

HIGH COURT OF AZAD JAMMU & KASHMIR

Writ Petition No.1827/2020.

Date of institution 17.12.2020.

Date of decision 21.03.2022.

Kashmir Orphan Relief Trust Jarri Kass Mirpur through Ch. Muhammad Akhtar Chairman Orphan relief Trust Jarri Kass Mirpur A.K.

(Petitioner)

Versus

1. Family Judge Hajira.
2. Saqlain Ishaq S/o Muhammad Ishaq R/o Bokra Mandhole Tehsil Hajira.

(Real-Respondents)

3. Tania Zafar D/o Muhammad Zafar R/o Mandhole Tehsil Hajira.

(Proforma-Respondent)

WRIT PETITION

Before:- Justice Syed Shahid Bahar, J.

PRESENT:

Muhammad Ajmal Sultani and Khalid Bashir Mughal, Advocates for the petitioner.

Raja Zulqarnain Khan, Advocate for respondent No.2.

Judgment:

Captioned writ petition has been addressed under Article 44 of Azad Jammu & Kashmir Interim Constitution, 1974 by the petitioner-Kashmir Orphan Relief Trust, seeking annulment of the order dated 20.10.2020 passed by the learned Family Judge Hajira and beseeched relief in a following manner:-

“Under the circumstances, it is therefore, most humbly and respectfully prayed that the impugned order dated 20.10.2020 passed by the learned respondent No.1 as a Family Judge, Hajira may very kindly be declared illegal, unlawful, unwarranted and against the norms of the natural justice and may graciously be set aside in the supreme interest of justice.

It is further prayed that during the pendency of the instant writ petition the operation of the impugned

order dated 20.10.2020 passed by learned respondent No.1 may very kindly be suspended in the interest of justice equity.

Any other relief permissible under law may also be granted in favour of the petitioner against the respondents.”

BRIEF FACTS:- Proforma Respondent Tania Zafar, resident of Bokra Mandhole, Tehsil Hajira submitted an application to the Chairman, Kashmir Orphan Relief Trust (petitioner herein), wherein she prayed for custody of her minor girl having age of 2 months at that time. Abstract/ verbatim of the application listed with the writ petition as “Annexure “PB” is reproduced vide infra:-

”بخدمت جناب چیئر مین ادارہ کشمیر آرٹرن ریلیف ٹرسٹ KORT جڑی کس میر پور

درخواست بمراہ خواگی نابالغہ بھر دو ماہ

جناب عالی! گزارش سائل بذیل ہے۔

۱۔ یہ کہ سائلہ بوکرہ منڈھول تحصیل بھیرہ حال سیکٹر 1/G میر پور کی رہائشی و سکونت ہے۔

۲۔ یہ کہ سائلہ کا نکاح ہمراہ تابش رفیق ولد محمد رفیق ساکن منڈھول بوکرہ تحصیل بھیرہ کے ساتھ بمطابق شریعت محمدی بالعوض حق مہر 5 تو لے سونا اور 10 ہزار روپے بخل مورخہ 06-10-2017 کو ہوا تھا۔ ازاں بعد ملزمان ثقلین اسحاق ولد محمد اسحاق قوم عباسی ساکن بوکرہ منڈھول تحصیل بھیرہ نے سائلہ کو بلیک میل کرتے ہوئے اغواء کیا۔ ثقلین اسحاق وغیرہ نے مورخہ 14-09-2018 کو سائلہ کو اغواء کیا اور کھوڑا و لپنڈی لے جا کر مورخہ 14-09-2018 کو سائلہ کا جعلی فرضی نکاح تیار کروالیا۔ اور زیادتی کا نشانہ بناتے رہے۔

۳۔ مورخہ 15-05-2019 کو سائلہ ملزمان کے چنگل سے آزاد ہو کر والدین کے پاس آگئی اور سارا واقعہ تحریری طور پر سپریم کورٹ میں مورخہ 10-06-2019 کو بیان کیا اور سائل کو والدین کے سپرد کر دیا گیا۔ اس طرح دو ماہ قبل سائلہ کے ہاں ناجائز طور پر ایک بچی پیدا ہوتی ہے۔ سائلہ کا نکاح چونکہ قبل ازیں ہو چکا ہوا تھا۔ نکاح پر نکاح کیا گیا جو کسی طور مطابق شریعت درست نہیں ہے۔ اس طرح بچی ناجائز ہے۔ سائلہ سادہ غریب اور بے سہارا ہے سائلہ کسی طور پر اس بچی کو پرورش نگہداشت نہ کر سکتی ہے اور اب سائلہ نابالغہ کی مکمل طور پر پرورش و تعلیم و تربیت کے لیے جناب والا کے ادارہ کے حوالہ کرنا چاہتی ہے۔

لہذا جناب سے التماس ہے کہ بمظوری درخواست ہذا نابالغہ جس کی عمر اس وقت دو ماہ ہے ادارہ کو حکم صادر فرمایا جائے کہ نابالغہ کو اپنی تحویل میں لیا جائے تاکہ نابالغہ کی بہتر تعلیم و تربیت ہو سکے۔

تحریر: 07-11-2019

العارض

تانیہ ظفر زوجہ تابش رفیق دختر محمد ظفر

ساکن بوکرہ منڈھول تحصیل بھیرہ ضلع پونچھ

حال ساکن سیکٹر 1/G میر پور

The Petitioner (hereinafter shall be called as Trust) accepted the application of proforma respondent Tania Zafar and has accordingly taken the custody of the minor girl and thereafter the minor is properly being looked after by the petitioner i.e. Trust.

Meanwhile, the petitioner-trust has also filed an application seeking guardianship of the minor-Aleena Akhtar before the learned Additional District Judge empowered as Guardian Judge, Mirpur, which is awaiting adjudication. In the meantime, father of minor Saqlain Ishaq filed an application, before the Additional District Judge empowered as Judge Family Court Hajira, seeking custody of the minor-Aleena Akhtar which was accepted by the Family Court Hajira vide order dated 20.10.2020. The Judge Family Court, Hajira while passing the aforesaid order declared the respondent No.2, Saqlain Mushtaq as father of the minor, who is entitled to take back the custody of minor from the petitioner (Trust) and ordered that the trust is under legal obligation to hand over the custody of the minor to Saqlain Ishaq (father of minor). After proceedings in the case, the writ petition was admitted for regular hearing. For the safe administration of the justice, I directed the petitioner to produce the minor girl before the court and simultaneously summoned Tania Zafar proforma respondent (mother of the minor girl) as well as Saqlain Ishaq (father of minor). In order to judge the tendency of minor girl now having age of 2 ½ years, I ordered the real mother and father of minor to put her in their arms but the minor girl on their attempt to take her in arms resisted and she did not show any love and affection towards both of them. I have also observed that the minor girl seems to be astonishingly attached with the relevant employee of the trust (female who was taking her in womb).

Written arguments were filed by both the parties on the direction of this court.

After deep perusal of the written arguments offered by the parties and minute perusal of the record it is an admitted fact that the minor girl was given into custody of the petitioner-trust by her real mother proforma respondent, Tania Zafar at a crucial time when she was only having the age of 2 months. As separation had also been taken place between the spouses and as per own statement of proforma respondent, which transpires from her application that she was kidnapped and thereafter forced into agreement of “Nikah” and as per her stance the minor daughter is not a legitimate offspring as before entering into second agreement of wedlock she was already in a marital tie with another person.

PETITIONER’S SUBMISSIONS:- Mr. Mohammad Ajmal Sultani, the learned counsel for the petitioner vehemently pressed grounds agitated in the writ petition through written arguments and prayed for issuance of writ and annulment of the order passed by the Family Judge, Hajira. The learned counsel staunchly submitted that the impugned order dated 20.10.2020 has been passed by the Judge Family Court Hajira in an arbitrary fashion and without jurisdiction. He added that according to Section 9 of the Guardian & Wards Act, 1890 as adopted in AJ&K, the Court in whose jurisdiction minor is residing is empowered to adjudicate such like matter and can also take cognizance of any issue pertaining to the guardianship or custody of the minor, as per his estimation, the order passed by the Judge Family Court is without jurisdiction and colourable exercise of powers. The learned counsel for the petitioner vehemently contended in written arguments, the objection raised by the non-petitioner No.2 is not tenable in the eye of law

regarding right of appeal as per his stance that order dated 20.10.2020 has been passed under Section 12 of the Guardian & Wards Act and the aforesaid order is not appealable under Section 47 of the Guardian & Wards Act, 1890 as adopted in Azad Jammu & Kashmir, therefore, instant writ petition has rightly been filed for redressal of the grievance of the petitioner.

RESPONDENT'S SUBMISSIONS:- Mr. Raja Zulqarnain Khan, While in juxta-position the learned counsel for the respondent No.2 in his written arguments strongly opposed and objected the writ petition and submitted that as per schedule of AJ&K Family Courts Act 1993, the matter regarding the custody of the minor and guardianship is also within the exclusive jurisdiction of the Family Court, hence, against the impugned order, appeal under Section 14 of the Family Courts Act was competent instead of filing the instant writ petition as the aforesaid right of appeal has been provided other sort of final order. The learned counsel for respondent No.2 placed reliance on vertical precedents of Honorable Apex Court of AJ&K i.e (1) 2021 SCR 645 (2) 2018 SCR 908 & (3) 2019 SCR 77.

It is also reflecting from written arguments tendered by respondent No.2 that he has objected locus standi of the petitioner on multiple reasons one of which is that petitioner is not a state subject of AJ&K and rather it is non-governmental organization (NGO), therefore, order passed by the learned Judge Family Court is completely in line with the scheme of law. As enumerated above the pivotal question involved in the matter is custody of the minor girl having age of 2 ½ years who was given in the custody of the petitioner (Trust) by her real

mother proforma respondent by tendering an application (mentioned above) wherein she has categorically alleged and conceded that minor girl is not legitimate offspring and she also leveled allegation to respondent No.2-Saqlain Ishaq and objected his conduct therefore, in such like eventuality, be that as it may, in this perspective of the matter when the minor girl is at present in the safe hands of the petitioner/Trust having good repute for such like services, particularly rehabilitation of the orphan kids how the court of law can betray from the basic responsibilities rests on their shoulders quo judging the welfare of the minor which is paramount aim of the law. Minor girl who is continuously in the safe custody of the petitioner (Trust) and being looked-after efficaciously by the aforesaid Trust, in such like eventuality the disturbance or change of the custody of the minor not seems to be in the interest of justice nor is in the welfare of the minor, that too, the tendency of the minor is also relevant as per Section 17 of the Guardian & Wards Act, 1890 as adopted in AJK. In this regard dicta of the Hon'ble Suprem Court laid down in **2021 SCR 586 titled "Waheed Bashir Vs. Muhammad Munsaf Khan**, sufficely indicates the roadmap in this regard. Relevant captions of the dicta is reproduced vide infra:-

“Guardain and Wards Act, 1890---

---Section 17---custody of minor---the Court has to consider the character and capacity of the proposed guardian---serious allegation against mother in FIR---such atmosphere cause negative inference against mother for entitlement of custody of minor---such toxic state of affairs lead to an unpeaceful and healthy atmosphere which adversely affects the well-being of the minor---it is the paramount duty of the Court to make sure that the environment in which the minor is to be brought-up is suitable for his health, religious and moral well-being and does not in any

way harm his mental and physical health or his religious and moral values.

(a) Custody of minor---

---Contention of--- the utmost priority of the Court in determining the custody of a minor is the welfare and well-being--- the objective of law is not just handing over the custody of the minor, but to examine all the aspects which come with it--- the power and duty of the Court while considering the question of custody of a minor is to thoroughly and comprehensively take into consideration the minor's welfare---the word "welfare" in such case is to be taken in its widest sense, which includes not only the monetary expenses of the minor but also his mental and physical health, education needs, physiological well-being, religious and moral values---the Courts are duty bound to consider custody in the best interest and health up-binging of the minor which sometimes may yield the rights of the parents---no doubt according to certain Muslim Jurists, custody of minor son till the age of seven years may remain with the mother and in the case of minor daughter till she attains the age of puberty and thereafter, normally their custody should be restored to the father.

---the paramount consideration in all such situation would be the betterment of the minor and even mother may be deprived of the custody of minor, if circumstances of the case allow."

DETERMINATION BY THE COURT:- As I have already narrated

above that the main purpose and intent of law is to look into the welfare of the minor while deciding such like applications seeking custody of the minor. The case in hand is novel one, mother of minor herself stated that she gave birth to an illegitimate child, therefore, legitimacy cannot be presumed in such like eventuality. The mother of minor has already contracted second marriage and has fled over to somewhere in Pakistan.

The objection and maintainability of the writ petition and competency of appeal raised by respondent is hereby discarded as this court is blessed with cornucopia of powers under Article 44 of the AJK Interim Constitution, 1974 to redress the grievance of the petitioner who

seeks aid of the court by indicating any violation of the law or enforcement of constitutional fundamental guaranteed rights. This court after its satisfaction and in a fit case can exercise powers to embark upon any such order / decision which is contrary to law or passed in colourable exercise of powers or coram non-judice. Late Chief Justice of Pakistan Mr. AR. Cornelius has rightly ordained that “remedy of writ for an aggrieved person is like fragrance of flowers of paradise and whole length of Pakistan is not wide enough to contain the fragrance of the same.” In my estimation this is a fit case for exercise of writ jurisdiction by this court. As the matter regarding custody of the minor is already pending adjudication before Judge Family Court Mirpur as reflecting from the copy of the application filed therein listed with the petition as “Annexure PB” , hence, matter of the final custody is definitely to be decided by the learned Additional District Judge/Guardian Judge Mirpur, therefore, I restrain myself from giving any final verdict or observation regarding custody of the minor (as it is pure prerogative of relevant fora) seized with the matter. I would like to advert the other objections of the learned counsel for the respondents quo maintainability of the writ petition through which he voiced his arguments that the writ petition is not maintainable as the order impugned herein has been passed under Section 12 of the Guardian and Wards Act, 1890 as adopted in AJK, which is not an appealable order in view of Section 47 of the aforesaid Act. It is significant to add that if it is presumed for a minute that appeal is competent even then despite fact as the order impugned herein is without jurisdiction, hence, invites indulgence in extraordinary

jurisdiction by this Court and we cannot shut our eyes in such like situation.

Plain language of Section 47 of the Guardian & Wards Act, 1890 adopted in AJK reveals that the order impugned herein is not an appealable order. It is also in the fitness of things to mention that the proposition involved in the instant matter is being governed by *Pari-Materia* laws and as per canon of interpretation statutes which relates to some subjects, the same person or things, or deem to constitute one system of law, they are considered as one statute, subsequent laws are regarded as supplementary or complimentary to the earlier enactment. When enacting the new law, the legislature is presumed to have had the contemplation the existing statutes on the same subject.

Minor girl is admittedly living in Mirpur and is in the safe custody of petitioner No.1 (Trust) and definitely the jurisdiction vests to the Guardian Judge Mirpur, so, the order passed by the learned Additional District Judge/ Family Judge Hajira, in my estimation is not as per scheme of law which seems to be passed in haste and telegraphic manner. The learned Judge Family Court Hajira did not pay heed to the importance of the matter which requires deep ponderance while adjudication of the custody of the minor as essence of the custody is welfare of the minor which is also a first and pivotal brick in the foundation of the matter.

Nub of the above discussion is that by accepting the instant writ petition, the impugned order dated 20.10.2020 passed by the learned Additional District Judge /Judge Family Court Hajira is hereby set-aside. The learned Additional District Judge/ Guardian Judge Mirpur is hereby

directed to decide the matter of the guardianship of the minor girl Aleena Akhtar daughter of Tania Akhtar expeditiously and strictly in accordance with law, particularly keeping in view the welfare of the minor which is paramount aim of the law. Till final disposal of the original lis, the minor daughter Aleena Akhtar shall remain in the custody of the petitioner/Trust. The petitioner/Trust is expected to leave no stone unturned for taking necessary measures quo utmost care and welfare of the minor, Aleena Akhtar as well as all other such like kids brought in their custody. Moreover, office is directed to send a copy of this decision to Chairman Kashmir Orphan Relief Trust (KORT) Mirpur as well as to the learned Additional District Judge/ Guardian Judge Mirpur for compliance.

Muzaffarabad,
21.03.2022.

-Sd-
JUDGE

Approved for reporting

-Sd-
JUDGE