IN THE HIGH COURT OF SINDH AT KARACHI

C.P. No. S-784 of 2021

Dewan Abdullah Ahmed Farooqui …….. Petitioner

vs

The Court of Family Judge South and another …….. Respondents

Mr. Farjad Ali Khan, advocate for the petitioner.
Ms. Sara Malkani, advocate for the respondent no. 2.

Date of judgment: **6th January, 2022**

JUDGMENT

Omar Sial, J.: Mr. Dewan Abdullah Ahmed Farooqui ("**Mr. Farooqui**") has impugned an order dated 5-10-2021 passed by the learned Family Judge, Karachi South. In terms of the said order, the learned court dismissed an application filed before it by Mr. Farooqui pursuant to section 11 of the Code of Civil Procedure, 1908 read with section 17 of the Family Courts Act, 1964.

2. A brief background to the case is as follows. Mr. Farooqui married Ms. Farah Jabri ("**Ms. Jabri**") on 22-4-2000. The couple gave birth to four daughters. The daughters were named Angel Michelle, Aysha, Sarah and Rahma. Things unfortunately did not work out for the couple and in the year 2012, Ms. Jabri left for the United Kingdom. In the year 2013, Ms. Jabri filed an application (G & W Application No. 829 of 2013, hereinafter "**the first application**") before the learned 16th Civil and Family Judge, Karachi South, in which she sought custody of the four children. The learned trial court on 7-5-2016 dismissed the application. In the year 2021, Ms. Jabri, once again, moved an application (G & W Application No. 1620 of 2021, hereinafter "**the second application**") before the learned Family Judge, Karachi South seeking custody of Aysha, Sarah and Rahma. The eldest daughter of the couple, Angel Michelle, was eighteen by this time and thus exercising her independent right had already opted to go live with Ms. Jabri. In response to the filing of the second application, Mr. Farooqui moved an application under section 11 of the Code of Civil Procedure, 1908 read with section 17 of the Family Courts Act, 1964 stating therein that the second

application was barred by the principle of *res judicata* and thus should be dismissed. Mr. Farooqui's arguments did not satisfy the learned trial judge, who vide the impugned order dismissed Mr. Farooqui's prayer.

3. I have heard Mr. Farjad Ali Khan (learned counsel for Mr. Farooqui) as well as Ms. Sara Malkani (learned counsel for Ms. Jabri). Both have very ably assisted the court. For the sake of brevity, their respective arguments are not being reproduced but are reflected in my observations and findings below.

4. For the facilitation of reference, section 11 of the CPC as well as section 17 of the Family Courts Act, 1964 are reproduced below:

> **Section 11 of the CPC**
>
> *11. No Court shall try suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.*
>
> [Explanations have intentionally been omitted)
>
> **Section 17 of the Family Courts Act, 1964**
>
> *17. Provisions of Evidence Act and Code of Civil Procedure not to apply.— (1) Save as otherwise expressly provided by or under this Act, the provisions of the Evidence Act, 1872, and the Code of Civil Procedure, 1908, except sections 10 and 11, shall not apply to proceedings before any Family Court.*
>
> *(2) Sections 8 to 11 of the Oaths Act, 1872, shall apply to all proceedings before the Family Courts.*

5. Learned counsel for Mr. Farooqui has stressed that allegations raised by Ms. Jabri against Mr. Farooqui in the second application are similar to those raised by her earlier in the first application. According to him, as the "*matter directly and substantially in issue*" in the second application is the same as the "*matter directly and substantially in issue*" in the first application, the second application is hit squarely by the principle of *res judicata* contained in section 11 C.P.C. Ms. Malkani, learned counsel for Ms. Jabri, has however taken the position that under the circumstances, section 11 cannot prohibit the second application

as the principle of *res judicata* will not apply in cases dealing with custody of a child.

6. A perusal of the first application reflects that the main ground urged by Ms. Jabri to seek custody of the children at that stage was that Mr. Farooqui abused them in various ways, details of which abuse are contained in the said application. Other grounds in that application highlighted alleged cruelty of Mr. Farooqui however the focus of the alleged cruelty was Ms. Jabri herself. The learned counsel for Ms. Jabri, while conceding that allegations of abuse were agitated in the earlier application, argued that with the passage of time the abuse to which the little girls were subject has grown exponentially. In support of her contention she drew attention to the fact that the eldest daughter, Angel, had to flee from her house and that subsequently she has sworn an affidavit in which she has detailed the abuse suffered by her and her sisters at the hands of Mr. Farooqui.

7. The record reflects that the dates of birth of the three daughters of the couple (excluding Angel) are: Rahma (6-5-2011); Sarah (4-3-2008); Aysha (22-5-2006). They were roughly 2 years old, 5 years old and 7 years old, respectively, when the first application was filed by Ms. Jabri. The girls have now grown and were roughly 10 years old, 13 years old and 15 years old, respectively, when the second application was filed. The record further reflects that Ms. Jabri has not married again whereas Mr. Farooqui subsequently re-married some time in 2014. From that marriage the couple has two little boys and one little girl. The second marriage of Mr. Farooqui has also been raised as a ground that did not exist at the time the first application was filed.

8. I have given great thought to the respective arguments of the counsels. It is judicially well settled by now that decisions in custody cases have to be guided by the welfare principle i.e. welfare of the minor. There can be no set formula to determine as to what constitutes “welfare” of the child. Often circumstances are not so black and white. The learned family courts of our country have worked with great resolve towards achieving this objective and have always considered the child’s interest, comfort and relationship with the parent who would have custody for the child’s welfare in determining the question of welfare. Factors that determine the welfare of a child are not necessarily static. They are of a

dynamic nature and have the potential to fluctuate over time due to many reasons. Custody cases are of a very sensitive and special nature as they deal with the most beautiful creation of God who due to circumstances beyond their control are put in a vulnerable position due to difference between their parents. It is for this reason that some flexibility from following the rule of *res judicata* must be given. It would be unfair to a child that he or she is told that once it has been decided which parent you will be with, that is the end of the road for you. Surely, that cannot be in the welfare of a child. Indeed this thought is also echoed by the Supreme Court in the case of **Ihsan-ur-Rehman vs Najma Parveen (PLD 1968 SC 14)** when it observed that **"**the Family Court when acting as a Guardian Judge exercises parental jurisdiction and the technicalities in so far as it is possible should not be allowed to frustrate substantial justice. A second application wherever it is permissible and is in accordance with the conditions for filing such an application before the Family Court (if there is substantial change of circumstances and situation) is not barred under the relevant law."

9. I am inclined to agree with the learned trial judge that an order of custody of a child is not one of a permanent nature. Circumstances may change since an earlier order of custody was passed necessitating a revisit of the custody order. A child will inevitably grow physically, emotionally and psychologically and what was in the best interest of the child at an earlier stage may not be true in the changed circumstances. Children can express themselves more intelligently. Each child is different with his or her own individual strengths. No definitive age can be stated at which the child is able to express his or her preference in a custody case.

10. In the present case the first application was made in 2013. At that time the little girls were aged 2 years, 5 years and 7 years. 9 years passed before the second application was made by Ms. Jabri. Ideally, the parents should have put aside their respective egos and differences, and amicably decided as to which parent would more likely be in a better position to raise their children. It would have been better for a child's psychological and emotional growth if the child was not subjected to the rigors of court proceedings. Unfortunately, in the present case accusations and counter-accusations have flown from both parties to date and it appears that considerable passage of time has done little to heal their

wounds. The children are older and wiser than what they were at the time of the first application. They were so small at the time of the first application that their voices were not heard. Now that they are older, the opportunity for them to be heard cannot be taken away from them. What was once determined to be in their better interest and welfare may not necessarily be true and correct for the entire period in which they achieve the age of majority. However, just because a child prefers to stay with one parent or the other does not mean that that wish must necessarily be acceded to. A child in adolescence may be motivated by desires that may not be in their better interest. It is the learned family court which will determine if the child is mature enough to express his or her preference as well as determine the intent and reasoning behind their preferences. This determination however will mandatorily take into account the better interest of the child. At trial, the court may be able to gain greater insight to each parent's parenting styles, and the court can see first-hand whether or not the child is a well rounded and healthy individual. I am satisfied that the principle of *res judicata* will not strictly apply and that Ms. Jabri, due to the changed circumstances, cannot be barred from once again repeating her application for custody. Learned counsel for Mr. Farooqui has filed a number of documents under cover of his statement dated 17-11-2021. These documents, he argued, show that the children are happy with Mr. Farooqui, doing well at school and that for various reasons the affidavit sworn by Angel, cannot be made the basis of any custody order. Whether or not the alleged abuse has worsened is an issue that will require evidence to be recorded. As both parties are at odds, as to whether or not the abuse exists and whether or not it has worsened, this becomes a question of fact and cannot be decided by this court in its writ jurisdiction. I therefore make no comment on the same in this order. Another important new ground that has arisen over the passage of time is that Mr. Farooqui re-married and it is an admitted position that the children are in the care of his second wife. While no allegations per se have been made against Mr. Farooqui’s second wife, it has been argued that the atmosphere in the home has become very toxic and the three young ladies often witness Mr. Farooqui abusing his second wife and that his mother-in-law is not kind to the three children.

11. In the case of **Malik Khizar Hayat Khan and another vs Zainab Begum and others (PLD 1967 SC 402)** (though it dealt with an O9 R9 CPC application) the Honorable Supreme Court observed:

If they had done so, it would have been apparent to them that this was not a case to which even principles analogous to those contained in order IX, rule 9 of the Code could have had any manner of application, for, the right to the custody; of a minor is, in any event, in the nature of a continuing right as for each day the minor is kept out of the custody of a person lawfully entitled thereto separate applications can be made Unless, of course, the right of custody itself has been adjudicated upon and one or the other contesting party has been found to be disentitled to it or that it has been found that the welfare on the minor demands that no guardian should be appointed. Even then if a change in the situation has taken place a defeated party may still be entitled to renew his application for custody. Until such an adjudication of the right of the party concerned has been made there can be no question of a second application being barred specially if the second application is founded upon additional or new grounds which have come into existence since the making of the last application.

12. I have also been persuaded by the wisdom of various learned Single Benches of the courts of the country on this issue. In **Shabana Kausar vs District Judge and others (2020 CLC 2099)** it was observed that:

At this juncture, it is relevant to observe that order relating to custody of child is by its very nature not final but is interlocutory in nature and subject to modification at any future time upon proof of change of circumstances requiring change of custody but such change in custody must be proved to be in the paramount interest of the child.

13. In **Mohammad Islam Vs Rashida Sultana and 4 others (2013 CLC 698)** (though a case of maintenance) it was observed that:

It is true that section 11, C.P.C. is applicable on the proceeding before the Judge, Family Court, but it is an established law that under the changed circumstances with passage of time, the petition or suit for enhancement of maintenance is maintainable and the prayer in this respect may be accepted if the necessity for increase is made out. Section 11, C.P.C. is not applicable on the suit/petition for enhancement in the rate of maintenance.

14. In **Ayesha Tahir Shafiq vs Saad Anamullah Khan and 2 others (PLD 2001 Karachi 371)** it was observed:

It may be mentioned here to this regard that an order passed by the Guardian Court in respect of the custody of the minor (consent order or otherwise) may be an order in the best interest and welfare of the minor at that point of time but due to certain future eventuality and subsequent developments the same may not serve as such. It is for this reason that the Guardian Court has been empowered to modify, set aside or alter an earlier order and pass an appropriate order at any subsequent stage to safeguard the interest and welfare of the minor and that the order passed earlier in that context will not operate as a bar of jurisdiction for the Guardian Court for all future time to come.

15. In **Sultana Begum vs Muhammad Shafi (PLD 1965 (W.P.) Karachi 416** it was observed that:

The learned counsel for the respondent cited Mrs. Shushila Ganju v. Kunwar Krishna (A I R 1948 Oudh 266) Saraswati bai Shripad Ved v. Shripad Vasanji Ved (A I R 1941 Bom. 103) and In Re Ghulam Mohammad (A I R 1942 Sind 154). In the first case it was held that orders as to custody of a minor are of a temporary character and if any time it should appear that the person entrusted with custody is not giving that care and attention to the child which is expected of her and is not giving the child a proper education, it will always be open to the other side to move the Court for a proper order. In the second case, it was observed that orders as to custody of the child are of a temporary nature and those interested in the minor are at liberty to apply to the Court again, in case the mother, who was granted custody of the child, was not fit to look after the child, or there was danger to the health of child from contact with her. In the third case, it was held that appointment under section 17 of the Guardians and Wards Act must necessarily be in the nature of things, not final and unalterable; and they can be altered from time to time, as circumstances require. If when the applicant shows that he is no longer a stranger to the boy, that he had taken an interest in the welfare of the boy, and is a fit and proper person to be appointed guardian of the boy, he can apply to the Court again. These cases bring out the principle that normally there should be a change in the circumstances or capacity of the

guardian for a change in the custody of a minor to be ordered by a Court in the interest of the welfare of the minor.

16. To summarise the above discussion:

(i) In custody cases, the welfare of the child is of paramount consideration.

(ii) An order of custody of a child is not one of a permanent nature. Change in circumstances or new grounds that may have arisen with the passage of time may necessitate re-visiting an earlier order for custody. A second application is not barred in such circumstances. An earlier order for custody however must be given due weight and importance while deciding the second application.

(iii) A child's physical, emotional and psychological growth may be considered as a change of circumstances. No definitive age can be stated at which the child is able to express his or her preference in a custody case. However, just because a child prefers to stay with one parent or the other does not mean that that wish must necessarily be acceded to. A child in adolescence may be motivated by desires that may not be in their better interest. The court will determine if the child is mature enough to express his or her preference as well as determine the intent and reasoning behind their preferences.

(iv) In the present case new grounds for example, the children being substantially older, re-marriage of Mr. Farooqui, Angel's departure and allegations as well as the allegation of increased abuse, necessitate that the court examines these issues based on evidence to support such allegations. The children must be given an opportunity to express themselves.

17. For the above reasons the impugned order is upheld and the petition dismissed.

JUDGE