

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

C.P. No.3-156 of 2021

[Ajeet Kumar Vs. Province of Sindh & others]

Mr. Ali Akbar Lakho, Advocate for petitioner

Ghulamullah Chang Advocate for respondent No.4 and detainee No.1

Mr. Khadim Hussain Soomro, Amicus Curie

Mr. Allah Bachayo Soomro, Additional Advocate General, Sindh

Mr. Shewak Rathore, Deputy Prosecutor General, Sindh along with SHO.

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Date of hearing & order: 31.10.2022.

ORDER

ADNAN-UL-KARIM MEMON, J. The Petitioner, Ajeet Kumar, has filed this petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (the "Constitution"), praying that her minor daughter Muskan be recovered from the alleged illegal custody of Respondent No.4 and dealt with in accordance with law

2. Mr. Ali Akbar Lakho learned counsel for the Petitioner contended that baby Muskan aged about 7 years was/is a minor and Respondent No.4 had converted her as well as her mother/wife of the petitioner (alleged detainees) to Islam through inducement and undue influence. Per learned counsel, the girl being of tender age could not make an informed decision to change her religion and even if both detainees had consented to it the same was of no legal consequence. He further contended that even if such conversion of detainees was recognized and declared valid, the Petitioner being husband of detainee No.1 and father of minor baby Muskan could not be deprived of Minor's custody. He argued that in their enthusiasm to support the conversion of a female of tender age Respondent No. 4 had not only ignored the Injunctions of Islam but also the law of the land. The learned counsel prayed that the custody of Muskan with Respondent No.4 be declared illegal and she may be returned to the Petitioner-father.

3. I have gone through the contents of the memo of the petition; it is alleged that the petitioner had married Shreemati Koshila about 10 years ago and out of said wedlock, they have one minor Muskan baby. Both the alleged detainees are produced by the SHO concerned. Alleged detainee No.1 denied the allegation of wrongful confinement at the hands of the private respondent and further stated that previously she belonged to Hindu Religion and after separation from her previous husband/petitioner, she was married to the private respondent namely Photo Machi according to her wishes and free will and now her Islamic name is Shazia while her daughter's name is Mareet (shown as alleged detainee No.2 in the matter). She also stated that on the aforesaid issue, the petitioner was annoyed with her marriage and causing harassment, as such she moved an application before learned Sessions Judge, Mirpurkhas for legal protection, which was provided to the couples vide order dated 02.12.2019. She prayed for dismissal of the instant petition.

4. From the above contentions of alleged detainee No.1 Mst. Shazia (old name Koshila) it appears that no one has forced or detained her illegally rather she being sui-juris had embraced Islam and contracted marriage with respondent No.4 according to her consent and free will and now living with him happily as per her statement.

5. The questions involved in the present matter, Whether the minor/alleged detainee No. 02, who is admittedly the daughter of the petitioner, can embrace Islam as being minor and whether the alleged detainee No. 01/mother can retain the custody of minor/alleged detainee No. 02 after contracting second marriage and embracing Islam?

6. Keeping in view the sensitivity of the matter, Mr. Khadim Hussain Soomro advocate was appointed as Amicus Curiae in the matter, who appeared and submitted that if a married non-Muslim woman embraces Islam she must file a petition in the family court for termination/dissolution of marriage. The family court shall summon her husband, inform him of her conversion and offer him to accept Islam. The Court then shall wait till the expiry of her Iddat period for a reply/decision of her husband; that if the husband in response to the offer embraces Islam within the period of Iddat, the marriage shall continue, but if he remains non-Muslim even after the expiry of Iddat period, the court may pass a decree of termination/dissolution of marriage. The woman thereafter would be free to marry a Muslim man, if she so wishes; that Iddat is compulsory after the dissolution of marriage of any character. The Iddat is imposed to provide an opportunity for a non-Muslim husband to consider whether he wishes to embrace Islam and also as a matter of public policy to ascertain whether the woman is pregnant by the earlier

husband to avoid confusion about parentage. In support of his contentions, he relied upon **PLD 2020 Lahore 489** (*Nasira Vs. Judicial Magistrate and 5 others*), **1986 CLC 1857** (*Mst. Maryam Zohra Vs. Younas Jamal and 02 others*), **1999 CLC 1202** (*Aya Sasaki Vs. Zarina Akhtar*), **1995 P Cr. L J 474** (*Mst. Nasim Akhtar Vs. Sh. Gulzar Ahmed and 4 others*) and **2022 MLD 1956** (*Mst. Fatima Zahra Vs. Muhammad Sheraz and 2 others*) and unreported **order dated 30.09.2022** passed by this Court in *Criminal Miscellaneous Application No. 5 -177 of 2022*. I appreciate the pains so taken by the learned Amicus Curiae, to assist this court on the subject issue.

7. I have heard learned counsel for the parties, and have also gone through the record available before me as well as the case-law cited.

8. There is no denial of the fact that the purpose of filing this petition is served as the mother and her minor daughter have been produced before this Court and the minor baby is living with her mother.

9. Going ahead on the other aspect of the case, the freedom of religion must be construed liberally to include freedom of conscience, thought, expression, belief, and faith. Freedom, individual autonomy, and rationality characterize liberal democracies, and the individual freedoms thus flowing from the freedom of religion must not be curtailed by attributing an interpretation of the right to religious belief and practice exclusively as community-based freedom. In this regard Article 20 of the Constitution of 1973 sanctifies it as fundamental right. Under normal circumstances, a parent or guardian has the right to decide the choice of various issues affecting an infant's life until he / she reaches the age of majority.

10. In principle, the minor lacked the legal capacity to renounce her religion without the consent of her parents or guardian. Admittedly, the Petitioner is the real father and natural guardian of Muskan. Petitioner submits that mother is disentitled to the custody of minor Muskan because she has converted to Islam and contracted a second marriage. Primarily this issue relating to custody of minor could be better looked at by learned family court in terms of Section 17 of the Guardian & Wards Act, 1890. And till the party approaches the learned family court, the mother being the lawful guardian of Muskan is entitled to her custody and exercise control over her and there is no reason to deprive her of that right. However, petitioner-father has the right to meet with her daughter.

11. During the hearing learned counsel for the father submitted that the right of hizanat of child vesting in the mother is over, in terms of remarrying of the mother. I

do not agree with this proposition for the reason that the mother is entitled to the custody (hizanat) of her male child until he has completed the age of seven years and of her female child until she has attained puberty. The Honourable Supreme Court in the case of Muhammad Siddique v. Lahore High Court, Lahore through Registrar and others (PLD 2003 SC 887), it was held that although the general rule is that the mother on contracting second marriage forfeits her right of custody, this rule is not absolute and if it is in the interest of child, custody should be given to the mother. The Honourable Supreme Court further held that 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 can be determined or custody can be awarded. The Honourable Supreme Court in the case of Mst. Shahista Naz v. Muhammad Naeem Ahmed (2004 SCMR 990), concluded 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 minor child rather she may lose the preferential right of custody. Additionally, there is no denial of fact that there can be no substitute of minor child except mother, especially at tender age, therefore, the consideration for grant or refusal of custody will always be the welfare of minor. In this case, the mother even on contracting second marriage was / is entitled to retain custody of minor. Again while looking at the Islamic provisions on custody of minor, the Honourable Supreme Court in the case of Mst. Hameed Mai v. Irshad Hussain (PLD 2002 SC 267) held that the question of custody of 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 welfare of minor. The Honourable Supreme Court in the case of Shabana Naz v. Muhammad Saleem (2014 SCMR 343), 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 mother then she should be awarded custody. The Honourable Supreme Court in the recent case of Raja Muhammad Owais Vs. Mst. Nazia Jabeen and others vide unreported judgment dated 5.10.2022 has concluded on the same analogy.

12. In view of the foregoing, this petition is disposed of and the custody of Muskan aged about 7 years shall remain with mother till her custody is regulated by the family court if approached by the petitioner-father.

JUDGE