

IN THE HIGH COURT OF SINDH AT KARACHI

C.P. No.S-935 of 2019

[Muhammad Kashifv..... Mst. Batool & others]

Date of Hearing : 17.02.2023

Petitioner through : *Nemo.*

Respondents through : *Nemo*

ORDER

Zulfiqar Ahmad Khan, J:- This petition assails the concurrent findings of the learned trial Court dated 03.10.2018 as well as first Appellate Court dated 14.05.2019.

2. Precise facts of the case are that the petitioner filed an application under Section 25 of the Guardians & Wards Act, 1890 for permanent custody of the respondent No.2/minor girls which application of the petitioner was dismissed by the learned Family Court vide order dated 03.10.2018, thereafter, the petitioner impugned the said findings of the learned Family Court before the First Appellate Court by filing Family Appeal No. 179/2018 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 children is always with the father as the mother/respondent No.1 is not doing any job for livelihood, therefore, the custody of the minor/respondent No.2 be handed out to him and concurrent findings be set aside.

4. I have heard learned counsel for the petitioners 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. The petitioner during course of testimony admitted before the trial Court that:-

"It is correct to suggest that I did not produce any proof regarding my job in Patel Hospital."

"It is correct to suggest that I am not doing job at Patel Hospital."

"It is correct to suggest that since April, 2009 she (respondent No.1) is residing with her parents along with minor daughter."

"It is correct to suggest that since 2009 she is taking care her properly"

7. It is gleaned from appraisal of the foregoing that the learned trial Court having observed 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 would be worth reproduction in this respect which is delineated hereunder:-

"Nothing on the record to show that the minor is not being looked after by the mother. The father/appellant has not proved that the minor is not keeping good health., but the record shows that the minor is being looked aftger by the mother and the appellant has admitted in his cross examination that the respondent No.1 is residing with her parents and alongwith her minor daughter. The record shows that minor is enjoying every facility of life with her mother. In above circumstances, welfare of the minor which is a prime consideration, live with her mother."

8. 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 respondent No.2/minor is enjoying

every facility of life with her mother/respondent No.1 as admitted by the petitioner before the learned Family Judge, therefore, interference in the concurrent findings would be a miscarriage of justice.

9. 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.¹

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

Karachi
Dated: 17.02.2023.

JUDGE

Aadil Arab.

¹ Farhan Farooq v. Salma Mahmood (2022 YLR 638), Muhammad Lehasab 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).