

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
CP No.S-280 of 2022

Yasir Kalwar Petitioner

Vs.

Mst. Farzeen
 & others Respondents

M/s. Amel Khan Kasi and Khuram Ashfaq, advocate for petitioner
 Mr. Zohaib Sarki, advocate for respondents No.1

**Date of hearing
 & order : 24.09.2024**

ORDER

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MUHAMMAD IQBAL KALHORO J: Petitioner filed an application under Section 25 of Guardian & Wards Act, 1890, seeking custody of his minor daughters namely Baby Iman and Baby Aaira from respondent No.1, his ex-wife on the ground that she had contracted second marriage with a person, who was stranger to his daughters not related to them within prohibited degree.

2. After service respondent No.1 filed her written statement rebutting claim of the petitioner and stating that petitioner was not a good person, did not spare time for minors even during subsistence of marriage. He did not shoulder any responsibility, was neither a good husband, nor a good father. He was in habit of drinking "Alcohol" in presence of minors and is not entitled to their custody.

3. This application was dismissed vide impugned order dated 30.04.2021, which was challenged by the petitioner in Family Appeal No.106/2021, which too has been dismissed by impugned order dated 19.02.2022, hence, this petition.

4. The main ground of petitioner is that respondent No.1 has contracted a second marriage with someone, who is totally stranger not related to his daughters within prohibited degree. Learned counsel for the petitioner has relied upon the case laws reported in **2014 S C M R 343, 1981 S C M R 200 and 2018 Y L R 1771.**

5. Whereas, on the other hand, the main ground taken by learned counsel for respondent No.1 is that petitioner is a CSS Officer and is not posted in Karachi. He remains posted at different cities of the country and it is not possible for him to sustain custody of the minors with him at one place. Learned counsel for respondent No.1 has relied upon the case law reported in **2022 S C M R 2123** to support his arguments. However, in rebuttal, learned

counsel for the petitioner has stated that the petitioner lives in a joint family system; his parents are living with him and most of the time, he stays in Karachi with his parents and in his absence, his mother can take care of minors. But more than that he has emphasized on the fact of second husband of respondent No.1, who is stranger to the minors and does not come within prohibited degree, his daughters are growing up rapidly, their living with an stranger is even against injunctions of Islam.

6. The facts of the case show that previously petitioner had filed a similar application before the Family Court which, when was dismissed, was challenged by him in Family Appeal No.26/2019, which was also dismissed. Finally, petitioner landed up before this Court in CP No.S-1004/2019, but it was disposed of by putting the petitioner at liberty to move a fresh application u/s 25 of G&Ws Act, 1890 in view of the fact that respondent No.1 had contracted second marriage meanwhile.

7. The second marriage of respondent No.1 with someone, who is not related to the minors within the prohibited degree i.e. stranger is not disputed. In terms of paragraph-352 and 354 of principles of Muhammadan Law, it is settled that mother on contracting second marriage forfeits her right of custody to the minor. However, it is also settled that this rule is not absolute and can be departed; and if it is still in the interest of child, the custody could be given to the mother. Paramount consideration in such cases is the welfare of the minor, which means that best interest of the child is to be considered while deciding the case of his/her custody.

8. No doubt, the mother has a right to *Haznat*, which in case of a son extends to the period of 07 year but in case of a daughter is extended till the time she attains puberty. However, when the mother contracts second marriage the circumstances change for her and she loose a right of *Haznat*. Thereafter only when there are some exceptional circumstances to justify her continues custody of the minor, the burden of which would be upon her to establish, the custody would be shifted to the father.

9. Here during the arguments, it has been pointed out that baby Iman is aged about 16/17 years; whereas, baby Aaira has become 13/14 years. Keeping in view their age, it is obvious that both have attended puberty and as far as right of *Haznat* of mother is concerned, it is no more available to her. But, be that as it may, it does not mean the custody would be taken away from her automatically without first determining the welfare of the minors; and deciding where the best interest of the ward lies and further whether there are exceptional circumstances to justify departure from the above rule. It is always boundan duty of the Court to consider all such factors including physical and

emotional needs of the minor, medical care and parents' ability to provide a safe and secure home, where quality of relationships between the children and parents grow before deciding the issue of custody of the minor.

10. No material has been produced by respondent No.2, mother of the minors to show that the petitioner, who himself is a well-placed person cannot sustain maintenance of the minors at his house or there are some special and exceptional circumstances to justify minors living with an stranger and not with their real father. The minor daughters' living with an stranger, who might be husband of their mother but not related to them within prohibited degree, is not even sanctioned by Islam. In absence of any exceptional circumstances, which the mother has not pointed out through tangible evidence and which may disentitle the petitioner from custody of his minor daughters, the living of minor daughters with stranger cannot be perpetuated judicially at the altar of convenience of the minors, which they are used to by the dint of living with their mother for a considerable time.

11. The petitioner is the real father of the minors, hence natural guardian. He is living in a joint family house, where apart from him, his parents are also residing. The minor daughters would be comfortable living with their father and grandparents more than living with a stranger, goes without saying.

12. In view above, this petition is allowed along with pending application(s) and the impugned judgments are set aside. The custody of minors are handed over to the petitioner/father, however, respondent No.1/mother will have a right of visitation to see her daughters on any day once a week or as many times as mutually agreed by the parties, at any place of their choice.

The Petition stands disposed of in above terms along with pending application(s).

JUDGE

Rafiq/P.A..