

IN THE HIGH COURT OF SINDH AT KARACHI

C.P. No.S-633 of 2021

[Muhammad Jan.....v..... Mst. Faiza & others]

Date of Hearing : 15.03.2023
Petitioner through : Mr. Jawed Haleem, Advocate.
Respondents through : *Nemo*

ORDER

Zulfiqar Ahmad Khan, J:- This petition assails the concurrent findings of the learned trial Court dated 12.09.2019 as well as First Appellate Court dated 24.05.2021.

2. Precise facts of the case are that the respondent No.1 filed an application under Section 7 of the Guardians & Wards Act, 1890 (“G&W, Act”) for appointment of guardian of respondent No.2/minor which application was allowed by the learned Family Judge vide Judgment dated 12.09.2019 and respondent No.1 as appointed as guardian of the respondent No.2/minor. Petitioner being father of the minor impugned the said judgment of the learned Family Court before the First Appellate Court by filing G&W Appeal No. 196/2019 which met the same fate, hence the petitioner is before this Court against the concurrent findings.

3. The petitioner’s entire case was premised on the argument that the welfare and wellbeing of the child is always with the father as the mother/respondent No.1 is not doing any job for livelihood, therefore, the custody of the minor be handed out to him and concurrent findings be set aside.

4. None present for the respondents. I have heard learned counsel for the petitioner at length and have also scanned the available

record. I would take liberty in reiterating established legal principle, so enunciated by apex Court, in matters of custody of minor(s) that welfare of the minor shall always be the paramount consideration rather a decisive factor, however, the poverty of lady/mother (respondent No.1) alone would not be sufficient to hold her disentitled for custody of minor as legally the burden to maintain the child lies on father. (Mst. Razia Bibi v. Riaz Ahmed and another (2004 SCMR 821). In a recent judgment the honourable apex Court in the case of Mst. Mubeena v. Raja Muhammad and another PLD 2020 SC 508 while reaffirming the legal position of any agreement between parents over custody as invalid went on in holding that even physical disability of mother would not be sufficient to hold her disentitled from the custody of the child. The operative part reads as:-

“11. The principles of Policy (the Principles) set out in the Constitution is the path, and the destination, that the nation has set for itself. The Principles require that, 'Steps shall be taken to ensure full participation of women in all spheres of national life'. If women with physical life stand excluded from participation in family life and excluded from the much higher proclaimed objective of participation in all spheres of national life. The Principles also require that the State shall protect 'the mother and the child'. If child is taken away from the mother, deprived of her love and benefit of her upbringing the mother and the child's relationship is fragmented.”

5. I would further add that a legitimate child can't come to existence without parents' love, affection, and care of both the parents is, always, in the best interest of the child and his (child's) growth, therefore, a balance is always to be maintained while making decision in the matter(s) of custody of the minor. I would also add that the law does recognize the right of Hizanat which itself is an indication of the fact that in matters of custody of the child with

reference to gender the age of child matters. This, being the rule of Muslim and Nature's Law itself, needs to be given weight. All these aspect(s) are always to be appreciated while making a decision on the question of fitness of parents for custody of the child.

6. A child's personality can develop and he can groom only in a healthy environment which includes a happy home. However, when there are disputes in the family whether it is between the parents or otherwise and the matter reaches the court and it is asked to decide the question of custody of the minor, its primary consideration is his welfare. Section 17(1) of the GWA gives statutory recognition to this principle.

7. "Welfare" is an all-encompassing word, which on one hand includes "material welfare, both in the sense of an adequacy of resources to provide a pleasant home and a comfortable standard of living and in the sense of an adequacy of care to ensure that good health and due personal pride are maintained¹." On the other hand, it signifies "the stability and the security, the loving and understanding care and guidance, the warm and compassionate relationships that are essential for the full development of the child's own character, personality and talents²." In *Rahimullah Choudhury v. Sayeda Helali Begum and others* (1974 SCMR 305) the Hon'ble Supreme Court of Pakistan held that "welfare" is a question of fact and has to be determined on the basis of the materials placed before the Judge and not on presumptions.

8. The learned Family Court as well as First Appellate Court are concurrent on the ground that the petitioner failed to bring on record

¹ Walker v. Walker & Harrison, 1981 N.Z. Recent Law 257, cited by the British Law Commission, Working Paper No.96

² Ibid

that the petitioner who works abroad and in his absence who will look after the minor as well as the petitioner failed to illustrate that how come the learned First Appellate Court having examined the pros and cons dismissed the plea of the petitioner as well as the learned First Appellate Court declined to interfere with the findings of the learned Family Court. The findings of the learned First Appellate Court are worth reproduction in this respect which are delineated hereunder:-

“5. Now reverting to the findings of learned trial Court, while deciding the issue of welfare of the minor, it has been held that admittedly appellant/father resides out of Pakistan and that no solid proof has been produced by the father that he had been forced to stay away from the ward when his in the custody of the mother. As per learned trial Court it is settled principle of law that welfare of minor is primarily to be considered in appointing his guarding and that no disqualification of the mother had been substantially brought on record for her not being eligible for appointment as guardian of the ward.

6.....The father admittedly residing at Dubai, has not been able to explain within his appeal as to who shall be taking care of an autistic child when he shall leave for work.

9. It is crystal clear from above reproduction that the learned First Appellate Court having examined the record as well as evidence reached to the conclusion that the petitioner works abroad and in his absence, only mother can do well and look after the minor and none else and having seen so, the learned First Appellate Court declined to interfere in the findings of the learned Trial Court.

10. It is common knowledge that the object of exercising jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (“Constitution”) is to foster justice,

preserve rights and to right the wrong where appraisal of evidence is primarily left as the function of the trial court and, in this case, the learned Family Judge which has been vested with exclusive jurisdiction. In constitutional jurisdiction when the findings are based on mis-reading or non-reading of evidence, and in case the order of the lower fora is found to be arbitrary, perverse, or in violation of law or evidence, the High Court can exercise its jurisdiction as a corrective measure. If the error is so glaring and patent that it may not be acceptable, then in such an eventuality the High Court can interfere when the finding is based on insufficient evidence, misreading of evidence, non-consideration of material evidence, erroneous assumption of fact, patent errors of law, consideration of inadmissible evidence, excess or abuse of jurisdiction, arbitrary exercise of power and where an unreasonable view on evidence has been taken. No such avenues are open in this case as both the judgments are well jacketed in law. It has been held time and again by the Apex Court that findings concurrently recorded by the courts below cannot be disturbed until and unless a case of non-reading or misreading of evidence is made out or gross illegality is shown to have been committed.³

11. In view of the rationale and deliberation delineated above, the petition at hand is dismissed.

Karachi
Dated: 15.03.2023.

JUDGE

Aadil Arab.

³ Farhan Farooq v. Salma Mahmood (2022 YLR 638), Muhammad Lehrasab Khan v. Mst. Aqeel un Nisa (2001 SCMR 338), Mrs. Samina Zaheer Abbas v. Hassan S. Akhtar (2014 YLR 2331), Syed Shariq Zafar v. Federation of Pakistan & others (2016 PLC (C.S) 1069).