

**IN THE HIGH COURT OF SINDH BENCH AT SUKKUR**

**C. P. No. S – 143 of 2024**

*Deedar Hussain & another v.*

*Additional District Judge-III, Naushahro Feroze & another*

Date of hearing : **02.09.2024**

Date of decision : **02.09.2024**

Mr. Abdul Qadir Khanzada, Advocate for petitioner.

**ORDER**

**Zulfiqar Ahmad Khan, J.** – Through this petition, the petitioner has impugned the judgment dated 09.08.2024, passed by learned Additional District Judge-III, Naushahro Feroze in G&W Appeal No.02 of 2024, whereby the appeal has been allowed and Guardian Order dated 03.02.2024, passed by learned Family Judge, Naushahro Feroze in G&W Application No.14 of 2023 has been set aside remanding the matter to the trial Court to decide afresh on merits.

2. Respondent No.2 filed a Guardianship Application under Sections 7 and 10 of the Guardian & Wards Act, 1890, read with Section 25 of the Family Courts Act, 1964. She claims to be the natural mother and guardian of the minors Sameer Ali, Humair Ali and Abdul Rehman, aged about 08, 06 and 05 years respectively at the time of filing of the Guardianship Application on 07.03.2023, whose father, her husband, was murdered. Respondent No.2 alleged that the petitioners, the minors' paternal uncles, have been inciting the children to seek revenge for the murder of their father, making their home environment unsuitable. She requested for custody of the minors asserting that she can provide better care including education, food, maintenance and medical treatment to them, and sought a formal declaration as their guardian.

3. The petitioners' case is that before filing the Guardianship Application, respondent No.2 had filed an application under Section 491, Cr.P.C., in which the children appeared in the concerned Court and disclosed relevant facts, and the said application was dismissed. They also claim that respondent No.2 is currently living with her brothers and, during her previous stay with them, the children were mistreated. Due to this maltreatment, the children returned voluntarily to the petitioners, who are now providing them with proper care, education, food, clothing and a happy environment.

4. The learned Family Court observed that the minors and respondent No.2 lived together with the deceased Rahatullah (their father) in the house jointly owned by the petitioners and their deceased brother, and that respondent No.2 observed her *iddat* period in the petitioners' house. The petitioners filed an FIR for Rahatullah's murder, which is still under adjudication. A dispute arose when respondent No.2 began living with her brothers. Before filing the Guardianship Application, respondent No.2 had sought custody of the minors under Section 491 Cr.P.C, but her application was dismissed because the minors were unwilling to communicate or meet with her. The learned Family Court has further held as under:

*“During course of cross-examination applicant Mst: Rukhsana has stated that Now a days she is residing with her brother Qamar uddin and her livelihood is sole dependent upon her embroidery work. She further has testified that her monthly income from embroidery is nominal. Applicant also admits that Opponents have agriculture land and they are financially sound. As per testimony of applicant her brother Qamar Din is serving in WAPDA and his house consist upon 3 rooms (one room is in use of her brother and two rooms are in her use). Moreover applicant during cross-examination herself admitted that minors are studying in School. While during evidence Head Master Mukhtiar Ahmed Khaskheli of Primary School Abran has been examined, who asserted that minors vide respective GR numbers*

*are registered in the School. Whereas applicant witness/brother Waheed Ali has testified that he belong to Ahle Tasheeh Sect/ Fiqah Jafria and Opponents as well as deceased Rahatullah/ father of minors belongs to Fiqah Hanfia. Applicant witness Waheed Ali contrary to the testimony of applicant Mst. Rukhsana states that she is residing with him, while applicant Mst: Rukhsana had deposed that she resides with her brother Qamar Din. Applicant witness Waheed Ali further asserted that he and other bother also financially support applicant and applicant also works of embroidery, and her monthly income from embroidery work is round about PKR:5000/- to PKR:8000/-.*

*Meanwhile Opponent Deedar Hussain has testified in cross-examination that Minor Abdul Rehman is studying in class one, minor Humair is studying in class two and minor Sumair Ali is studying in class three. Opponent Deedar Hussain admitted that after murder of their deceased brother Rahib alias Rahatullah have not contacted applicant. Opponent Deedar Hussain further asserted that he has two daughters and two sons, and his son Aslam has qualified intermediate and Shahzad is studying in Matric class. Moreover the children of opponent Hakim are also studying but none has government jobs.”*

5. On the basis of above evidence, the learned Family Court dismissed the G&W Application and held the petitioners as fit persons to nurture and look after the minors, and the mother was only allowed to meet her children on first and third Saturday of every month from 11:00 a.m. to 01:00 p.m. **(two hours only)** within premises of the trial Court. In case first or last Saturday of the month is to be declared as holiday, meeting shall be held on subsequent working day.

6. Respondent No.2, dissatisfied with the trial Court’s decision, filed a G&W Appeal. The appellate Court allowed the appeal and remanded the case for a fresh decision, criticizing the trial Court for not recording the children’s statements and failing to consider that respondent No.2, as the children’s biological mother, has a closer relationship compared to the petitioners. The appellate Court noted that there was no evidence of respondent No.2’s eyesight issues affecting the custody decision, and

emphasized that factors such as child upbringing and nurturing are crucial. Additionally, it has been observed that the petitioners had not complied with the visitation order, which was limited to the Court premises. The appellate Court directed the trial Court to reconsider the case with a proper understanding of the law, arrange for respondent No.2's meeting with her children on weekends at her home, and take strict action if the petitioners disobey the Courts' orders. The trial Court was instructed to resolve the matter within two months without unnecessary adjournments.

7. Though, still custody has not been handed over to the mother (respondent.2) and only meeting time has been extended from **'two hours fortnightly'** to **'two days weekly'** till a fresh decision by the trial Court, the petitioners instead of contesting the matter before the trial Court afresh, approached this Court with the instant petition praying for setting aside the impugned judgment of the appellate Court.

8. In a custody decision involving minors whose father has passed away, awarding custody to paternal uncles solely based on their financial stability from agricultural land etc., while dismissing the mother's claim due to her lower income from embroidery work, is legally and ethically flawed because the mother has a primary relationship with the children as their biological parent. This primary relationship is a significant factor in custody decisions. The bond between a mother and her children is foundational, and a mother's custody claim generally holds substantial weight in the determination of the children's best interests. While the financial stability of the custodians is an important consideration, it is not the sole criterion.

9. In this case, the paternal uncles' financial resources are derived from agricultural land etc., which does not outweigh the primary bond between the mother and her children. The mother's income from embroidery, though insufficient (Rs.5,000/- to Rs.8,000/- monthly), can be supplemented by her late husband's property share and family support.

Custody decisions should not be made solely based on financial capabilities, especially when the primary caregiver has a strong emotional and relational bond with the children. The paternal uncles, though financially sound, have a secondary relationship with the minors compared to their biological mother. Additionally, the uncles have their own older children, which could affect their capacity to provide the same level of attention and emotional support to the minors. The relationship between the minors and their uncles is secondary and does not offer the same familial connection and emotional security as the relationship with their mother.

10. If the custody of the children of 5 to 10 years old is given to their paternal uncles, their aunts, while supportive, may not be able to fully replicate the nurturing and emotional bond that their biological mother provides. The mother's unique role contains not only direct caregiving but also a deep emotional connection built over years, which is integral to the children's well-being. An aunt, though well-meaning, might lack this established emotional intimacy and the nuanced understanding of the children's individual needs and preferences that their mother inherently possesses, potentially impacting the children's emotional adjustment and stability.

11. It may be observed that separating the children from their mother could have long-term negative effects on their emotional and psychological development. The mother, who is alive, has not remarried, and is currently living with her brother, is likely to provide a more stable and emotionally secure environment compared to the uncles. Her separation from her children not only affects the children's future but also causes significant distress to her as their biological mother.

12. In the case of Abdul Razaque and 3 others v. Dr. Rehana Shaheen and another (PLD 2005 Karachi 610), this Court held as follows:

*“10. .... It is settled law that the grandparents of the Minor cannot replace the love and affection which can be bestowed upon him/her by his natural/real parents and unless there are other considerations not to do so, custody is normally given to the latter. .... Insofar as the wishes of the Minors are concerned, no doubt, it is one of the factors to be taken into consideration but cannot be decisive in the matter. After all, the Minors are of tender age and it cannot be expected that they should be able to decide where their welfare lies. In this regard although, both minors during the course of evidence as well as in my presence have expressed their unwillingness to accompany their mother, in my opinion, this is the result of their association with their grandparents and they cannot be expected to say anything else. Reliance can be placed upon the case of Mst. Aisha v. Manzoor Hussain (supra), where the Honourable Supreme Court has held that the Minor is not the best judge of where his/her welfare lies.”*

13. The Peshawar High Court in the case of *Abdul Ghaffar v. Shoukat (2022 YLR 2482)*, where a father, acquitted of a murder charge related to his wife’s death, sought custody of his biological son, who had been under the care of his maternal grandfather and then the maternal uncle after the grandfather’s death, and the Family Court granted custody to the maternal uncle, has observed as under:

*“9. For the sake of custody of minor's physical, mental health, education and psychological development, it is important that the custody of the minor Muhammad Hilal should be restored to the petitioner, who is biological father and the natural guardian of the minor. No doubt, choice of a minor is a factor to be taken into consideration but it cannot be made a decisive factor in matters relating to custody of minors as is seen from the record, the facts of the instant case are different from those cases where the consent of the minor has to be considered while deciding issue of custody of minor as in the instant case, the minor has been influenced by the respondents to make a particular choice and, therefore, he is not in a position to form intelligent preference.*

*10. As far as the criminal case against the petitioner is concerned, the acquittal of petitioner proved his innocence and*

*the fact of filing appeal against his acquittal does not destroy the presumption of his innocence, besides, the second wife of the petitioner is present in the court room, who fully assured the court that she will leave no stone unturned in the best upbringing of the minor Muhammad Hilal.*

*11. Accordingly, in view of the above, this court is of the view that welfare of the minor Muhammad Hilal lies with his father, the petitioner, and the courts below by giving his custody to respondent No. 2 have gone into wrong premises and when so the petition is allowed, accordingly, the judgments of both the courts below are set aside and as a consequence thereof by allowing the petition of the petitioner, custody of minor (respondent No.3) is granted/ handed over to the petitioner.”*

14. A custody decision that prioritizes financial resources over the primary parent-child relationship, and that overlooks the emotional well-being of both the children and their mother, lacks a solid foundation. Custody decisions should prioritize the primary caregiver’s relationship with the children, their emotional needs, and their ability to provide a nurturing environment, rather than focusing primarily on financial stability.

15. The instant petition, therefore, is **dismissed in limine** along with pending application(s). The trial Court, where the matter has been remanded by the appellate Court, is directed to decide the case afresh purely on merits keeping in view the observations made hereinabove.

Above are the reasons of my short order dated 02.09.2024.

J U D G E

Abdul Basit