

IN THE HIGH COURT OF SINDH AT KARACHI

BEFORE:
Mr. Justice Muhammad Shafi Siddiqui

C.P. No. S-1715 of 2016

Mst. Sadaf Younus

Versus

Saqib Nadeem & others

Dates of Hearing: 18.12.2017

Petitioner: Through Mr. Iftikhar Javaid Qazi Advocate.

Respondent No.1: Through Mr. Muhammad Ishaque Advocate.

J U D G M E N T

Muhammad Shafi Siddiqui, J.- This Constitution Petition involves issue of permanent custody of ward whose real father and mother are divorced and then solemnized their respective second marriages.

Brief facts of the case are that petitioner got married with respondent No.1 somewhere in the month of July 2009. Out of this wedlock child namely Usman Ghani was born on 23.10.2010. The relationship between parties could not survive longer and were divorced in March 2011. The families of petitioner and respondent No.1 were stated to be related. After divorce the petitioner/mother solemnized second marriage somewhere in February 2013. The respondent also got married soon after the divorce.

The respondent filed Guardian & Wards Application for the permanent custody of ward through attorney in April, 2013 which case was contested by the petitioner who also filed the written statement through attorney. The Guardian & Wards Court on consideration of the evidence of the parties dismissed the Guardian & Ward Application/petition however being aggrieved of the order/judgment the respondent preferred a Guardian & Wards Appeal No.61 of 2015 and on re-examining

the facts and the evidence the same was allowed and the custody was awarded to the father/respondent hence in view of the conflicting judgments of the two Courts below the mother/petitioner has filed this petition.

I have heard the learned counsel and perused the material available on record.

Present situation and circumstances may not be conducive, at least for the ward, as the real father and mother contracted their respective second marriages soon after their divorce. They may have their individual objects and goals in their life, which by all means they are permitted to achieve and may thrive for a successful life but the victim here is a ward, their real son.

It is difficult to ascertain the welfare of the ward on the basis of evidence that has been recorded by the trial Court since only the evidence of father, and that too through attorney was recorded and from the petitioner's side the petitioner examined herself only for which she came from Australia a month before recording of the evidence. She is living in Australia with her second husband. Both the petitioner and respondent opted not to examine any other witnesses. The ward is living with maternal grandparents in Pakistan who were also not examined.

It is the desire and/or stand taken by the father/respondent that welfare of the child lies with him since he is residing in Italy and has a good life and future for the ward. However, for that there has to be sufficient evidence that the ward at this tender age will be looked after properly in Italy by his sister with whom respondent is living, as is claimed by the respondent. No doubt the health and education issues are better in Italy but this is one part of the story; there are other norms of life which at this tender age are essential for ward and inevitable.

The other part of the story is that most of the time the ward remain with maternal grandparents. There is no evidence with regard to their (grandparent's) health and as to their capability to look after the ward. Schools and good educational institutes are not enough for a child of a broken house, at least at an early age. It is a basic requirement no doubt but then our social system demands and requires a domestic grooming to interact in our own social system till the basics are over.

One may very conveniently be inclined to consider the welfare of the child while being with father as he is living abroad with all such facilities above par but that may not be the only basis that should take me to such inference. This initial young age requires supervision and constant monitoring, at least upto the age of 10. The ward is certainly without care of the parents. No doubt the mother must have taken all effort to send the ward to a best school and may have provided best healthcare facilities according to resources, but providing silver spoon to the ward without actual love and care, cannot be regarded as a best grooming opportunities for the ward.

Insofar as Rules 5 and 6 of the West Pakistan Rules under Muslim Family Laws Ordinance 1961 is concerned, the petitioner was divorced in Pakistan while the custody of the ward was with her. Both the counsels have not objected that the ward is a dual national and since ward being with mother is living within the territorial limits of the Court where Guardian & Ward application was filed and the cause of action in terms of Rule 6 *ibid* arisen, it has the jurisdiction. Such point was never raised before the trial Court or before the appellate Court and hence it does not lie in the mouth of the respondent who himself filed an application for the custody of the ward surrendering himself to the jurisdiction of the trial Court.

In view of the above, on the basis of limited evidence available on record, which may not be the best quality of evidence to decide the welfare of the ward, I am inclined to dispose of this petition as under:-

- i) The ward may complete his basic education till the age of 10 under the care and custody of maternal grandparents with guidance of father/respondent being the natural guardian. He (father/respondent) is at liberty to visit ward as and when he wishes to and if the parties have any issue regarding place of visit, the last resort is Court premises. This is because the bond may not be broken with the passage of time;
- ii) No sooner ward turns 10 and/or passes the grade he would be in at that time, the respondent/father shall be at liberty to have the custody of the ward and take him to Italy, as desired by him, for further education of the ward, if he continues to live there. However, during summer vacation every year the petitioner may enjoy 30 days uninterrupted custody of ward and the respondent shall made all such arrangements including venue, wherever she/petitioner wishes, for the convenience of the petitioner;
- iii) In case by the time, as mentioned in above clause (ii), the father/respondent settles himself himself in Pakistan, the custody may continue with the grandparents (may God give them best of health and energy to take care of their ward/ grandchild);
- iv) In case the circumstances as of now or described in Para (iii) changes or if the health of grandparents does not permit, the custody of ward may be entrusted to respondent for the welfare of ward, forthwith.

In view of the above, the petition is allowed and impugned order of the appellate Court and that of the trial Court are modified to the above extent.

Dated:

Judge