

**HIGH COURT OF SINDH, CIRCUIT COURT,
HYDERABAD**

C.P No. S-591 of 2022

[Mst. Nazia versus Asad Ali & another]

Petitioner : Through Mr. Altaf Sachal Awan advocate
Respondent No.1 Through Ms. Shabeela Mallah advocate
Mr. Allah Bachayo Soomro, Addl. A.G
Date of hearing & Order: 21.10.2022

ORDER

ADNAN-UL-KARIM MEMON, J- Through this petition, the petitioner has impugned the Order dated 20.06.2022 passed by learned IVth Additional District Judge Dadu in Guardian & Ward Appeal No.06 of 2022.

2. Facts of the matter are that respondent filed Guardian & Wards Application No.14 of 2021 before learned Family / Guardian Judge Dadu, stating therein that he married to petitioner on 24.12.2016 out of which they were blessed with daughter namely Aliza aged about four years; but thereafter, due to strained relations, the petitioner got khula through competent court of law and after completing iddat period contracted second marriage. Thereafter, the present respondent being the father approached the petitioner for custody of minor and on her refusal, he filed the above-said application before learned Family/ Guardian Court, which was disposed of on 12.04.2022 with following directions:

“12. In view of above discussion the instant G & W application stands disposed of with no order as to costs. However since the applicant is real father of minor, so that naturally he would have love and affection for his minor daughter and its welfare also needs the company of its father (applicant) likewise recognition applicant by minor being its father is also necessary, therefore the opponents are hereby directed to cause the meeting of minor with its father (applicant) twice in a month on 1st and 3rd Saturday of every month calendar from 10:00 AM to 12:00 PM within the premises of this Court.”

3. The respondent- father, being aggrieved by the above order, preferred Appeal before learned Appellate Court, which was disposed of on 20.06.2022 with the following conclusion:

“7. Although 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. Nothing on record to show any exceptional circumstance disentitling father to have custody of minor daughter, equally when the opponent (mother) has contracted second marriage and could not explain as to how she will guard the chastity of her minor daughter from her second husband who is totally stranger to the minor girl and she has also birth to new baby. Impugned decision of the leaned trial Court is set aside and modified to the effect that custody of minor daughter (Aliza) is directed to be handed over to her father in circumstances. However, the schedule of meeting is maintained. Parties are directed to bear their own costs.”

4. Being aggrieved by the above order of Appellate Court the petitioner/mother has preferred the instant petition.

5. Mr. Altaf Sachal Awan learned counsel for the petitioner / mother argued that the impugned judgment passed by learned appellate Court is opposed to law, facts justice and equity; that learned Appellate Court did not apply its judicial mind, which could be seen from para-08 of the impugned judgment; that the minor baby (Aliza) is of tender age and needs to be brought up under the umbrella of love and affection of mother/petitioner; that snatching away such love and affection of mother from the minor only on the ground of re-marrying of mother, when it is well settled law that remarrying of mother with a person not related to the minor will not entitle the Court to deprive the mother of the custody of minor baby; that it is undeniable fact that the father hardly finds time even to talk to the baby, leaving the house for work as he is serving labour foreman in Chinese Company at Pattaro Sehwan; that the minor baby Aliza is of tender age and handing over of her custody to the father at this too little age, only for the reason of contracting second marriage by the petitioner/ mother, will not deprive the mother of her right of custody of minor child of tender age, but it may have an abiding adverse effect on the personality of minor baby Aliza, as she will grow up without knowing the tenderness of love and affection, being she herself deprived of mother's love and care; that the principal consideration which has been laid down in the Guardian and Wards Act is to secure the welfare of minor irrespective of age, sex, religion of the minor, character and capacity of kin to the minor, nearness of kin to the minor, wishes of the deceased parent and any existing or precious relations of proposed guardian with the minor or his/ her property, forum and intelligent preference are to be considered; that these tests as provided under Guardians and Wards Act are equally relevant while considering the welfare

of the minor, and the Court of law, has to deal with such matters as parental of the minor; that learned Family Judge Dadu has rightly discussed the evidence brought by both the parties and dismissed the application of the respondent No.1 but the learned Additional Sessions Judge –IV Dadu set-aside the order passed by Family Judge and allowed the Guardian Appeal without considering the facts. He lastly prayed for setting aside the impugned Appellate Order dated 20.06.2022 passed by the learned Appellate Court.

6. On the other hand Ms. Shabeela Mallah learned counsel for respondent/father while opposing the petition argued that the order passed by the Appellate Court is speaking one and requires no interference by this Court; that the Appellate Court has rightly held that the petitioner/mother had contracted second marriage, as such her right of Hizanat discontinued as her second husband was not related to minor baby and is stranger one; that the Appellate Court has rightly held that the petitioner has contracted second marriage and is not in a position to explain as to how she will guard the chastity of minor girl from her second husband who is stranger to her. She prayed for dismissal of the present petition.

7. I have heard learned counsel for the parties and perused the record with their assistance.

8. The basic contention of respondent-father is that the petitioner-mother has lost her right to custody of minor baby Aliza due to her second marriage. The learned counsel argued that in this case, the father has not remarried; he has a respectable job and can take care for minor; that man the mother has remarried has already children from previous wife and amongst these children, her minor daughter could live with step-father and step-brothers, which is not permissible under the law.

9. The emphasis by father is on the mother's second marriage which disentitles her to custody of minor under Islamic Law. Primarily the mother is entitled to the custody (hizanat) of her male child until he completes the age of seven years and her female child until she attains puberty. Besides this right continues whilst she is divorced from the father of child, however, in the event she marries a second time, custody then belongs to the father. Further, the mother who is otherwise entitled to the custody of child, loses the right of custody if she marries a person not related to the child within the prohibited degrees; where she remarries, she can be disqualified for custody.

10. Primarily Section 17 of Guardian & Ward Act requires the trial court to consider the welfare of minor when appointing a guardian and welfare will be decided based on the age, sex, and religion of the minor, as well as the character and capacity of guardian and the preference of minor where he / she is old enough to state his / her preference intelligently. The Honourable Supreme Court has held that although the general rule is that the mother on contracting second marriage forfeits her right of custody, however, this rule is not absolute and if it is in the interest of child, custody should be given to the mother. Besides it is the welfare of minor that must be considered while determining custody and there is no absolute rule or fixed criteria based on which the welfare of minor could be determined or custody could be awarded. In *Mst. Shahista Naz v. Muhammad Naeem Ahmed* (2004 SCMR 990), the Honourable Supreme Court held that the right of Hizanat having the force of Injunctions of Islam is an accepted principle of Islamic Law and a female on account of re-marriage may be disqualified to exercise this right, but a mother on account of re-marriage is not disqualified to be entrusted the custody of a minor child rather she may lose preferential right of custody. The Honourable Supreme Court further held that there is no denial of fact that there could be no substitute for the mother of minor child, especially of tender age, therefore, the consideration for grant or refusal of custody will always be the welfare of minor, for which learned appellate court failed to consider the above aspect of the case.

11. Going ahead, in this case, the mother even on contracting second marriage was entitled to retain custody of minor. The Honourable Supreme Court held in the case of *Mst. Hameed Mai v. Irshad Hussain* (PLD 2002 SC 267) that the question of custody of a minor child will always be determined based on the welfare of minor and notwithstanding the father's right for custody under Muslim Personal Law, this right is subject to the welfare of minor. Again in *Shabana Naz v. Muhammad Saleem* (2014 SCMR 343), the Honourable Supreme Court concluded that although Mohammadan Law provides that the mother is disentitled to custody if she re-marries, this is not an absolute rule but one that may be departed from if there are exceptional circumstances to justify such departure and even in a situation of second marriage if the welfare of minor lies with the mother then she should be awarded custody.

12. The aforesaid judgments dispel the stance taken by the father that on account of mother's second marriage, she has lost the right of custody. Time

and again, the Honourable Supreme Court has held that the paramount consideration where custody is concerned is the welfare of minor, that is to consider what is in the best interest of child. The court's jurisdiction in custody cases is in the form of parental jurisdiction which means that the court must consider all factors from the parent's ability to provide for the child including physical and emotional needs, and medical care also relevant is the parent's ability to provide safe and secure home where the quality of relationship between the child and each parent is comforting for the child. The Hon'ble Supreme Court in the recent judgments has held that there is no mathematical formula to calculate the welfare of minor, as the factors range from financial and economic considerations to the household environment, the care, comfort, and attention that a child gets. Accordingly, the concept of welfare of child is an all-encompassing concept that will cover not only how the child has to be cared for but will also include the physical, mental, and emotional well-being of the child. In view of the above, no sanctity could be attached to the reasoning put forward by the respondent-father of the minor child on the aforesaid plea.

13. Under the circumstances, I find legal infirmities in the impugned Order. Consequently, the case for interference is made out in the proceedings undertaken by learned Appellate Court on the aforesaid analogy. The petition is allowed and the impugned Order dated 20.6.2022 passed by learned Additional District Judge-IV, Dadu is set-aside.

JUDGE

Sajjad Ali Jessar