

IN THE HIGH COURT OF SINDH, KARACHI

C.P.No.S-2210 of 2017

Imran Ahmed
v/s.
Mst. Madiha Younus and others

Before: Justice Mrs. Ashraf Jahan.

For Petitioner : Mr. Shahid Hussain Soomro,
Advocate

For Respondents : Mr. Rana Muhammad Arshad,
Advocate for Respondent No.1.

Date of Hearing : 06.11.2017

Date of Order : 06.12.2017

JUDGMENT

Mrs. Ashraf Jahan, J.:- The Petitioner has assailed the order dated 12.10.2017, passed by learned Vth Additional District Judge, Karachi (East) in Guardian and Wards Appeal No.167/2017, by way of present petition, praying therein that impugned order alongwith earlier order dated 18.08.2017 passed by the Family Court in Guardian and Wards Application No.3111/2015 may be set aside and the custody of minors may be allowed to remain with him.

2. The precise facts relevant for disposal of instant petition are that Respondent No.1 had filed an application under section 25 of the Guardian and Wards Act, 1890 for seeking permanent custody of her two minors before the Court of IInd Civil and Family Judge, Karachi (East), stating therein that she had married with the Petitioner on 30.12.2005. They had two sons Huzaifa Imran, born on 04.11.2006 and Aashad Imran, born on 17.10.2008. After

marriage, the Petitioner changed his attitude and used to treat her as housemaid, he was also jobless and addicted to alcohol. In the year 2008 she came to know that the Petitioner was already married with one Mst. Shamim which fact was concealed at the time of their marriage, thus he proved himself to be irresponsible and careless person. Further he failed to maintain her as well as two minors. Resultantly, she filed Family Suit No.1570/2015 and obtained Khulla from him through the Court. Thereafter she tried to meet with the minors, but the Petitioner did not allow her to meet with them. Having no other remedy she filed Guardian and Wards Application, which was decided in her favour vide order dated 03.07.2017, which was successfully challenged by the Petitioner, as his appeal was allowed vide order dated 10.08.2017 and the case was remanded to the Family Court to decide it afresh. But again the learned Family Court decided the case in her favour vide order dated 18.08.2017. The above order was challenged before the Vth Additional District Judge, but this time appeal was dismissed and order of the Family Court in her favour was upheld.

3. Conversely, the present Petitioner denied the allegations of Respondent No.1 and stated that she suppressed the actual material facts and concocted a fictitious story in her favour. The Petitioner had before marriage informed her about his first marriage with Mst. Shamim. Previously he was working in police department and maintained his family properly. The Respondent No.1 herself left the minors at his house and went to her parents' house and then filed suit for dissolution of marriage, where marriage was dissolved by way of Khulla. The minors are residing happily with the Petitioner being their natural guardian and thus no case for handing over their custody to Respondent No.1 is made out.

Upon pleadings of the parties, the Family Court framed the following issues:

1. “Whether the application of Plaintiff is maintainable under the law?
2. Whether the welfare of minors namely Huzaifa Imran and Arshad Imran lies in favour of applicant?
3. Whether the welfare of minors namely Huzaifa Imran and Arshad Imran lies in favour of opponent?
4. What should the decree be?”

4. I have heard the learned counsel for the parties. It is contended by learned counsel for the Petitioner that the trial Court did not consider the real facts and passed the order in a hasty manner. Infact Respondent No.1 is doing job from 9:00 a.m. to 5:00 p.m. thus welfare of the minors lies with present Petitioner; the children are happily residing with the Petitioner and they are being properly looked after, therefore, no case for granting their custody to Respondent No.1 is made out. Furthermore the children are quite sensible and for this reason an application was moved before the Family Court to record their statements to see their preference, but the Court dismissed such application without any legal justification and illegally granted the custody of minors to Respondent No.1. He further contended that under the Islamic Law, in case of male child, right of Hizanat in favour of mother, is only upto the age of 7 years, whereas in the present case both the minors have already crossed the age of seven years. It is also pointed out that the present Petitioner has substantive earnings, as presently he is working as Zonal Manager, Tajjia Marketing Corporation and his first wife is running a beauty parlor. Hence, he is in better financial position as compared to Respondent No.1, who is working as Lecturer. Thus, the orders of the Family Court, as well as, Appellate Court are liable to

be set aside and custody of minors may be allowed to remain with the present Petitioner. In support of his contentions, learned counsel for the Petitioner relied upon the cases reported as 2012 MLD 762 (Zainab Bibi v/s. Zaffar Iqbal), PLD 2015 Lahore 401 (Miss Fauzia Iqbal v/s. Farhat Jahan and others) and 2009 YLR 2339 (Mst. Farzana Kausar v/s. Muhammad Tufail and 2 others).

5. On the other hand, learned counsel for Respondent No.1 contended that welfare of the child lies with Respondent No.1, as she is their real mother, who can properly look after the children of this age. The present Petitioner has no proper arrangement at home for the care of the children, therefore, the learned Family Court and the Appellate Court have rightly ordered for the custody of children in her favour. It is also vehemently urged that the other wife of the Petitioner is running a beauty parlor, where she is busy from morning till evening, whereas the Petitioner himself also not available at home to look after the children; therefore, present petition may be dismissed. In support of his contentions, learned counsel for Respondent No.1 relied upon the cases reported as 2009 MLD Lahore (Tahira Bibi v/s. Muhammad Saeed and another), 2009 MLD 37 Karachi (Nasir Hayat v/s. The State), PLD 2005 Karachi 610 (Abdul Razzaque and 3 others v/s. Dr. Rehmana Shaheen and another).

6. I have considered the arguments advanced by both the sides and have perused the case record, which reveals that Respondent No.1 filed application under section 25 of Guardian and Wards Act before the IInd Civil and Family Court, Karachi (East), praying therein that custody of her two minor sons may be given to her. In her application referred to above, she claimed that being educated

mother she is in better position to maintain and look after her children. She alleged that their father being jobless and illiterate person neither can maintain them properly nor could take care of them otherwise.

7. The Petitioner in his written statement denied the allegations leveled against him and stated that Respondent No.1 herself left the children with him on 02.06.2015 and since then they are residing with him happily. Besides, he has sufficient resources to maintain them, therefore no case for grant of custody of minors in favour of Respondent No.1 was made out.

8. Earlier the Family Court after recording the evidence of both the parties and only hearing the counsel for the present Respondent No.1 passed the order dated 03.07.2017, which was challenged by the present Petitioner before the Court of Vth Additional District Judge. This appeal was allowed and case was remanded to the Family Judge with directions to decide the same afresh after hearing both the parties. The Family Court vide Order dated 18.08.2017 decided the case afresh in favour of Respondent No.1. and directed the father to handover the custody of both minors to their mother (Respondent No.1.). Again this order was challenged by the Petitioner before the Appellate Court, who vide its Judgment dated 12.10.2017, dismissed the appeal and maintained the order of the Family Court. It will be relevant to mention that before the Family Court as well as the Appellate Court present Petitioner has moved applications under section 17(3) and (5) of Guardian and Wards Act, praying therein to record the statements of minors but such request was disallowed for no cogent reasons.

9. Be that as it may, while deciding the issue of custody of minors, the prime duty of the Court is to examine, evaluate and determine the welfare of minor. In this regard, Court has to consider all the circumstances including relationship of proposed guardian, character, his or her financial capacity, home, age, religion and sex of the minor. Thus the question of welfare of minor varies from case to case in the given circumstances. So far as the facts of present case are concerned, it is admitted position that the children are residing with their father since June, 2015, when both the parents started living separately and finally marriage was dissolved by way of Khulla on 11.12.2015. When the case of both parties is put in juxtaposition, it appears that on one hand there is mother, working as Lecturer at some College; at her house she has her sister in law and aged father. On the other hand is father, who is natural guardian of minors and with whom the children are residing since their birth. Besides father, there is step mother and grandmother to look after their wellbeing and there are no adverse allegations against their attitude towards minors.

10. It is also to be kept in mind that right of hizanat under the Islamic Law lies in favour of mother only upto the age of seven years in case of male child. In the case in hand, admittedly at present both the minors are more than seven years of age. Moreover, nothing has come on record to show any disqualification of the father to hold their custody being their natural guardian. This ground alone is sufficient for awarding the custody of minors to their father. It appears that the Family Court as well as first Appellate Court have not applied the principle of right of Hizanat as per its real prospective provided under the Islamic Law. Thus, it is established

that there is non-reading / misreading of evidence and the impugned orders are illegal.

11. It is important to note that both the minors remained present before the Court on two dates of hearings. They both appeared to be intelligent enough to form their opinions. Therefore, during course of hearing both the parents were sent out from the Court room and one by one both the minors were asked to disclose their preference, who in clear and specific words chosen to live with their father, they disclosed about their schooling and other daily routine and repeatedly expressed their wish to live with their father as they are happy with him and being properly looked after by their grandmother, step-mother as well as their father. The minor Huzaifa, who is student of class-V and the other Aashad, student of class-III also disclosed that their education at home is given by some tutor and they get the positions in their class examinations. They both appeared to be healthy and confident in their appearance and conduct and on questions put by the Court they replied intelligently and opted to live with their father.

12. In the light of above mentioned facts and circumstances, their preference cannot be ignored altogether and has to be given its due importance. Even otherwise, looking to the growing age of minor boys they need the supervision of their father in order to groom them properly to meet the future challenges of society.

13. The case law cited by the learned counsel for Respondent No.1 is distinguishable and not applicable to the facts and circumstances of the present case.

14. Resultantly, I am of the view that at this stage welfare of minors lies with the present Petitioner. Accordingly, Orders dated

12.10.2017 and 18.08.2017 are set aside and present petition is allowed. However, Respondent No.1 would be entitled to meet the minors fortnightly on Saturdays from 10:00 a.m. to 6:00 p.m. In this regard parties are directed to appear before the Family Court and mutually settle the arrangement regarding meeting the minors. She will also be entitled to meet the minors on second day of both Eids. Moreover, Respondent No.1 (mother) will be entitled for the custody of both the minors for five days in winter holidays and fifteen days during summer vacations as per convenience of both the parties but subject to furnishing surety by Respondent No.1 for Rs.50,000/- before the Family Court for the safe return of minors to their father. If deems appropriate, Family Court would be at liberty to appoint any Court Official as Commissioner in respect of handing and taking over the minors.

Judge