

Stereo. H C J D A 38.
Judgment Sheet
LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

W.P No.3513/2023

Hina Imtiaz Vs. Additional District Judge etc.

J U D G M E N T

Dates of Hearing	07.11.2023, 15.11.2023, 17.11.2023, 21.11.2023, 28.11.2023, 29.11.2023, 13.12.2023, 02.05.2024, 09.05.2024, 20.05.2024 and 24.05.2024.
Petitioner by:	Mr. Sajid Hussain Bhatti, Advocate along with petitioner.
State by:	Mr. Mohsin Raza Bhatti, Assistant Attorney General. M/s M. Saad Bin Ghazi, Imran Khan and Hussain Ibrahim Muhammad, Assistant Advocates General, Punjab. Muhammad Ali, Sub Inspector with minor, Shama Ilyas, Child Protection Officer (Legal) on behalf of Child Protection Welfare Bureau, Lahore.
Respondents No. 2 and 3 by:	M/s Riaz Ahmad Kharal and Muhammad Waqas, Advocates alongwith respondent No.2 and the minor boy.

Anwaar Hussain J: By way of factual background, it has been noted that the petitioner was married to one Imtiaz Bhatti from whose wedlock two children were born. The issue in the present petition relates and is confined to the custody of the minor boy namely, Muhammad Daniyal (“**minor boy**”). The other child is the minor girl namely, Muskan (“**minor girl**”). Both the minor boy and the minor girl are hereinafter collectively referred to as “**the minors**”. The socio-psychological ordeal of the minors in general and the minor boy in particular finds its genesis and commenced when the father of the

minors was murdered. The minors have lost their father to a crime and their misfortune had worsened, as the petitioner who is their mother, was arrested as a co-accused in the said criminal case. The petitioner was arrested and the minor girl aged 05-years at that time was left to spend her infancy/childhood with the petitioner, in jail, until the petitioner was released on bail whereas the minor boy was kept by respondent No.2/the paternal grandmother (“**respondent grandmother**”). The petitioner after her release on bail, approached this Court by filing habeas petition, for recovery of the minor boy, which was admittedly dismissed by this Court primarily, on the basis that the respondent grandmother had obtained an injunctive order from the Guardian Court, Okara in an application for appointment of guardian of the minor boy and order of this Court was upheld by the Supreme Court of Pakistan. It was left to the wisdom of the Guardian Court to decide the issue of guardianship of the minor boy. The petitioner then approached the Guardian Court concerned with an application for custody of the minor boy and also contested pending guardian petition filed by the respondent grandmother. The Trial Court allowed custody petition of the petitioner and dismissed the guardian petition of the respondent grandmother, however, the Appellate Court below, *vide* impugned judgment dated 08.12.2022 has upended the said decision of the Trial Court on the ground that the petitioner is accused of murder of her husband-father of the minors and hence, it is not in the welfare of the minor boy to appoint the petitioner as his guardian. Hence, the present petition.

2. An attempt, at the outset, was made today by *vice* counsel of Sardar Khurram Latif Khosa, Advocate with request to submit power of attorney executed by respondents No.2 and 3, while superseding Rai Riaz Ahmad Kharal, Advocate, without obtaining NOC from the latter, who represents respondents No.2 and 3. The latter confirms this fact. It is also observed that Rai Riaz Ahmad Kharal, Advocate

himself had superseded another counsel namely, Sheikh Saeed Ahmad, Advocate with the averments that the matter was earlier being dealt with by erstwhile counsel whose ill-advice has made respondent grandmother and respondent No.3 to become fugitive from the Court and they had disappeared along with the minor boy and the said Sheikh Saeed Ahmad, Advocate then ceased to appear in this case. The attempt on behalf of respondent grandmother and respondent No.3 to engage another counsel who not even bothered to appear today to argue the matter and has deputed an associate from his office is deprecated and the power of attorney is not taken on record. It is imperative to state that this case has been heard on multiple dates so as to assess and ascertain the welfare of the minor boy, under peculiar facts and circumstances of the case.

3. Learned counsel for the petitioner submits that the Appellate Court below decided the matter on the basis of the assumption that welfare of the minor boy does not lie with the petitioner as the latter has been charged with accusation of facilitating murder of her deceased husband, which is misconceived as the petitioner is merely an accused at the moment and depriving a child from the love of the mother, on the basis of mere accusation is *prima facie* an erroneous decision. It is the case of the petitioner that she is the natural guardian, and it is settled principle of law that minor's welfare is best secured in the hands of the mother and not the respondent grandmother who has conflict of interest *qua* the property of the minors. Conversely, it is case of the respondent grandmother that the petitioner is accused of committing murder of her deceased husband/father of the minors, therefore, preference should be given to the paternal relatives in general and the respondent grandmother in particular, which aspect has been correctly appreciated by the Appellate Court below. On a pointed question as to that if she had love and affection for the children of her deceased son, why the respondent grandmother was

not conscious of wellbeing of the minor girl (her real grand-daughter), at the time when she approached the Trial Court, by filing the guardian petition in respect of the minor boy, no plausible explanation could be extended. However, learned counsel for the respondent states that petition for guardianship of the minor daughter has been also filed on 25.01.2023 and is pending adjudication and seeks permission to submit certified copy of the same, which is taken on record as **Mark 'B'**. Adds that this Court has limited scope to review the decision of Appellate Court below in respect of welfare of the minor.

4. Arguments heard. Record perused.

5. While appointing a guardian and/or granting custody of a minor, the Courts are always obligated to consider a number of factors and is to be guided by the same as laid down in Section 17 of the Guardians and Wards Act, 1890 ("**Act**"). However, the same are neither conclusive nor exhaustive for the determination as the overarching and pivotal consideration is always the welfare of the minor.

6. A minor of very young age, like the minors in the present case, ought to be with their mother in ordinary circumstances, as it is the mother in whose hands a child's welfare is best secured and her lap is considered as heavenly abode. However, as stated above, it is trite and well-established principle that in deciding about a minor's custody or his/her guardianship, the welfare of the minor is of paramount consideration. This principle is embodied under Section 17 of the Act. The word "ordinarily" has much significance. It takes into account the circumstances that could be emergent in a case where the mother might be disqualified to hold a minor's custody. There could be cases where the minor's welfare may not be best secured in the mother's hand. Certainly, such circumstances disentitling her from custody/guardianship would have to be clearly pleaded and undisputedly

proved. These could be, the mother being physically or mentally incapacitated, or demonstrably living in circumstances where the minors' welfare - physical, mental and psychological, would not be secure, or accused of a crime involving moral turpitude, that would impact the minor's welfare.

7. One of the matters which is required to be considered by a Court of law is the "character" of the proposed guardian. Thus, a complaint against the petitioner alleging and attributing the murder of the father of the minors is indeed a relevant factor while deciding the custody of the minor boy in favour of such a person. On the facts and in the circumstances of the case, both the Courts were duty-bound to consider the allegations against the petitioner and pendency of the criminal case regarding murder of the spouse, as also the dispute related to the property of the minors.

8. As welfare of a minor is a social aspect to be determined and measured with reference to his own distinct social milieu and frame of reference, the same becomes an objective assessment on the basis of subjective material of each case available before the Court. Thus, the factual aspect of a mother having been accused of murder of her husband-father of the minor(s) would always weigh heavily with the Court in appointing guardian and granting custody of the minor to the said mother but the same cannot be considered as conclusive factor as it is only a measure and mean to determine the ultimate aim of welfare of minor. There might be other factors which outweigh the mother being accused of murder in the overall determination of welfare of minor. Before answering the fundamental question as to whether a child's custody could be entrusted to the accused-the petitioner so long as her guilt or innocence is not determined, it is imperative to analyze the chain of events that took place after filing of the present petition.

9. After issuance of notice and appearance of the parties, the parties were asked to produce the minors before this Court through order dated 27.09.2023. While the petitioner produced the minor girl before this Court, the respondent grandmother along with other respondents kept on lingering the matter on one pretext or the other. On 07.11.2023, learned Law Officer was directed to ensure that the respondents are intimated through law enforcing agencies that the minor boy shall be produced on the next date of hearing. Respondent No.4 namely, Muhammad Munir, who is real paternal uncle of the minor boy tendered appearance on 07.11.2023 and submitted that the custody of the minor is with respondent No.3 who is paternal aunt of the minor boy and submitted that he has no objection *viz-a-viz* the grant of custody of the minor boy to the petitioner. On 15.11.2023, Station House Officer, Police Station Mandi Ahmadabad appeared and submitted that he has raided the house of the respondents (respondent grandmother and paternal aunt, namely, Azra Bibi/respondent No.3), however, they are not residing at the given address. When confronted with the sorry state of affairs *qua* the conduct of the said respondents who were retaining custody of the minor boy, Sheikh Saeed Ahmad, Advocate who was representing the said respondents (including grandmother), submitted that he has also tried to reach out to the respondents but remained unsuccessful. The SHO who was in attendance was directed to ensure the recovery and production of the minor boy before this Court on the next date of hearing. On failure of SHO to trace out the respondents having custody of the minor boy, District Police Officer, Okara was directed to appear in person. Thereafter, on 28.11.2023, Sheikh Saeed Ahmad, Advocate again submitted that he has been trying hard to reach out his clients but has remained unsuccessful, therefore, he will be filing an application for withdrawal of his power of attorney. Mansoor Amaan, District Police Officer, Okara appeared and stated that despite hectic

efforts the minor boy could not be traced out. On Court's query, the official in attendance stated that there is piece of land vesting in the name of the minor boy, which is being cultivated by the lessee of the respondents, including respondent grandmother and perhaps the same is the reason as also the bone of contention between the parties. The Revenue Officials concerned were directed not to create any third-party interest in respect of the property of the minor boy and it was directed that the lessee cultivating the land be also intimated and directed to appear on the next date of hearing. On 29.11.2023, when the case was called, at the outset, one Mian Mazhar Hussain, Advocate appeared and stated that he represents one Mian Asif Shakir, Advocate ("**the lessee**"), who is the lessee of the property. He submitted that the lessee is a practicing advocate and was last contacted by the respondent grandmother and respondent No. 3, telephonically, on 13.11.2023 whereafter the said respondents were not in touch with the lessee. The Police Officials also verified this fact on the basis of CDR that the last call from the cell number of the respondent grandmother was made to the lessee, on the said date whereafter the former switched off her cell phone. Mian Mazhar Hussain, Advocate, also contended that the police officials have acted illegally and improperly by harassing the family of the lessee just to know the whereabouts of the respondents; that the lessee entered into the lease agreement, in respect of the land, in accordance with law and sought permission to submit copy of the lease agreement, which was taken on record as **Mark 'A'**. Perusal of lease agreement depicts that an amount of Rs.9,112,500/- has been purportedly paid in cash by the lessee to the respondent grandmother and respondent No. 3. It does not find mention in the lease agreement that the respondents acted as guardian of the minor boy and the lease money was received for his benefit. When confronted, learned counsel for the lessee asserted that there is litigation between the respondents and the minor boy *qua* the

ownership of part of the lease property as the said property was owned by the grandfather of the minor boy (husband of respondent No.2/ grandmother and father of respondent No. 3) who made a gift of the same and the said gift has been disputed and challenged. It is worth mentioning that the respondent grandmother was only appointed as guardian of person of the minor boy and not guardian of the property. It was evident from the above-mentioned facts that, *prima facie*, the minor boy, in whom valuable immovable property vests, had been hard done out of the motivation to grab his property, which raised serious concerns and apprehensions as to the security and safety of the minor boy and therefore, the Police Officials were directed to ensure production of the minor boy, on the next date of hearing, and while proceeding so, they were directed not to exceed the legal limits and cause unjust harassment to any individual and matter was adjourned to 07.12.2023, where-after more time was sought by Police Officials when case was taken up on 13.12.2023. However, the case was not fixed thereafter until 02.05.2024, when the minor boy, was produced before this Court by the hectic efforts on part of the Police Department, which were appreciated. On the said date, the respondents were accompanied by Mr. Rai Ahmed Kharal, Advocate, who stated that he has been recently engaged as the previous counsel for the private respondents was not appearing on their behalf. Learned Counsel for the respondent grandmother candidly conceded that she was avoiding appearance *albeit* on account of ill-advice by the former counsel and it was observed even the ill-advice on part of the counsel does not warrant disobedience of orders of the Court and to flee the Courts of law with the minor boy. On a pointed question as to whether the lease of land, was executed in favour of lessee, on instructions, it has been acknowledged that the land was given on lease, however, the lease amount was not fully paid by the lessee to the respondents.

10. The above resume of the chain of events that took place after of the filing of the present petition has to be put in juxtaposition with the fundamental question as to whether the petitioner, who is accused of murder of the father of the minor boy can be entrusted with the guardianship of the latter. On the one hand is the mother, accused of charge of committing murder of her husband, and on the other hand is the respondent grandmother along with paternal aunt/respondent No.3 have adverse interest regarding the property vested in the minor and their conduct before this Court whereby they willfully disobeyed the orders of this Court to appear and produce the minor boy coupled with the fact that they leased out the property of the minor without being appointed as guardian of the property. At this juncture, it is imperative to note that while both sides as also the Police Officials have not given the exact mode through which the lease land has been vested with the minor till date, only today it transpired that the said land and other property was originally owned by grandfather of the minors who gifted the same to his sons that includes deceased father of the minors. One of the paternal aunt of the minors, namely, Kauser Bibi has laid challenge to the said gift and the respondent grandmother has not clearly denied the claim of said Kauser Bibi although respondent grandmother is dealing with the property, *inter alia*, vesting with the minor boy after demise of his father, without being appointed as guardian of the property.

11. The present case reflects that the principle of welfare of a minor cannot be considered in absolute terms rather the same is a relative consideration and, at times, the same may have to be seen and considered through the prism of what is least detrimental for the minor, which implies that the Court may have to select a guardian out of the rival contestants who is least detrimental to the upbringing and welfare of the minor. In the present case, the fundamental question which requires adjudication by this Court is to determine the

appointment of guardian of a minor between a mother who is accused of murder of her husband and father of the minor, and the paternal grandmother of the minor boy who has been dealing with the property of the minors without being appointed as the guardian thereof.

12. Thus, this Court is to consider the welfare of the minor boy by juxta-positional and parallel analysis of an accused mother and respondent grandmother who has acted in a manner which caused great concern to this Court as to the safety of person and property of minor boy. It is well evident that in the garb of appointment as guardian of person of the minor boy, his property has been dealt with, to the detriment of the minor boy. Perusal of the lease agreement (Mark 'A') reveals that the same was executed on 23.10.2023, well after filing of the present petition and the respondent grandmother and respondent No. 3 were served and, on their behalf, adjournments were solicited on one pretext or the other. On a pointed question, as to why the respondent grandmother along with respondent No.3 gave away the valuable property of the minors, on lease to lessee who is statedly a near relative as well and a lawyer by profession, without seeking appointment of guardian of the property, there was no plausible explanation available with the learned counsel for the respondent grandmother.

13. It is noted that while the Trial Court did not address the effect of registration of criminal case against the petitioner altogether, the Appellate Court below was so swayed away with the said aspect of the matter that it overlooked and swept aside all other aspects such as the conflict of interest of the proposed guardian (the respondent grandmother in present case). Another fundamental aspect which was overlooked by the Appellate Court below was that the minor girl was also daughter of the deceased son of respondent grandmother but not only that her custody and/or guardianship was never sought from the

Court when guardian petition for custody of the minor boy was filed, rather, she was left to be brought up in an adverse atmosphere amongst the prisoners jailed with the petitioner/mother. Similarly, while seeking the guardianship of the minor boy, the respondent grandmother never made any effort to bring up siblings in the company of each other whereas it is right of both the siblings to be brought up together and spend childhood in each other's company. Question arises that if the respondent grandmother was so concerned about the welfare of the minor boy, what prevented her from approaching the Court of competent jurisdiction to seek guardianship of her granddaughter-the minor girl. The application for guardianship of the minor girl has been filed on 25.01.2023, when the present petition had already been filed and admitted to regular hearing on 19.01.2023. It is perhaps the property of the minors and not the minor by himself which has made everyone to plead for his custody/guardianship. Even the lessee and the respondent grandmother pleaded adverse positions before this Court regarding the lease amount as the counsel who appeared on behalf of lessee stated that the respondent grandmother and respondent No. 3 have been given the entire leased amount for a period of 03 years in advance to the tune of Rs. 9,112,500/-, whereas the respondents stated that the entire amount has not been paid. This factum alone indicates that the welfare of the minor boy, at least his financial and economic interest are neither safe nor being carried out in good faith, and this Court apprehends that the appointment of the respondent grandmother as guardian would put the person of the minor at peril as well. It is also worth mentioning that the respondent grandmother acted without good faith as she concealed factum of filing of the petition at Pakpattan, and approached the Guardian Court, Okara. When confronted with, learned counsel for respondent grandmother submits that there was a 'note' given at the bottom of the second petition and there was no concealment, however,

he was asked to read the opening sheet of the second guardianship petition, which contemplates otherwise. Relevant column of the opening sheet reads as under:

نہیں	۴۔ آیا کوئی درخواست تقرر ولی عدالت کو پہلے دی جا چکی ہے اور اس پر کیا نتیجہ ہوا۔
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14. The totality of the circumstances on record is to be considered. There is no cavil to the preposition that moral and ethical values are even more important and essential considerations over physical comforts. Had the conduct of the respondent grandmother who was appointed as guardian by the Appellate Court below been aboveboard while seeking the appointment in general and after the appointment in particular, in this case, she could have been preferred by this Court over the petitioner until the latter is acquitted of the charge against her inasmuch as it does not augur well for the child's welfare, to be placed in the custody of a parent, whose fitness to cater to his welfare is in doubt on account of accusation of committing murder of the spouse. It is admitted feature of the case that the charge against the petitioner is one of conspiracy, but true or not, she is accused of her husband's murder, along with a paramour. If the charge is proven to be true, the petitioner would not be an ideal person to groom the minors, whose welfare not only requires fulfillment of their physical needs, but many other things, which includes their moral character. One may argue that if the charge was true, the minors' safety might also be compromised. It can also be argued that the petitioner faces a charge about her husband's murder, in relation to which, she is facing trial and there is a possibility, remote or not so remote, that she might be convicted and sentenced and if that was to happen, while the minors are staying with her, it would cause great trauma to the minors, to know that their mother, with whom they have bonded and are living, stands convicted

of their father's murder. But equally important is to keep in sight and mind that what will happen if the above-mentioned contingency was not to come true and the minor boy is handed over to the respondent grandmother. In such eventuality, the minor boy, who has already lost his father, will be deprived of the love of his mother while he will be in the custody of respondent grandmother who in instant case has been dealing with property of the minors without authority, in a clandestine and suspicious manner. It is certainly a situation which ought to be avoided. Even otherwise, the petitioner, at present, is merely an accused and it is settled principle of law that an accused is the "favourite child of law", which is the concept based on farsightedness and prudence that calls for protecting an innocent person from getting punished. In the instant case, it is not just the petitioner who will be punished, before the conviction (if awarded) by deprivation of custody of her son-the minor boy, but the later who along with the minor girl have already lost their father and through the impugned decision have been deprived from the love of the mother as well. It is worth mentioning that the witness of the respondent-grandmother, namely Ibrar Ahmad AW-2, appeared during the Guardian Court and, while being cross examined, stated that respondent No.4, before this Court, namely Munir Ahmad, who is real son of respondent grandmother has filed a complaint that it is the paternal aunt of the minors (respondent No.3) and her husband who has committed murder of his deceased brother-father of the minors. AW-2 stated as under:

”یہ درست ہے کہ امتیاز احمد متوفی کے والد نے اپنے بیٹوں منیر احمد اور امتیاز کے نام اراضی منتقل کر دی تھی جسکی بابت منیر احمد، امتیاز، عذرا بی بی، روفان اور کوثر کے درمیان لڑائی جھگڑے چلتے رہے۔ منیر احمد بشیرا بی بی کا سگا بیٹا ہے اور بڑا بیٹا ہے۔ یہ درست ہے کہ منیر احمد نے تھانہ منڈی احمد آباد میں ایک درخواست اندراج ریپٹ روزنامہ تھانہ منڈی احمد آباد میں گزاری تھی جس میں منیر احمد نے محمد نواز، ابرار اور عذرا بی بی کے خلاف اپنے بھائی کے قتل کروانے کا الزام لگوا یا تھا۔“

(Emphasis supplied)

The above quoted statement of witness of the respondent grandmother in itself indicates that guilt of the petitioner and/or any other family member of the deceased is unclear and yet to be determined by the Court of competent jurisdiction. The respondent grandmother and respondent No.3 are residing together alongwith the minor boy and the latter too is accused of the murder of the father of the minors. This aspect is equally alarming.

15. Moreover, the conflict of interest of the respondent grandmother *qua* the minors is further evident from the fact that on the one hand, paternal aunt of the minor, namely, Kausar Bibi challenged the gift of property in favour of deceased father of the minor and arrayed the respondent grandmother as defendant and on the other hand, the lease agreement (Mark 'A') has been jointly executed in favour of the lessee, *inter alia*, by Kausar Bibi and the respondent grandmother.

16. There is yet another angle from which this case can be examined. While the petitioner and the respondent grandmother locked their horns to get the custody of the minor boy, welfare of the minor girl was not considered important by the respondent grandmother and that deprived the minors to live together as admittedly, the minor girl is staying with the mother. The respondent grandmother did not show the same love and affection for the minor girl, which she has been exhibiting for the minor boy. While exercising *parens patriae* jurisdiction, the *inter se*, separation of the minors is perturbing for this Court. It is not just parents or grandparents, who had some rights of custody and/or control over the minor children but there are rights of the minors to enjoy each other's company, as siblings. This Court has already opined in case bearing **Writ Petition No.244677/2018** titled "Imtiaz Hussain Versus District Judge etc." (2023 LHC 6165) that the right of minor siblings to develop bond of love and ownness among themselves by remaining

united and grow up in the companionship needs to be kept in sight by the Guardian Courts to avoid causing additional trauma to the minors of facing separation from each other. Therefore, if the respondent grandmother is allowed to keep the custody of the minor boy, the minors will be deprived of being united that will further add to their existing agony of losing father as result of a crime, with the mother as an accused thereof.

17. In view of the above discussion, the impugned judgment passed by the Appellate Court below is set aside and that of the Trial Court is restored. The petitioner is entitled to receive the custody of the minor boy within a period of 30 days from today. For this purpose, she is directed to appear before the Trial Court on 22.06.2024 alongwith copy of this judgment and also tender third party surety bond to the tune of Rs.02-million to the satisfaction of the Trial Court before the custody of the minor boy is handed over to her. Respondent grandmother is also directed to produce the minor boy on 22.06.2024. The visitation schedule chalked out in favour of the petitioner by Appellate Court below will *mutatis mutandis* apply in favour of the respondent grandmother. Before parting with, it is observed that the respondent grandmother would be entitled to file fresh petition for custody and guardianship, as the case may be, if the petitioner mother is proved to be guilty and is convicted for the offence charged.

18. **Allowed** in above terms.

(The order was announced in open court, dictated on the same date and signed on 25.05.2024).

(ANWAAR HUSSAIN)
JUDGE

Approved for reporting

Judge