

SUPREME COURT OF AZAD JAMMU AND KASHMIR

[Review Jurisdiction]

PRESENT:

Ch. Muhammad Ibrahim Zia, C. J.

Raja Saeed Akram Khan, J.

Civil Review No.34 of 2016

(Filed on 17.12.2016)

Muhammad Pervaiz s/o Muhammad Said Khan,
caste Sudhan r/o Hussain Kot, Tehsil Rawalakot,
District Poonch.

....PETITIONER

VERSUS

Nuzhat Sarwar d/o Muhammad Sarwar Khan,
caste Sudhan, r/o Pothi Bala, Teshil Rawalakot,
District Poonch.

.... RESPONDENT

(In the matter of review from the judgment of
this Court dated 17.11.2016 in Civil Appeal
No.166 of 2016)

FOR THE PETITIONER: Sardar Abdul Sammie
Khan, Advocate.

FOR THE RESPONDENT: Nemo.

Date of hearing: 13.03.2017

JUDGMENT:

Raja Saeed Akram Khan, J.— The titled review petition has been filed for review of the judgment of this Court dated 17th November, 2016, whereby, the appeal filed by the respondent, herein, has been accepted.

2. The summary of the facts is that the marriage between the petitioner and the respondent was solemnized on 11.7.2004. Out of the wedlock, three children namely, Abdul Sammie, Hadia Parvaiz and Abdul Qadir were born. Later on, due to strained relations between the spouses, the marriage could not be maintained and ultimately ended by way of divorce (*Talaq*) on 11.8.2014. Both the petitioner and the respondent filed separate applications for the appointment as guardian of the minors in the Court of Judge Family Court, Rawalakot. The trial Court framed issues in the light of the pleadings of the parties. At the conclusion of the proceedings, the trial Court ordered that Muhammad Parvaiz, petitioner, is

entitled to the guardianship of his minor son, Abdul Sammie, while the respondent, Nuzhat Sarwar is entitled to the guardianship of her minor girl, Hadia Parvaiz and the minor son, Abdul Qadir. Feeling aggrieved, both the parties filed the separate appeals before the learned Shariat Court. The learned Shariat Court dismissed both the appeals vide judgment and decree dated 8.7.2015. Feeling dissatisfied, respondent, herein, filed appeal before this Court which was accepted vide judgment under review dated 17.11.2016, hence, this review petition.

3. Sardar Abdul Sammie Khan, Advocate, the learned counsel for the petitioner, argued that this Court while passing the judgment under review has not considered the application filed by the petitioner on 04.10.2016 and the documents annexed with the same, which is an error apparent on the face of the judgment. He added that this Court vide judgment under review handed over the custody of the minors to the respondent without adhering to

the fact that the same amounts to deprive the minors from basic necessities of life like quality education, better living and healthcare facilities as the respondent is not in a good financial position to fulfil the same. He further added that the petitioner is a retired army personnel and he has the entitlement to provide free medical treatment facility to the disable minor, Hadia Pervaiz, but this fact has been overlooked by this Court which is also an error apparent on the face of the judgment. He further submitted that for better welfare of the minors and their safe future, it was necessary to handover the custody of the minors to the father, but all these aspects of the case escaped the notice of this Court while handing down the judgment under review.

4. We have heard the arguments of the learned counsel for the petitioner and gone through the impugned judgment. To appreciate the argument of the learned counsel for the petitioner that this Court has not taken into consideration the

application dated 04.10.2016 and the documents appended with the same, we have examined the judgment under review as well as the application dated 04.10.2016. The petitioner claimed in the said application that the custody of the minor Abdul Sammie was not handed over to him in compliance of the judgment of the Family Court. The minors are studying in an orphans trust school due to weak financial position of the respondent. The custody of the minors should be handed over to the petitioner for their better welfare. The judgment under review shows that this Court after taking into consideration the stance taken by the petitioner in para 6 of the judgment has observed that the minor Abdul Sammie himself refused to accompany his father and opted to remain living with his mother. The minor cannot be forced to live with his father and in view of subsection (3) of section 17 of the Guardian and Wards Act, 1890, the choice of the minor cannot be taken lightly and must be given due weight. We have also observed in the said paragraph that the father is legally and morally

bound to maintain the minors even if the minors are in the custody of the mother, therefore, on the pretext of having limited sources, a mother cannot be deprived of the custody of minors. The father can take measures for better welfare of the minors even if the spouses are separated. In such state of affairs, the argument of the learned counsel for the petitioner, in this regard cannot be given weight.

5. So far as, the argument of the learned counsel for the petitioner that the minor, Hadia Pervaiz is disable and needs medical treatment and the petitioner being a retired army personnel has the opportunity to provide her free medical treatment facility in Fouji Foundation Hospital, is concerned, it may be stated here that this Court while handing down the judgment under review has taken into consideration this aspect of the case and observed that that it is an admitted fact that the trial Court handed over the custody of the minor son, Abdul Sammie to the father, whereas, minor girl, Hadia Pervaiz and the minor son, Adbul Qadir

to the mother and the learned Shariat Court upheld the judgment of the trial Court. If the petitioner had filed appeal against the judgment of the Shariat Court for custody of minor girl, Hadia pervaiz, then the argument was available. As the petitioner has not challenged the judgment of the Shariat Court before this Court, therefore, the petitioner is not entitled to raise such argument as it shows lack of interest of the father to the minor Hadia Pervaiz. It appears that the petitioner wants reopening and rehearing of the case which is not permissible. It is settled law that the review petition cannot be argued like an appeal as parameters of the review and appeal are quite different. Reliance may be made on a case reported as *Azad Govt. & 7 others vs. Shakoor Bashir & 39 others* [2011 SCR 228], it has been observed by this Court as under:-

“5. We have duly considered the arguments of the learned counsel for the parties and perused the record. The perusal of the grounds

of review petition apparently reveals that the applicants want the re-appraisal of the High Court's judgment according to their point of view, whereas this Court already after due deliberation, consideration and proper appreciation of the points raised, has recorded the judgment. The bare reading of the grounds of the review petition leads to the conclusion that the applicants want reopening and rehearing of the case. It is a consistent practice of this Court that rehearing and reopening of a case is out of the scope of review. The review is only competent when there is an error apparent on the face of record. In the instant case the applicants are unable to point out any such error to justify the review petition....."

Similarly, in a case reported as *Ch. Zahid Hussain vs. Khalid Iqbal & 3 others* [2009 SCR 192], it has been held by this Court as under:-

"4. We have heard the learned counsel for the petitioner and gone through the record. All the points agitated and argued by the learned counsel for the petitioner in the memorandum of appeal and concise statement have been resolved by the Court at length. No point was left undecided. The Court decided the point in respect of the notification dated 09.02.1994 in para 6 of the judgment which starts from page 5 and goes up to page 9 of the judgment. The Court has traced the history of quota and representation of all the units in the services. The petitioner wants to reopen the whole case and seeks rehearing of the case on all the points which were decided. The petitioner wants to persuade the Court that it shall deliver the judgment and interpret the law in the manner different to one decided on the point. It is well settled law that the powers of

review are limited and are different from the powers vested in appellate jurisdiction. This Court in number of cases has held that the review cannot be allowed to reopen the case for the purpose of affording an opportunity of rehearing on the points already resolved.”

The principal of law enunciated in the referred reports is fully attracted in the matter in hand. The petitioner has failed to point out any error apparent on the face of the record to justify the review.

In view of the above, finding no substance, this review petition is hereby dismissed. No order as to costs.

Muzaffarabad.
.03.2017.

JUDGE

CHIEF JUSTICE

Date of Announcement 24.03.2017