

IN THE HIGH COURT OF SINDH AT KARACHI

C.P. No.S-963 of 2021

[Waseem Younus Chugtaiv..... Arooba Rana]

Date of Hearing : 26.01.2023
Petitioner through : Mr. Manzar Bashir Memon, Advocate.
Respondent through : Syed Muhammad Ali Shah, Advocate
Ms. Sania Zubair, Advocate

ORDER

Zulfiqar Ahmad Khan, J:- This petition assails the concurrent findings of the learned trial Court dated 10.07.2021 as well as first Appellate Court dated 08.11.2021.

2. Brief facts are that the Petitioner and Respondent were married and had baby girl Anaya, now aged about 6 years which marriage was dissolved in the year 2016 whereafter an application for the custody under section 25 of the Guardians and Wards Act, 1890 (Act) was filed by Respondent/mother before the learned trial Court/Family Court, which application was allowed vide order 10.07.2021 said order was challenged before the Appellate Court by the petitioner/father, but the learned Appellate Court maintained the earlier order by dismissing the appeal vide impugned judgment dated 08.11.2021.

3. The basic contention of the petitioner/father is that the mother has lost her right to custody upon she having contracted the second marriage and now she has two children out of that wedlock too for the fulfillment of her motherhood, whereas, the petitioner/father has not remarried, and he has all of his attention available for the minor. That he has a respectable job which is On-line (run from home) and that he is able to take care of the minor lot better than

the mother hence, the petitioner be given custody of the minor and the minor should not be permitted to live with the step-father, which act is not acceptable socially and morally in our society.

4. On behalf of the mother, the learned counsel confirmed that she has remarried, but now has full access to the funds from the husband (who already have two other wives with children, but live separately). The minor is a female child and the welfare of the female child always stays with the mother, which fact was considered in the concurrent findings.

5. I have heard the submissions of respective learned counsel and have considered the record. The emphasis by the petitioner/father is on the mother's second marriage disentitles her to custody under the Islamic Law. D.F. Mullah in Mohammadan Law in Para 352 provides that the mother is entitled to the custody (hizanat) her female child until she has attained puberty. Para 352 ibid provides that this right continues whilst she is divorced from the father of the child, however, in the event she marries second time, custody then belongs to the father. Para 354 of Mohammadan Law provides that the mother, who is otherwise entitled to the custody of a child, loses the right of custody if she marries a person not related to the child within the prohibited degrees which are specified in paras 260-261 of Mohammadan Law. So as per the principles of Mohammadan Law by D.F. Mullah where she remarries, she can be disqualified for custody.

The United Nations Convention on the Rights of the Child, 1989 (UNCRC) is an international treaty which sets out the rights of children, be it economic, social, health or family. The UNCRC was ratified by Pakistan in 1990 with reservations that it will adopt the

Convention, subject to the requirements of the Islamic Law. However, in 1997, the ratification became absolute as the reservation was withdrawn. The UNCRC recognizes that the child should grow up in an environment of love, happiness and understanding. Article 3 provides that in all actions concerning children whether by courts of law or public, or private welfare institution amongst others, the best interest of the child shall be a primary consideration. Article 7 provides that every child has right to be cared for by their parents and Article 9 requires that in the event of separation between the parents, the child should be in contact with both parents unless either one can cause any harm. Article 12 provides that a child capable of forming his or her own view should be able to express it and it should be given due weightage. This Article suggests that children's preferences can be a guiding factor in custody cases, hence, encouraging their participation and opinion in custody matters. This is essential because custody is about the care and comfort of the child and the right of the child to a family. Custody matters are always sensitive and require a great deal of care as the court has to weigh in all factors in order to determine where the welfare of the minor lies. In cases of remarriage, circumstances change, hence, while looking at the welfare of the child, the entire living arrangement and environment has to be reassessed in the context of the welfare of the child. Fundamental to this decision is the best interest of the child and not that of the parents.

6. To a query raised by this Court to the respondent mother whether she remarried to which she replied yes. She also contended that she has two children from the new marriage, and her current

husband has also two other wives, which, however, live separately, but children therefrom often visit her house too. There is no cavil to the facts that Islamic Law clearly disentitles a mother from custody of the child upon contracting second marriage, and a stepfather to a female child is regarded as a “Na Meharram”, therefore, remaining custody of the minor daughter with the mother/respondent becomes inappropriate in the presence of real father who is a single-father with no children. The wellbeing as well as upbringing of a female child with the step-father in the given circumstances, in my humble view, would be less than what is desirable, therefore, the learned courts below erred and jumped to the conclusion in a cyclostylistic manner. The Hon’ble Supreme Court in the cases reported as “PLD 2003 S.C. 877¹”, “2014 SCMR 343²” and “2021 YLR 1194³” this Court has also held such a view.

7. I have also appointed Commissioner to visit both the houses, who also met father as well as mother, but I do not concur from his conclusion.

8. In view of the above, the petition at hand is allowed, findings of the learned trial Court dated 10.07.2021 as well as those of the learned Appellate Court dated 08.11.2021 are set aside. Respondent is directed to hand out the custody of the minor Anaya to the petitioner and the visitation rights be governed by the mechanism provided in the order of the trial Court dated 10.07.2021 given under issue No.2 (page-37) where for the words “mother” or “applicant” have been replaced by the words “father” or “petitioner” and reproduced hereunder after the above correction:-

¹ Mrs. Seema Chaudhry v. Ahsan Ashraf Sheikh.

² Shabana Naz v. Muhammad Saleem

³ Mst. Tahmina Ansari v. Rafique Ahmed alias Gulzar Lakho

“1.The petitioner/father is directed to hand over the custody of minor child to the respondent/ mother on alternate Saturday and Sunday of the month for 4 hours from 12.00 Noon to 04.00 p.m.

2. The petitioner/father is also directed to hand over the custody of minor child to the respondent/ mother on second day of both Eids for 5 hours from 01.00 p.m. to 06.00 p.m.

3. The petitioner/father is also directed to hand over the custody of minor child to the respondent/ mother, during summer vacations for 15 days and during winter vacations for 5 days for a period of 4 hours from 01.00 p.m. to 05.00 p.m. as per convenience of both the parties, however, if both the parties viz father and mother fail to arrive at an amicable settlement as to date of such periods, then such period of 15 days in summer vacation is set from the very 1st day of summer vacation, whereas, 5 days would be deemed in the last winter vacation schedule.

4. The petitioner/father is also directed to hand over the custody of minor child to the respondent/ mother on her birthday for 4 hours from 4.00 p.m. to 08.00 p.m.”

Karachi
Dated: 26.01.2023.

JUDGE

Aadil Arab