ORDER SHEET

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

C.P.No.S-111 of 2016.

DATE	ORDER WITH SIGNATURE OF JUDGE

1. For orders on office objection.
2. For katcha peshi.
3. For hearing of M.A-1089 of 2016.

Date of hearing 22.11.2016.
Date of Order: 29.11.2016

Mr. Ghulam Sarwar Qureshi, Advocate for petitioner, alongwith the petitioner.

Mr. Farhad Ali Abro, Advocate for respondent No.1, alongwith respondent No.1 and minor Baby Kashaf Gul.
Chaudhry Bashir Ahmed, A.A.G.
=

Salahuddin Panhwar, J.- Through instant petition, petitioner has impugned judgment/order dated 22.12.2015 and 30.10.2014, passed by learned IXth Additional District Judge, Hyderabad in Family Appeal No.14/2014 and learned Civil Judge / Family Judge-V, Hyderabad in Guardianship Application No.58/2011, respectively.

2. At the outset, learned counsel for the petitioner has contended that respondent, who is mother of minor Baby Kashaf Gul, has contracted marriage with one stranger hence under section 353 of Mohammadan Law she is disqualified and petitioner, who is father, being natural guardian is legally entitled for permanent custody of the said minor; minor girl with stranger is not safe, he has relied upon **2014 S C M R 343**. In contra, learned counsel for the respondent has contended that petitioner has also contracted marriage hence he is also disqualified for the custody of minor baby; the petitioner despite orders of the trial Court as well appellate Court deliberately had not taken the custody of the minor for a single day during last six years and now he is stranger for minor.

3. Heard the respective sides and have *carefully* examined the record.

4. The *sole* ground, *inter alia* , argued by petitioner, can well be shaped as following *proposition:*

> *"Whether a father shall earn a right of custody of child only on count of marriage by ex-wife (mother of child) or yet question of* welfare of minor *shall prevail?*

5. The above *proposition* was already answered and it has been held that it is the *welfare of the minor* which shall prevail even a claim, based on *blood-relation* alone shall not be sufficient to absolve the Courts from satisfying itself to examine question of *welfare of minor.* This is so because it is the Court which is ultimate *guardian* of minor hence shall not act *blindly* merely in name of ***'degree of relationship'*** because it is now settled principle that while deciding such like matters it would not be the name of *'relationship'* alone but the honour and respect of the obligations, arising out of such *relationship.* Without going into much details, the legal position shall stand *clear* from referral to relevant portion of the case of *Shabana Naz v. Muhammad Saleem* 2014 SCMR 353, relied by petitioner *himself* wherein the honourable Apex Court while discussing the Para-352 and 354 of Muhammad Law held as:

> *"23.* 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 father. **I**t has been constructed 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 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."**

From above, conclusion, the answer to the *drawn* proposition would be nothing but a **"NO".**

6. In the same case *(supra),* the Honourable Apex Court also explained some of *prima facie* grounds which can well be reasons for departure from the said *"Rules"* yet insisting that if any other *circumstance* tilting the scale in favour of some body else contesting for custody of minor on ground of *welfare of minor* then again departure from *'Rules',* based on practice, can well be departed. The relevant para thereof *(supra case)* is referred hereunder:

> "8. It may be noted that in terms of section 7 of the Guardians and Wards Act, 1890 (the Act), the paramount consideration for the Court in making the order of appointment of guardian of minor is that it should be satisfied that it is for the welfare of minor. Although it is an established 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 the fact that he be appointed as a guardian and the custody of minor be delivered accordingly. There are many factors, which may not entitle the father to the custody of minor and some of the factors could be, where the father is *habitually involved in crimes or is a drug or alcohol addict, maltreats his child / children, does not have a capacity or means to maintain and provide for the healthy bringing up of his child / children or where the father deliberately omits and fails in meeting his obligation to maintain his child / children. The factors noted above are not exhaustive and they may also not be considered* **as conclusive** *for that each case has to be decided on its own merits in keeping with the* **only and only paramount consideration of welfare of minor."**

7. Having been clear of the *legal position* that the mere act of marriage by mother alone shall not be sufficient to hand over the custody to the *father* , now I shall revert to examine whether the lower court committed any error in holding the petitioner disentitles for custody of minor or otherwise? Which could be the *only* ground to interfere in the orders of lower court in such like matter. For this, it would be conducive to refer the points No.1 and 2 (answered by the learned appellate Court in negative), which are that;

*"**POINT No.1&2.***

1. Before discussing legal and factual controversy in this appeal I would feel it appropriate to reproduce cross-examination of the appellant recorded in the suit for maintenance which is as under:-

> *"The minor daughter born in Hyderabad Memon Hospital. It is a fact that since year 2008 she left my house and residing in Nawabshah. The plaintiff left my house in June, 2008. It is a fact that I did not pay any maintenance to plaintiff during her stay in Nawabshah.* **It is a fact that I did not pay any maintenance of minor daughter.** *It is a fact that brothery faisla I produced as Ex.20, and bears no signature or either party. It is a fact that I did not lodge any FIR of offence that brother of plaintiff fought with me and robbed golden chain. Vol: says that I went to P.S but matter was referred to Union Council for brother faisla. It is incorrect to suggest that I have shop as commission agent at Subzadi Mandi Hali road. Vol: says that shop is of my father. It is a fact that name of shop is Pehlwan Ikramuddin Fruit and Vegetable Commission Agent. It is a fact that I used to help my father.* **It is a fact that I received my pocket money as Rupees Fifty One Hundred per day.** *It is a fact that in my counter affidavit on application U/s 17 A in Para No.1 deposed that I can earn 8000/- Eight thousand per month which is my pocket money.* **It is a fact that my father manages our family affairs and requirements"**

2. Another Cross Examination recorded in the present case of the appellants as under:

> *"It is correct that opponent filed family suit No.22/2010 against me in the court of civil and family Judge-II Nawabshah.* **Minor is in custody of opponent since 2008.** *I earn Rs.10,000/- to Rs.11,000/- per month from joint business with my father. It is correct that I showed my monthly income Rs.8,000/- per month in my evidence recorded in Family suit at Nawabshah. I used to pay Rs.2000/- of maintenance of my minor in the Court of Nawabshah as per order of court.* **It is correct that I handed over the custody of minor to opponent as over faisla made by UC Nazim on 04.02.2010.** *It is correct that in such faisla I voluntarily* **with draw from the custody of my minor and opponent with draw from claim of maintenance of minor**.

3. Very amazingly the allegation leveled I the application of contracting second marriage by the opponent with one stranger has not been deposed by the appellant in his entire evidence. The grand argued that appellant has apprehension that minor would be sexually used has not been deposed by the appellant. **He only deposed about his marriage, divorce and return of dowry articles, except a single reason that it was mutually divided that opponent would not claim any maintenance and he would not claim custody he deposed nothing for the purpose of relief claimed this case.**

4. Now question arises if really it was decided between the parties that lady will not claim maintenance and he will not claim any right over the minor, it would be a good agreement. The answer is "No". It is

> *his duty to provide maintenance to the minor no matter where she is residing. Very astonishingly he was contended if maintenance is not claimed the he would not meet the minor.* The appellant's love for his own daughter felt *by him only when* suit for maintenance is filed otherwise he was **satisfied not to see the minor since her birth till suit for maintenance is filed**.
>
> *5. the appellant has admitted that he has* **not paid any maintenance to the minor in another case** *and in the present case also only when suit for maintenance was filed he filed case for custody of minor as a counter blast, as it appears.*
>
> *(Emphases supplied)*

8. From above reproduction, it is quite obvious that the present petitioner *himself* voluntarily agreed to part from right of custody merely for reason to avoid payment of *maintenance* to minor child; he voluntarily never bothered to show his *intention* to see the minor child till the time suit for maintenance was filed; he attempted to pain his *financial* position too poor to pay maintenance, therefore, the learned lower court concluded the findings on said issues:-

> *"8. The welfare of minor is paramount consideration in deciding such issue. In the present case the opponent has brought up the minor with whom she must be having maximum attachment. The word is with the opponent her birth since her. The appellant has not proved any such fact which could disentitle the opponent from custody of minor. To deprive the opponent from the custody of minor, will not be in the welfare of minor. "*

9. A father who goes on to waive his right to *see* his own child only against some *rupee* ; A father never showed *his* face to the child to have an *attachment* or *least* an acquaintance for the child to know his / her *father* ; A father who paints himself dependant on *pocket money* only to avoid or *least* contest claim of maintenance of his *own* child then, I am unable to understand, how can he claim custody of the child *merely* while referring to Rule 354 of Muhammadan Law which *otherwise* stood held to be not *conclusive* but a **'rule of practice'**. The orders of lower court since *otherwise* appear to have properly appreciated the question of 'welfare of minor' hence same are not open to any exception. However, to avoid any prejudice to minor, as apprehended by petitioner though never established, the custody of the minor is hereby

handed over to 'maternal grand other. Pursuant to order dated 21.11.2016, respondent No.1 has brought her mother / maternal grandmother of minor baby Kashaf Gul with her, and she is ready to receive the custody and look after minor '….. Who *otherwise,* per Rule 353 of Muhammadan Law is entitled for custody of *female* child on failure of *mother* of child and has been listed at *top. Further it is matter of record that trial court fixed three thousand rupees maintenance of minor whereas same was reduced by the appellate court from 3000 to 2000, rupees, in present circumstance when admittedly father has business in fruit market, and amount fixed by both courts is inadequate, hence same is increased from two thousand to six thousand per month, petitioner shall deposit Rs 6000 per month in trial court, with rider that in case respondents mother for any reason, discontinues education of minor amount fixed by trial court would be restored . Grandmother of minor shall submit proof of school fees, every month before trial Court. Needless to add that trial court shall not get impression that increase of 3000 is only School fees.*

Accordingly, the instant petition is disposed of.

JUDGE