

Case Comment

Dr. Muhammad Asif v. Dr. Sana Sattar and Others

(Review Jurisdiction) Supreme Court of Pakistan

(C.R.P. No. 458/2024 in C.P.L.A. No. 2514/2024)

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Abstract

This case note examines the landmark decision in a case titled ‘*Dr. Muhammad Asif v. Dr. Sana Sattar*’ (decided on May, 16, 2024) rendered by the Supreme Court of Pakistan. In this seminal case, custody of a minor child was involved, which led to the jurisprudential shift from the patriarchal concept of “welfare of the minor” under the Guardians and Wards Act, 1890 towards a rights-based and the participatory standard, more aligned with the provisions of United Nations Convention on the Rights of the Child (CRC) 1990. The Court, while elucidating the scope of the Articles 3 and 12 of the Convention, emphasised the necessity of directly hearing from the minor child in order to harmonize Section 17 of the Act, 1890 with constitutional guarantees i.e., dignity, equality, and child protection. It also signified in unequivocal terms that the mother’s employment in no way can be a ground of disqualification from the right of custody of the minor. The judgment integrated the international human rights obligations into the domestic law on a way to redefining the scope of judicial discretion in custody disputes. This case note also analyses the factual dimensions of the situations, the judicial reasoning and doctrinal innovations by the Court, towards the child-centred justice in Pakistan.

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Introduction

The Guardians and Wards Act, 1890 (a colonial legislation) is the primary law in Pakistan for deciding custody disputes. Although, family laws in Pakistan have deep roots in the Islamic jurisprudence yet colonial legislations have great influences in the setting of the standards for determining the custody of the child. The law has given mandate to the courts to decide the custody matters by keeping prime the standard of ‘welfare of the minor.’ This welfare standard has been interpreted by the courts in a discretionary and adult-centric manner, in which most of the time, voice of the child is marginalized. Whereas after the ratification of Convention on the Rights of Child (1990) the constitutional guarantees provided under Articles 9, 14, 25, and 34 of the Constitution of Pakistan, 1973 a more rights-oriented approach has been emerged.

The present case has seamlessly been selected by the Supreme Court of Pakistan to reconcile domestic statutory provisions with the global jurisprudence pertaining to child rights. In fact, the Court extended the doctrine of ‘*updating construction*’ typically called ‘*always speaking*’ to family law, and thereby transformed the simple meaning of ‘*welfare of a child*’ into a more dynamic concept ‘*best interests of the child*.’

Facts of the Case

In the facts of this case; the petitioner Dr. Muhammad Asif is a father, who has sought custody of the minor children (aged 8 and 7 years) from the respondent mother Dr. Sana Sattar. The spouses are professional physicians and have remarried but they are still hanging in legal battle to get custody of the minors over and above the visitation rights. Initially, the minors were in custody of the father. It was the mother, who filed a custody case before the Family Court in Layyah where her claim did not succeed and she was granted merely the visitation rights. The mother appealed against the declining order while the father appealed against the order of visitation rights. However, the appellate court allowed the

claim of custody in favor of the respondent mother while father's appeal impugning the visitation rights was dismissed.

The petitioner father was aggrieved of such order, then he invoked the constitutional jurisdiction before the Lahore High Court, Lahore; however, the same was dismissed. In consequence whereof, he approached the Supreme Court under Article 185 (3) but the same was also dismissed. Hence, the instant review petition was filed. The claim of petitioner father hinges upon the facts that he is a child specialist, owner of a hospital and his professional expertise place him in a better position to care for the special-needs child. He had remarried and had a one-year-old child from his second marriage so the minor will have a family life in the house.

On the other hand, the respondent mother was also a medical doctor employed in the government service defended the claim of custody arguing that she being mother of the minor children is entitled to retain their custody for their education and therapy in Lahore. Although, she remarried, her spouse's adult children did not live with them; therefore, the minors would face no difficulty, deprivation or hardship.

Legal Issues

The case raised multiple questions of law and principle, which are as follows: -

- How should Section 17 of the Act, 1890 be interpreted in light of provisions of Convention on Rights of Child and Constitutional guarantees?
- Does the right of a child as to hearing him constitute a binding judicial obligation on the court in custody matters under the provisions of CRC?
- To what extent should parental circumstances (such as remarriage, employment, extended family support) influence the determination of the welfare of the child or the child's best interests?

- Should the Alternate Disputes Resolution (ADR) mechanisms, particularly mediation, be preferred in custody disputes as a child-sensitive alternative to adversarial proceedings?
- How can the courts in Pakistan maintain a balance between the colonial legislations and adherence to the evolving constitutional and international standards?

Grounds of the Decision

The Court referred to the words of James Baldwin in Essays: The Nation (1980): -

‘the children are always ours, every single one of them, all over the globe; I am beginning to suspect that whoever is incapable of recognizing this may be incapable of morality.’

The Court made a comparative analysis of the laws, pressed a need for alignment in law and practice, also considered living conditions of both the competing parents in the case. Regarding the best interest of the minor children; the court held a comprehensive discourse covering the following areas: -

Harmonization between Guardian and Wards Act and Convention on Rights of Child

The Court undertook an in-depth study of the provisions of the Act, 1890, the provisions of Convention on the Rights of Child (1990) and the precedent law on the subject of custody to underscore the inconsistency between the legal frameworks and the judicial practice. Although Pakistan is form of state under the international law which needs codification of the internationally agreed provisions in the domestic law rather than their per se application pursuant to the international convention or treaty at international level. The Supreme Court of Pakistan considering the essential and significant aspects of the participation and choice

of the ward made a doctrinal shift by construing Section 17 of the Act, 1890 through the doctrine of '*updating construction*'.

The Court candidly observed that the word '*welfare*' of the child mentioned in the law was embedded in its colonial sense, which was vague and adult-centric, thus needs to be harmonized with Article 3 of the Convention on the Rights of Child. The article has been articulated in a well-structured way involving the participatory standard to consider the '*best interests of the child*.' The Court implied that interpretations inviting the participatory role of the ward, especially in custody matters would ensure that the provision remains a '*living law*,' more flexible and adaptive, and thus consistent with contemporary international, constitutional and domestic norms.

Choice of the Ward

As per the provisions of the Convention on the Rights of Child, the Court is required to hold a meeting with the minor children. During the case proceedings, the Court held such meeting and interacted with the minor children in a friendly manner, excluding the formal and rigorous decorum of the court room to find out their free choice of parent for custody. In result thereof, the elder child expressed his desire to live with both parents while the younger could not articulate his preference, perhaps due to undeveloped maturity. However, the Court emphasized that listening to the children before deciding their custody matter should not be taken in routine as a formality or of symbolic character rather it is essential and sine quo non to protect their dignity and legality of the judicial outcomes.

Gender and Non-Discrimination

Argument of the petitioner that mother's professional employment in the government sector would deprive her from the custody of the Ward was also rejected based on her inalienable right to development and growth. The Court also referred to the early decisions of the Supreme Court of Pakistan, where it was already held that employment of mother shall have no bearing on

the custody matter. The Court further observed that treating her employment as an embargo to her right to custody of the minors would not only perpetuate discrimination against the women but also be tantamount to a denial of international obligations. The Court rendered custody of mother as suitable despite her professional employment finding it in conformity with Article 11 and 16 of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).

Alternative Disputes Resolution (ADR) in Family Disputes

Considering the essence of CRC principles, which require the participation of minors and minimisation of adversarial harm to the stakeholders, the Court emphasised '*mediation*' as a preferred mode to settle family disputes. The Court found it child-sensitive and voluntarily excepting undue psychological burdens and other formalities on the wards. More so, the settlement reached through '*mediation*' would not only foster the relations between the parted parents but also close the doors for any further legal battle. It was also commented that custodial arrangements based on mutual understanding would better reflect the best interest of the children, making them more sustainable and helping the minor children in developing their personality and grooming. For these reasons, the Court in a postscript directed all family courts in Pakistan to ensure that the child's voice is heard in custody and guardianship matters and same is duly recorded and made part of the record.

The discussion has highlighted the import of doctrinal development from a narrow approach of '*welfare of the child*' to the broad term of '*best interest of child*'. The interpretative tool of '*updating construction*' typically applied in the commercial and constitutional issues has now been extended to the interpretation of family laws and their disputes. The word '*welfare*' had an established position in the guardian and custody matters, which has been anchored with another threshold of '*best interest*' of the child. It is not merely a shift from discretionary principle of '*welfare of the child*' to the participatory role of the minors rather it has brought the law and practice in conformity with the

international law obligations holding the children rights holder than passive objects.

In this case, the Court reinforced the rights of women by invoking provisions of the Convention on the Elimination of all Forms of Discrimination against Women and thereby dismissed the patriarchal biases against the working women, especially mothers. The Court elucidated and redefined the terms of custodial capability, not merely the availability at home, but rather considered it inclusive of emotional, psychological, and developmental support to the ward under custody. Therefore, this case law is likely to have a great influence on future decisions by the family courts involving professional women, and same would ensure nondiscrimination in the adjudication of custodial and guardianship matters. Hence, by referring to and embedding the provisions of CRC and CEDAW principles into domestic jurisprudence, the Supreme Court of Pakistan, in fact, reinforced the constitutional commitment to dignity, equality, and protection of childhood.

Practical Challenges

The Court did not lose sight of the ground realities and practical hardships, where the best interests of the child can hardly be realised due to infrastructural deficiencies. The Court further observed that a conducive environment is necessary for the minor children to choose the most viable option and highlighted the following items to be made available: -

Child-Friendly judges and Courtrooms

In order to Implement the directions contained in the judgment, it calls for substantial reforms, where judges must be imparted trainings in the subject of *child psychology* to enhance their capacity to observe and adopt a child-centric approach. The courtroom environments must also be adapted and reshaped to help in relieving their pressure and stress, thereby enabling them to make their best choice.

Establishment of Court Annexed Mediation

Recently, mediation centers have been established in the family courts of Pakistan, where the mediation services have begun to be provided in the family matters. For sake of reference, in the Islamabad district, the services of a highly learned Civil Judge, namely Raja Farrukh Ali Khan, who has already received master training with accredited mediation experience, have been dedicated for the mediation center for both the East and West districts, where he has already commenced mediation proceedings in the family matters.

Conclusion

The Supreme Court's decision in a case titled '*Dr. Muhammad Asif v. Dr. Sana Sattar*' is a landmark in the jurisprudence of child custody and guardianship matters in Pakistan. It signals a decisive departure from colonial welfare paternalism towards a rights-based paradigm grounded in the Convention on the Rights of Child and the Constitution of Pakistan. This judgment is of great import concerning the voice of the child as essential component for the determination of his guardianship and custody, reinforcing gender equality in custodial claims and encouraging the alternative dispute resolution mechanisms especially the mediation, which has marked a revolutionary direction in the practice.