2022 C L C 2022

[Balochistan]

Before Rozi Khan Barrech and Muhammad Aamir Nawaz Rana, JJ

FAROOQ AHMED and 2 others----Petitioners

Versus

MUHAMMAD AQIB JAVED and 2 others----Respondents

C.P. No.1149 of 2020, decided on 1st August, 2022.

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

----S.25---Custody of minors---Right of father vis-à-vis maternal grandmother---Scope---Maternal grandmother of minor assailed orders passed by courts below whereby minor's custody was granted to her real father/respondent---Validity---Mother of the minor had died and her natural guardian had sought custody of the minor which was allowed by the courts---Nothing was alleged against the respondent which could qualify or disentitle him from custody of the minor girl---Respondent was educated and did not suffer from any disqualification envisaged by law---Respondent, right from the inception was vigorously pursuing the remedies to obtain the custody of his daughter---Contention of petitioner that respondent had no feelings towards his daughter and he had deliberately left the daughter at the house of the petitioners after the death of his wife had no force---Constitutional petition was dismissed.

Nasir Raza v. Additional District Judge Jhelum 2018 SCMR 590 rel.

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

----S.17---Matters to be considered by the Court in appropriate guardian---Scope---While dealing with the question of custody of minor, the paramount consideration before the Court of law is the welfare of minor and the welfare of minor cannot be jeopardized on any other consideration.

(c) Family Courts Act (XXXV of 1964)---

----Preamble & S.17---Provisions of Evidence Act, 1872 and Code of Civil Procedure not to apply---Scope---Family Courts, which are creation of Family Courts Act, 1964, have to formulate their own procedure---Provisions of C.P.C. are not applied in the context---Legislature has intentionally kept the provisions of C.P.C. not applicable in the proceedings before the Family Court in order to expedite the proceedings and for early disposal of cases so that the litigants before the Family Court e.g. family members, husband or spouses should not suffer the agony of prolonged litigation.

Farzana Rasool v. Dr. Muhammad Bashir 2011 SCMR 1361 and Muhammad Tabish Naeem Khan v. Additional District Judge, Lahore 2014 SCMR 1365 rel.

Ahsan Rafiq Rana for Petitioners.

Date of hearing: 21st July, 2022.

ORDER

MUHAMMAD AAMIR NAWAZ RANA, J.---The petitioners have brought challenge against the order dated 19.04.2022 passed by Family Judge-IV, Quetta (hereinafter "the trial Court") (whereby the application for custody of minor girl was allowed in favour of respondent No. 1) and against the order dated 27.06.2022 passed by Additional District Judge-VII, Quetta (hereinafter "the appellate Court") in which the appeal so filed by the petitioners against the order dated 19.04.2022 passed by the trial Court was dismissed. The contest for custody of minor girl is between her real father and her maternal grandmother.

2. Necessary facts required to be considered are that respondent No.1 had filed an application under section 25 of the Guardians and Wards Act, 1890 (hereinafter "the Act") for custody of his minor girl namely Minsha Aqib daughter of Muhammad Aqib Javed. Record reveals that despite service of summons, the matter was protracted on lame excuses by the petitioners and having left with no other option, the trial Court was compelled to pass ex-parte order on 17.05.2021. Being aggrieved from the ex-parte order, the petitioners preferred appeal before the appellate Court which was allowed and matter was remanded to the trial Court vide order dated 24.06.2021 for deciding the same on merits.

On remand of the matter, the petitioners did not mend their behavior and again prolonged the matter on one pretext to another which is evident from the order sheets of the trial Court.

3. Eventually, again the application was allowed by the trial Court in favour of respondent No.1 in the light of available material and custody of the minor girl was directed to be handed over to his father (respondent No.1).

4. Learned counsel for the petitioners mainly contented that petitioner No.2 being the maternal grandmother of the minor girl is entitled for custody of minor as per Sharia and the trial Court as well as the appellate Court have committed gross error by allowing the application so filed by respondent No. 1.

Learned counsel for the petitioners further contended that the petitioners were condemned unheard and sufficient opportunity has not been granted to respondents Nos.1 and 2 for filing reply to the application. Ultimately, learned counsel for the petitioners argued that since the impugned orders have not been passed in accordance with law, therefore the same be set aside and custody of minor girl should be allowed to be remained with the petitioners.

Arguments heard. Record perused.

5. It is settled principle of law that Family Courts, which are creation of Family Courts Act, 1964, have to formulate their own procedure. The provisions of C.P.C. are not applied in this context. The legislature has intentionally kept the provisions of C.P.C. not applicable in the proceedings before the Family Courts in order to expedite the proceedings and for early disposal of cases so that the litigants before the Family Courts e.g. family members, husband or spouses should not suffer the agony of prolonged litigation. Reliance in this regard is being placed on judgment passed by Hon'ble Supreme Court titled as Farzana Rasool v. Dr. Muhammad Bashir[1], relevant portion whereof reads as under:

> "In presence of the Code, need was felt to have a forum for resolution of family disputes, wherein instead of cumbersome procedure, a short and simple methodology shall be provided for settlement and disposal of disputes relating to family matters. It was, therefore, that the Act was promulgated, which is a special Act for special cases in respect of special disputes between a special class of people i.e. husband and wife and children in case of their maintenance and custody.
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> The object was to have expeditious disposal of such matters in shortest possible time. The provisions of the Code and the Evidence Act were made inapplicable on the strength of section 17 of the Act. It is well known that under the Code, there is lengthy procedure for trial with so many bottlenecks, where civil disputes linger on between the parties for decades at the trial stage. Similarly, strict adherence to the rules of the Evidence Act, if followed, would also create so many hindrances in recording of the evidence and technical bars as to the admissibility and relevance of the evidence. It is, therefore, that even the provisions of the Evidence Act were made inapplicable to avoid technicalities.
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> So, if the provisions of the Code and the Evidence Act were made applicable, it would have frustrated the very object of the Act, which requires the Special Court shall be constituted and such Court shall have exclusive jurisdiction in respect of the matrimonial disputes. The object of the Act is to shorten the agony of litigant parties and to provide them justice as early as could be possible. Matters pertaining to the Family Court be of dissolution of marriage, restitution of conjugal rights, entitlement of a child or children or of wife to the maintenance, payment of dower, all such issues are required to be decided in speedy manner, because no such issue can be left undecided for decades; because a minor, seeking maintenance, may become major by the time his case is decided by the Family Court or a wife, seeking dissolution of marriage, may go out of marriageable age by the time she get decided her suit for dissolution of marriage."

Furthermore, while considering the conduct of the party in the same judgment, the Hon'ble Supreme Court has observed as follows:

> "34. Conduct of a party before a Court of law is always taken as relevant. The Court has to take exception to the conduct of a party like' in the case in hand. The respondent-husband voluntarily opted for the settlement of his family dispute through his nominated panel of Advocates being Arbitrators but latter objected to it. Such

conduct of the respondent-husband has to be condemned ".

6. In another case titled as Muhammad Tabish Naeem Khan v. Additional District Judge Lahore[2], the Hon'ble Supreme Court has held as follows:

> -----. We are not persuaded to hold, that the ex parte decree dated 4-7-2008 was void, for the reason that there is no provision in the West Pakistan Family Courts Act, 1964 to strike off the defence of the petitioner, when he failed to file the written statement, thus it (decree) should be ignored; suffice it to say that the Family Court is the quasi judicial forum, which can draw and follow its own procedure provided such procedure should not be against the principles of fair hearing and trial, thus if a defendant of a family matter, who is duly served; and especially the one who appears and disappears and also does not file his written statement within the time allowed to him by the Court, the Court shall have the inherent power and ample power to proceed ex parte against him, to strike off the defence and to pass an ex parte decree in line with the principles as are enunciated by the Civil Procedure Code. "
> (Emphasis Provided)

In view of the above citations, the conduct of the petitioners before the trial Court could not escape our intention, relevant order sheets maintained by the trial Court and in view of order dated 17.05.2021 (whereby initially ex-parte order against the petitioners was passed), it seems that deliberately the petitioners resorted to the policy of prolonging the matter without any justification to grind their own axe. In this regard the relevant portion of the order passed by the trial Court is reproduced herein below:

"4. After process, on 11.03.2021 Mr. Waheed ur Rehman, Advocate appeared for respondents Nos.01 to 03 thereafter the matter was fixed for filing rejoinder. On 19.03.2021 Mr. Haider Ali Jakhrani, Advocate filed power for respondent No.03, thereafter on 26.03.2021 rejoinder on behalf of the respondent No. 03 was filed. Therein the application is seriously resisted with assertion that the applicant himself left the minor with the maternal grandfather to save his skin from the special care of suckling baby. Now the present application is filed just to pressurize the respondents.

5. On 09.04.2021 Mr. Asadullah Baloch, Advocate submitted that the power on behalf of the respondents Nos.01 and 02 shall be filed. On 14.04.2021 none appeared for respondents. Rejoinder for respondents Nos.01 and 02 was not filed even opportunity was provided on 22.04.2021, 29.04.2021 and thereafter on 05.05.2021. On 29.04.2021 and on 05.05.2021 despite the repeated calls there was no representation at the part of respondents, therefore ex-parte proceedings were carried out vide order dated 05.05.2021.

6. After recording ex-parte evidence application was ex -parte decided vide order dated 17.05.2021.

7. Being aggrieved the respondents preferred an appeal before the court of Worthy ADJ-VII, Quetta who remanded the case vide order dated 24.06.2021 with direction to decide the matter on merits.

8. On 12.07.2021 application was re-registered Mr. Haider Jakhrani, Advocate entered

appearance for respondents Nos.01 to 03. Since the respondents Nos.01 and 02 despite the opportunity dated 09.08.2021, 13.08.2021 and 27. 08.2021 did not file reply, therefore their right to that extent was closed vide order dated 27.08.2021.

---The matter was adjourned for cross-examination over the applicant. Applicant was present on 17.12.2021, 22.12.2021, 03.02.2022 and 12.02.2022, but counsel for respondents did not appear to cross examine the applicant. Therefore their right to that extent was closed vide order dated 12.02.2022. The matter was adjourned for production of respondents evidence. On 19.02.2022 Mr. Haider Jakhrani, advocate for respondents appeared, evidence was not produced. Opportunity provided till 24.02.2022 and thereafter 03.03.2022. Evidence did not adduce, however, on 03.03.2022 an application for recalling of order dated 12.02.2022 was filed which was accepted on the same date and applicant was directed to appear for cross examination over his statement. On 10.03.2021 applicant again appeared but there was no representation from the side of respondents. In such circumstances, since the matter was already been delayed and there was strict directives by the Hon'ble Apex Court for quick disposal. The order dated 03.03.2022 was recalled, the matter was fixed on 17.03.2022 for evidence of respondents and thereafter their right for evidence was closed on 28.03.2022, as evidence was not produced. The matter adjourned till 06.04.2022 for final arguments".

7. The noted conduct of the petitioners before the trial Court is strongly disapproved as such like behavior not only distort the trust of the litigants upon due process of law but at the same time stigmatizes the whole process of dispensation of justice. Considering the relevant record, we are of the view that sufficient opportunities were afforded to the petitioners to contest the matter on merits but deliberately they floated the orders of trial Court and considering their conduct, they do not deserve any leniency at this stage.

8. Nevertheless, while considering the merits of the case, the mother of minor girl had died and now her natural guardian/real father sought custody of the minor which was allowed by the concurrent findings of the Courts below. It is by now settled principle of law that while dealing with the question of custody of minor, the paramount consideration before the Court of law is the welfare of minor and the welfare of minor cannot be jeopardized on any other consideration. In this regard section 17 of the ibid Act also highlights the importance of welfare of minor which is reproduced herein below for reference:

"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.

(4) [Repeal].

(5) The Court shall not appoint or declare any person to be a guardian against his will "

(Emphasis provided)

9. Considering the facts and circumstances and by perusing the available record and in view of the reply filed by respondent No.3 before the trial Court, we observe that absolutely nothing has been alleged against respondent No.1 which could disqualify or disentitle him from custody of the minor girl. It is admitted fact that respondent No.1 is educated and does not suffer from any disqualification envisaged by law. Furthermore, respondent No.1 right from inception is vigorously pursuing the remedies to obtain the custody of his daughter. In this regard he had filed habeas corpus application before the Additional Sessions Judges-II, Quetta and thereafter Constitution Petition No.1227/2020 was also filed but same was withdrawn in order to approach the relevant Family Court under the Guardians and Wards Act, therefore the contention of the petitioners that respondent No.1 has no feelings towards his daughter and he has deliberately left the daughter at the house of petitioners after the death of his wife has no force.

The paramount consideration has always been the welfare of minor so considering this aspect and in view of the conduct of the petitioners before the trial Court provided; absolutely no disqualification, was/is alleged against the respondent No.1, the petitioners have not been able to persuade us to interfere in the concurrent findings of the Courts below. In this regard, reliance is being placed upon the case titled as Nasir Raza v. Additional District Judge Jhelum[3]. Relevant portion whereof reads as under:

> "The petitioner, who is real father of the children, is ready and willing to look after the children and has the financial resources to fulfil their material needs and educational requirements. He has neither returned to his job abroad nor remarried keeping in view the welfare and best interest of his children. His mother, a younger sister of Respondent No.2, is also available in the house to help him look after and raise the children. Therefore, prima facie, the best interest and welfare of the minors lies in handing over their custody to the petitioner, the real father. There is nothing on record to suggest and it has not even been alleged that he is unfit, unable or unwilling to perform his duties as a guardian of his children. In our opinion, it would be unjust and unfair to deprive the children of the company, love and affection of their real father. Specially so, where the father does not suffer from any legal disability that may deprive him from his legal right to have custody of his children."

Considering the aforementioned judgment of the Hon'ble Supreme Court of Pakistan (in which contest was between real father and real maternal grandmother of the minor) and after thorough analysis of the material available on record, we find no merits in this petition. Same is dismissed in limine.

SA/125/Bal. Petition dismissed.