IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

GUARDIANSHIP PETITION (L) NO.11653 OF 2022

1. Sudeep Suhas Kulkarni and
2. Nikita Ashok Choksi … Petitioners

Vs.

Abbas Bahadur Dhanani … Respondent

Mr. Gauraj Shah a/w. Ms. Priyanka Sinha and Ms. Simran Grover i/b. ANP Partners for Petitioners.

CORAM : MANISH PITALE, J.
DATE : DECEMBER 08, 2022

ORDER :

. Heard Mr. Shah, learned counsel for the petitioners.

2. This petition is filed under the provisions of the Guardians and Wards Act, 1890, seeking various reliefs. The facts of the present case are peculiar.

3. Petitioner No.2 and the respondent were married on 14.08.2005 and minor child was born on 06.08.2011. The petitioners have specifically asserted that although the minor child was born during the subsistence of the marriage between petitioner No.2 and the respondent, as a matter of fact, petitioner No.1 is the biological father of the minor child.

4. Perhaps for the aforesaid reason and due to other circumstances, the respondent divorced petitioner No.2 by means of a written *Talaqnama* dated 19.10.2015. Copy of the same along with its translation is placed on record with the petition. It is recorded in the said document that on the said date, the respondent pronounced Talaq to petitioner No.2 in the presence of two witnesses upon payment of amounts towards *Meher* and *Iddat* by way of cheques. Although as per

the requirements of Muslim Law, petitioner No.2 and the respondent stood divorced, by way of abundant caution, petitioner No.2 filed Petition No.B-77 / 2017 before the Family Court at Bandra, praying for a decree for declaration of her status as 'divorced'. On 05.12.2018, the Family Court passed its judgment and order in the said petition. It was recorded as a matter of fact that the said minor child was not born from the respondent as he was not the biological father and that the custody of the minor child always remained with her mother i.e. petitioner No.2. The Family Court further observed that since the *Talaqnama* dated 19.10.2015 was executed by consent and it was a valid *Talaq* or divorce, the decree as sought by petitioner No.2 was unnecessary. It was held that no cause of action was made out and on that basis, the petition stood rejected under Order 7, Rule 11(a) of the Code of Civil Procedure, 1908.

5. Petitioners have placed on record a copy of the DNA Test report dated 18.12.2021, which specifically records petitioner No.1 as the father of the minor child.

6. It is stated in the petition that the petitioners are residing together with the minor child and that the material placed on record along with the petition, including the DNA Test report, sufficiently shows that the petitioners are indeed the biological parents of the minor child. On this basis, the petitioners claim that they are fit to be appointed as guardians of the minor child.

7. It is also brought to the notice of this Court that the petitioners and the minor child are facing practical difficulties in the peculiar facts and circumstances of the present case, *inter alia*, because the birth certificate of the minor child records petitioner No.2 as the mother and the respondent as the father, although petitioner No.1 is the biological father of the minor child.

8. Learned counsel for the petitioners has also referred to a 'no objection affidavit' dated 21.09.2022 submitted by the respondent in the present petition. This was pursuant to notice being served on the respondent. In the said affidavit, the respondent has specifically stated that he has no objection to the petitioners being declared as the natural and legal guardians of the minor child. He has further stated that he gave sole custody of the minor child willfully to petitioner No.2.

9. Learned counsel for the petitioners has fairly brought to the notice of this Court the position of law in respect of the rights available to a child, who is born outside marriage, as in the present case and is unfortunately referred to as an illegitimate child. This Court is of the opinion that for no fault of the child, it is branded illegitimate for the world at large, which in itself amounts to harassment to the child.

10. Learned counsel for the petitioners referred to the Commentaries on Muslim Law. In the Commentary on Muslim Law authored by Manzar Saeed in the Second Edition 2015, it is stated that *nasab* or descent under Muslim Law is established by valid marriage or by the semblance thereof and it is not established by illicit intercourse (*zina).* It is also stated in the Commentary that when man commits *zina* with woman, the descent of the child is not established from the man but it is established only from the woman by its birth. It is further stated in the Commentary that an illegitimate child referred to as '*walad-uz-zina*' has no *nasab* or parentage and that the child cannot inherit title or otherwise.

11. Reference was also made to the Principles of Mahommedan Law by Mulla, 21st Edition, wherein it is stated that paternity of the child can only be established by marriage between its parents. The said position is reiterated in the other Commentaries referred to by learned counsel appearing for the petitioners.

12. Learned counsel for the petitioners has then relied upon the judgment of the Supreme Court in the case of *Athar Hussain Vs. Syed Siraj Ahmed and others*, **(2010) 2 SCC 654**. The Supreme Court has referred to the situation faced by individuals under the Mohammedan Law in the context of custody and guardianship of minor children, who are in conflict with the personal law. After referring to various aspects of Mahommedan Law, in the context of the questions that arose regarding custody and guardianship, the Supreme Court held that if there is a conflict between the provisions of personal law and the provisions of the Guardians and Wards Act, 1890, by keeping the interest of the minor child as the paramount consideration, the Court can proceed on the basis that the provisions of the Guardians and Wards Act, 1890 would prevail over the personal law.

13. This Court has considered the position of law as brought to the notice by learned counsel for the petitioners and the facts of the present case are also taken into consideration. Applying the principles of the Mahommedan Law strictly to the facts of the present case, it would appear that the minor child would have no inheritance and she would virtually stand deprived of basic rights, only because she is the product of a relationship between petitioner No.1 and petitioner No.2, during the subsistence of the marriage between petitioner No.2 and the respondent. This Court is of the opinion that since the petitioners in the present case are the biological parents and there is sufficient material placed on record to show that petitioner No.1 is the biological father of the minor child, it would be a travesty of justice if the prayers made in the present petition are not considered, merely because the personal law applicable to the minor child indicates that being an ‘illegitimate child’, she can have no rights towards inheritance or descent. As indicated by the Supreme Court in the aforementioned judgment in the case of **Athar Hussain Vs. Syed Siraj Ahmed and others** *(supra)*, as per Section 17

of the Guardians and Wards Act, 1890, the consideration of the welfare of the minor should be the paramount factor and it cannot be subordinated to the personal law of the minor.

14. An additional factor in the present case is the affidavit presented by the respondent, wherein he has specifically expressed his no objection to the prayers in the present petition being granted and that he willfully gave up the custody of the minor child in favour of her mother i.e. petitioner No.2. If the prayers of the petitioners in the present petition are not considered favourably, it would create a situation where the respondent already having given up any claims towards the minor child, she would be deprived of the right to be taken care of and maintained by the petitioners, who are more than willing to take care of her needs, being the biological parents of the minor child. Such a situation where the minor child, for no fault of hers, is left high and dry, cannot be countenanced and therefore, this Court is of the opinion that keeping the interest of the minor child as the paramount consideration, the present petition can be favourably considered.

15. Section 4(2) of the Guardians and Wards Act, 1890 defines the term ‘guardian’ to mean a person having the care of the person of a minor or of her property or of both, her person and property. Section 7 of the Act provides for the power of the Court to make order as to guardianship and it reads as follows:-

> “**7. Power of the Court to make order as to guardianship.** - (1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made-
>
> (a) appointing a guardian of his person or property or both, or
>
> (b) declaring a person to be such a guardian the Court may make an order accordingly.
>
> (2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.
>
> (3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this

> section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act."

16. It is undisputed that the minor child has been in the custody of petitioner No.2 i.e. her mother and it is specifically stated in the petition that petitioner Nos.1 and 2 are residing together along with the minor child. The material on record, including the DNA report demonstrates and this Court is satisfied to conclude that the petitioners are indeed the biological parents of the minor child. They have specifically undertaken to take care of all the needs of the minor child 'Ziana'.

17. In these circumstances, this Court is of the opinion that the present petition can be allowed. A perusal of the prayer clauses would show that prayer clause (a) is rendered infructuous for the reason that the respondent has indeed taken notice and filed his no objection affidavit. Prayer clauses (b) and (c) can be granted in the light of the observations made hereinabove. Insofar as prayer clauses (d) and (e) are concerned, this Court is inclined to make appropriate observations. In view of the above, the present petition is allowed in terms of prayer clauses (b) and (c), which read as follows:-

> "b. The petitioners be appointed and declared as the natural and legal guardians of the minor Ziana (without security and remuneration);
>
> c. The petitioners be permitted to represent the said minor Ziana at school or any other authority as guardians of the minor."

18. Insofar as prayer clauses (d) and (e) are concerned, the petitioners are at liberty to make appropriate representations before the concerned authorities, on the strength of the order passed in the present petition. The concerned authorities are expected to take a reasonable approach in the matter, keeping the best interest of the minor child as the paramount consideration.

19. Petition is disposed of accordingly.

(MANISH PITALE, J.)

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