

## IN THE HIGH COURT OF SINDH AT KARACHI

### *C.P. No.S-669 of 2019*

Dates of hearing: : 29.9.2021 & 05.10.2021

Date of Judgment : 29.10.2021

Petitioner Mohammad Hassan Zaman : through Mr. Farhanullah Hassan Minhas, Advocate a/w Petitioner

Respondent No.1, Mst.Bilquees : through Mr.Syed Saeed Hassan Zaidi, Advocate alongwith respondent No.1.

### JUDGMENT

**Muhammad Saleem Jessar, J.-** Through this Constitutional Petition petitioner, Mohammad Hassan Zaman son of Mohammad Zaman has challenged Judgment dated 27.02.2019 passed by Xth Additional District Judge, Karachi East, whereby he dismissed Family Appeal No.113 of 2018 filed by the petitioner and upheld Order dated 04.07.2018 passed by learned XXX-Family Judge Karachi East, whereby she dismissed G&W Application No.997 of 2016 filed by the petitioner for handing over custody of two minor babies namely, Iraj Hassan and Hiba Hassan to him.

Precisely, the facts giving rise to the filing of instant Constitutional Petition are that the petitioner was married to late Nazia Fayyaz, daughter of respondent No.1, at Karachi on 20.04.2010. Out of this wedlock two female children namely, Iraj Hassan and Hiba Hassan were born on 09.02.2011 and 05.08.2013 respectively. On 28.09.2014 wife of petitioner namely, Nazia Hassan committed suicide and both minors were sent by the petitioner alongwith the dead body of their mother from Rawalpindi to the house of respondent at Karachi. According to petitioner, after funeral ceremony, the petitioner requested respondent No.1 to

send back both minors to their home but respondent refused to do so. Thereafter, the petitioner filed a Habeas Corpus Petition bearing no. 97/2015 before 6<sup>th</sup> Additional District Judge, Karachi East for production of minors and for handing over their custody to him; however, the Court directed the parties to approach concerned Guardian and Wards Court for custody of minors. In the circumstances, the petitioner filed a petition under Section 25 of Guardian & Wards Act before respondent No.3, as after the death of minors' real mother, petitioner being the natural guardian of minors, was entitled to their custody. It is further asserted by the petitioner that he is working in Dr. A.Q. Khan Laboratory at Kahouta, Rawalpindi as a helper therefore is financially very sound to take care of his children and on the contrary the respondent is very cruel who had brainwashed the minors against the petitioner, although he is their real father, so also their natural guardian. According to him, the respondent has deprived the children from fatherly love and affection of the petitioner. He, therefore, prayed for a direction to handover physical custody of the children to the petitioner permanently and also for arranging meeting of the kids with him during the pendency of G & W Application.

After service of notices, respondent No.1 filed her reply/written statement on 02-10-2017, wherein she denied all the allegations levelled by the petitioner, excepting the factum of marriage of the petitioner with her late daughter Nazia Fayyaz and birth of minor daughters on 09.02.2011 and on 05.04.2013 respectively from that wedlock. She prayed for dismissal of instant petition.

After framing of issues, recording of evidence and hearing learned counsel for the parties, learned trial Court dismissed application under Section 25 of the Guardian and Wards Act filed by the petitioner vide Order dated 04.07.2018. The said order was assailed by the petitioner in Family Appeal No.113/2018 which was also dismissed vide impugned judgment dated 27.02.2019, hence this Constitutional Petition by the petitioner.

I have heard learned counsel for the parties and have gone through the material available on the record.

Learned counsel for the petitioner, contended that two courts below erred in passing the impugned Order / Judgment which are not sustainable in law and on facts. He further contended that two courts below have not appreciated properly

the evidence adduced by the parties and have passed the impugned orders in a hasty manner. He next submitted that earlier respondent No.1 had moved an application under Section 7 of the Guardian and Wards Act for appointing her as guardian of the minors; however the same was dismissed by the concerned Court. According to him, although copy of such order was annexed in the G & W Application filed by the petitioner but the trial Court did not take the same into consideration. He further submitted that the petitioner is working as a helper in Dr. A.Q. Khan Research Laboratory at Kahuta Rawalpindi and is earning handsome amount, besides the facilities provided to him by the department are sufficient to maintain the children for their bright future. Learned counsel further submitted that the petitioner being real father of the children, is their natural guardian. He also submitted that the petitioner has not been declared as unfit or insane so as to deprive him to retain the custody of the minors. In support of his contention, he placed reliance on the cases of *Nasir Raza Vs. Additional District Judge, Jhelum and another (2018 SCMR 590)* and *Mir Bat Khan Vs. Mst. Sherin Bibi and others (2019 SCMR 520)*.

Learned counsel further submitted that paramount consideration in the matter of custody of minors is their welfare and not the rights of their parents. In support of his contention, he placed reliance upon the case of *Mst.SALIMA BIBI Vs. MOHAMMAD KHAN and others (PLD 1987 Lahore 383)* and *FATIMA BIBI Vs. DISTRICT & SESSIONS JUDGE, MANDI BAHA-UD-DIN and 2 others (2004 YLR 652)*. He further submitted that respondent No.1 being maternal grandmother, has no right to retain custody of the minors. According to him, the entire family depends upon the husband of respondent No.1, who is a carpenter by profession and resides in one roomed house, which is insufficient to give suitable atmosphere to the minors. He, therefore, prayed for allowing instant petition and handing over custody of the minors to the petitioner.

Conversely, learned counsel for respondent No.1, while supporting the impugned order/judgment, contended that the petition is not maintainable against the concurrent findings of two Courts below. In support of his contention, he placed reliance upon the cases of (i)*Mrssrs. FEROZE AFAQ AHMED KHAN and others Vs. NASIR AHMED and others (2007 YLR 3282)*, (ii) *ALI MOHAMMAD Vs. ADDITIONAL SESSIONS JUDGE and others (2007 MLD*

*1096*), (iii) *LIAQUAT ULLAH KHAN KHATAK and 5 others Vs. HAFEEZ AKHTAR and 9 others (PLD 2004 LAHORE 312)*, (iv) *Malik ABDUL KADIR Vs. ATIQUE AHMED through Legal Heirs and another (PLD 2004 Karachi 555)*, (v) *Messrs. HABIB INSURANCE CO. LTD. Vs. Messrs. STATE LIFE INSURANCE CORPORATION OF PAKISTAN LTD. and another (PLD 2006 Karachi 294)*. Learned counsel referred to written statement available at page 49 of the case file as well as affidavit-in-evidence at page 59 and deposition at page 123.

He further contended that the two courts below have delivered the impugned judgments in accordance with the law after taking into consideration each and every point involved in the case, as such the same do not call for any interference by this Court in exercise of its constitutional jurisdiction. He submitted that at the time of death of minors' mother, minor Iraj Hassan was aged about 3 ½ years, whereas the age of minor Hiba Hassan was about 1 ½ years; however, at present they are aged about 12 years and 10 years respectively and during this intervening period they have developed great love and affection with respondent No.1, their maternal-grandmother. He further submitted that when Mst. Nazia, mother of minors, died, the petitioner informed this fact to one Imran, brother of deceased lady, whereupon said Imran rushed to Kahota on 29.09.2014 by Air and on the very same day the dead body was sent to Karachi for her funeral. He further submitted that none from the petitioner's family had accompanied the dead body for participating in the funeral ceremony and even none from the petitioner's family visited for a single day after the death of minors' mother. Learned counsel also submitted that since 2014, the petitioner has miserably failed to pay even a single rupee towards maintenance of the minors. He added that the application filed by respondent No.1 before the Guardian & Wards Court under Section 7 of the Act for appointing her as guardian of the minors was dismissed and First Appeal bearing No.121 of 2018 was filed by the respondent which is pending adjudication before the Court of 9<sup>th</sup> Additional District Judge, Karachi East and the case has been kept sine die due to pendency of instant Constitutional Petition. He further submitted that the father is bound to maintain his children in all circumstances and in case of his failure to maintain the children, he becomes disentitled to keep their custody. In support of his contention, he

placed reliance upon the case reported as *SHER MOHAMMAD Vs. ADDITIOANL DISTRICT JUDGE (NLR 1992 [Criminal] 439)*.

Learned counsel for the respondent further argued that paramount consideration in such matters is the welfare of the children. According to him, although the father is natural guardian; however, without providing maintenance to the minors, he cannot retain custody of the minors. In support of his contention, he placed reliance upon the case of *Mst.Rasheedan Bibi Vs. Additional District Jude and 2 others*, reported in *2012 CLC 784*. Learned counsel further contended that preference is to be given to the interests of minors over the interests of their parents. In support, he relied upon the case of *Mst. NIGHAT FIRDOUS Vs. KHADIM HUSSAIN (1998 SCMR 1593)*. According to him, the father / petitioner did not meet with the minors, nor provided them any maintenance, therefore, maternal-grandmother could be legitimate guardian to retain the custody of the minors. In support, he relied upon the case of *MOHAMMAD IQBAL Vs. ADDITIONAL DISTRICT JUDGE, BEHAWAL and 2 others (2002 CLC 108)*. He prayed for dismissal of instant petition and upholding the impugned order/judgment.

In rebuttal, learned counsel for the petitioner, referred to pages 79, 83 and 151 of the case file. While referring to last paras of page 79 of the case file, he submitted that minors were sent to the respondent at the time of death of their mother through Shaheen International Airlines alongwith their grandfather Mohammad Zaman Khan and one Irfan. He further submitted that allegation levelled by the respondent to the effect that none from the petitioner side participated in the funeral ceremony carries no weight, as this was a case of suicide and the petitioner had to face the problems with regard to the legal formalities. Learned counsel, while referring to page 83 of the case file, submitted that these are the facilities which could be availed by the minors if they reside with the petitioner at Kahota and otherwise they would not be allowed to avail such facilities. According to learned counsel, respondent No.1 has not adduced even a single document or any bank statement which could support her plea that her husband, who is a carpenter by profession, is capable to maintain the minors as per their needs.

In the first instance, I would like to deal with the issue of *Hizanat* of the minors. According to the Islamic principles, the right of *Hizanat* of a male child lies with the mother till the age of seven years and that of a female child till she attains puberty. However, under the principles of Islamic Law, after the death of mother, custody of the minors is to be retained by maternal-grandmother. In this connection, reference may be made to the case of *Mohammad Iqbal Vs. Additional District Judge, Bhalwal and 2 others (2000 CLC 108 [Lahore])*, wherein it was held as under:

***“6. Under the personal law, after the death of the mother, the maternal-grandmother can legitimately claim custody of the minors.”***

In another case of *Mst. Nighat Firdous Vs. Khadim Hussain*, reported in **1998 SCMR 1593**, Honourable Supreme Court, while deciding a matter of custody of a minor after the death of his mother between minor’s maternal aunt (appellant) and father of minor (respondent), held as under:

***“10. It would, thus, be seen that welfare of the minor is the paramount consideration in determining the custody of a minor. The custody of a minor can be delivered by the Court only in the interest and welfare of the minor and not the interest of the parents. It is true that a Muhammadan father is the lawful guardian of his minor child and is ordinarily entitled to his custody provided it is for the welfare of the minor. The right of the father to claim custody of a minor is not an absolute right, in that, the father may disentitle himself to custody on account of his conduct, depending upon the facts and circumstances of each case. In this case, the respondent-father, who sought custody of the minor, neglected the child since his birth. The minor had admittedly been under the care of the appellant since the death of his mother. Thus, visualized the mere fact that the minor has attained the age of seven years, would not ipso facto, entitle the respondent-father to the custody of the minor as of right.....We are of the view that the minor, who has been living with the appellant almost since his birth and was being looked after properly, his welfare lies with her and not with his father, who has not taken any interest even in defending this appeal and oppose the interim order dated 5-4-1994 passed by this Court, whereby status quo in respect of custody of the minor was directed to be maintained. The preference of the minor, in guardianship cases, is ordinarily taken into consideration but it is not always relevant because the minor is not the best judge of his/her welfare. It is for the Court to determine as to whom the custody of the minor should be delivered in his/her welfare. In the instant case, we find that the welfare of the minor,***

*who is now about 15 years old, lies in retaining the custody with the appellant.”*

Now, adverting to the merits of the instant case, it seems that the petitioner was married to late Nazia Fayyaz daughter of respondent No.1 at Karachi on 20.04.2010 and they started living in Kahota, Rawalpindi. Out of said wedlock, aforesaid two female children were born. On 28.09.2014 wife of the petitioner namely, Nazia Hassan allegedly committed suicide and both minors were sent by the petitioner with the dead body of their mother to Karachi at the house of respondent No.1, their maternal-grandmother, and since then they have been residing there with respondent No.1. It is also worthwhile to point out here that at the time of death of their mother, the minors were respectively aged 3 ½ years and 1 ½ years.

It seems that during the course of recording of his evidence, the petitioner made certain material admissions which strengthen the case of respondent No.1. He admitted that *both minors were sent to Karachi by him along with the dead body of their mother*. He further admitted that *he did not come to Karachi along with the dead body of minors' mother*. He also admitted that *he has not attended the Soim and Chehlum of his late wife*. Petitioner also admitted that *his father in law is his real Uncle (Taya) and respondent is his real Aunty*. He also admitted that *since the date of his wife's death i.e. 29.09.2014, he came to Karachi several times but he never visited the respondent's house*. Petitioner also admitted that *he is earning Rs.30,000/- per month and since 29.09.2014 he has send maintenance to his daughters only two or three times through money order*. He also admitted that *at the time of death of minors' mother, minor Iraj Hassan was about 3 ½ years of age and minor Hiba was about 1 ½ years of age but now minor Iraj is about 07 years of age and minor Hiba is about 05 years of age*. He also admitted that *both minors are getting their education in school and maternal grandparents of minors are affording all educational expenses of minors*. He further admitted that *he has not leveled a single allegation against the respondent regarding the environment of her residence*.

Before proceeding further, it may be observed that now it is well settled that the paramount consideration in respect of custody of a minor is the 'welfare of the child'. It is also well settled that while deciding the custody of the minors,

their interests and welfare is to be given preference over the interests of the parents.

In the case reported as *Khan Mohammad Vs. Mst. Surayya Bibi and other* (2008 SCMR 480) Honourable Supreme Court observed:

**“It is worth mentioning that right of the father being natural guardian of minor, is subject to welfare of the minor because the overriding fundamental and paramount important consideration is always the welfare of the minors.”**

In the case of *Mohammad Nawaz Vs. Additional District Judge* reported in 1992 CLC 1487, it was held:

**“Welfare of a minor is the paramount consideration which must weigh with and influence the Court in deciding as to whom his/her custody should be entrusted. Further, welfare is a question of fact to be resolved on material placed before the Judge and not upon mere presumption. Personal Law, in this behalf is subordinated to that of welfare of minor, which alone must govern the question relating to his/her custody.”**

In the case reported in *Mst. Nafeesa Vs. Mir Bahadat* (2013 C L C 1784), a Division Bench of Peshawar High Court held as under:

***“It is true that father has preferential right under personal law to get custody of male child after period of Hizanat is over. But, it is also accepted and being persistently followed on basis of numerous findings of superior courts that welfare of minor is always of paramount consideration while determining question of custody. Personal Law is not to be allowed blindly or in automatic fashion, but has to be decided objectively.”***

Examining the instant case in the light of above guidelines provided by the Superior Courts, it seems that on the strength of admissions made by the petitioner himself in his cross-examination, it seems that welfare of both the minors lies in continuing retention of their custody with their maternal-grandmother, particularly in view of the fact that from very inception of the death of their mother, when they were 3 ½ years and 1 ½ years of ages, they have been residing with their maternal-grandmother, therefore they must have developed love and affection with her to a great extent and their separation from her may be injurious and damaging to their health, welfare and interests. Besides, admittedly, the petitioner did not accompany the dead body of her wife and also did not attend her funeral



ceremony. For the sake of arguments, if the defence taken by the petitioner in this regard is accepted that as this was a case of suicide and the petitioner had to face the problems with regard to the legal formalities and furthermore his CNIC was also kept by the concerned police, therefore he could not accompany the dead body and participate in the funeral ceremony of Mst.Nazia, even then it is not understandable that what compelled the petitioner in not participating in the *Soim* and *Chehlum* ceremonies thereafter. Not only this, even he has himself admitted that *since the date of his wife's death i.e. 29.09.2014, he came to Karachi several times but he never visited the respondent's house*. It is one's beyond imagination that when a real father comes several times from Rawalpindi to Karachi where his minor children are residing, as to what were the hurdles in his way to visit and meet his children. This creates doubts and suspicious vis-à-vis the allegation leveled by the respondent that, in fact, the petitioner had committed murder of Mst.Nazia and even such suggestions were put to him during his cross-examination.

Yet there is another salient feature of the case. Although the allegation of the respondent is that after the death of Mst.Nazia, the petitioner has not paid even a single pie towards maintenance of the children; however, even if stand taken by the petitioner himself in this respect is taken into consideration during his cross-examination, to the effect that *since 29.09.2014 he has send maintenance to his daughters only two or three times through money order*. Needless to emphasize that it is the bounden duty of a father to provide maintenance to his children in all circumstances, regardless the fact, as to whether they are residing with him or not; their mother is alive or not; whether the tie of marriage is still subsisting or not etc. and in case of his failure to provide maintenance to his children, he disentitles himself to claim custody of the minors. In this context, reference may be made to the case of *Mst. Rasheean Bibi Vs. Additiional District Judge and 2 others (2012 CLC 784)*, wherein it was held as under:

*“In number of cases, non-payment of maintenance allowance without any justification was considered a valid ground to disentitle the father from the custody of his minor children. Reference in this respect may be made to the case of Mohammad Iqbal v. Additional District Judge, Bhalwal and 2 others (2000 CLC 108 Lahore)*

It is also significant to point out at this stage that the petitioner has also admitted that *both minors are getting their education in school and maternal grandparents of minors are affording all educational expenses of minors* and that *he has not leveled a single allegation against the respondent regarding the environment of her residence*. What else is required to be considered while deciding the welfare of minors? Both the minors since the age of 3 ½ years and 1 ½ years till they have attained the ages of about 12 years and 10 years respectively, have been continuously residing with their maternal-grandmother, who under the Islamic Law, has the right of *Hizanat* of the minors after the death of their mother, and they have developed love and affection with her to a great extent; that they have continuously been provided maintenance by the respondent; that admittedly they are getting education in the school and all the educational expenses are being borne by the respondent; that there is no allegation that the minors are residing at a place having bad / unsuitable atmosphere.

Yet there is another important aspect of the case. Although the petitioner has been taking the plea that on account of welfare of the minors, he has not contracted marriage after the death of minors' mother namely, Mst. Nazia for the sake of welfare of his children, but this fact is belied by a document i.e. copy of *Nikahnama* placed on record by respondent No.1 through STATEMENT of her counsel dated 29.09.2021. From the perusal of this document, it appears that the petitioner has contracted marriage with one *Zubeda Perveen D/o Mohammad Mansha* on 3<sup>rd</sup> January, 2020 at Toba Tek Singh. No specific denial and / or explanation, either verbally or through any document, has come on record on behalf of the petitioner, as such I have been left with no option but to accept such plea raised on behalf of respondent No.1.

This makes the case of petitioner worse, inasmuch as; assuming for a while that custody of the minors is handed over to the petitioner, then they will have to stay with a *step mother*, because mostly the petitioner would remain busy in his professional work and it would be their *step mother* with whom they will have to stay for most of the time. This has not been appreciated by the Superior Courts. In the case of *Mohammad Ashraf Vs. Mst. Sakina and other*, reported in *1989 SCMR 1277*, Honourable Supreme Court observed as under:

*“The dispute is about the custody of minor children of the petitioner. Mother Sakina Bibi was given the custody by the Guardian Judge which order was upheld by the High Court.*

*We have heard learned counsel for the petitioner. We don't think there is any merit in this petition for the High Court after taking all the relevant facts into consideration confirmed the finding of the Guardian Judge keeping in view the welfare of the children especially when the petitioner has re-married and has children from the second marriage.”*

In the case of *Mukhtar Ahmed Shahzad Vs. Mohammad Adeel and others* reported in *2020 M L D 368 [Lahore]*, contest for getting custody of the minor was between **maternal-grandfather and the father** of the minor. While relying upon various judgments of Superior Courts including the case of *MOHAMMAD ASHRAF* (supra), following observations were made by Lahore High Court:

*“Admittedly, the Ward is living with the petitioner since the year 2013 when her late mother was deserted by respondent No.1, thus, it is natural that the Ward has developed attachment with him. Further, respondent No.1 has contracted second marriage out of which he has two siblings, thus, handing over of Ward to respondent No.1 would amount to leave her at the mercy of step-mother. When a father contracts second marriage his right for appointment as guardian in routine vanishes rather the court is supposed to be more cautious. Reliance in this regard is placed on the cases reported as *Muhammad Ashraf v. Mst. Sakina and 2 others* (1989 SCMR 1277), *Mst. Naseem and another v. Ali Akbar and another* (PLD 2015 Balochistan 30), *Fazlur Rehman v. Mst. Shazia Bibi and 2 others* (2015 CLC 116), *Shaukat Pervez Butt v. Mst. Nargis Sultana and another* (PLD 1988 Lahore 290) and *Jamshed Sultan Taimoori v. Mst. Anisa Begum* (PLD 1980 Karachi 299).”*

Even otherwise, now it is well settled that **concurrent findings** of two courts below cannot be interfered with by this Court in exercise of its constitutional jurisdiction, save in exceptional circumstances. Needless to emphasize that the jurisdiction of this court under Article 199 of the Constitution is extra-ordinary in nature which is aimed at proper dispensation of justice and to avoid abuse of the process of law. Therefore, normally such jurisdiction is not to be exercised by the High Court to interfere with the discretionary orders of the subordinate Courts, where jurisdiction has been conferred upon it by some special statutes, more particularly where there are concurrent findings of the two Courts

below. In the case of *LIAQUAT ULLAH KHAN KHATAK and 5 others Vs. HAFEEZ AKHTAR and 9 others (PLD 2004 Lahore 312)*, it was held as under:

*“For what has been discussed above, the concurrent orders passed by the Courts below are neither arbitrary, or against the record, nor do they reflect any jurisdictional defect to warrant interference in the Constitutional jurisdiction of this Court.”*

The upshot of above discussion is that instant petition being devoid of merits is hereby dismissed alongwith all pending Misc. Applications, with no order as to costs. It may be clarified that the arrangement for meeting/visitation of the petitioner / father with the minors as mentioned in the Order of Guardian and Wards Court Order dated 04.07.2018 passed by learned XXX- Family Judge Karachi East, would continue.

JUDGE