

**SUPREME COURT OF AZAD JAMMU AND KASHMIR**

(Appellate Jurisdiction)

**PRESENT**

Mohammad Azam Khan, C.J.

Ch. Muhammad Ibrahim Zia, J.

Civil Appeal No. 20 of 2016

(PLA filed on 31.12.2015)

1. Mst. Khursheed Begum w/o Muhammad Ghous Khan (late), Caste Sudhan, r/o Bahitah, Tehsil & District Sudhnooti, through her special attorney Zia-ur-Rehman s/o Muhammad Ghous Khan (late), Caste Sudhan, r/o Bahitah, Tehsil and District Sudhnooti.
2. Shafiq-ur-Rehman s/o Muhammad Ghous Khan (late), Caste Sudhan, r/o Bahitah, Tehsil & District Sudhnooti.

.... APPELLANTS

VERSUS

Mst. Shabnam Naz d/o Niaz Ahmed, Caste Sudhan, r/o Numb-Paprian, Tehsil & District Sudhnooti, Presently Lecturer in Department of Botany, Hazara University, Mansehra, Pakistan.

.... RESPONDENT

(On appeal from the judgment of the Shariat Court dated 22.12.2015 in Civil Appeal No. 95/2015)

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FOR THE APPELLANTS:

Barrister Humayun Nawaz Khan, Advocate.

FOR THE RESPONDENT:

Kh. Ataullah Chak, Advocate.

Date of hearing: 08.12.2016

**JUDGMENT:**

**Ch. Muhammad Ibrahim Zia, J.—** This appeal by leave of the Court is the outcome of the judgment of the Shariat Court dated 22.12.2015, whereby the appeal filed by appellant No. 1, herein, has been dismissed.

2. The facts of the case are that respondent, herein filed two applications; one for appointment of guardian and other for custody of the minor before Guardian Judge, Pallandri on 15.07.2008 and 18.07.2008, respectively. The objections were filed by the defendants. The learned Guardian Judge consolidated both the applications and accepted the same while ordering the defendants to handover the custody of the minor to the mother, vide judgment dated 13.04.2009. The said judgment was challenged before the Shariat Court by the appellants, herein. During pendency of appeal, the respondent, herein, entered into a compromise with the grandfather of the minor, Qazi Muhammad Ghous and withdrew the custody of the minor with the condition that no hurdle will be created in her meeting with the minor. The

appeal was, therefore, dismissed by the Shariat Court on 15.02.2010. Thereafter, on 07.03.2015, the respondent moved an application before the Guardian Judge on the ground that the comprise deed was executed with the grandfather of the minor who had died, therefore, she is entitled for custody of the minor in current circumstances. The learned Guardian Judge accepted the application with the direction to hand over the custody of the minor to the mother, vide judgment dated 14.10.2015 the appeal against which has been dismissed by the learned Shariat Court through the impugned judgment.

3. Barrister Humayun Nawaz Khan, Advocate, the learned counsel for the appellants argued the case at some length. He stated the past history of the case and mostly stressed on the point that the respondent, mother of the ward, has no interest in ward because she even did not take care of the child when he was an infant of months' age and thereafter, she surrendered her right of guardianship. He further argued that the respondent has no permanent residence. She is living somewhere in Pakistan and cannot properly take care of the minor or look after him. The child, who is living

with grandmother according to his own pleasure, is not willing to accompany his mother. He is getting education in a proper institution. The father of the minor, who has sufficient resources, is interested in the welfare and education of the child. Moreover, the respondent's right of guardianship is recognized till the ward attains the age of seven years. Now the ward is nine years' old, thus, legally the respondent-mother has no right to claim his custody or remain his guardian. He further submitted that the Guardian Judge in his judgment has also not determined the most vital proposition of welfare of the ward. He referred to the cases reported as *Irshad Begum vs. Mirza Muhammad Haleem and others* [2003 YLR 3245], *Shaheen Akhtar vs. Muneer Ahmed and 2 others* [2003 SCR 502], *Mst. Shazia Kosar vs. Nisar Ahmed* [2014 SCR 572] and *Zainab Bibi vs. Zaffar Iqbal* [PLJ 2012 SC(AJ&K) 26] and submitted that while accepting this appeal the judgments of the Courts below be set-aside.

4. Conversely, Kh. Ataullah Chak, Advocate, the learned counsel for the respondent forcefully defended the impugned judgment and submitted that the same is speaking one, well reasoned and passed after proper

appreciation of the whole circumstances and facts of the case. The arguments of the learned counsel for the appellants are misconceived. Previously, the matter was settled through a compromise reached at between the respondent and the grandfather of the ward. Now, the grandfather has died, whereas, the grandmother is an old lady of more than 90 years of age. She being paralyzed herself requires care and is physically incapable to look after the ward, therefore, the welfare of the ward can only be safeguarded by the mother who is an educated lady serving as Assistant Professor in the University having sufficient resources and reasonable accommodation. It is also of worth consideration that the father has shown no interest as he did not apply for appointment as guardian or custody of the ward. He has also not filed any appeal against the findings of the Guardian Judge. In this state of affairs, in presence of parents, no other can be a better choice to be appointed as Guardian of the ward. As the father, having no interest, has not approached the Court, thus, only the mother is natural guardian and best custodian of the rights of the ward. This appeal has no substance and the same is liable to be

dismissed. He referred to the cases reported as *Bashir Bibi vs. Ghuam Rasool and others* [2004 SCR 561], *Javed Iqbal vs. Mst. Kalsoom Bibi* [1996 SCR 33].

5. We have considered the arguments of the learned counsel for the parties and examined the record made available. According to the brief case history, previously, the matter came under consideration of the Guardian Judge in applications filed by the respondent for appointment of guardian and custody of the minor. After completion of the required proceedings, finally she was declared guardian and entitled for custody of the child with the condition that this right shall be operative till the minor attains the age of seven years. Against the order of the Guardian Judge an appeal was filed which, in the light of compromise reached at between the parties, was dismissed, thus, the findings of the Guardian Judge attained finality.

6. At the time of compromise of the parties, the grandfather of the child was alive and admittedly he subsequently died. Thereafter, the ward remained in the custody of the grandmother, who is an old lady and not in a position to effectively safeguard the welfare of

the minor, whereas, the mother of the minor is an educated lady serving as Assistant Professor. She is litigating for custody of the child since long which is speaking proof of her serious interest in the welfare of the child. As no one can be more affectionate to a child more than a mother, therefore, she is a natural guardian. No doubt, according to the Islamic law for a male child the right of mother is recognized till the child attains the age of seven years and thereafter father's right is preferential but the case history of this case speaks that the father has shown no interest as neither he applied for appointment of guardian nor for custody of the child. Moreover, he is serving abroad, thus, due to lack of proper interest of the father, the mother, who is natural guardian, cannot be deprived of her legal right to safeguard the welfare of her minor child. In this state of affairs, the argument of learned counsel for the appellants that the guardianship was made effective till the minor attains the age of seven years, is not acceptable. In view of peculiar facts of this case, the father is abroad and he also has not approached the Court for custody of the minor or declaration as guardian, thus, in this state of affairs, merely on the

ground of attaining the age of seven years, the mother cannot be deprived of her rights. The principle laid down for preferential right of guardianship on attaining age of seven years is relevant when the contest is between a male and a female of equal degree of relationship, such like the mother and father but in this case no such proposition is involved.

7. The case law referred to by the counsel for the parties, in view of peculiar facts of this case, is not relevant, therefore, need not be discussed separately. This Court in the case reported as *Shaheen Akhtar vs. Muneer Ahmed and 2 others* [2003 SCR 502] while dealing with the question of welfare of minor observed as follows:-

“Relying upon the aforesaid case law in consideration of the following facts: (i) Qadeer the minor son is handicapped, (ii) the minors in view of their ages are required to be looked after which cannot be done by the respondent who has to work outside the house and no one else is shown to look after the minors, and (iii) the trial Court who has recorded the statements of the witnesses, held that welfare of the minor lies with their mother, the appellant herein, and the resolution was in a way approved by the



Shariat Court, we are of the view that welfare of the minors lies with their mother. A perusal of the evidence, though this Court was not obliged to appraise, however for the safer administration of justice the same was made, also shows that welfare lies in their remaining in the custody of the appellant.”

8. So far as the argument of the learned counsel for the appellants that the minor is not willing to accompany the mother, is concerned, as the child is in custody of the appellants since his infancy. He has not experienced the patience, affection, love and sacrifice of the mother. Naturally the child of such age is not capable of realizing his long time interest and welfare. As he remained in custody of the appellants so he is only familiar with the people among whom he is living. In this state of affairs, the temporary unwillingness of minor cannot be a sole criteria for determination of the right of guardianship or custody. Some time, a minor can even feel more comfort and pleasure in the company of person having no relationship or interest in his welfare on the basis of some deceitful, inducing and enticing act and conduct. In view of the peculiar facts of this case, when the grandmother is admittedly an old lady having no

personal resources and also physically not capable of taking proper care and supervision of the ward, the respondent-mother cannot be deprived of her right of custody and guardianship and she is the best protector of rights and welfare of the minor.

9. In view of peculiar facts and circumstances of this case, after death of the grandfather of the minor and keeping in view the conduct of his father as discussed hereinabove, the welfare of the minor can be safeguarded in the best way by the respondent-mother. She being natural guardian is entitled for custody of the minor. In this state of affairs this appeal has no substance, hence, the same stands dismissed. No order as to costs.

Mirpur,  
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JUDGE

CHIEF JUSTICE