

IN THE HIGH COURT OF SINDH, SUKKUR BENCH AT SUKKUR

C.P No.S-52 of 2023

Petitioner : Mst. Yaseena Kalwar
Through Mr. Shafique Ahmed Leghari,
Advocate

Respondent No.1 : Lal Bux Through Mr. Shabbir Ali
Bozdar, Advocate

Respondent No.2 : Mr. Asfand Yar Kharal, AAG

ORDER

Date of hearing : 10th May 2024

Date of decision : 24th May 2024

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ARBAB ALI HAKRO, J: The matter in hand relates to the custody of the female child, who, as per strife of both the parties, has reached the age of puberty and has been residing with the Petitioner "**Mother**" since the date when relations between the spouse became strained and ultimately dissolved through competent Court of law by way of Khula and at that time, she was aged about three years and nine months. However, Respondent "**Father**" filed an application under Sections 7, 10 & 25 of Guardian and Wards Act before a competent Court of law for custody of the female child on the pretext that petitioner contracted 2nd marriage who is not related to the female child rather a stranger and the child nearly touched to puberty. Hence, the petitioner is not entitled to retain custody of the female child, which was dismissed by the learned Family Judge, against which he preferred an appeal, which was subsequently allowed.

2. The Petitioner, herein referred to as the "**Mother**", aggrieved by the judgment dated 16.02.2023, rendered by the learned Additional District Judge-II, Mirpur Mathelo, hereinafter referred to as the "**Appellate Court**", challenges the reversal of the decision of the learned Family Judge pertaining to the retention of custody of the

minor with the petitioner. The reversal was premised on the fact that the Mother had entered into a second marriage with an individual bearing no relation to the minor. In such circumstances, the Appellate Court deemed the retention of custody with the Mother inappropriate in the presence of a stepfather who has no other children. Consequently, the petitioner invokes the extraordinary jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, and has filed the instant petition. The petitioner contends that the learned Appellate Court committed a gross irregularity by allowing the appeal without due consideration of the welfare and well-being of the female child. The child, now an adult, is at an age where a mother can comprehend her emotions, aspirations, and mindset to shape her societal norms and guide her through the vicissitudes of life, particularly when a female child has reached the age of puberty.

3. The salient facts precipitating the filing of the instant petition are that the petitioner entered into a marital union with the respondent on 25.09.2005. They were blessed with a daughter, Benazir, during their marital cohabitation on 27.02.2008. Regrettably, the marital bond between the spouses deteriorated, culminating in the dissolution of the marriage through khulla. Post-dissolution, the minor child resided with the Petitioner (Mother). The respondent initially sought custody of the minor by filing a Guardian & Wards Application (06/2010), which was subsequently withdrawn and dismissed on 07.06.2011. A similar application before the 2nd Civil Judge/Family Judge, Ghotki, was also dismissed on merits on 29.01.2014. Despite these legal hurdles, the petitioner has provided exemplary education and care for her daughter, Benazir, to ensure holistic development and societal integration. Upon the petitioner's entry into a second marriage, the respondent raised objections before the Court of Civil/Guardian Judge Ghotki. The respondent contended that the petitioner's re-marriage posed a threat to the life and honour

of the minor child, as the new spouse was unrelated to the child and not within the prohibited degree of relationship. The initial plea was dismissed, but the respondent subsequently appealed, which was allowed. Consequently, the Petitioner (Mother) has filed this petition to challenge the impugned judgment and decree dated 16.02.2023, passed by the Appellate Court.

4. At the outset, the learned counsel for the petitioner asserts that the Appellate Court committed a grave oversight by precipitously rendering the impugned judgment and decree without applying a judicious mind. Counsel contends that the Appellate Court neglected to consider the factual dimensions of the case, specifically the statement of the minor Benazir. She unequivocally expressed her desire to reside with her Mother and maternal uncle, emphasizing the potential threat to her life if her custody were to be transferred to her father, whom she alleges to be mentally unstable. The counsel argues that the Appellate Court overlooked a critical factor concerning the welfare of the minor, which is presumed to be best served with the Mother, particularly during the adolescent years. Furthermore, the counsel posits that the judgment and decree passed by the Appellate Court contravene sub-Section (3) of Section 17 of the Guardian and Wards Act. Counsel maintains that reasonable grounds exist to suspect a significant miscarriage of justice. Therefore, the counsel implores for the impugned judgment and decree passed by the Appellate Court to be annulled by granting the instant petition. He cites the precedent established in the case reported as **2022 SCMR 2123, 2017 CLC 96 & 2009 CLC 705** to support his arguments.

5. Conversely, the counsel for the Respondents posits that the Appellate Court judiciously rendered the judgment and decree by awarding the custody of the female child to the Respondents. This determination was predicated on the fact that the petitioner had contracted a second marriage with Muhammad Aslam, who bears no familial or blood ties with the minor. The counsel underscores that

entrusting the care of the child to an individual outside the prohibitory degree of relationship contravenes not only the tenets of Islam and the law but is also deemed unacceptable in our societal context, particularly given that the child is approaching puberty. Moreover, the counsel asserts that the Appellate Court did not perpetrate any illegality, gross irregularity, or infirmity in issuing the judgment and decree, which appears to be comprehensive and cogently reasoned. In support of his argument, the learned counsel cites the case law reported as **2014 SCMR 343, 2021 YLR 1194, 2018 YLR 1771 & 2022 SCMR 2123**.

6. The learned Assistant Advocate General (AAG) supports the impugned judgment and decree passed by the Appellate Court, echoing the arguments put forward by the counsel for the respondents. The AAG emphasized that the issue of custody of the female child, who has reached puberty, is a critical factor. It was pointed out that the Mother has entered into a second marriage with a stranger, and therefore, placing the child in the care of a stranger could be harmful. The AAG further asserted that the Court, as the custodian, has a responsibility to consider the welfare of the minor, especially since it will significantly impact the fate of the female child, who is on the verge of puberty.

7. Upon meticulous consideration of the arguments advanced by the learned counsel for the parties and comprehensive examination of the extant record pertinent to the instant case.

8. After conducting a comprehensive review of the available records, it is clear that the Petitioner and the Respondent were previously married and had children together. Subsequently, the marriage was legally dissolved, with the petitioner initiating the dissolution proceedings, which were granted by the Court. Following the dissolution of the marriage, the respondent initially applied for custody of the minor children but later withdrew the application.

When the petitioner entered into a second marriage, the respondent sought custody of his female daughter, who was on the verge of puberty, on the grounds that the child's Mother had married a stranger unrelated to the minor. Initially, the request was dismissed, but the respondent appealed and was eventually granted custody. In response, the petitioner has filed an instant petition, contending that it is crucial for the Court to consider the child's expressed desire to live with her Mother and maternal uncle, as well as her fear for her safety due to her father's mental instability.

9. Article 199 of the Constitution serves as a cornerstone in upholding justice, safeguarding rights, and rectifying perceived injustices. It bestows upon the High Court the authority to rectify any wrongful or excessive jurisdiction exercises by subordinate Courts and to address any procedural irregularities that may have negatively impacted a case. However, it is crucial to note that Article 199 does not empower the Court to reassess or reconsider the facts of a case that has already been adjudicated based on evidence by lower courts. The Court's jurisdiction is circumscribed to reviewing cases in instances of misinterpretation or non-interpretation of evidence, misapplication of law, or an overreach or misuse of jurisdiction. Judicial review under Article 199 is restricted to cases where there has been a misinterpretation or non-interpretation of evidence or when a finding is unsupported by evidence, resulting in a miscarriage of justice. Furthermore, this jurisdiction cannot be utilized as a substitute for a revision or appeal, nor can it be employed to disrupt findings of facts through a reevaluation of evidence in constitutional matters. In this context, I am reinforced by the case law reported as Shajar Islam vs Muhammad Siddique (PLD 2007 Supreme Court 45).

10. The Petitioner asserts that the learned appellate Court awarded custody of a female child predicated on the Mother's second marriage to an individual unrelated to the child. This decision contravenes the prohibitive degree of relationship as per Islamic law and is deemed

unacceptable in societal norms. However, the female child demonstrated confidence and expressed her desire to reside with her Mother. In numerous legal jurisdictions, a mother's second marriage can render the custody of a female child a subject of meticulous legal scrutiny. The Court typically evaluates various factors, including the paramount consideration of the child's best interests, the psychological and emotional impact of the Mother's re-marriage on the child, the relationship between the child and the new spouse, and any potential alterations in the child's living environment. The Court may also take into account the child's wishes, particularly if she is of age and maturity, to express her preferences when rendering a custody decision. This approach ensures that the child's welfare and best interests are at the forefront of any custody determination.

11. While it is widely acknowledged that according to paragraphs 352 & 354 of the Principles of Muhammadan Law by D.F Mulla, a mother relinquishes her right to custody upon entering into a second marriage, this principle is not unequivocal. Custody may be awarded to the Mother if it is determined to be in the child's best interest. In exercising its *parens patriae* jurisdiction, the Court must consider many factors, including the parents' capacity to cater to the child's physical and emotional needs and their ability to provide medical care. It is crucial to assess the parents' ability to furnish a safe and secure home for the child and to foster a positive relationship with them. The welfare of a child cannot be ascertained by a simplistic formula, as it encompasses a broad spectrum of factors, including financial stability, the overall household environment, and the physical, mental, and emotional well-being of the child. In instances of re-marriage, the living arrangement and environment must be reassessed in the context of the child's welfare. This ensures that the child's best interests are always prioritized in custody decisions.

12. When confronted with divergent interpretations of Courts under Article 199 of the constitution, it is imperative to meticulously analyze the legal reasoning and interpretations put forth by each Court. This may necessitate a review of the specific points of law and the context in which they were applied. The respondent's argument is primarily centered on the fact that the petitioner entered into a second marriage with an individual unrelated to the child, which, according to the principles of Muhammadan Law, forfeits her right to custody. However, it is essential to reiterate the multifaceted role of a mother in a child's upbringing. Mothers invariably play a pivotal role in providing emotional support, nurturing, and care to their children. They often shoulder the responsibility of creating a safe and supportive home environment, offering guidance, and instilling values and morals. Furthermore, mothers typically assume the role of primary caregiver, attending to the child's daily needs and fostering a strong bond through nurturing and affection. In the case at hand, the Guardian Judge considered the welfare of the child based on her age and gender. However, one of the factors that held sway with the lower Court was the child's expressed wish to live with her Mother. The female child also appeared before this Court and confidently articulated her desire to live with her Mother, a factor particularly relevant when a child is capable of expressing her preference. This underscores the importance of considering the child's wishes in custody decisions.

13. The evidence under examination must satisfy a level of substantiality and significance that warrants this Court's intervention. The Court's involvement is predicated on the assumption that the evidence submitted is potent enough to contest the judgments rendered by the subordinate courts. However, in the current case, the Appellate Court concentrated solely on the aspect of a second marriage, reviewing it under the lens of Muhammadan Law. It is important to note that this principle is not an absolute one.

Furthermore, the female child has expressed her preference to reside with her Mother. Therefore, this Court cannot disregard her wishes and desires. A mother's second marriage should not be the sole determinant in disqualifying her custodial rights. In a situation analogous to the current case, the Supreme Court of Pakistan, in the case of Muhammad Owais vs Nazia Jabeen (2022 SCMR 2123), has ruled as follows: -

"6. The basic issue is with reference to the custody sought by the Mother for her four children. The emphasis by the father is on the Mother's second marriage, which it is argued disentitles her to custody under the Islamic Law. D.F. Mullah in Mohammadan Law in Para 352 provides that the Mother is entitled to the custody (hizanat) of her male child until he has completed the age of seven years and of her female child until she has attained puberty. Para 352 ibid provides that this right continues whilst she is divorced from the father of the child, however, in the event she marries a second time, custody then belongs to the father. Para 354 of Mohammadan Law provides that the Mother, who is otherwise entitled to the custody of a child, loses the right of custody if she marries a person not related to the child within the prohibited degrees which are specified in paras 260-261 of Mohammadan Law. So as per the principles of Mohammadan Law by D.F. Mullah where she remarries, she can be disqualified for custody ... These provisions and the principles of Mohammadan Law have been examined by this Court in several judgments where it has held that the conditions contained in Paras 352 and 354 of Mullah's Mohammadan Law are not absolute and are subject to the welfare of the child. In Muhammad Siddique v. Lahore High Court, Lahore through Registrar and others (PLD 2003 SC 887), it was held that although the general rule is that the Mother on contracting a second marriage forfeits her right of custody, this rule is not absolute and if it is in the interest of the child, custody should be given to the Mother. The Court further held that it is the welfare of the minor that must be considered while determining custody and there is no absolute rule or fixed criteria on the basis of which welfare of the minor can be determined or custody can be awarded. In Mst. Shahista Naz v. Muhammad Naeem Ahmed (2004 SCMR 990), this Court concluded that the right of Hizanat having the force of Injunctions of Islam is an accepted principle of Islamic Law and a female on account of re-marriage may be disqualified to exercise this right, but a mother on account of re-marriage is not absolutely disqualified to be entrusted the custody of a minor child rather she may lose the preferential right of custody. The Court further held that there is no denying the fact that there can be no substitute for the Mother of the minor child especially of tender age, therefore, the consideration for grant or refusal of custody will always be the welfare of the minor. In this case, the Mother even on contracting second marriage was entitled to retain custody of

the minor. Again while looking at the Islamic provisions on custody of minor, this Court concluded in Mst. Hameed Mai v. Irshad Hussain (PLD 2002 SC 267) that the question of custody of a minor child will always be determined on the basis of the welfare of the minor and notwithstanding the father's right for custody under Muslim Personal Law, this right is subject to the welfare of the minor. Again in Shabana Naz v. Muhammad Saleem (2014 SCMR 343), Paras 352 and 354 of the Mohammadan Law were considered and the Court concluded that although Mohammadan Law provides that the Mother is disentitled to custody if she remarries, this is not an absolute rule but one that may be departed from if there are exceptional circumstances to justify such departure and even in a situation of a second marriage if the welfare of the minor lies with the Mother then she should be awarded custody.

7. The aforesaid judgments clearly dispel the stance taken by the father that on account of the Mother's second marriage, she has lost the right of custody over her four children ..."

14. Based on the reasons stated above, the instant petition is **allowed**. The judgment and decree issued by the learned Appellate Court are set aside, and the judgment and decree passed by the learned trial Court are upheld.

Faisal Mumtaz/PS

JUDGE