

IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

Mr. Justice Amin-ud-Din Khan
Mr. Justice Athar Minallah

CIVIL PETITION NO.3801 OF 2022

*(Against the order dated 21.09.2022 of the
Lahore High Court, Rawalpindi Bench passed
in Writ Petition No.2582 of 2022)*

Shaista Habib ... Petitioner

Versus

Muhammad Arif Habib and others ...Respondent(s)

Petitioner: In person a/w Ibrahim (minor)

For respondent No.1: Raja Muhammad Sattar, ASC
a/w respondent No.1

Date of hearing: 06.03.2023

JUDGMENT

Athar Minallah, J.- The High Court has dismissed the petition of Shaista Habib ("**petitioner**"), who had invoked the jurisdiction vested under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 ("**Constitution**"). She had challenged the orders of two competent courts, whereby the question of custody of a child, Mohammad Ibrahim, was decided against her. Through this petition she has sought leave against the judgment, dated 21.09.2022, of the High Court.

2. Muhammad Arif Habib ("**respondent**") and the petitioner had tied the knot on 21.6.2012. They were blessed with a son, Muhammad Ibrahim ("**minor**") on 17.4.2013. The matrimonial differences which developed between the spouses had initially led to their separation but, subsequently, the marriage ended in a divorce on 22.11.2016. The petitioner and the minor moved to the house of the former's mother after separation. The relationship between the parties became unpleasant to such an extent that, on acceptance of the respondent's

petition, the Justice of the Peace, vide order dated 02-01-2017, ordered registration of a criminal case against the petitioner. The respondent filed an application on 28-01-2017 under section 25 of the Guardian and Wards Act, 1890 ("**the Act of 1890**") seeking the custody of the minor. The Guardian Judge/Judge Family Court, Kahuta, allowed the application on 30.06.2021 while the appeal preferred by the petitioner was dismissed by the Additional District Judge on 20.06.2022. The constitutional petition filed by the petitioner did not succeed and it was dismissed by the High Court vide the impugned judgment dated 21.09.2022.

3. The petitioner appeared in person along with the minor, Mohammad Ibrahim. The latter was smartly dressed and we found him to be visibly confident and mature for his age. He responded to our queries intelligently and his self assured demeanor was noticeable, despite having been exposed to the vicissitudes of separation followed by the divorce of his parents. He has unequivocally stated that although he acknowledged the respondent to be his father but he was a stranger to him, since they had hardly met after leaving his house. He, therefore, unequivocally expressed his reluctance to be separated from his mother i.e the petitioner so as to live with his father. It was obvious that the respondent and the minor did not have a relationship or a bond in order to justify uprooting the latter from the custody of his mother. The learned counsel for the respondent was also heard.

4. The petitioner and the respondent are litigating over the custody of the minor since 2017. The marriage had ended in a divorce in 2016 and the respondent had filed an application before the family court in 2017 for obtaining the custody of the minor. The minor was an infant when he had left the house of the respondent and since then he has lived with the petitioner. The record shows that the respondent had not

made a serious and meaningful effort to enable him to spend time with the minor, either through intervention of the court or otherwise. Admittedly, the petitioner has contracted another marriage after her divorce and the second husband has children from his first wife. It appears from the reasoning recorded in the judgments rendered by the Guardian Judge/Judge Family Court as well as the appellate court that the petitioner's second marriage and the age of the minor were the two factors that had prevailed for granting custody of the minor to the respondent. The variables in the context of assessing the welfare of the minor were not taken into consideration. The evidence produced by the parties appears to have been found sufficient to decide the custody dispute. The evidence relied upon by both the courts was not in the context of those factors which should have been considered in order to assess the welfare of the minor. The courts also did not seek professional assistance in order to assess the crucial factor of the welfare of the minor, nor such a professional service or facility appears to have been accessible to the courts. The minor was at the centre stage of the custody battle between feuding parents and the assessment of his interests and welfare was most crucial. This was definitely an overarching principle which ought to have been considered while deciding the custody dispute. The rights of the parents were subservient to the welfare of the minor and thus it was the duty of the courts to assess and determine a course that would have served the best interest of the minor. Any decision regarding the custody of a child without assessment and determination of the latter's welfare and best interests by taking into consideration the relevant factors and variables cannot be sustainable, nor can the exercise of discretion be lawful. The welfare of a minor and the latter's best interest is the foundational principle for deciding custody disputes. In order to appreciate the significance of the

principle governing custody disputes it would be beneficial to highlight the settled law which ought to guide a court.

5. It is settled law that the father is the natural guardian while the mother is entitled to the custody (*hizanat*) of a male child till the age of seven years while in case of a female till she attains puberty. This right continues notwithstanding a divorce or separation. As a natural guardian it is the obligation of the father to maintain the child even if the custody is with the mother. The inability of the mother to financially support the child is not a determinate ground to deprive her from custody because in such an eventuality the father's obligation regarding maintenance is not extinguished. The rule that the father is a natural guardian and, therefore, entitled to the custody of the child nor that the mother loses the right of *hizanat* after the minor has attained the prescribed age or puberty, as the case may be, is not absolute, rather subject to exceptions.¹ The decision regarding custody of a child is governed on the fundamental principle, the paramount and overarching consideration is the welfare of the child i.e to ascertain the course which is in the latter's best interest. The crucial criterion is, therefore, the best interest and welfare of a child while determining the question of custody. The rights or aspirations of the parents or some other person are subservient to this principle and each case of custody must be decided on the basis of ascertaining a course which is in the 'best interest of the child'. The factors or variables that may be taken into consideration while determining the question of custody of a child are not exhaustive but they would depend on the facts and circumstances of each case. The guiding principle is to ensure that the determination

¹ Malik Khizar Hayat Khan Tiwana and another v. Mst. Zainab Begum and others (PLD 1967 Supreme Court 402),

Mst. Rubia Jilani v. Zahoor Akhtar Raja and others (1999 SCMR 1834)

Mst. Zahida Kiani and another v. Capt. (Rtd.) Shahid Ali Khan (1993 SCMR 2303)

Mst. Nighat Firdous v. Khadim Hussain (1998 SCMR 1593)

Mst. Feroze Begum v. Lt.Col. Muhammad Hussain (1983 SCMR 606)

of custody promotes the rights of the child as well as the latter's wellbeing. The overriding consideration must be to protect the child from any physical, mental or emotional injury, neglect or negligent treatment. The mother's disability, illiteracy or financial status are not the sole determinant factors.² The second marriage contracted by the mother also cannot become a stand-alone reason to disqualify her from obtaining the custody of the child.³ The question of custody involves taking into consideration the factors which are relevant to the upbringing, nursing and fostering of the child. It essentially extends to the emotional, personal and physical wellbeing of a child. The sole object is to ensure that the overall growth and development of the child is guaranteed. The process adopted in order to determine the best interest has been described by the House of Lords⁴ " connotes a process, whereby all the relevant facts, relationship, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to follow will be that which is best in the interest of the child."

7. The overarching principle in cases involving the question of custody and visitation rights of the parents is, therefore, determination of the welfare of the child, i.e. to ascertain a course that would serve the best interest of the child. Sections 17 and 25 of the Act of 1890 set out the broad guidelines which are to be taken into consideration while deciding custody disputes. It is the duty of the court to form an opinion and adopt a course on the basis of the paramount principle of the welfare of the child. Section 17 explicitly provides that a court shall be guided by what appears in the circumstances to secure the welfare of the minor, consistent with the law to which the minor is subject. Sub-

² Mst. Beena v. Raja Muhammad and others (PLD 2020 Supreme Court 508)
Bashir Ahmed v. Incharge (Female) Darulaman, Mianwali and others (2011 SCMR 1329)

³ Raja Muhammad Owais v. Mst. Nazia Jabeen and others (2022 SCMR 2123)

⁴ J. v. C. 1970 (H.L.(E.) 668

section (3) provides that if the minor is old enough to form an intelligent preference then the court may consider that preference. As already noted above, while determining the welfare of the child in the context of custody disputes the court may grant the custody to a person other than the parents e.g the grandparents or aunt, if doing so would promote the welfare and best interest of the child.⁵ As a general rule the guardian and family court is the final arbiter for determining the question of custody, except when it has made a determination in an arbitrary, capricious or fanciful manner i.e when the fundamental principle of welfare of the child has not been considered or determined in the light of the variables which are relevant in the given circumstances.⁶ If the court has ignored the welfare of the child and the latter's best interest or has given preference to some other ground then the decision would not be sustainable. The court, in its endeavor to assess and determine the welfare of a child, is not bound to follow rigid formalities, strict adherence to procedure or rules or technicalities if doing so may hamper the determination or undermine the fundamental criterion of the best interest of the child.⁷ In a nutshell, the overarching and fundamental principle that must prevail and guide a court in determining custody disputes is the welfare of a child. The court has to adopt a course that would be in the best interest of the child because his/her welfare must always be the paramount consideration.

8. In the case before us, the minor was confident, intelligent and mature enough to form his own preferences. He had unambiguously stated before us that his father was no more than a stranger because he had not had the opportunity to spend time with him. He had also stated that he was not familiar with the other members of his father's family

⁵ Raja Muhammad Owais v. Mst. Nazia Jabeen (2022 SCMR 2123), Zahoor Ahmad v. Mst. Rukhsana Kausar and others (2000 SCMR 707) and Mst. Razia Rehman v. Station House Officer (PLD 2006 SC 533)

⁶ Mirjam Aberras Lehdeaho v. SHO Police Statoin Chung and others (2018 SCMR 427).

⁷ Mst. Rania Jilani v. Zahoor Akhtar Raja and others (1999 SCMR 1834)

and thus for him they too were strangers. He visibly appeared to be happy and comfortable with his mother and his relationship with his step father also seemed to be pleasant. It is obvious from the record that the respondent, despite being his father, had not made a serious and meaningful effort to assert his visitation rights. The minor was definitely not prepared nor willing to live with his father at this stage. He unambiguously stated that he preferred to remain in the custody of his mother with whom he had lived since his birth. The crucial factor of the welfare of the minor and his best interest was not taken into consideration by the courts. In such an eventuality the minor would have been compelled, without his consent, to abruptly shift to a new abode where all the inhabitants would have been strangers to him. It would have definitely exposed him to unimaginable mental and emotional trauma. It could have resulted in irreversible lifelong psychological scars. It is obvious from the record that neither the family court nor the appellate court had taken appropriate steps to assess the welfare of the minor and, instead, the question of custody was decided on the basis of other factors. The factors taken into consideration could not override the criterion of adopting the course which would have been in the best interest of the child. The courts had erred in failing to inquire into or assess the emotional and psychological impact on the minor in case of an abrupt displacement from the custody of his mother with whom he had lived since his birth. There is nothing on record to even remotely show that the courts had undertaken an effective exercise to assess and determine the welfare of the minor and, thereafter, adopt a course that would have been in his best interest. The courts appear to have treated the delicate and sensitive dispute relating to child custody as if it was an ordinary civil matter. The judges who had dealt with the case may not have been professionally trained in order to enable them to identify the relevant variables and to assess and determine the

question of custody of the child on the basis of the foundational principle of welfare of the child and then adopt a course that would have been in the latter's best interest. The relevant factors such as the parenting capacity, relationship of the child with each parent, the mental health of both the parents as well as the minor, the latter's emotional and mental needs and such other relevant factors in the context of determining the welfare of the child were not taken into consideration let alone assessment and determination of a course that would have been in the best interest of the child. The order regarding giving custody of the minor to the respondent in the circumstances could not have served his best interests. The psychological and emotional impact on the minor would have breached the foundational principle of his welfare and of adopting a course in his best interest. The impugned judgments are, therefore, not sustainable because the paramount fundamental criterion, the welfare of the minor, was not even considered, let alone its assessment and determination.

10. For the above reasons, we convert this petition into an appeal and the same is allowed. The impugned judgments/orders are hereby set-aside. Consequently, the custody of the minor shall be retained by the petitioner. We expect that as reasonable and responsible parents the respondent and the petitioner will amicably settle the custody dispute having regard to the best interest and welfare of the minor. We also expect that a visitation schedule will also be settled by them in such manner which will not breach the principle of the welfare of the minor. In case they fail to agree upon a schedule then the respondent shall be at liberty to approach a competent court to assert his visitation rights. In the meanwhile, the schedule, if any, settled by a competent court shall continue to be observed until it has been modified and varied.

11. We cannot turn a blind eye to the apparent failure of the State to fulfill its constitutional obligations in the context of safeguarding the rights of the children embroiled in litigation between the parents regarding their custody. The children are vulnerable and traumatic experiences early in life can leave lifelong scars which may profoundly affect the quality of their lives. The exposure of a child to the environment generally prevalent in the ordinary courts could profoundly affect their impressionable minds. Moreover, insensitivity or lack of special expertise on part of the presiding judges while dealing with matters relating to litigation involving the rights of children can gravely affect their rights and thus impact their lives adversely. The litigation involving the rights of children, such as custody disputes, requires special expertise, training and professional aptitude on part of the presiding judges. The environment of a court dealing with the rights of the children must also cater to their emotional and psychological needs. The courts must also be adequately equipped and enabled to professionally assess and determine the welfare of a child in each case. The courts must have access to professional consultation and advice of qualified experts such as psychologists. The parents and the courts must also have access to child welfare and social assistance services to protect and fulfill the rights of each child. Article 35 of the Constitution has explicitly made it an obligation of the State to protect the marriage, the family, and the mother and the child. The State has been defined in Article 7. It is a constitutional duty under Article 29(3) of the President or the Governor of the Province, as the case may be, to cause to be prepared and laid before the respective legislatures a report in respect of each year, inter alia, regarding observance and implementation of the obligation relating to children under Article 37 of the Constitution. Likewise, it is an obligation of the State to ensure that the fundamental rights enshrined in the Constitution are protected and fulfilled in the

case of children. It is, therefore, implicit in the obligation of the State towards protecting the rights of the children to provide child friendly courts presided by specially trained professional judges. It is also the duty of the State to enable the child friendly courts to assess the welfare of the child in family matters, such as custody disputes, by providing access to professional consultation and opinions of experts e.g. psychologists etc. It is the State's responsibility to provide affective child care and social services to protect and facilitate fulfilling the rights of those children who get entangled in custody disputes between feuding parents. It is an obligation of the State of Pakistan under the United Nation Convention of Rights of the Child to ensure the protection and to take all necessary steps for child welfare. We direct the Registrar of this Court to send copies of this order to the President and the Governors of the Provinces to ensure compliance with their respective obligations under Article 29(3) of the Constitution in the context of Article 35 *ibid*. The Registrar is further directed to send copies of this order to the Chief Secretaries of the Provinces and the Chief Commissioner of Islamabad Capital Territory for fulfilling the obligations of the State in relation to the rights of the children as highlighted herein above. In addition, copies of the order is directed to be sent to the Director Generals of the Federal and Provincial Judicial Academies for their consideration to include special training courses for judges and staff of family courts, relating to dealing with child custody cases and to develop their capacity to assess and determine the criterion of welfare of the child.

Judge

Judge

Islamabad the

6th March 2023

'APPROVED FOR REPORTING'

(Aamir Sh./Momal Malik, LC)