

**HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD**

**Const. Petition No.S-9 of 2020**

Petitioner Mst. Shabana d/o Majno through Mr. Nawab Ali Kaka, Advocate.

Respondent No.1 Nadir Ali Magsi son of Anwar Ali through Mr.Abdul Hameed Bajwa, Advocate.

Respondents 2 to 4 Through Mr. Allah bachayo Soomro, Addl. A.G.

Date of hearing **11.02.2022**

Date of order 11.03.2022

<><><><><>

**ORDER**

**SHAMSUDDIN ABBASI, J:-** By means of this constitution petition filed under Article 199 of the Constitution of Islamic of Pakistan, 1973, the petitioner seeks following reliefs:-

*"To call the R & P of Family Appeal No.18/2019 from the Court of District Judge Mirpurkhas and R & P of Guardian and Wards Application No.03/2018 titled "Nadir Ali Magsi v Mst. Shabana" from the Court of Civil and Family Judge Mirpurkhas and after examining the same as to legality, propriety and correct this Honourable Court will further be pleased to set-aside the judgment dated 03.12.2019 passed in Family Appeal No.18 of 2019 and maintained the order dated 25.03.2019 passed by respondent No.2 or pass any other order as deem fit and proper under the circumstances of the case".*

2. Facts relevant for the purpose of deciding this petition are that the petitioner was married to the respondent No.1 on 29.03.2013. Out of the wedlock two children, baby Romana, aged about four years, and baby Kinza, aged about three years, were born. The petitioner left the house without permission of the respondent No.1 and started residing with her parents. While staying at her parents' house, she demanded "Talaq" and subsequently obtained "Khula" by filing Suit No.58 of 2016. During subsistence of marriage, the petitioner proved herself disobedient, short temperament and greedy as well as characterless. She developed illicit relations with strangers, who used to visit her house. Prior to the marriage with the respondent No.1, the petitioner left her parents' house alongwith a stranger namely, Kamran and finally contracted marriage with one Lal Muhammad @ Laloo, who is not related to the minors, therefore, she loses

her right of "Hizanat". The petitioner is a careless mother and if custody of the minor daughters is handed over to her shall adversely affect the interest and welfare of the minors. The respondent No.1, therefore, filed Guardian and Wards Application No.03 of 2018 seeking following reliefs:-

- "(a) That the applicant being real father of minors is entitled to custody of both minors.*
- (b) That the applicant may be appointed as guardian of the person and property of minors namely baby Romana aged about 4 years and baby Kinza aged about 3 years.*
- (c) That the custody of the minors namely baby Romana and baby Kinza may kindly be handed over to applicant from the custody of mother during pendency of guardianship application.*
- (d) Any other relief be granted, which this Honourable Court deems fit and proper under the circumstances of the case".*

3. The petitioner contested the suit and filed her written statement, wherein she has denied all the allegations leveled against her by the respondent No.1 and submitted that she did not left the house at her own but it was the respondent No.1 who forcibly ousted her from his house alongwith the minors. All efforts for reconciliation were failed because the respondent No.1 was not ready keep the petitioner as his wife, therefore, she filed suit for dissolution of marriage and obtained "Khula". The respondent No.1 failed to prove himself a good husband and caring father so he is not entitled to the custody of minors.

4. The following issues were framed:-

- "1. Whether the applicant is entitled to appoint the guardian of person and property of minors namely (1) Baby Romana aged about 4 years and (2) Baby Kinza aged about 3 years and obtain their custody?*
- 2. Whether applicant is entitled to receive custody of minors?*
- 3. What should the order be?*

5. The respondent No.1 examined himself and produced Aijaz Ali as his witness. On the other hand, the petitioner examined herself and produced Hanif as her witness. The learned Civil/Family Judge Mirpurkhas, after

hearing the parties' respective counsel, dismissed the Guardian and Wards Application vide judgment dated 25.03.2019 leaving the respondent No.1 to file fresh guardianship application for custody of minors till they attain the age of 10 years.

6. Impugning the judgment passed by the learned Civil & Family Judge, the respondent No.1 filed appeal (Family Appeal No.18 of 2019) mainly agitating that in the matter relating to custody of ward the welfare of minor is supreme and the Court is duty bound to ascertain as to in whose custody the welfare of the minor lies. The petitioner has contracted second marriage, therefore, she loses her right of "Hizanat". The impugned judgment is, therefore, bad in law and facts and against the dictum laid down by the Hon'ble Superior Courts.

7. The proceedings in appeal come to an end vide judgment dated 03.12.2019, penned down by the learned District Judge, Mirpurkhas, whereby the judgment and decree passed by the learned Civil and Family Judge, Mirpurkhas were set-aside and the custody of the minors were ordered to be handed over to the respondent No.1 allowing the petitioner to have a meeting with minors on alternate Saturday from 11.00 A.M. to 8:00 P.M. on Sunday as well as one day before Eid from 7:00 P.M. to 5:00 P.M. of second day of Eid.

8. Aggrieved by the judgment and decree passed by the learned appellate Court, the petitioner has filed the instant petition mainly agitating that she has contracted second marriage with her cousin and besides her the minors are under the care and company of their grand-mother and maternal aunt.

9. Heard and record perused minutely.

10. There is no denial of the fact that marriage between the parties has already been dissolved by way of "Khula" and the petitioner (mother) has contracted second marriage. The petitioner was not divorced by the respondent No.1, but she herself approached the Court of competent jurisdiction and obtained "Khula". Per learned counsel for the respondent No.1, the petitioner (mother) while contracting second marriage has lost her

right of "Hizanat" and she is not entitled for the custody of the minor daughters as it would never be in the interest and welfare of the minors to live with the mother, who has contracted second marriage with a person who is not related to the minors within the prohibited degree. The learned Family Court while dismissing the guardianship application of the respondent No.1 has observed that second marriage of the petitioner alone is not a ground to disentitle the mother from custody of the minors. The learned appellate Court, on the other hand, has allowed the appeal of respondent No.1 (father) taking into account all aspects of the matter and concluded as under:-

*"In this case it has been brought on record that the respondent/opponent Mst. Shabana has married with another person and in this regard in Para No.7 of the guardianship application, the appellant/applicant has stated that respondent/opponent Mst. Shabana has contracted marriage with a person not related to the minors within the prohibited degree, therefore, she loses the right of Hizanat on this ground alone and during cross examination respondent/opponent Mst. Shabana has admitted that she has married with another person and according to her own statement her husband is her real cousin and has further admitted that the pleadings of Para No.7 of the guardianship application wherein it is mentioned that she has contracted marriage with an stranger has not been denied by her in her written statement so also she has admitted in her cross examination that appellant/applicant has still not contracted marriage for the sake of children. The respondent/opponent's witness Hanif, who is brother of respondent/opponent Mst. Shabana, during his cross examination has admitted that appellant/applicant is providing maintenance to the minors. He has also admitted during evidence that minors are not residing with respondent/opponent. It has also been admitted that respondent/ opponent is residing in a village whereas appellant/applicant is residing in the city. First of all during evidence it has been brought on record that minors are not living with the respondent/opponent Mst. Shabana who has contracted marriage with one Lal Muhammad and she is living with her husband having one son from said wedlock wherein six other family members of her husband are residing".*

11. The two minors are daughters and attained the ages of eight years and seven years. The respondent No.1 is real father of the minors and taking care of his daughters, who are growing and need care, company and protection of father whereas the petitioner has contracted second marriage with a person, who is not related to the minor daughters within the prohibited degree and that too he has a son from his first wife and there are six other family members in his house. The record is also suggestive of the fact that respondent No.1 (father) has not contracted second marriage

only due to love and affection with his daughters. He is a natural guardian and can take care of his daughters as well as provide strong protection in bringing up his daughters in a better way as that of the petitioner (mother), who took second husband, not related to the minors within prohibited degree.

12. It is well-settled law that paramount consideration while deciding the question of custody is the welfare of the minor irrespective of age, sex, and religion. Primarily, welfare includes his/her moral, spiritual and material wellbeing. While considering what is the welfare of the minor the Court shall have regard to the age, sex, religion of the minor, the character and capacity of the proposed guardian and the preference of the minor if he or she is intelligent enough to make it. In accomplishment of such object it becomes the duty of the Court to take care of the ward's welfare and shall ensure that the litigating parents are not disputing to settle their own score or to satisfy vanity or even to soothe his/her craving of love and affection for minor as it could only be done if the welfare of the ward demands. In principle, in the cases, concerning the custody of a child, the Family Court is not required to go into the intricacies/technicalities of the matter and confine its findings to the extent of the welfare of the child/minor, which is a paramount consideration. Primarily, the reasoning assigned by the Family Court is not in accordance with settled principles for governing the custody of minor daughters for the reason that the petitioner (mother) has contracted second marriage with a person not related to the minor daughters within prohibited degree whereas the respondent No.1 (father), who is caring and concerning to his daughters, due to their love and affection has not contracted second marriage and taken hectic efforts by running from pillar to post merely to have custody of his daughters. Firstly, he filed guardianship application for custody of minors and having failed to obtain their custody knocked the door of appellate Court and succeeded. Thus, on the basis of cumulative effect of the facts and circumstances, discussed herein above, I am of the view that petitioner (mother) loses her right of "Hizanat" while contracting second marriage and she is not entitled to have custody of minor daughters in such circumstances. Reliance may well be made to the case of *Shabana Naz v Muhammad Saleem* (2014 SCMR 343), wherein it has been observed as under:-

*"As regard the second marriage with another woman by respondent No.1, it may be noted that this fact alone will not disentitle respondent No.1 from obtaining custody of his minor daughter. Moreso, when it is an admitted fact that the appellant too has remarried another person, namely, Haji Syed Wali with whom the minor has no relationship.*

*"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).*

*15. For, all what has been discussed above, we find no illegality or perversity or impropriety in the impugned judgment, which seems to be based upon the evidence available on record and the applicable law and we have no reason to interfere with the same. Thus, the present appeal fails and the same is, therefore, dismissed with no order as to costs".*

13. This Court, in the exercise of its jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 has to exercise parental jurisdiction and is not precluded in any circumstance, from giving

due consideration to the welfare of the minor and to ensure that no harm or damage comes to him/her physically or emotionally by reason of the breakdown of the family tie between the parents. Reliance may well be made to the cases of *Mirjam Aberras Lehdeaho v S.H.O., Police Station Chung, Lahore and others* (2018 SCMR 427) and *Mst. Madiha Younus v Imran Ahmed* (2018 SCMR 1991).

14. In view of the analysis and combined study of the entire record as well as applicable law, with care and caution, I am of the view that impugned judgment passed by the learned appellate Court in Family Appeal No.18 of 2019 is well reasoned, according to law and outcome of a proper application of judicial mind to the facts and circumstances of the case and in accordance with law. Thus, this Court is hesitant to interfere while exercising its constitutional jurisdiction. In view thereof, the findings recorded by the learned Family Judge in Guardianship Application No.03 of 2018 are reversed. Resultantly, the instant petition is bereft of merit stands dismissed. As regard visitation schedule of minors with the petitioner is concerned, the learned appellate Court has rightly passed the judgment because the mother could not be denied right of access to her daughters. The minor daughters would not only need company and guiding hand of the father, but also love and affection, care and attention of the mother. Therefore, negating mother of her right to meet her daughters would lead to emotional deprivation. I am, therefore, of the view that the learned appellate Court has rightly chalked out reasonable visitation/meeting schedule of the minors with the mother in the light of the precedents of Hon'ble Superior Court.

JUDGE