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JUDGMENT SHEET

IN THE LAHORE HIGH COURT, MULTAN BENCH, MULTAN.
JUDICIAL DEPARTMENT

Writ Petition No. 8676 of 2015.

Ali Irtaza.

versus.

A.D.J., Multan & 2 others.

J U D G M E N T

Date of hearing.	**16.08.2017.**
Petitioner by:	Mr. Ihsan Qadir Babar, Advocate.
Respondent No.3 by:	Mr. Iftikhar Majid, Advocate

ABDUL RAHMAN AURANGZEB, J.:- Through this writ petition, the petitioner has challenged the validity of judgments dated 09.07.2014 and 13.03.2015, passed by the learned Guardian Judge, Multan, and learned Additional District Judge, Multan, whereby, the application moved by the petitioner under Section 25 of The Guardians & Wards Act, 1890, was concurrently dismissed.

2. Briefly, the facts necessary for the disposal of this writ petition are that the petitioner filed an application under Section 25 of The Guardians & Wards Act, 1890, for custody of the minor girl, namely Aleeza. The contention of the petitioner is that, after marriage with respondent No.3/Mst. Komal Zahoor, a baby girl Aleeza was born on 30.09.2005, but later on the relationship between the parties were not remained cordial, and ultimately the marriage of the spouses was dissolved through divorce on 31.08.2006. Thereafter, respondent No.3 filed a suit for recovery of maintenance allowance alongwith delivery expenses and dowry articles, which was decreed in her

favour on 18.06.2009, and in continuation of further proceedings, respondent No.3 also filed an execution petition.

3. During the pendency of above-mentioned suit and execution petition, the petitioner filed an application for permanent custody of the minor, which was hotly contested by respondent No.3.

4. The learned Guardian Judge, after framing of issues and recording of evidence, dismissed the application of the petitioner on 09.07.2014, and the appeal also met the same fate, by the learned appellate Court on 13.03.2015. Hence, this writ petition.

5. Learned counsel for the petitioner contends that both the Courts below erred in law without adverting to the issues, in question, and decided the matter on flimsy ground of presumption of application for DNA (*deoxyribonucleic acid*) test of the minor, allegedly moved by the petitioner and, hence, on this ground, the petitioner was not held to be entitled for the permanent custody of his minor daughter. He further argued that Issues No.1 and 6, pertaining to welfare of the minor and disqualification of custody, was not decided on the basis of material evidence available on the record. Thus, both the Courts below have committed grave illegality to exercise their vested jurisdiction; therefore, both the impugned judgments are liable to be set-aside.

6. On the contrary, learned counsel for respondent No.3 has vehemently opposed the contentions and stated that both the Courts below have validly examined the contentions and, after taking into consideration the material, has rightly turned down the application, on the basis of legal, as well as, factual aspects of the case.

7. I have heard learned counsel for the parties at length and have perused the record minutely.

8. The controversy between the parties requires that, while deciding the matter, in hand, the paramount consideration is the welfare of the minor girl. The evidence produced by both the parties was not properly analyzed by both the Courts below. In this regard, my keen observation relates to the findings of the learned Guardian Judge, where Issue No.1 relating to the welfare of the minor girl was decided erroneously by the learned Guardian Judge. The learned Guardian Judge merely reproduced the evidence of the parties and after reproduction of the evidence, decided the fate of this crucial issue on the basis of an application, allegedly moved by the petitioner for DNA test of the minor girl. Admittedly, the application was dismissed by the learned Guardian Judge, but on the basis of this application, it was held that the petitioner, who has not by his heart accepted the minor as his real daughter and for this reason, it presumed that the petitioner is not entitled for the custody of the minor. Similarly, the learned appellate Court has also not viewed the consideration of the welfare of minor and merely re-endorsed the only reason of trial Court.

9. At this juncture, it is not out of place to mention that the evidence produced by the parties is totally deficient in nature, the stance of the parties based on the previous litigation, but the required evidence of parties was not made part of the record from where it could be ascertained that whether the petitioner has not accepted the paternity of minor or otherwise. Similarly, the application for DNA Test was also not available on record of the trial Court as per requirement of evidence. The opinion of trial Court without any admissibility of the application is an act of surmises and conjectures, hence, both

the Courts below have not adverted to this fact judiciously. In addition to this, even if it is accepted that the petitioner has wilfully moved an application for DNA Test of his minor daughter, which was negated by the petitioner, has no bearing effect on the fate of the custody of minor. As the authenticity of DNA Test was not approved by the Apex Court as a conclusive opinion in dispute of paternity. In this regard, reliance can be placed upon *AZEEM KHAN and another vs. MUJAHID KHAN and others* (**2016 SCMR 274**) and *Mst. RUBINA KAUSAR vs. ADDITIONAL SESSIONS JUDGE and others* (**PLD 2017 Lahore 604**). It is essential for the Courts below to examine that whether the minor daughter, whose maintenance allowance has been asked by respondent No.3 is or is not a legitimate child of the petitioner, and secondly, the effect of the dismissal of the application for DNA Test. In view of this matter, the decision of application under Section 25 of The Guardians & Wards Act, 1890, for custody of the minor, could not merely based on the application for DNA Test and for this reason above, he could not be held disentitled. It is held in "*Mrs. SEEMA CHAUDHRY and another versus AHSAN ASHRAF SHEIKH and others"* (**PLD 2003 Supreme Court 877**) that

> "*The primary consideration for determining the question of custody is always the welfare of the minor and there could not be an absolute rule and fixed criteria to determine the question of welfare in the same manner in each case rather it being a mixed question of law and fact is decided in the facts of each case and consequently the factors having only social importance or the desirability of the father or mother to retain the custody of minor, would not overwrite the consideration of welfare in determining the question of custody."*

10. The other important aspect of the case, in hand, is also contentious, which was decided by the learned trial Court in a cursory manner. Issue No.6 framed by the learned trial Court reveals that the petitioner agitated the grounds of custody in view of provisions of Para-354 of Mahomedan Law by D.F.

Mullah. But the learned trial Court without deciding the legal issue declared it redundant. At this stage for better appreciation of the subject in the referred *Para* is reproduced below: -

> *"**354. Females when disqualified for custody.**-A female, including the mother, who is otherwise entitled to the custody of a child, loses the right of custody---*
>
> *(1) if she marries a person not related to the child within the prohibited degrees (ss. 260-261) e.g., a stranger (n), but the right revives on the dissolution of marriage by death or divorce (o); or,*
>
> *(2) if she goes and resides, during the subsistence of the marriage, at a distance from the father's place or residence; or,*
>
> *(3) if she is leading an immoral life, as where she is a prostitute (p); or*
>
> *(4) if she neglects to take proper care of the child."*

The above-referred Para shows that the disqualification for retaining the custody of the minor in presence of marriage with a person, who is not related to the child within the prohibited degrees, loses the right of custody of the minor. The learned trial Court has not considered this aspect of the case, and also failed to discuss the evidence, produced by the parties, on this ground, especially when it has been admitted by the respondent No.3 that she married with a person, namely, Abdul Baqi, who does not belong to prohibited degree of minor girl. Similarly, at the same time the other aspect and effect of remarriage of parents was also not determined by the Courts below.

11. At this stage, I feel it proper without further expressing any opinion with regard to the deficient evidence, produced by the parties. However, it is in the interest of justice

to point out that the relevant evidence with regard to the custody of a child, especially when she is a girl, should be determined by the learned trial Court in the prime interest of justice especially when the evidence on record is insufficient to decide the question involved.

In "*Syed SHARIF UL HASSAN through L.Rs versus Hafiz MUHAMAMD AMIN and others*"(**2012 SCMR 1258**) it is held that: -

> " *This Court has consistently held that if a lis involving a disputed question of fact is decided, it has to be decided on proper appraisal of evidence and that if a lis involving appreciation or interpretation of law is decided, it has to be decided in accordance with the well recognized principles laid down by this Court from time to time. Justice at no cost and at no stage be allowed to fall prey to the procedural technicalities. They be ignored if they tend to create hurdle in the way of justice. For law can survive as a living force only, when it dynamically assimilates and adapts to the changes around to further the cause of justice. This is how the law grows and this is how the jurisprudence advances."*

Furthermore, the impugned judgment in my view suffers from basic defect due to declaration of the issue No.6 as redundant, hence, it deems that no decision on this specific issue. Therefore, I have left with no other option, except to allow this constitutional petition. Thus, this petition is **allowed** and consequently the impugned judgments dated 09.07.2014 and 13.03.2015, passed by both the Courts below are set-aside. The matter is remanded back to the learned Guardian Judge, where the parties would be at liberty to bring on record the required additional evidence, and the learned Guardian Judge will decide the matter afresh in accordance with law.

12. Since the parties are being represented through their learned counsel today; therefore, they are directed to appear before the learned Guardian Judge, Multan, on 18.09.2017, who is further directed to expedite the proceedings of the matter and conclude the same positively by third week of December, 2017.

(**Abdul Rahman Aurangzeb**)
Judge

Approved for reporting.

JUDGE.

M.AYYUB