

2021 Y L R 1989

[Lahore]

Before Ali Baqar Najafi, J

SAROSH SIKANDER and others---Petitioners

Versus

GUARDIAN JUDGE, LAHORE and others---Respondents

Writ Petition No. 248310 of 2018, decided on 23rd June, 2020.

(a) Guardians and Wards Act (VIII of 1890)---

---Ss. 8 & 12---Family Courts Act (XXXV of 1964), S. 5, Sched.---Interim custody of minor---'Parent'---Scope---Application moved by grandparent---Maintainability---Respondent (grand-mother of the minor) instituted application for interim custody and visitation rights of minor girl, whereas the petitioner (mother of the minor) filed application for rejection of the same on the ground of maintainability---Guardian Court rejected the application of petitioner---Petitioner invoked constitutional jurisdiction of the High Court contending that only the parents could request for the visitation right of the minor as the 'grandmother' was not covered in the definition of 'parent'---Validity---Record revealed that parents of the minor got married to each other but , soon after the birth of minor, the divorce was effected---Intensity of estrangement was so high that a criminal case was got registered on the behest of father of the petitioner which though was later cancelled---Father of the minor was a foreign national, who came back after the birth of child to see new-born child and to reconcile but the efforts failed and he returned abroad after pronouncing divorce---Petitioner had referred to definition of the word 'parent' from dictionaries, which included adoptive parents, but such concept was not recognized in Islam---Keeping in view the fact in the present case that neither the real father of the minor had come forward with any definite plea nor the effort was made to implead him as a party, his tacit approval could be presumed---Proceedings before the Guardian Court were for the visitation right of the minor only, therefore, the application filed by the grandmother was competent---Constitutional petition dismissed, in circumstances.

(b) Family Courts Act (XXXV of 1964)---

---S. 5, Sched.---Guardians and Wards Act (VIII of 1890), Ss. 8 & 12---'Parent'---Scope---Interim custody of minor---Application moved by the grandmother (respondent) before the Guardian Court---Maintainability---Contention of the petitioner (mother of minor) was that only the parents could request for the visitation right of the minor as the 'grandmother' was not covered in the definition of 'parent'---Held, that the word 'parent' used in S. 5 and the Sched. of the Family Courts Act, 1964, was wider in sense and was not restricted to its literal meaning particularly when the grandchild was entitled to inheritance from the grandparent---Application of the respondent (grandmother) was maintainable before the Guardian Court---Constitutional petition was dismissed, in circumstances.

Mst. Mahmooda Sultana v. Mst. Jainila Begum 1988 SCMR 538 ref.

(c) Family Courts Act (XXXV of 1964)---

---S. 5, Sched.---Family Court (Amendment) Ordinance, 2002 (LV of 2002), Preamble--- Guardian and Wards Act (VIII of 1890), Ss. 8 & 12---Interim custody of minor---Application moved by the grandmother before the Guardian Court--- Maintainability--- 'Parent'---Scope---Respondent (grandmother of the minor) instituted application for interim custody and visitation rights of minor girl, whereas the petitioner (mother of the minor) filed the application for rejection of the same on the ground of maintainability--- Guardian Court rejected the application of petitioner---Contention of the petitioner was that the Family Courts Act, 1964, was promulgated as a special act for special class of people i.e. husband and wife in case of their custody---Validity---Although contention of the petitioner was correct but the Guardians and Wards Act, 1890, also dealt with the situation where only grandparents were contestants, therefore, the same would not stop the Guardian Court to adjudicate upon matter-in-hand---In the Family Court Act, 1964, the Schedule made under S. 5 thereof, prescribed "custody of the children" in clause (5), however, an amendment was made through Family Court (Amendment) Ordinance, 2002 and after " custody of children" the words "and the visitation rights of parents to meet them" were added---Application of the respondent (grandmother) was maintainable before the Guardian Court---Constitutional petition was dismissed, in circumstances.

Farzana Rasool and 3 others v. Dr. Muhammad Bashir and others 2011 SCMR 1361; Mst. Abeera Khan v. Adnan Jamil and another 2019 CLC 1478 and Mst. Maryam Masood v. Mughisuddin Mirza and 2 others 2009 CLC 1443 distinguished.

(d) Guardians and Wards Act (VIII of 1890)---

---Ss. 8 & 12---Family Courts Act (XXXV of 1964), Ss. 5, Sched. & 14---Constitution of Pakistan, Art. 199---Constitutional petition filed against an interlocutory order of Guardian Court---Maintainability---Interim custody of minor---Impugned order was just an interlocutory order holding that the application of interim custody/visitation right filed by the grandmother could proceed and the same was not even an order deciding the application filed by the grandmother, therefore, constitutional petition was not maintainable since an appeal could be filed against the final order---Constitutional petition was dismissed in circumstances.

Muhammad Shah Nawaz Khan for Petitioners.

Fahad Ahmad Siddiqui for Respondent No.2.

Zafar Raheem Sukhera, A.A.G. for Respondents.

Date of hearing: 31st January, 2020.

JUDGMENT

ALI BAQAR NAJAFI, J.--- Through this constitutional petition, the petitioner has challenged the order dated 12.09.2018 passed by learned Guardian Judge-II, Lahore whereby her application for rejection of petition filed by respondent No. 2 under section 5 of the Schedule attached with the Family Courts Act, 1964 read with section 8 of the Guardians and Wards Act, 1890, was dismissed.

2. Brief facts giving rise to file the present writ petition are that respondent No. 2 being the grandmother of the minor, namely, Rahmeen Shoaib born on 15.9.2016 had filed petition

under section 5 of the Schedule attached with the Family Courts Act, 1964 read with section 8 of the Guardians and Wards Act, 1890 on 31.10.2017 for the interim custody and visitation rights of the minor. However, the petitioner, being real mother, on 07.03.2018 filed an application for the rejection of the said petition on the ground of maintainability which was dismissed, hence this direct constitutional petition.

3. The argument advanced by the petitioner is that only the parents can request for the visitation right of the minor as required under section 8 the Guardians and Wards Act, 1890; that parents do not include grandparents of the minor; that under the Schedule (Part-1) and under section 7(2) of the Act *ibid*, the visitation request is only for the parents to meet their children; that in the presence of the petitioner being biological parent (mother) giving of the interim custody to anyone else would be against the welfare of the minor, particularly when she remained in the custody of the petitioner since her birth; that the logic that minors can directly inherit under Islamic Law from grandparents is not enough to give even the visitation right/interim custody to them particularly when the father is alive and living in U.K.

3. Conversely, the learned counsel for the respondent argues that the order was rightly passed, hence, seeks dismissal of the writ petition.

4. Arguments heard and file perused.

5. Admittedly, the petitioner and Shoaib Muhammad son of Rasheed Ullah and respondent No.2 got married on 20.12.2015, whereafter minor Rahmeen Shoaib was born on 15.9.2016 but unfortunately soon a divorce was effected between them on 30.10.2016. The intensity of estrangement was so high that FIR No. 582 dated 08.11.2016 under sections 363, 511, 354, 337-A(i), 337-F(i) and 337-L/2 of P.P.C. was got registered on 08.11.2016 at Police Station Model Town, Lahore on the behest of father of the petitioner which was although cancelled on 29.06.2017. Both father and brother of the respondent are U.K. national and to ensure the foreign nationality, the marriage was solemnized. After the birth of the child, the father of the minor came to Pakistan to see the new born child and to reconcile but the efforts failed and, therefore, he returned to U.K. on 02:11.2016 after pronouncing divorce to the petitioner. The above referred divorce was also registered.

6. The respondent No.2 had filed a petition under sections 5 and 8 before the Guardian Court on 31.10.2017 while relying upon case titled "Muhammad Tabish Naeem Khan v. Additional District Judge, Lahore and others" reported as 2014 SCMR 1365 and case titled "Malik Khizar Hayat Khan Tiwana and Malik Ghulam Muhammad Khan v. Mst. Zainab Begum, Ch. Aziz Ahmad Waraich, District Judge, Lahore and Qazi Muhammad Dastgir, Guardian Judge, Lahore" reported as PLD 1967 SC 402 and prayed for interim custody of half of the time by making a schedule. This application was contested by the petitioner on the ground that it is only the parents who are entitled to the custody, and the grandmother is not covered in the said definition of parents. However, on 12.09.2018, the said application filed by the respondent was found maintainable on the ground that the word parent used in section 5 of the Schedule is wider in sense and is not restricted to its literal meaning particularly when the grandchild is entitled to inheritance from her. Reliance was placed upon case titled "Mst. Mahmooda Sultana v. Mst. Jamila Begum" reported as 1988 SCMR 538. The argument advanced by the learned counsel for the petitioner that Family Courts Act, 1964 was promulgated as a Special Act for special class of people i.e. husband and wife and children in

case of their custody is correct but the Guardianship Act also caters for the situation where only grandparents are contestants, therefore, it will not stop the Guardian Court to adjudicate upon such matters. The reliance is placed upon case titled 'Farzana Rasool and 3 others v. Dr. Muhammad Bashir and others' reported as 2011 SCMR 1361 is therefore misplaced. The other reliance upon case titled "Mst. Abeera Khan v. Adnan Jamil and another" reported as 2019 CLC 1478 and case titled "Mst. Maryam Masood v. Mughisuddin Mirza and 2 others" reported as 2009 CLC 1443 are also irrelevant as in the said case, the controversy was between the father and the mother, and not the grandparents.

7. In the original West Pakistan Family Courts Act, 1964, Schedule made under section 5 thereof, prescribed "custody of the children" in clause 5. However, through an amendment made on 01.10.2002 after "custody of the children" following words were added through amending Ordinance of Family Court (Amendment) Ordinance, 2002 (LV of 2002):--

"and the visitation rights of parents to meet them".

8. The main thrust of the learned counsel for the petitioner was on the interpretation of the word parents, wherein according to him it does not include grandparents. He has referred to the various definitions of the word parent from different dictionaries. Notably, they include the adoptive parents, a concept not recognized in Islam. Keeping in view the fact that neither the real father of the minor has come forward with any definite plea nor the effort was made to implead him as a party, his tacit approval can be presumed. The proceedings pending before the Guardian Court are for the visitation right of the minors only, therefore, the application filed by the grandmother is competent. Even otherwise, the maintainability of such application does not guarantee that it would be allowed. However, it would be a matter of concern to read and appreciate the evidence which the respective parties would like to produce to support their respective claim. Notably, the impugned order is just an interlocutory order holding that application for interim custody/visitation right filed by the grandmother could proceed. It is not even an order deciding the application filed by the respondent, therefore, the writ petition was not maintainable since an appeal lies against the final order.

9. At this stage, it is noted therefore much appreciated that both sides are fully loaded with the solid arguments in their favour, but at this stage giving any observation would prejudice their case before the Guardian Court where the question whether in the facts of the case, the grandmother can have the interim custody/visitation rights is pending. It is, therefore, observed that the application of the respondent will be decided expeditiously and preferably within six months but in accordance with evidence and the law. This writ petition is therefore, dismissed as not maintainable.

MQ/S-22/L

Petition dismissed.