

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

Constitutional Petition No. S-252 of 2020

Date	Order with signature of Judge
-------------	--------------------------------------

1. For orders on office objections at Flag "A"
2. For orders on CMA No.6235/2020
3. For hearing of main case

Mr. Nazir Ahmed Shar, Advocate for petitioner
Respondent No.1, in person, along with minor Jiya Ali

Date of hearing : 22.11.2021 & 06.12.2021
Date of decision : 06.12.2021

ORDER

KHADIM HUSSAIN TUNIO, J- Through captioned constitutional petition, the petitioner has impugned the judgment dated 24.10.2020, passed by the learned II-Additional District Judge, Naushahro Feroze whereby the Guardian & Wards Appeal No.06/2019 filed by the petitioner was dismissed.

2. Brief facts of the Constitutional Petition are that the petitioner was married to one Mst. Faiza and they had one daughter from the wedlock namely Jiya Ali, who remained with respondent No.1. On 17.05.2015 while the petitioner was not present at his house, his wife Mst. Faiza swallowed black stone, which caused her death soon after. The son of respondent No.1, thereafter, lodged an FIR against the petitioner stating therein that he had committed the murder of deceased Mst. Faiza, his late wife. The petitioner was arrested and the custody of his baby daughter, Jiya Ali remained with respondent No. 1 since then.

3. Learned counsel for the petitioner has argued that the impugned judgment passed by the learned appellate Court as well as the trial Court is opposed to actual law, facts and equity; that the petitioner has already been acquitted in the FIR lodged against him on 30.10.2018; that the petitioner is the real father of the minor hence, is entitled for her custody; that the petitioner earns sufficiently to give good care to the minor if the custody of the child is given to him. The learned counsel for the petitioner, therefore prays for setting aside the impugned judgment and awarding the custody of the petitioner's daughter to him. Learned counsel for the petitioner has referred the case titled *Nasir Raza v. Additional District Judge, Jhelum & another* (2018 SCMR 590).

4. Respondent No. 1, on the other hand, supported the impugned judgment and argued that the minor has developed hatred against the petitioner for the murder of her mother namely Mst. Faiza, allegedly committed by the petitioner.

5. I have heard the learned counsel for the petitioner and respondent No. 1 in person and have perused the record available before me.

6. This Court is conscious of the fact that the petitioner was acquitted in the murder of his wife, Mst. Faiza and also the fact that he is the father of the minor. However, at the very outset, it is observed that the mere entitlement of a father as the natural guardian of a minor would never be sufficient to decide the question of welfare of a child. In this regard, reliance is placed on the case of *Mst. Rasheedan Bibi v. Additional District Judge and 2 others* (2012 CLC 784). The

legislators were conscious of every aspect and enacted the Guardians and Wards Act, 1890 to secure the welfare and interests of minors living within the jurisdiction while highlighting the degree of preference to establish guardianship. S. 17 of the Guardians and Wards Act, 1890 enunciates, quite expressly, the considerations by a Court for appointing a guardian. The welfare of the child finds prime importance after a bare perusal of the legislation, which is reproduced hereunder for ready reference:-

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.

7. The welfare of the child is the determining question taken into due consideration by the court while granting custodial/preferential rights to anyone regarding the custody of the child. In the case of *Khalid Mehmood v. Additional District Judge Islamabad and 2 others (2011 CLC 889)*, it was observed that:-

“In appointing the guardian of the minor paramount consideration for the court should be welfare of the minor. Court must see as to who was the most likely to contribute to the well being of the minor and who would be in better position to look after and take care of the minor.”

8. Therefore, certain aspects which eventually become highly consequential such as the financial stability of a parent, reported misconduct, character and capacity of parent are

attached great importance to the issue on the anvil. Even because, simply, the father loves his children and is not shown to be otherwise undesirable does not necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him. Children are not mere chattels nor are they toys for their parents. Absolute right of parents over the destinies and the lives of their children, in the modern changed social conditions must yield to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society. The word 'welfare' used in Section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the Court as well as its physical well-being. Though the provisions of the special statutes, which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its *parens patriae* jurisdiction arising in such cases. When the Court inquired from the minor, it was not a matter of surprise to the Court that she showed visible hatred towards her father, despite the father being acquitted of the murder and categorically stated to reside with her maternal grandparent (*respondent No. 1*). Similar view has been taken by the Honourable Apex Court in unreported case of *Rashid Hussain v. Additional District Judge, Islamabad (East)* and others while deciding Civil Petition No.1665 of 2020 vide order dated; 02.11.2021.

9. It is a matter of record that the minor is living a normal life with her grandfather (*respondent No. 1*) and is also going to school and studies in KG-1, which shows that the

respondent No. 1 is also providing education to the minor and is bringing her up in a good atmosphere. On the other hand, the father of the minor has not produced any documents before this Court to establish that he is earning well enough to take care of his daughter and what has also not lost sight of this Court is the fact that the minor is aware of what her father allegedly did to her mother and the sense of abhorrence for her father will be mentally taxing for her and also leaves room for apprehension of future danger/threat for her own life.

10. Consequently, the instant constitutional petition was dismissed. Impugned judgment dated; 24.10.2020 passed by the learned Court of Additional District Judge-II, Naushahro Feroze in Guardian & Wards Appeal No.06/2019 Re- Ali Sher Vs. Muhammad Mithal, was upheld. However, the learned trial Court was directed to proceed with the matter expeditiously and to decide the same preferably within two months, after granting full opportunity of hearing to both sides on merits, in accordance with law.

These are the reasons for the short order even dated.

J U D G E