

SUPREME COURT OF AZAD JAMMU AND KASHMIR

[Shariat Appellate Jurisdiction]

PRESENT:

Raja Saeed Akram Khan, CJ.

Civil PLA No.252 of 2020

(Filed on 24.11.2020)

Hadayat Begum widow of Mirza Muhammad Rafique,
caste Mirza Mughal resident of Gujranwala at present
resident of Sector F new City, Mirpur, Tehsil and
District Mirpur.

.....PETITIONER

VERSUS

1. Mirza Muhammad Riaz Ahmed son of Mirza Habib Ullah,
2. Mst. Tanveer Akhtar w/o Mirza Riaz Ahmed, caste Mughal resident of Kathira, Tehsil Hajira, District Poonch.

..... RESPONDENTS

[On appeal from the judgment of the Shariat Appellate
Bench of the High Court dated 29.09.2020 in Family
Appeal No.131 of 2019]

FOR THE PETITIONER: Ch. Yasir Mehmood,
Advocate.

FOR THE RESPONDENTS: Mr. Javaid Najam us
Saqib, Advocate.

Date of hearing: 14.06.2021

ORDER

Raja Saeed Akram Khan, CJ– The captioned petition
for leave to appeal is the outcome of the judgment of
the Shariat Appellate Bench of the High Court (High

Court) dated 29.09.2020, whereby the appeal filed by the petitioner, herein, has been dismissed.

2. The respondents, herein, filed an application before the Additional District Judge, Hajira for custody of the minors (Muhammad Hunzla, Mirza Bilal Baig, Meerab Ali and Mirza Fakhar Ali Baig) on 26.01.2019. It was stated that the mother of minors has died, whereas, the applicants are real paternal grandfather and grandmother of the minors, therefore, they be appointed the guardian of minors for their welfare. The learned Additional District Judge, Hajira, vide order dated 31.01.2019 handed over the custody of minors to the respondents. The petitioner, herein, who is maternal grandmother of the minors filed an application on 17.07.2019 for cancellation of the Guardian Certificate dated 31.01.2019 on the ground that she has not been made party while filing application for appointment of guardianship. The applicant-petitioner is American National and can take care of the minors in the better way as compared to the respondents. It was further alleged that the petitioner got the knowledge of judgment dated 31.01.2019 on 29.06.2019, hence, while accepting the

application the ex-parte judgment dated 31.01.2019 may be set aside and the applicant/petitioner be appointed as guardian of the minors. The application was rejected by the trial Court vide order dated 31.10.2019. The petitioner filed an appeal before the High Court which failed, hence, this petition for leave to appeal.

3. Ch. Yasir Mehmood, Advocate, the learned counsel for the petitioner argued that the impugned orders passed by both the Courts below are not in accordance with law. He stated that the respondents got issued the certificate of guardianship without making the petitioner a party. The petitioner got knowledge of the ex-parte order dated 31.01.2019 on 29.06.2019 and immediately filed an application before the trial Court for cancellation of the certificate of the guardianship but the same has illegally been rejected by the trial Court as well as the High Court. He added that from the date of knowledge the application was well within time, hence, the observations of the High Court made in the impugned judgment are not correct. He further added that the petitioner is American National, hence, she can take care of the minors in the

better way. As important legal propositions are involved, hence, grant of leave is justified.

4. Conversely, Mr. Javaid Najam us Saqib, Advocate, the learned counsel for the respondents seriously opposed the appeal while submitting that both the Courts below have passed well-reasoned orders. Under Rule 13 of the AJ&K Family Courts (Procedural) Rules, 1998 an application for setting aside the ex-parte proceedings can be filed within a period of thirty days of passing of the decree or decision, whereas, the petitioner filed the application after elapse of five months, hence, the same has rightly been rejected by both the Courts below. The argument of learned counsel for the petitioner that she has not been made party in the application for custody of minors; is baseless as she was not necessary party. The guardianship certificate has been issued keeping in view the welfare of the minors. No legal ground exists for grant of leave, hence, this petition is liable to be dismissed.

5. I have heard the arguments of learned counsel for the parties and gone through the record. The controversy relates to the custody of the minors

(Muhammad Hunzala, Mirza Bilal Baig, Meerab Ali and Mirza Fakhar Ali Baig). In the matters of custody of the minors, the paramount consideration is the welfare of the minors. The minors are in the custody of the respondents with the consultation of their father, whereas, the petitioner lives at different places and is an American National. In my opinion, in view of the overall facts and circumstances of the case the respondents are the best guardians of the minors and in this respect the orders passed by both the Courts below are well in accordance with law.

6. The argument of learned counsel for the petitioner that she has not been made party in the application filed for custody of the minor and that she has got knowledge on 29.06.2019, is baseless. It may be stated here that under Rule 13 of the AJ&K Family Courts (Procedural) Rules, 1998 an application for setting aside the ex-parte proceedings may be filed within thirty days of passing the decree or decision and there is no concept of condonation of delay under this Rule. It is unambiguous that the limitation for setting aside the ex-parte decree is thirty days from the date of decree and not from the date of knowledge. In this

regard, the case reported as 2012 SCR 341 has rightly been referred to and relied upon by the learned High Court. The petitioner has failed to make out any valid ground for interference in the impugned judgment of the High Court, which is well in accordance with law.

For the foregoing reasons, finding no force, this petition for leave to appeal is dismissed with no order as to costs.

CHIEF JUSTICE

Mirpur,
14.06.2021