

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

CP No. S- 529 of 2022

Petitioner : Hyder Ali through
Mr. Mazhar Ali Leghari, Advocate

Respondent : Mst. Naseem Fatima through
Nemo

Mr. Ayaz Ali Rajpar, Asstt: A.G.

Date of hearing & Decision: 09.09.2022

ORDER

ADNAN-UL-KARIM MEMON, J. Through instant petition, the petitioner has called in question the Judgment dated 20.05.2022 passed by learned IInd Additional District Judge / MCAC, Sanghar whereby the learned Judge while dismissing Guardian Appeal No. 04 of 2022 maintained the judgment dated 14.3.2022 passed by learned Family / Civil / Consumer Protection Judge & J.M- Sanghar allowing the Guardianship Application No. 05 of 2021 of respondent moved under Section 25 of the Guardian & Wards Act, inter-alia on the ground that respondent-mother is not letting the petitioner to pass a smooth, happy and healthy life and the same is continuing unabated till to date on one pretext to another; that, even though the petitioner is a laborer and he kept the respondent and minors happy and maintained at their highest esteem and was providing all basic necessities and on the other hand, the respondent has no self income and is relying upon the shoulder of her brothers while the daughters of the petitioner are getting younger day by day and their residence with the respondent in a joint family is highly questionable since all the male members residing therein are Na-Mehram to them; that since the real and actual facts were concealed by the respondent, as such, the affidavit submitted by the petitioner before learned Sessions Judge in Cr. Misc. Appl. Filed by the respondent U/s 491 CRPC has been used as a tool to take revenge from the petitioner while treating the same as perjury as during pendency of Cr. Misc. Appl. U/s 491 CRPC before Honorable High Court of Sindh, one minor was taken away by police from custody of petitioner; that the impugned judgments passed by the lower courts are not in accordance with law; that both the courts below failed to apply judicial mind and decided the matters against the petitioner purely in one-sided manner; that respondent approached the trial court with unclean hands and thereby achieved ulterior motives.

2. I have heard Mr. Mazhar Ali Leghari learned counsel for the petitioner on the aforesaid pleas; and perused the material available on record with his assistance.

3. It appears from the record that respondent No.1 filed Guardianship Application against the applicant before the Family Judge Sanghar with the assertion that the parties married to each other in the year 2006, out of wedlock one son and 04 daughters were born; it was alleged that in the month of April-2020 the petitioner expelled the respondent-wife along with children; respondent being aggrieved by the conduct of petitioner, filed Family Suit No.54/2020 for maintenance, meanwhile on 23.08.2020 petitioner forcibly took away all minors from the custody of respondent; that on 24.08.2020 petitioner filed Guardian & Wards Appl. No. 19/2020 for the custody of all minors; in the meanwhile respondent-wife moved an application under Section 491 Cr. P.C before learned District & Session Judge Sanghar whereby rule of Nisi was issued through concerned SHO, who submitted report that minors were not found in the house of petitioner; that respondent approached this Court, and during pendency of Cr. Misc. App. No. 412/2020 minor namely Waseem Abbas was handed over to respondent being a suckling baby; that on 04.01.2021 petitioner brought remaining four minors before this Court, where the custody of minor Wazeer Fatima @ Saira was handed over to respondent and both parties were directed to approach Guardian court for permanent custody of minors. The respondent submitted that she is real mother and has no adverse interest in the minor thus the welfare of minor lies with her. Finally, she prayed that she may be appointed as guardian of minors. After admission of application, the petitioner appeared and filed his objections / written statement wherein he stated that he deserve the custody of minors being real father. On the pleadings of the parties, learned trial court framed the following issues:-

- (i) Whether it would be in the welfare & interest of the minors/wards namely (01)-Najma Khatoon, (02)-Majida Khatoon & (03)-Sajida Khatoon, if their custody is handed over to the applicant/mother permanently?
- (ii) What should the decision be?

4. To settle the above issue learned trial court recorded the evidence of the parties and after hearing, allowed the Guardianship Application in the following terms:-

“16) Under these circumstances and bring in mind the paramount consideration of the welfare of child, I am convinced that minors' interest and welfare will be best served if they permanently remained in custody of their mother. Keeping in view of minors/wards ordinary comfort, health, education and favourable surroundings, physical comforts, I allow the application of applicant mother for the permanent custody of minors. In aforesaid terms, all issues stand decided. In the light of aforesaid confab, the application of applicant filed under provision of section 25 of Guardian & Wards Act stands disposed of with no order as to costs. The guardianship application in hand is disposed of accordingly. Since presently the custody of minors/wards namely (1)-Najma Khatoon, (02)-Majida Khatoon and (3)-Sajida Khatoon are with father/opponent, hence opponent/father namely Hyder Ali is directed to produce all minors/wards namely (1)-Najma Khatoon, (02)-Majida Khatoon and (3)-Sajida Khatoon before this court on or before 26.03.2022 to hand over the custody of minors to mother/applicant without fail.”

5. The petitioner being aggrieved by and dissatisfied with the above Judgment, preferred Guardian Appeal No. 04 of 2022. The said appeal was also dismissed on the same analogy as discussed supra.

6. In principle, a person who has custody of a minor is responsible to look after the minor regarding his health, education, and supporting him / her in all respects. In every matter related to minor, the court will give preference to the child's welfare and interest over that of the parent's rights. It is true that Muhammadan father is the lawful guardian of his minor child and is ordinarily entitled to his custody provided for the welfare of minor. However, the right of the father to claim custody of minor is not absolute, in that, the father may disentitle himself to the custody on account of his conduct, depending upon the facts and circumstances of each case; in the present case, the petitioner admitted before the trial court that he was/is unemployed and laborer. He also admitted that respondent-mother and all three brothers were/are educated. The trial court while recording evidence observed as under;

“.....I am unemployed & do not have any agricultural land or other sources of income. I am a laborer & my source of income is only income from labor.....”

“.....It is correct to suggest that all three brothers of the applicant are educated...I am educated middle (08th Class) passed. It is correct to suggest that I did not produce any documentary proof in the court, which shows that all three minors are getting the education in any school/college.....”

7. The learned trial court has allowed the visitation rights of the petitioner-father, to have a meeting with his minor children and he was directed to meet the minors for 03 hours, from 10:00 Am to 01:00 Pm, within the court premises. Petitioner was also directed to pay an amount of Rs. 1,000/- (One Thousand Rupees) in the shape of expenses of traveling for all minors on each meeting.

8. Prima-facie, the arrangement so made by the trial court as discussed supra is within the parameters of law thus no interference of this court is required in the constitutional petition. Consequently, this petition is dismissed.

JUDGE