

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT: Mr. Justice Mushir Alam
Mr. Justice Qazi Faez Isa

Civil Petition No. 4129/2019 and
C. M. A. No. 10406/2019

(On appeal against the judgment dated 16.09.2019
passed by the Peshawar High Court, Peshawar,
in W. P. No. 1903-P/2019)

Mst. [REDACTED] ...Petitioner

Versus

[REDACTED], etc. ...Respondents

For the Petitioner: Ms. Jamila Jahanoor Aslam, ASC
Syed Rifaqat Hussain Shah, AOR

For Respondent No. 1: Mr. Arshad Hussain Yousafzai, ASC
a/w respondent No. 1 in-person.

Child, [REDACTED], produced pursuant to Court order.

Date of Hearing: 9 July 2020.

ORDER

Qazi Faez Isa, J. The petitioner was married to the respondent No.1 (**'the mother'** and **'the father'** respectively) and they had one son, [REDACTED], born in October 2012 (**'the child'**). The mother sought the physical custody of her son and the learned Family Judge granted it to her. The father challenged the decision by filing an appeal, which was dismissed. The learned Chief Justice of the Peshawar High Court exercising jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan¹ (**'Constitution'**) set aside the judgments and decrees of the learned Judges of the Family Court and of the Appellate Court.

¹ The Constitution of the Islamic Republic of Pakistan, 1973.

C. P. No. 4129/2019

2. The High Court set aside two concurrent judgments by a pithy three-page judgment and the reason for doing so is contained in its paragraph 4, reproduced hereunder:

Perusal of the record reveal that marriage between the parties was solemnized some seven (07) years ago, out of the wedlock, minor ██████ was born. Record further reveals that respondent No. 1 is a crippled / disable lady, who took 'Khula' from the petitioner at her own will by waiving off her dower, coupled with the fact that the minor ██████ would also remain in the custody of respondent No. 1/father and in this regard, a deed was executed on 16.03.2018, which is available on file, but this fact has been overlooked by both the courts below while deciding application of respondent No. 1. The only reason given by respondent No. 1 for taking custody of minor is that petitioner is a bad character person but this fact has not been proved through cogent evidence. Moreover, respondent No. 1 is a crippled/disabled lady having no source of income except receiving special investment package, which had been given to the widow of the village as alleged in para-5 of the application/suit while the petitioner is a Rikshaw driver and having earned enough would take care of his son very well; hence, keeping in view the above facts and circumstances of the case, both the Courts below have wrongly allowed the custody of minor ██████ to respondent No. 1 and the same are, thus, liable to be set aside.

3. Ms. Jamila Jahanoor Aslam, the learned counsel representing the petitioner-mother, submits that the mother was compelled to obtain *khula* (dissolution of marriage) from her husband by foregoing her *haq mehr*, which comprised of a house constructed on 5 marlas of land and 4 tolas of gold by signing on the dotted line of an agreement dated 16 March 2018 ('**the agreement**'). This agreement also provided that the mother would not claim the custody of her son. The learned counsel states that the clause of the agreement whereby the mother gave up the custody of her child is contrary to public policy and without consideration, therefore, void under the Contract Act, 1872² ('**the Contract Act**'). She also relies on the judgment of this Court in the case of *Razia Rehman v Station House Officer*³. The learned counsel next submits that in the impugned judgment the physical

² Section 23 and 25 of the Contract Act, 1872, respectively.

³ PLD 2006 Supreme Court 533.

C. P. No. 4129/2019

disability of the mother was mentioned to deprive her of the child's custody which is contrary to law. Mere disability is not a ground to disentitle a mother to raise her child and deny the child of the love, care and upbringing that only a mother can provide, submits the learned counsel. The mother at the time of her marriage and when the child was born was suffering from a physical disability, yet carried her child for nine months and nurtured him. It is further submitted that the resilience and determination of the lady is such that she rose to the challenge life had thrown her way and supports herself by working in an embroidery centre. In any event, learned counsel submits, 'receiving special investment package' has nothing to do with a mother's right to *hizanat*. Concluding her submissions, the learned counsel states that since in law the primary responsibility for maintaining a child is of the father it is immaterial whether the mother is financially capable to maintain the child.

4. The learned counsel for the father submits that the parties had entered into the agreement which the father abided by but which the mother violated in seeking the custody of the child, and in doing so unnecessarily dragged the father into different courts. The learned counsel states that as a consequence of the agreement the mother obtained *khula* from the father and having done so cannot be permitted to violate the other terms of the agreement, including, for the purposes of the present case, seeking the child's custody. It is further submitted by the learned counsel that the paramount consideration in custody matters is the child's welfare which in the present case lies with the father as the mother is not physically able to take care of the child's needs as she is wheelchair bound. The learned counsel concluding his submissions states that, the child was unwilling to go to his mother and pointed out in Court that the child clung to the father and did not want to even look at his mother, which self-evident reason was sufficient to deny the mother custody of the child.

5. We have heard the learned counsel for the parties and with their assistance examined the documents on record. It has come on record and confirmed by the father that he has three children,

C. P. No. 4129/2019

two elder children aged nine and ten years from a previous marriage who, we were told, reside in his father's house. The respondent No. 1 lives in a separate house which is at some distance from his father's.

6. The learned Family Judge, Ms. Sidra Jalal, recorded the evidence of both the parties and after hearing them came to a considered decision that, the child's welfare lay in the mother having his physical custody. She further held that the mother's disability was not a factor that could deprive her of custody. And, even if the mother was financially incapable to provide for the child, it was not her responsibility to do so but that of the father to maintain the child. On each of these three points the learned Family Judge was factually and legally correct. The judgment of the learned Family Judge was upheld by the learned Judge of the Appellate Court. However, these two concurrent judgments were set aside by the High Court by relying on the agreement between the parties, and the clause therein stipulating that the mother could not claim the custody of her son. The High Court held that the mother's physical condition meant that she was not able to look after her child and further held that she was not financially independent. All three of the reasons which prevailed with the learned Judge these were extraneous to the law and *shariah*, pertaining to the personal law of Muslims.

7. Through the agreement the mother obtained her release from her matrimonial bond by foregoing her dower (*haq mehr*) and obtained *khula*. Muslim personal law prescribes rules of *hizanat* (custody); a mother in whom *hizanat* vests cannot be compelled to surrender it nor can such surrender constitute consideration for an agreement of *khula*. The custody of a child or rights to his/her custody cannot be surrendered to obtain *khula* nor can the husband demand such surrender. The Constitution mandates⁴ that all laws must conform with the Injunctions as laid down in the Holy Qur'an and Sunnah and no law shall be enacted which is repugnant to such Injunctions. The Holy Qur'an, which enables

⁴ Article 227 of the Constitution of the Islamic Republic of Pakistan, 1973.

C. P. No. 4129/2019

*khula*⁵, does not contemplate surrendering a child's custody to secure *khula* nor that it can constitute valid consideration for it. To insert such a condition in an agreement of *khula* is contrary to the law and the Injunctions of Islam.

8. In the agreement under consideration the petitioner in order to obtain *khula* not only surrendered her dower (*haq mehr*) but also agreed to forego the custody of her son. The agreement to the extent that the mother surrendered the custody of her child or which stopped the mother to claim his custody is not *lawful consideration*; it is contrary to the Islamic principles governing *hizanat* and the law determining the custody of minors and thus forbidden. An agreement the *object or* consideration of which is against *public policy* is void, as stipulated in section 23 of the Contract Act, reproduced hereunder:

What considerations and objects are lawful and what not. The consideration or object of an agreement is lawful, unless - it is forbidden by law; or

is of such a nature that, if permitted, it would defeat the provisions of any law; or

is fraudulent; or

involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

The welfare of the minor cannot be relegated to the personal interest of the father and such a clause or condition is against public policy. The clause in the agreement whereby the mother agreed to give up her son's physical custody and/or not claim it is also without consideration. The welfare of a minor cannot be subsumed by the interest of his father, and if this is done it will be against public policy, and such clause or condition will be void. Such a stipulation will also be void under section 25 of the Contract Act because it is without consideration.

⁵ *Surah Al-Baqarah* (2) verse 229 and *surah An-Nissa* (4) verse 35.

C. P. No. 4129/2019

9. We are indeed surprised that the High Court overturned two concurrent decisions, and did so without quoting law, *shariah* or precedent to support the decision. The High Court also overlooked the judgement of this Court in the case of *Razia Rehman*, relevant portion whereof is reproduced hereunder was also overlooked:

8. ... It is also an un-deniable fact that according to the law of the land, any agreement reached between the two parents, inter alia, regarding the custody of the minor children is neither valid in law nor even enforceable. Therefore, even if it be presumed that the petitioner-lady had, through some alleged compromise which she is however, denying, waived her right of HIZANAT, the said compromise or agreement had no binding force in the eyes of law.⁶

10. It also pains us to state that the High Court was not very sensitive in dealing with the case. By referring to the petitioner as a, '*crippled/disabled lady having no source of income*'. In determining the welfare of the child and his custody neither the mother's physical condition nor her income were determinative factors. It was also inappropriate to refer to the mother as *crippled* or *disabled*. The petitioner has a physical disability; she should not be called a cripple or disabled. The mother has not resorted to beggary; she works and earns an honest living. To denigrate such a lady was wholly inappropriate. Instead she should be admired for demonstrating remarkable determination and perseverance. Chief Justice Syed Mansoor Ali Shah, as his lordship then was, in the case of *Asfandyar Khan Tareen v Government of Punjab*⁷, held:

13. Dignity has its roots in the simple idea that justice consists of the refusal to turn away from suffering. Most central of all human rights is the right to dignity. Dignity unites the other human rights into a whole. The right to dignity reflects the 'recognition that a human being is a free agent, who develops his body and mind as he wishes, and the social framework to which he is connected and on which he depends. Human dignity is therefore the freedom of the individual to shape an individual identity. It is the autonomy of the individual will. It is the freedom of choice. Human dignity is infringed if a person's life or physical or mental welfare is harmed'.

⁶ *Razia Rehman v Station House Officer*, PLD 2006 Supreme Court 533, 53.

⁷ PLJ 2018 Lahore 508.

16. The use of the terms or words like "*disabled*", "*physically handicapped*" and "*mentally retarded*" characterize and label a person on the basis of an impairment, which negates reasonable accommodation as they deny persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms. These words also amount to discrimination on the basis of disabilities as they have the effect of impairing or nullifying the recognition, enjoyment or exercise of persons with disabilities, on an equal basis with others, of all human rights and fundamental freedoms. These words, labels and characterization seriously offend the right to be a person thereby infringing constitutional guarantees like right to life, right to human dignity and right to non-discrimination of persons with disabilities, thereby violating Articles 9, 14 and 25 of the Constitution.

20. In addition to the above the Federal Government, as well as, the Government of the Punjab is directed to discontinue the use of these words in official correspondence, directives, notifications and circulars and shift to persons with disabilities or persons with different abilities.

We endorse and approve his lordship's observations that pejorative words, like *crippled* or *disabled*, '*seriously offend the right to be a person thereby infringing constitutional guarantees like right to life, right to human dignity and right to non-discrimination of persons with disabilities, thereby violating Articles 9, 14 and 25 of the Constitution.*' We may add that the Constitution permits '*the State from making any special provision for the protection of women and children*'⁸ but does not permit discrimination.

11. The Principles of Policy⁹ (**the Principles**) set out in the Constitution is the path, and the destination, that the nation has set for itself. The Principles require that, '*Steps shall be taken to ensure full participation of women in all spheres of national life*'¹⁰. If women with physical disabilities are considered not able to take care of their children they would stand excluded from *participation* in family life and excluded from the much higher proclaimed objective of participation in *all spheres of national life*. The

⁸ Article 25(3) of the Constitution of the Islamic Republic of Pakistan, 1973.

⁹ Chapter 2 of the Constitution of the Islamic Republic of Pakistan, 1973.

¹⁰ Article 34 of the Constitution of the Islamic Republic of Pakistan, 1973.

C. P. No. 4129/2019

Principles also require that the State shall protect '*the mother and the child*'¹¹. If a child is taken away from the mother, deprived of her love and the benefit of her upbringing *the mother and the child's* relationship is fragmented.

12. Another of the Principles provides that Muslims must be enabled to live their lives '*in accordance with the fundamental principles and basic concepts of Islam*'¹² and '*to promote unity and the observance of the Islamic moral standards*'¹³. The religion of Islam gives a high status to expectant ladies and mothers. When performing the Hajj and Umrah pilgrimages, Muslims run between the mounts of *Safa* and *Marwah* (*Sa'ee*) in the footsteps of the lady Haajar to emulate her when she desperately searched for water for her child, Ismail (peace be upon him). Haajar the esteemed mother is commemorated in perpetuity by incorporating her actions as an integral component in the performance of Hajj and Umrah of the Islamic Faith. A mother-child bond and a mother's agony instituted a religious obligation, a rare if not the only example, in world religions. The mother of Islam's progeny, lady Haajar is buried next to her son, the Prophet Ismail (peace be upon him), in the *Hateem*, the crescent shaped enclosure adjacent to one of the walls of the Holy Ka'ba, also known as *Hijr Ismail*, the shelter constructed by Prophet Ibrahim (peace be upon him) for his wife and child. Pilgrims from all over the world circumambulate the Holy Ka'ba, including the Hijr/Hateem.

13. The high status of motherhood is reflected in the naming of a chapter of the Holy Qu'ran after Maryam¹⁴ (Mary), peace be upon her, the only chapter named after a woman. Almighty Allah recalls her qualities and bestows on her a number of titles: a purified (*tahharaki*) and chosen (*istafaqi*) one¹⁵, a sign (*ayatan*) of God¹⁶,

¹¹ Article 35 of the Constitution of the Islamic Republic of Pakistan, 1973.

¹² Article 31(1) of the Constitution of the Islamic Republic of Pakistan, 1973.

¹³ Article 31(2)(b) of the Constitution of the Islamic Republic of Pakistan, 1973.

¹⁴ *Surah Maryam*, the 19th chapter of the Holy Qur'an.

¹⁵ *Surah Al-Imran* (3) verse 42.

¹⁶ *Surah Al-Muminun* (23) verse 50.

C. P. No. 4129/2019

truthful (*siddiqatun*)¹⁷ and devoutly obedient (*qanitina*)¹⁸. The lady Maryam (peace be upon her) is mentioned 34 times in the Holy Qur'an. The mother of the Prophet Isa (peace be upon him) faced the pangs of childbirth alone. She, like the lady Haajar, overcame formidable odds to care for her child. These great ladies are acknowledged and incorporated into the Faith, enriching Islam's glorious tradition. It is for believers to ponder and reflect upon their lives, and to derive lessons from it. To be financially underprivileged, to be weighed down with a child, to give birth or to have a disability is not something to be derided. For a mother to bear the pain of childbirth, the greatest human natural pain, but then to have her child wrested away from her on the pretext that she is incapable of taking care of the child is insensitive in the extreme, and may also be characterized as hypocritical.

14. In regards to the rights of the mother and child the law, Islam and the Constitution are often violated. However, it is inexcusable when constitutional office holders, who take an oath to uphold the Constitution and are paid to do so, undermine such rights. Disregarding the Principles is contrary to the express language of the Constitution, which provides that, *'it is the responsibility of each organ and authority of the State, and of each person performing functions on behalf of an organ or authority of the State, to act in accordance with those Principles in so far as they relate to the functions of the organ or authority'*¹⁹.

15. The Principles of Policy are contained in ten articles²⁰ and these were given by the people to themselves through their chosen representatives when the Constitution was written. The importance of the Principles is such that the President of Pakistan is required to submit an annual report to Parliament and similarly the

¹⁷ *Surah Al-Maidah* (5) verse 75.

¹⁸ *Surah Al-Tahrim* (66) verse 12.

¹⁹ Article 29(1) of the Constitution of the Islamic Republic of Pakistan, 1973.

²⁰ Articles 31 to 40 of the Constitution of the Islamic Republic of Pakistan, 1973.

C. P. No. 4129/2019

Governors to their respective Provincial Assemblies²¹, '*on the observance and implementation of the Principles of Policy*'²².

16. During the hearing the learned counsel for the father submitted that the right of *hizanat* of the child vesting in the mother is nearly over. In response to our query we were told that the judgments of the learned Family Judge and the learned Appellate Judge were not abided by, as the father retained the custody of the child. Therefore, we cannot accept such a preposterous contention because in doing so we will be rewarding those who take the law into their own hands and violate the decisions of courts vested with jurisdiction. Every judgment must be abided by unless it is suspended and/or set aside by a higher court. The father dragged out the proceedings and then unnecessarily invoked the constitutional jurisdiction of the High Court. There was no reason for the High Court to exercise its constitutional jurisdiction in terms of Article 199 of the Constitution and to set aside perfectly well-reasoned and legal judgments. As regards the learned counsel for the father, contending that the child has an aversion to the mother, just goes to show that the father has filled the child's innocent mind with fear and/or dread, and demonstrates that he has not been fair to either the child or the mother.

17. Therefore, for the reasons mentioned above we have no hesitation in setting aside the impugned judgment of the High Court dated 16 September 2019. Consequently, the respondent No. 1 is directed to hand over the physical custody of the minor, [REDACTED], to the petitioner within seven days from the date of this order, failing which the concerned police officer and the social welfare officer will ensure compliance; a copy of this order be sent to the learned Advocate-General, Khyber Pakhtunkhwa for onward transmission of this order to the concerned and to oversee compliance. In view of the important issues decided in this petition with regard to the custody of minors the Registrar of the Peshawar

²¹ Article 29(1) of the Constitution of the Islamic Republic of Pakistan, 1973.

²² Article 29(3) of the Constitution of the Islamic Republic of Pakistan, 1973.

C. P. No. 4129/2019

High Court is directed to provide copies of this order to all family/guardian judges and Judges of the Peshawar High Court. This petition is converted into an appeal and allowed in the above terms.

Judge

Judge

Bench-II
ISLAMABAD
13 July 2020
(Farrukh)

Announced in open Court at Islamabad on 17 July 2020.

Judge

Approved for Reporting