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Judgment Sheet

**IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT**

Case No. W. P. No. 43188 of 2023

Sayed Arshad Shah etc. **Versus** Addl. District Judge etc.

JUDGMENT

Date of Hearing:	28.11.2025.
Petitioners by:	Mr. Shoaib Akram Bhalli, Advocate.
Respondent Nos. 3 and 4 by:	Ch. Ali Hassan Jajja, Advocate.

FAISAL ZAMAN KHAN, J. Through this petition, order and judgment dated 31.05.2022 and 23.05.2023 passed by respondent Nos. 2 and 1 respectively have been assailed. By virtue of the former order an application filed by respondent Nos. 3 and 4 for the custody of the minor has been allowed and through the latter judgment the same has been upheld.

2. The facts giving rise to the present petition are that respondent Nos. 3 and 4 are the real parents of Sayed Wafa Abbas (**minor**) who is at present about 13 years of age. Admittedly, the custody of the said minor was handed over by respondent Nos. 3 and 4 to the petitioners as they are closely related (petitioner No.1 and respondent No.4 are real brothers). Subsequent thereto on 04.03.2022, an application seeking custody of the minor was filed by respondent Nos. 3 and 4 against the petitioners, in which the latter filed their reply. Out of divergent pleadings of the parties 03 issues were framed. Evidence pro and contra was led, whereafter through order

dated 31.05.2022 the application was allowed, however, a schedule was chalked out for meeting of the minor with the petitioners. Feeling aggrieved, petitioners filed an appeal which was dismissed through judgment dated 23.05.2023, therefore, this petition.

3. Learned counsel for the petitioners submits that out of their own sweet will and accord respondent Nos. 3 and 4 handed over the custody of the minor to the petitioners at the time of his birth, so that the petitioners can raise the said child as their own, therefore, at this belated stage when the minor is fully adjusted with the petitioners considering them to be his parents, there is no circumstance to hand over the custody of the minor to respondent Nos. 3 and 4, thus both the courts below erred in law in allowing the application for custody of the minor.

4. Replying to the above, learned counsel for respondent Nos. 3 and 4 submits that as a temporary arrangement the custody of the minor was handed over to the petitioners when he was about 06 months old, however, this by no mean would give a preferential right to the petitioners to retain the custody of the minor especially when his real parents (respondent Nos. 3 and 4) are alive and are ready to raise him. He further submits that the minor is not being brought up in a proper manner by the petitioners therefore the custody of the minor has rightly been handed over to respondent Nos. 3 and 4 by the courts below. Places reliance on judgments reported as Mrs. Shaukat Khalid v. Additional District Judge, Rawalpindi and 2 others (1991 SCMR 19), Waqar Haider Butt v. Judge, Family Court and others (2009 SCMR 1243), Muhammad Shamim Ali v. Mst. Asma Begum and others (2024 SCMR 1642) and Mst. Bakhat Bibi v. Bhadur Ali and others (2015 CLC 1260).

5. Arguments heard. Record perused.

6. While dilating upon the proposition in hand this has to be kept in view that a minor who at the time of birth or 6 months after his birth (as contrary stance has been taken by the parties) was handed over by respondent Nos.3 and 4 (actual parents) of their own sweet will to the petitioners (foster parents) and the latter set of parents have been upbringing him for 09 long years (when the custody petition was filed as now the minor is about 13 years of age) without any complaint from the actual parents and one fine morning the minor has been bombarded with the news that he is not the child of the petitioners and is in fact an off spring of respondent Nos.3 and 4. Imagine the plight, the state of mind and the emotion distress of the minor who has been living with the family consisting of mother, father and 06 sisters and a brother (foster family) considering them to be his actual family, that they are not related to him and is actually the child of respondent No.3 and 4 having 13 brothers and sisters (actual family).

7. While interpreting Section 17 of the Guardians & Wards Act, 1890 (**Act**) which spells out the guidelines for appointing a person as a guardian, it has been held by the Supreme Court of Pakistan in judgments reported as Raja Muhammad Owais v. Mst. Nazia Jabeen and others (2022 SCMR 2123), Mst. Beena v. Raja Muhammad and others (PLD 2020 S. C. 508), Rashid Hussain v. Additional District Judge, Islamabad (East) and others (PLD 2022 S.C. 32), Mir Bat Khan v. Mst Sherin Bibi and others (2019 SCMR 520), Shabana Naz v. Muhammad Saleem (2014 SCMR 343), Mehmood Akhtar v. District Judge, Attock and 2 others (2004 SCMR 1839), Badruddin Roshan v. Mst. Razia Sultana and another (2002 SCMR 371) and Mst. Nighat Firdous v. Khadim Hussain

(1998 SCMR 1593) that the primary and the foremost consideration for taking a decision *qua* custody of minor is his/her welfare.

8. The cumulative reading of the above judgments would show that there are many factors, which are required to be considered by the courts for determining the welfare of the minor, which include the age, sex and religion of the minor, character and capacity of the proposed guardian, his/her nearness of the kin with the minor, wishes, if any, of the deceased parents (if the parents of the minor are not alive) and the existing relationship of the proposed guardian with the minor. Apart from the above, the court can consider the intelligent preference of the minor, if the minor is old enough. It has also been held in the above judgments that the courts while determining the welfare of the minor can ignore the fact that father is the natural guardian or the mother has the right of *Hizanat*.

9. In addition to the above, while interpreting Section 17 of the Act, in a latest judgment dated 16.05.2025 passed by the Supreme Court of Pakistan in **CRP No.458 of 2024 in CPLA No. 2514 of 2014** titled "Dr. Muhammad Asif v. Dr. Sana Sattar and others", the Supreme Court has emphasized a lot on the concept that the 'voice of the child' and 'the preference given by the child that with whom he/she wishes to reside' has to be seriously considered while deciding the cases of the custody of the minor so that his/her best interest can be protected. It has also been observed that listening to a child does not mean obeying him/her rather understanding his/her perspective deeply enough to act in his/her best interest.

10. Keeping in view the afore referred case law, the peculiar circumstances of the present case and the preferential right of

the parties, the minor, who is about 13 years of age was asked to appear before this Court on 29.10.2025 upon which he was posed questions to weigh his mental state and intelligent preference which were answered by him ably and during the course of his deposition he in unequivocal and clear terms has shown his willingness and desire to reside with the petitioners. At that point in time, the custody of the minor was temporarily handed over to respondent Nos. 3 and 4 by this Court for a week's time so that minor gets a chance to live with his actual parents so that he can make an intelligent preference, subsequent to which the custody of the minor was returned to the petitioners on 07.11.2025 and today when the minor appeared before this Court in person, he was again asked that which set of parents he wishes to reside with, upon which he again in unequivocal and clear terms deposed that he wishes to reside with the petitioners.

11. It shall be apposite to observe here that the confidence and the maturity which the child has shown while deposing before this Court is commendable especially keeping in view the circumstances mentioned in *paragraph No.6 supra* which would reflect that he has been brought up well by the petitioners.

12. In view of the afore noted facts, keeping in view the peculiar circumstances of the case and listening to the voice of the minor, this Court is of the view that Sayed Wafa Abbas (minor) is of impressionable age and since he has shown his willingness to live with the petitioners especially so when respondent Nos.3 and 4 of their own sweet will and accord handed over his custody to the petitioners and have not been able to show any circumstances to establish that the minor is not being brought up in congenial circumstances, the courts

below erred in law in ignoring these facts and especially the voice of the child whose welfare is of paramount consideration, despite the fact that it had categorically been mentioned in ***paragraph No.17*** of the order passed by respondent No.2 that the minor appeared before the said court and made a unequivocal statement that he wishes to live with the petitioners, deliberately ignored the voice of the minor without assigning any reason that why such voice should not be heard and awarded the custody of the minor to respondent Nos.3 and 4.

13. There is no cavil to the proposition that when a comparison is made between the real parents and the foster parents qua custody of the minor, the real parents have a preferential right, however and as discussed in the previous paragraphs, the primary consideration for determining the custody of the minor is his welfare and while determining the said factum, the courts below have completely ignored that respondent Nos. 3 and 4 have not been able to prove that the custody of the minor was temporarily handed over to the petitioners with a caveat that as and when a male child is born to the petitioners the custody of the minor will be handed over to them. Had this been the situation, at least the details must have been mentioned in the application for custody of the minor qua such arrangement i.e. in whose presence, where, when and what time such arrangement was made. Moreover they have also not been able to prove that the minor is not being brought up in congenial comfortable environment.

14. Another aspect which has been ignored by the courts below is that respondent No.4 is a multi-married man having 13 children out of three marriages and would it be safe to send the minor to such a big family who are all alien to him as

compared to the petitioners, 06 sisters and a brother with whom he has been living with for 13 years considering them to be his actual family and what will be his state of mind if one fine morning he is sent to an absolute alien atmosphere. They have also ignored the fact that admittedly son of respondent No.4 namely Shahbaz was married to daughter of the petitioners namely Sania and there is a matrimonial dispute between them and as a counterblast to that the application for custody of the minor has been filed.

15. During the course of arguments, it was suggested by this Court to respondent Nos.3 and 4 that a schedule of meeting can be made by this Court for the said respondents to meet with the minor so that he can familiarize with them and if after some time the minor and the actual parents develop affinity, respondents can re-apply for the custody of the minor, however they refused the proposal.

16. As regards the judgments cited by learned counsel for respondent Nos.3 and 4, the same being outcome of different facts and circumstances are not applicable to the case in hand.

17. For what has been discussed above and keeping in view the peculiar facts and circumstances of the present case, this Court is of the view that the welfare of the minor lie with the petitioners and since both the courts below ignored the fact as enumerated in the previous paragraphs thus they erred in law in handing over the custody of the minor to respondent Nos. 3 and 4, therefore, this petition is allowed, as a consequence to which the impugned order and judgment are set aside, resultantly the application for custody of the minor filed by respondent Nos. 3 and 4 stands dismissed.

18. Respondent Nos.3 and 4 are at liberty to approach the family/guardian court for chalking out a plan for meeting with the minor.

(Faisal Zaman Khan)
Judge

Approved for Reporting.

Judge

*A.W.