JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD

WRIT PETITION NO.1951 OF 2019

Usman Ali Shah Vs. Bint-e-Fatima

WRIT PETITION NO.2225 OF 2019

Mst. Bint-e-Fatima Vs. Usman Ali Shah

Petitioner by	**:**	**Mr. Ikhlaq Ahamd, Advocate.** (for Petitioner in the instant Petition and for Respondent No.1 in W.P.No.2225/2019)
Respondent by	**:**	**M/s Abdul Haseeb Khan Afridi and Aman Ullah Kayani, Advocates.** (for Respondent No.1 in the instant Petition and for the Petitioner in W.P.No.2225/2019)
Date of hearing	**:**	**17.03.2022.**

SAMAN RAFAT IMTIAZ, J.:- Through the instant judgment, I propose to decide Writ Petitions Nos. 1951 and 2225 of 2019 as they involve the same parties and arise from the same judgments and decrees.

2. The case history of the matter is that the Petitioner [Usman Ali Shah] in W.P. No.1951/2019 (hereinafter referred to as the "**Petitioner**") filed a petition against the Respondent No. 1 [Bint-e-Fatima] under Section 25 read with Section 12 of Guardian and Wards Act 1890 for the joint custody of his minor son, Ameer Hamza whereas the Respondent No. 1 [Bint-e-Fatima] in such case filed W.P. No.2225/2019 (hereinafter referred to as the "**Respondent No. 1**") against the Petitioner for appointment of guardian of the minor. The learned Family Court consolidated both the petitions and passed the Impugned Judgment and Decree dated 27.10.2018 ("**Impugned Judgment and Decree I**") and dismissed both the petitions while chalking out a detailed schedule of visitation for the Petitioner.

3. Feeling aggrieved by the Impugned Judgment and Decree I, the Respondent No. 1 filed an appeal before the learned Appellate Court who vide Judgement and Decree dated 05.04.2019 ("**Impugned Judgment and Decree**

II") upheld the Impugned Judgment and Decree I to the extent of the matter of appointment of guardian as it was rightly held that Petitioenr being father of the minor is the natural guardian, however, with regard to custody the learned Appellate Court modified the Impugned Judgment and Decree I as follows:

> "*For what has been discussed above, the visitation schedule of the minor in the impugned consolidated judgment is hereby modified only to the extent that the* ***respondent will not be entitled to take the minor out of territorial jurisdiction of the court and he will also submit his personal surety bonds (as he is a public servant) amounting to Rs.20,00,000/- with undertaking that he will not take the minor out of territorial jurisdiction of the court*** *and will also return the minor to the appellant as per schedule given by the learned trial court vide impugned consolidated judgment. Only to this extent the appeal in hand is hereby accepted*." [Emphasis added].

Hence, the instant Writ Petitions filed by both the parties before this Court.

4. Learned counsel for the Petitioner, *inter alia*, contended that the Impugned Judgment and Decree I has been passed in complete disregard of the fact that the Petitioner is the natural guardian of the minor; that the Petitioner/Father is paying maintenance on time and there is no delay; that the Respondent No.1/mother admits that it is in the welfare of the minor that he gets acquainted with his paternal family; that the order of surety bond for visitation of minor within the territorial jurisdiction of the Court is unjustified and against settled law; that the Impugned Judgment and Decree I of the Family Court was appropriate and justified and the modification made vide the Impugned Judgment and Decree II is uncalled for, unjustified and contrary to the facts and record of the case; that the imposition of surety bond is a requirement for taking the minor out of territorial jurisdiction of Court and to that extent the Petitioner/father is willing to submit surety bond. The learned counsel prayed that the Writ Petition No.1951/2019 may kindly be accepted and the Impugned Judgment and Decree II dated 05.04.2019 may kindly be set-aside and the Petitioner/Father may kindly be allowed to take the minor to his residence in Abbottabad or Peshawar.

5. Learned counsel for the Petitioner in W.P. No.2225/2019 and for Respondent No.1 in W.P. No.1951/2019 contended that the learned Courts below while deciding the visitation schedule have ignored the various material aspects of the case i.e. the age of the minor, education, affiliation of the minor; that both the Courts below have erred while allowing the overnight stay of the

minor with the father on weekends; that the minor is of tender age and is unable to perform his personal chores without the assistance of mother; that the father has never been in touch with the minor since last five years therefore, if the overnight custody is granted to the father the minor will get psychologically disturbed; that the mother has no objection if the minor meets his father during the court timings within the court premises; that the father of the minor has till date never concerned himself with the affairs and education of the minor as is evident from the cross examination of the father; that the Respondent No.1 / father resides in Abbotabad whereas Minor Petitioner resides in Islamabad with mother who therefore, needs guardianship, which facts have been ignored altogether by the Courts below while deciding the guardianship petition.

6. Arguments advanced on behalf of learned counsel for the parties have been heard and record perused with their able assistance.

W.P. No.1951/2019

7. It is noteworthy that the Petitioner (Father) had initially file petition for joint custody of the minor, however, as recorded in the Impugned Judgment and Decree I, during the course of arguments before the Family Court it was submitted that the Petitioner does not wish to press the request for permanent custody provided that his visitation schedule with the minor is ordered. The Impugned Judgment and Decree I further records that the Petitioner submitted that he is ready to submit a written commitment in the court to the effect that the custody of the minor shall not be removed from the mother by him if she is adheres to the visitation schedule. Perhaps this was the reason why the learned Family Court did not impose the requirement of surety upon the Petitioner when granting visitation rights. On the other hand, the learned Appellate Court has not provided any reason for such imposition in the facts and circumstances of the case and as such is a non-speaking order in respect of visitation rights. In view of the foregoing, I am not convinced that requirement of surety for visitation with the minor within the territorial jurisdiction of this court is necessary.

8. It is settled law which does not require belaboring that the best interest of the minor is of paramount consideration for the Court in custody matters. Keeping the same in view, it is noted that the minor was six years old at the time of filing of these petitions, at which age he should be spending more time with

the father than would have been permissible at an earlier age. It goes without saying that the love and affection of both the parents is of utmost important for the healthy development of any individual. It would be a travesty to deprive a child of the love and affection of his father when such father is alive and eager to be a part of his child's life.

9. In so far as the Respondent No. 1's submission is concerned that she has no objection if the minor meets with the father within the court premises, in my opinion, meeting with the minor in court premises does not provide an opportunity to spend quality time with the father. The Respondent No.1 has not identified any reason which would persuade me to modify the visitation schedule fixed by the learned Family Court. It is also important that the minor should be acquainted that the paternal side of his family who are residing in Abbottabad/Peshawar. This fact was also admitted by the Respondent No.1 in her cross-examination. The Petitioner father has already expressed his willingness to submit surety bond for taking out the minor from the territorial jurisdiction of this Court. Therefore, in my opinion the Impugned Judgment and Decree I does not merit modification as per Impugned Judgment and Decree II.

W.P. No.2225/2019

10. With regard to Writ Petition No.2225/2019, both the lower courts have correctly come to the conclusion that under Section 19 of the Guardian and Wards Act, 1890 the court is not authorized to appoint a guardian in place of father when the father is alive and not unfit to be the guardian. Reliance is placed upon on the judgment reported as *Ms. Shazia Akbar Ghalzai Vs. Additional District Judge, Islamabad (East)*, 2021 MLD 817 (Islamabad). The learned counsel for Respondent No. 1 drew our attention to the cross-examination of the Petitioner to emphasis that the Petitioner has not been participating in the minor's upbringing and has neglected important fatherly duties to assert that the Petitioner is unfit to be guarding. On the other hand, the Petitioner submitted in his Affidavit-in-Evidence that the Respondent No. 1 deliberately kept the minor away from him. In any event, the concurrent findings of the Courts below is that the Respondent No.1 was unable to prove that the Petitioner is unfit to be guardian of his minor son.

11. A High Court in exercise of Constitutional jurisdiction does not act like a Court of appeal. It neither reappraises evidence nor does it substitute the concurrent findings of fact recorded by the Family Court and upheld by the Appellate Court with its own findings solely on the ground that another view was possible on the same evidence. A party approaching the High Court under Article 199 of the Constitution has to demonstrate that there is a gross misreading or non-reading of evidence or jurisdictional error or such legal infirmity that has caused miscarriage of justice. However, the Petitioner has not pointed out any such illegality, defect or illegality in the Impugned Judgments. In any event none of the reason cited are sufficient to conclude to that the Petitioner is unfit to be guardian.

12. In view of the foregoing, **Writ Petition No.1951/2019 is partly allowed** and the Impugned Judgment and Decree-I is modified to the extent that the Petitioner is entitled to take the minor out of the territorial jurisdiction of this court provided that he submits surety bond as directed by the learned Appellate Court vide the Impugned Judgment and Decree II. Whereas, **Writ Petition No.2225/2019 is dismissed**.

(SAMAN RAFAT IMTIAZ)
JUDGE

Announced in the open Court on 24th of May, 2022.

JUDGE

JUNAID