand is without any merits, the same is hereby dismissed.

(JAWAD HASSAN)
JUDGE

ZAHOOOR