

IN THE HIGH COURT OF SINDH AT KARACHI

C.P. No.S-1152 of 2023

[Zohaib Bin Asifv..... Xth Additional District Judge East Karachi & others]

Date of Hearing : 19.03.2024
Petitioners through : Mr. Sabir Khan, Advocate.
Respondents through : Mr. Munir Ahmed, Advocate for
respondent No.2.
Mr. Ahmed Khan Khaskheli, AAG.

ORDER

Zulfiqar Ahmad Khan, J:- This petition challenges successive judgments in favour of respondent No.2 mother rendered by learned trial Court in G&W Application No. 3288 of 2020 and order dated 11.09.2023 passed by learned Additional District Judge-X East Karachi in G&W Appeal No.323/2022.

2. The Respondent No.2 filed G&W Application No. 3288 of 2020 before learned Family Judge East Karachi for custody of the minor which was allowed vide order dated 08.10.2022 by the learned trial Court. The petitioner impugned the said Order of the learned trial Court before the Appellate Court by filing G&W Appeal No.323 of 2022 which appeal of the petitioner was dismissed, 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 minor is with her being paternal Aunty of the minor as well as she is Professor by profession as the mother/respondent No.2 is not doing any job for livelihood, therefore, the custody of the minor be handed out to her and concurrent findings be set aside.

4. Conversely, learned counsel for the respondent No.2 submitted that this petition challenges concurrent findings in family matter which is not maintainable. He further contended that the learned Family Court as well as Appellate Court granted custody of the minor to the respondent mother who is a natural guardian of the minor.

5. 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.”

6. 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.

8. 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

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

Karachi
Dated: 19.03.2024.

JUDGE

Aadil Arab.

¹ Per Sardar Tariq Masood.J in Khizar Hayat v. Additional District Judge Kabirwala (2010 PLD 422), 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).