

Form No.HCJD/C-121
ORDER SHEET
LAHORE HIGH COURT LAHORE.
JUDICIAL DEPARTMENT

W.P. No.9836 of 2016.

Naghma Rani. Versus Additional District Judge, Gujrat etc.

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27.09.2017. Mr. Faisal Toqeer Sial, Advocate for the petitioner.
Mr. Ijaz A. Janjua, Advocate for respondents No.3
& 4.

Succinctly, the petitioner filed a guardianship petition for custody of minors, namely, Qudsia Hassan and Hassan Ali, against respondents No.3 & 4, which was accepted by the learned Guardian Judge, Gujrat, *vide* order, dated 14.01.2016, against which respondents No.3 & 4 filed an appeal which was accepted by the learned Additional District Judge, Gujrat, *vide* judgment & decree, dated 03.03.2016; hence this petition.

2. Learned counsel for the petitioner submits that while deciding the matter the learned Appellate Court did not bother to consider that step-mother cannot be preferred over real mother; that mere second marriage of mother does not disentitle her for custody of the minor; that respondent No.3 has contracted second marriage with a lady who is alien to the minors, thus, custody of the minors with respondent No.3 is improper and that as respondent

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No.3 mostly remains out of home in relation to earn his livelihood, minors cannot be left at the mercy of step-mother. Relies on Mst. Razia Rehman v. Station House Officer and others (PLD 2006 SC 533), Iftikhar Ahmad Chishti v. District Judge, Chakwal and others (2012 MLD 670), Muhammad Nazir v. Additional District Judge, Mianwali and another (2009 CLC 1010) and Ghulam Mustafa v. Mst. Manzooran Bibi and others (1994 MLD 1199).

3. Conversely, learned counsel representing respondents No.3 & 4, while defending the impugned judgment & decree, submits that instant petition is liable to be dismissed simply for the reason that the documents produced before the court of first instance have not been appended by the petitioner; that as a matter of fact compromise was affected between the parties during proceedings before the learned Judge Family Court, Wazirabad according to which the petitioner waived her right for custody of the minors factum whereof was incorporated in the order passed by the learned Judge Family Court, Wazirabad; that after making statement before the learned Judge Family Court, Wazirabad regarding relinquishment of her right regarding custody of the minor the

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petitioner was estopped to approach the Guardian Court; that welfare of the minors would be at stake if they are handed over to the petitioner for the reason that a criminal case in respect of heinous offence has already been registered against her brother, thus, stay of the minors with such family is illegal; that the documents tendered in evidence by respondents No.3 & 4, during the course of evidence, show that not only the minors are being looked after properly in respect of their social needs but also they are exceptional in their education; that as respondent No.3 is goldsmith by profession, he is in a better position to bear expenses of the minors; that second husband of the petitioner, being alien to the minors especially the daughter, custody of the minors with the petitioner would be illegal especially in view of growing age of the daughter and that as second husband of the petitioner works on a Bus Stand he cannot manage requisite funds to meet with daily expenses of the minors. In support of his contentions, learned counsel has relied upon the case reported as Mst. Shaheen Bibi (Nusrat Shaheen) v. Zulfiqar Ali Shah Kazmi and 2 others (1995 CLC 306).

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4. While exercising his right of rebuttal, learned counsel for the petitioner submits that mother of respondent No.3 died when he was student of Class VI, presently there is step grandmother in the house of respondent No.3, thus, there is nobody in the house of respondent No.3, having blood relation with the minors, to look after them in absence of respondent No.3.

5. I have heard learned counsel for the parties at considerable length and have also gone through the documents, annexed with this petition, as well as the case-law cited at the bar.

6. It is trite law that while deciding matter regarding custody of minor, welfare of the minor is considered pivotal. Insofar as case in hand is concerned, the documents got exhibited by respondents No.3 & 4 before the learned Guardian Judge, Gujrat as Exh.R/5, Exh.R/6 & Exh.R/7 show that due to proper attention of respondent No.3 minors have exceptional academic results. This is proof positive of the fact that minors are being looked after properly.

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7. Learned counsel for the petitioner, while relying on the case reported as Iftikhar Ahmad Chishti v. District Judge, Chakwal and others (2012 MLD 670) has argued that second marriage of mother does not disentitle her for custody of the minor. Perhaps, learned counsel for the petitioner has raised such plea in oblivion of the law laid down by the apex Court of the country in the case reported as Shabana Naz v. Muhammad Saleem (2014 SCMR 343) wherein it has been held that when mother contracts second marriage with a person who does not fall within prohibitory degree with the minor, she loses her normal right of custody of the minor. Further, the exceptional circumstances highlighted by the apex Court of the country in the said judgment, where mother can be granted custody of the minor despite her second marriage, are missing in the case in hand.

8. During the course of arguments, learned counsel representing respondents No.3 & 4 has referred to Exh.R/3 which is a compromise between the parties produced before the learned Judge Family Court, Wazirabad. Not only the said compromise deed was signed by the petitioner but also got

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recorded her statement before the Court. After making statement before the Court the petitioner was bound to abide by that and any proceedings instituted by her in violation thereof were to be considered by the Court with due care and caution. Moreover, when the petitioner otherwise is not entitled for custody of the minors, the question of compromise is inconsequential.

9. Admittedly, Qudsia Hassan, the daughter, has crossed 8th year of her age and in view of her growing age her stay with second husband of the petitioner, who is alien for her, would be illegal. The apex Court of the country, in the case of Mst. Nazir v. Hafiz Ghulam Mustafa etc. (1981 SCMR 200) has held that a daughter cannot be allowed to stay with a person who does not fall within the prohibitory degree with her.

10. There is no cavil with the preposition that nobody else can be considered as substitute to mother's laps, however, when the mother herself has contracted second marriage with a person who is alien to the minors, said principle is not applicable in routine rather the Court has to see welfare of the

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minor. During the course of arguments, it has surfaced on the scene that second husband of the petitioner is working on a bus stand meaning thereby that his financial status as compared to respondent No.3 is feeble.

11. Though affidavit in evidence of Imran Khan, AW-2 and Fahad Aamir, AW-3 were got exhibited before the learned Guardian Judge, Gujrat as Exh.A/2 and Exh.A/3, however, the petitioner opted not to produce them before the Court for cross-examination which prima-facie suggests that they were not ready to support her case, thus, inference goes against her.

12. During the course of arguments, learned counsel for the petitioner has argued that respondent No.4 is not the real mother of respondent No.3 and real grandmother of the minors. On the other hand, learned counsel appearing on behalf of respondents No.3 & 4, has clarified that respondent No.4 is though not real grandmother of the minors but she is the real sister of real grandmother of the minors. Thus, the said objection taken by learned counsel for the petitioner has little importance as respondent No.4 has no adverse interest against the minors.

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13. So far as the case-law cited by learned counsel for the petitioner, is concerned, suffice it to observe that the same is not applicable to the case in hand inasmuch as in the case of Mst. Razia Rehman (Supra) the Hon'ble Supreme Court of Pakistan has *inter-alia* held that if the mother had waived her right of custody through some compromise the same had no binding force in the eyes of law but in the instant case after entering into a compromise the present petitioner appeared before the Court and made statement in line with the compromise thus the said case is quite distinguishable. So far as the case of Iftikhar Ahmad Chishti (Supra) is concerned, this Court *inter-alia* decided that better atmosphere alone cannot be considered sufficient to determine question relating to custody of the minor rather other factors are also to be taken into consideration. Admittedly, in the case in hand, the minors are living with their father/respondent No.3 without any objection from any corner, thus, besides his better financial conditions other factors also tilt in his favour. In the case of Muhammad Nazir (Supra) this Court held that in absence of the father, step-mother cannot be considered as a fit person to look after the minor but

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in the case in hand, it has been established on record that the minors are being looked after by respondent No.4 in absence of respondent No.3, thus, the said case is of no help. Now coming to the case of *Ghulam Mustafa* (Supra), I have observed that mother can be held entitled for custody of a minor even despite her second marriage but the same is subject to certain principles laid down by the apex Court of the country in the case reported as *Shabana Naz v. Muhammad Saleem* (2014 SCMR 343) which in my humble opinion are missing in the case in hand.

14. For what has been noted above, instant petition is **dismissed** with no order as to costs. However, the petitioner would be at liberty to file an application before the learned Guardian Judge for meeting with the minor as per observation of the learned Appellate Court.

(Shujaat Ali Khan)
Judge

Approved for Reporting.

Judge