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Before Mirza Viqas Rauf, J

Mst. HIFSA NASEER---Petitioner

Versus

A.D.J. GUJAR KHAN and 3 others---Respondents

Writ Petition No.3149 of 2014, decided on 30th June, 2016.

(a) Guardians and Wards Act (VIII of 1890)---

---Ss. 17 & 25---Custody of minor---Welfare of minor---Scope---Paternal grand-mother of minor moved application for custody of minor daughter which was accepted concurrently---Mother of minor daughter was disentitled from the custody due to her second marriage---Validity---Paramount consideration in the matter with regard to custody of minor was the welfare of minor---Mother of a child had natural love and affection for her children having no substitute---Daughter required company and association of her mother for preparing her to shoulder responsibilities in future---Mother would lose her preferential right of custody in case she married a person not related to the child within the prohibited degree but this was not an absolute rule---Welfare of minor would play pivotal role in deciding the question of custody of minor albeit mother had contracted second marriage---Father was not willing to obtain the custody of minor---Custody of minor in presence of real mother could never be handed over to the paternal grand-mother---Second marriage of mother or father could not be sole fact to decide the fate of custody of minor rather it was the welfare of minor which would prevail upon all other considerations---Both the courts below had disturbed the custody of minor on extraneous reasons---Courts below had mis-read the material piece of evidence---Impugned orders passed by the courts below were set aside by High Court being illegal and unlawful---Petition by the grand-mother was dismissed---Constitutional petition was allowed in circumstances.

Shabana Naz v. Muhammad Saleem 2014 SCMR 343; Mehmood Akhtar v. District Judge, Attock and 2 others 2004 SCMR 1839 and Mst. Gulnaz Bibi v. Faraqat Ali Shah and another PLD 2000 Pesh. 23 rel.

(b) Constitution of Pakistan---

---Art. 199---Constitutional jurisdiction of High Court---Scope---High Court to curb any illegality or perversity in the proceedings of courts below floating on the surface of record while exercising constitutional jurisdiction.

Raja Farrukh Arif Bhatti for Petitioner.

Raja Muhammad Jawwad Arsalan for Respondent No.3.

Mehnaz Begum for Respondent No.4.

Date of hearing: 23rd June, 2016.

JUDGMENT

MIRZA VIQAS RAUF, J.---Mst. Hifsa Naseer petitioner, through instant petition, assails the vires of judgment dated 09th of October, 2014, whereby the learned Additional District Judge, Gujar Khan, while dismissing her appeal affirmed the order dated 26th of May, 2014 passed by the learned Civil Judge 1st Class/Guardian Judge, Gujar Khan.

2. Precisely, the facts necessary for adjudication of instant petition are that the respondent No.3 filed a petition under Section 25 of The Guardians and Wards Act, 1890, seeking custody of minor daughter namely Hadia Umer. As per averments contained in the petition, the respondent No.3 was married to the petitioner on 06th of February, 2007 and from the wedlock, minor daughter was born on 07th of February, 2008. Due to strained relations, matrimonial tie ended in divorce. It is averred in the petition that the petitioner thereafter contracted second marriage with another person who is not related to minor within prohibited degree. The petitioner contested the petition and filed her reply wherein she not only raised preliminary objections, but also controverted the assertions contained in the petition. The divergent stance of the parties resulted into framing of multiple issues whereafter both the sides produced their respective evidence. Upon completion of evidence and hearing both the sides, petition was allowed vide order dated 26th of May, 2014. The petitioner, feeling dissatisfied from the said order, filed an appeal before the learned Additional District Judge, Gujar Khan, however, the appeal was dismissed vide judgment dated 09th of October, 2014, hence this petition.

3. Learned counsel for the petitioner submitted that the custody petition was nothing but a counter-blast of the suit filed by the petitioner for recovery of maintenance. He added that the petition was filed through attorney and respondent No.3 never appeared before the Court. Learned counsel contended that while disturbing the custody of the minor, both the Courts below were mainly persuaded with the fact of second marriage of the petitioner. Learned counsel maintained that re-marriage can never be the sole fact for deciding the fate of custody of the minor. Learned counsel argued that it is the welfare of the minor which is to be seen, while deciding the matter of custody but both the Courts below did not advert to this material aspect.

4. Conversely, learned counsel representing the respondent No.3 contended that on contracting second marriage, the petitioner lost the right of custody of minor in view of principles laid down in Para No.354 of The Muhammadan Law. Learned counsel submitted that respondent No.3 has not contracted second marriage and he was rightly held entitled for the custody of the minor. It is argued that there are concurrent findings of facts recorded by both the Courts below which are based on proper appraisal of evidence and constitutional petition is not maintainable.

5. I have heard learned counsel for both the sides at some length and perused the record in order to appreciate their respective contentions.

6. Before dilating upon the propriety of the judgments under challenge, it would be advantageous to observe that there are certain admitted facts which crept up from the record. At the time of filing of petition, the minor was about five years of age and she is in the custody of the petitioner right from her birth. The petition was instituted through general attorney namely Abdullah Haris who is real brother of the respondent No.3. It is also an admitted fact that the respondent No.3 is residing abroad. Perusal of impugned judgments reveals that findings of both the Courts below are solely influenced with the factum of second marriage of the petitioner.

7. Law is well settled by now that in the matter relating to the custody of minor, paramount consideration always remains the welfare of the minor. Section 17 of The Guardians and Wards Act, 1890 lays down the necessary considerations for deciding the matter of custody which reads as under:-

17. Matters to be considered by the Court in appointing guardian.--(1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

(4) Omitted by the Federal Laws (Revision and Declaration) Ordinance, XXVII of 1981.

(5) The Court shall not appoint or declare any person to be a guardian against his will.

It is manifest from the above that the Courts, while deciding the question of custody shall be guided by the principles enumerated hereinabove and prime consideration before the Court would always be the betterment of the minor but not claims or wishes of rival contesting parties.

8. Mother of a child always has natural love and affection for his children male or female having no substitute. Apart from care, love and affection of a real mother of which there is no substitute, daughter requires her company and association for preparing her to shoulder responsibilities in future. This is the reason that Muhammadan Law recognized preferential right of mother to custody, of infant children which is ordained in Para. No.352 of The Muhammadan Law by D.F. Mulla's. No cavil that mother loses her preferential right in case she marries a person not related to the child within prohibited degree but this is not an absolute rule. In the case of

"SHABANA NAZ v. MUHAMMAD SALEEM" (2014 SCMR 343), the Hon'ble Supreme Court of Pakistan while taking this issue very elaborately outlined the factors disqualifying the mother and father from the custody of minor in the following words:

"8. It may be noted that in terms of section 7 of the Guardians and Wards Act, 1890 (the Act), the paramount consideration for the Court in making the order of appointment of guardian of minor is that it should be satisfied that it is for the welfare of minor. Although it is an established law that father is a natural guardian of his minor child/children but indeed the Court has to be satisfied while appointing the father as a guardian that the welfare of minor lies in the fact that he be appointed as a guardian and the custody of minor be delivered accordingly. There are many factors, which may not entitle the father to the custody of minor and some of the factors could be, where the father is habitually involved in crimes or is a drug or alcohol addict, maltreats his child/children, does not have a capacity or means to maintain and provide for the healthy bringing up of his child/children or where the father deliberately omits and fails in meeting his obligation to maintain his child/children. The factors noted above are not exhaustive and they may also not be considered as conclusive for that each case has to be decided on its own merit in keeping with the only and only paramount consideration of welfare of minor.

11. Para 352 of the Muhammadan Law provides the mother is entitled to the custody (Hizanat) of her male child until he has completed the age of 7 years and of her female child until she has attained puberty and the right continues though she is divorced by the father of his child unless she marries a second husband in which case the custody belongs to the father.

12. Para 354 provides for disqualification of female from custody of the minor, which includes the mother and one of the instance laid down is that if she marries a person not related to the child within the prohibited degree e.g. a stranger but the right revives on the dissolution of marriage by death or divorce.

13. Thus, it is apparent from reading of the two paras of the Muhammadan Law that though the mother is entitled to the custody (Hizanat) of her minor child but such right discontinues when she takes second husband, who is not related to the child within the prohibited degree and is a stranger in which case the custody of minor child belongs to the father. It has been construed by the Courts in Pakistan that this may not be an absolute rule but it may be departed from, if there are exceptional circumstances to justify such departure and in making of such departure the only fact, which the Court has to see where the welfare of minor lies and there may be a situation where despite second marriage of the mother, the welfare of minor may still lie in her custody.

While going through the principles laid down by the Hon'ble apex Court in the case of Shabana Naz's (supra), it can safely be held that welfare of minor plays pivotal role in deciding the question of custody of minor albeit mother has contracted 'second marriage. Reference in this respect, if needed, can also be made to "Mehmood Akhtar v. District Judge, Attock and 2 others" (2004 SCMR 1839).

9. There is yet another important aspect that respondent No.3, while seeking custody of minor daughter despite being available in the country did not opt to file the petition directly rather same was filed by Abdullah Haris who is his general attorney. It is also an admitted position on the record that previously when the petitioner instituted a suit for recovery of maintenance, which was decreed in her favour it was the respondent No.3 who contested the proceedings himself. While going through the impugned judgment dated 09th of October, 2014, it is observed that custody of the minor was in fact directed to be handed over to her paternal grand mother and not the father. The relevant extract from the impugned judgment is reproduced below:--

"The mother of the respondent is a school teacher and retired from service and today on direction of court order she appeared before the court and got recorded her statement that she is ready to look after the minor in absence of her son. Admittedly the mother of the respondent is available at house who can take care of the minor and the respondent is in a better position to bear the expenses of the minor as well."

The conduct of the respondent No.3 clearly indicates that he was never willing to obtain the custody of the minor and petition was only filed to counter the suit for recovery of maintenance decreed in favour of the petitioner. Even otherwise, in presence of real mother custody can never be handed over to the paternal grand-mother.

10. Needless to observe that second marriage of mother or father is not the sole fact to decide the fate of the custody petition rather it is the welfare of the minor which will prevail upon all other consideration. Record reveals that minor has now attained the age of 08 years and she is studying in Class-3 in the school where the petitioner is also serving as a teacher. Though no other material evidence is available on record other than the second marriage of the petitioner disentitling her from the custody of minor but both the courts below disturbed the custody of minor on extraneous reasons. The accumulative effect of the available evidence leads to an irresistible conclusion that welfare of the minor lies with the petitioner. Both the Courts below have grossly mis-read the material pieces of evidence convenient for adjudication of question of welfare of the minor and proceeded to bank upon only question of second marriage of the petitioner with a person who is not related to the minor within prohibited degree, which approach can never be termed as judicious and lawful. Reference in this respect can also be made to "Mst. Gulnaz Bibi v. Faraqat Ali Shah and another"(PLD 2000 Peshawar 23).

11. Though there are concurrent findings of facts recorded by both the Courts below and this Court always exercises restraint, while interfering with such findings especially in constitutional jurisdiction but this by itself is not an inflexible rule. It is the primary duty of this Court to curb any illegality or perversity in the proceedings of the Courts below floating on the surface of the record, while embarking upon the constitutional jurisdiction in terms of Article 199 of The Constitution of Islamic Republic of Pakistan, 1973 in order to achieve the ends of justice. This Court cannot sit as a silent spectator, especially in the matter relating to the custody of minors and shut

its eyes only on the ground that the Courts below have concurrently arrived at some conclusion, despite being an erroneous and illegal.

12. For the foregoing reasons, instant petition is allowed and the impugned judgment dated 09.10.2014 as well as order dated 20.05.2014 are set-aside being illegal and unlawful. As a result thereof, the guardian petition filed by the respondent No.3 stands dismissed with no order as to costs.

ZC/H-17/L Petition allowed.

