

IN THE HIGH COURT OF SINDH AT KARACHI

C.P No. S-1257 of 2016

Date of hearing : 23.05.2018.

For Petitioner : Mr. Manzoor Ahmed, Advocate alongwith petitioner & minor daughter.

Respondent : Mr. Adnan Ahmed, Advocate for the respondent alongwith respondent.

J U D G M E N T

Kausar Sultana Hussain, J. :- The petition has been filed against the Judgment dated 24.04.2016, passed by the learned IVth Additional District and Sessions Judge Central, Karachi whereby, Family Appeal No.43 of 2014 filed by the appellant/respondent against the dismissal order dated 22.04.2014 passed by the learned IInd Family Judge, Karachi Central, in G&W Application No.1878 of 2010 (Javed Mahmood V/s Mst. Sanobar) was dismissed in terms of modification of schedule (a) of the meeting of minor baby with her father/respondent while remaining schedule of their meeting from serial no.(b) to (g) remains intact.

2. Necessary facts for disposal of this Constitution Petition are that the petitioner/respondent Mst. Sanobar and respondent/appellant Javed Muhammad got married at Karachi on 19.10.2007 and from their wedlock one female child Shiza was born on 25.01.2010 at Karachi. During matrimonial life, due to differences between the parties related with same alleged past and post marriage objectionable activities of the petitioner/respondent their relatives became estranged and in the month of May 2010, the petitioner/respondent left the house of respondent/appellant

alongwith minor baby in the absence of the respondent/appellant. At the time of leaving respondent's house the petitioner/respondent allegedly had taken away valuable articles of respondent up to Rs.15,20,000/- from his house and later on she obtained khula from the respondent/appellant through Family Court No.II, Karachi (Central). The respondent/appellant in his Guardian and Ward case bearing No.1878/2016 has prayed for handing over custody of minor baby Shiza to him.

3. The petitioner/respondent in her written statement submitted in reply to the contents of Guardian and Ward case of the respondent/appellant, wherein she had denied all allegations imposed by the respondent/appellant upon her, and in counter claim she stated that she got rented house due to inhuman and cruel behavior of respondent/appellant as well as his sister in law (Bhabi) and incurred amount of more than 200,000/- for purchasing house hold articles and renovation of house. She further stated in her written statement that the respondent/appellant turned her out from his house after beating and kept her jewelry from her parents side with him worth Rs.400,000/- for which she had filed a separate suit. She prayed for dismissal of respondent's case of custody of her minor baby with exemplary cost.

4. Parties led their respective evidence in the suit Guardian and Ward case and finally the learned IInd Family Judge Karachi Central on application of the respondent Jawaid Muhammad passed following Order dated 22.04.2014:-

“In view of what has been discussed above, the above Guardian & Ward case of the Applicant is dismissed with no order as to costs. However, the applicant being the

father has right of visitation. Therefore, the following schedule is set forth:-

- a. The Respondent is directed to handover the interim custody of the minor to her father/applicant on each and every Friday at 05.00 p.m. The Applicant is directed to return back the custody of minor to her mother/respondent on each and every Sunday at 08.00 p.m.
- b. The Respondent is further directed to handover interim custody of the minor to the Applicant on 02nd day of both Eids, Eid-ul-Azha and Eid-ul-Fitr at 05.00 p.m while the Applicant to return back the custody of the minor to the Respondent on 3rd day of both Eids, Eid-ul-Azha and Eid-ul-Fitr at 05.00 p.m.
- c. The Respondent is further directed to handover interim custody of the minor to the Applicant on birthday from 04.00 p.m to 07.00 p.m.
- d. The Respondent is also directed to hand over interim custody of the minor to the Applicant during vacation for one month preferably last 30 days of the vacation and 1st three days of the winter vacations.
- e. The above schedule of the meeting can be changed/varied at the request of either party or otherwise by this Court in the light of circumstances in future.
- f. Both parties are directed not to remove the custody of the minor out of Karachi without permission of the Court.
- g. Both the parties are also directed to comply the above schedule of meeting. In case of failure, the meeting order will be complied by the S.H.O where the minor resides."

5. On dismissal of Guardian & Ward Application under section 25 of Guardian and Ward Act 1908, the respondent/appellant has approached to the learned appellate Court No. IV Additional District Judge Karachi Central, who after hearing both the sides, dismissed

appeal of the respondent/appellant in terms of modification of schedule (a) of the meeting of respondent & minor baby Shiza as under while the remaining schedule of meeting mentioned at serial (b) to (g) remained intact:-.....

“the meeting is accordingly scheduled on fortnightly basis on every first and last Saturday of each month from 10.00 a.m to 12.00 Noon in the Court premises of the learned trial Court and fare charges of Rs.1,000/- whereof shall be borne by the Respondent”

6. Being aggrieved with the meeting schedule, the petitioner/respondent has assailed the said Judgment before this Court and prayed that the schedule of meeting set forth in Judgment dated 22.04.2014 may be set aside/changed and the meeting may be arranged in the Court only during Court hours.

7. While going through the meeting schedule as set forth by the learned trial Court in its Judgment and modified schedule (a) by the learned IVth ADJ Central, Karachi to the extent of routine meeting on fortnight basis, I found that modified schedule of fortnight meetings of minor baby with her father/respondent from 10:00 am to 12:00 noon in Court does not require any interference, however the appellant has some reservations on schedule set forth for the special days of Eid-ul-Fitr and Eid-ul-Azha for handing over the custody of baby Shiza to her father/respondent for overnight. The appellant also has some reservations on handing over interim custody of the minor to her father/respondent during summer vacations as well as winter vacations. Per order of learned trial Court during summer vacation father/respondent would be entitled to keep the custody of minor baby for last 30 days and in winter vacation for 1st 3 days. Regarding birthday, the learned trial Court decided that on the day of relevant occasion of birthday the petitioner will hand over the custody of

minor at 04:00 p.m till 07:00 p.m. Now the question arises that whether handing over minor's custody for a month time to such a father with whom she does not reside for whole year, is good for welfare of the minor without keeping in mind her convenience and mutual antipathy/bitterness between the parties/parents. Similarly number, time and duration of periodic meetings must be mentioned and reasonable not affecting the minor. In my view the visitation rights for over nights should be granted in exceptional cases because shuttling of minors from one parent to other may environmentally mal-adjust them which materially impacts the mental health and education of the minors. Section 17 of the G&W Act, 1890 provides guidelines and principles for deciding guardian cases and fixation of visitation schedule in the welfare of the minor and in order to achieve this paramount consideration as under:

- a. Age.
- b. Sex.
- c. Religion of minor.
- d. Character and capacity of the proposed guardian.
- e. Nearness of kin to the minor.
- f. Wishes of the deceased parent.
- g. Any existing or previous relations of the proposed guardian with the minor or his/her property.
- h. If the minor is old enough to form intelligent preference, that preference has to be considered.

8. It is noticed by this Court that the respondent/father after leaving his house by the petitioner/respondent was not paying the maintenance of the minor, due to that reason the petitioner/respondent had to file a Suit No.690/2011 for recovery of maintenance allowance for her minor baby. The said suit was contested by the respondent/father and ultimately it was decreed in favor of the minor baby in the year 2014, in spite that the

respondent/father was avoiding to pay her maintenance, therefore, the petitioner/mother had to file execution proceedings for making compliance of Courts order by the Respondents/father. Surprisingly, the respondents/father again did not pay her maintenance, therefore, the learned family Judge had to issue show cause notice and warrants of arrest against Respondent/father and attachment of his half of salary. After receiving said attachment order in December, 2017 the respondent/father approached to the executing Court, where he made request for installments of arrear of past maintenance at minimum rate of Rs. 5000/- per month and Rs. 15,000/- per month for future maintenance. However, the learned family Judge by taking lenient view allowed him to deposit 30% of total amount within a month and pay current maintenance alongwith Rs. 10,000/- on account of arrears vide order dated 25.05.2018. In such compelling circumstances, the Respondent/father recently had made compliance of order of the Family Court dated 25.05.2018 by depositing 30% amount of Rs. 352,514/- in the office of Nazir of District Court, Central Karachi on 30.07.2018 out of total arrears of Rs. 925,042/-. The attitude of the respondent/father towards payment of the monthly maintenance of the minor who has never been at any fault after more than seven years long fight, shows his affection to the minor baby. In deciding guardian cases which are sensitive in nature an arduous and cautious duty falls upon a guardian Judge to keep in view the paramount consideration i.e. the welfare of the minor, and that is why it is a rationale behind the fact that jurisdiction to entertain applications under guardian and wards act 1890 in view of section 9 of the Act vests with district Judge or under section 4-A of the Act is ordinarily delegated to the Senior Civil Judge of the District.

In instant case, the learned trial Court without considering paramount consideration of welfare of minor, principle consideration of law and rationale, allowed shuttling of the minor from one parent to other for which the learned trial Court did not consider her convenience, education, her emotional attachment with her mother. I, therefore; modify the schedule (b) of meeting of the respondent with the minor on special occasions of Eid-ul-Fitr and Eid-ul-Azha by reducing the time and overnight stay as set-forth by the learned Trial Court, by issuing directions to the petitioner to hand over the custody of minor to respondent on both special occasions on 2nd day of Eid at 1200 noon to 6 p.m, schedule (d) of handing over custody of minor for last 30 days of Summer Vacations is also modified to the extent that the petitioner will handover minor's custody to the Respondent/father on every Sunday at 11:00 am to 07:00 pm so that the minor conveniently spend Summer vacations with her both parents. Likewise, during winter vacations of 10 days, the petitioner is directed to handover the custody of minor on every alternate day of the vacation or the parties may decide as per their own convenience because it is a short term vacation; therefor, convenience of minor coupled with the convenience of parents is necessary; however, the parties are directed that if they opt the second option of meeting in winter vacation they should settle it rationally by keeping in mind the convenience of minor first and in case of their failure to decide convenient time of meeting in Winter vacation they should opt first option of meeting i.e. every alternate day. Since, the learned trial Court has already provided chance to the parties as mentioned in schedule (e) that schedule of the meeting can be changed/varied at the request of either party or otherwise by the trial Court in the light of circumstances in future therefore, both the parties are directed that in future till the marriage of the minor

they should avail that opportunity first. The schedule (f) and (g) will remain intact. Case laws relied upon by, the learned counsel for the respondent are distinguishable with the facts of present case.

9. With the above mentioned modifications, the orders of the learned both Courts below are hereby upheld. Constitution Petition in hand is hereby disposed of accordingly.

J U D G E

M. Khan.