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JUDGMENT SHEET

LAHORE HIGH COURT LAHORE

JUDICIAL DEPARTMENT

Writ Petition No.36910 of 2022

Ayesha Tahir Versus **Additional District & Sessions Judge, etc.**

J U D G M E N T

Date of Hearing:	19.01.2023.
Petitioner by:	Sahibzada Adeel Hussain, Advocate.
Respondent No.2 by:	Mr. Irshad Ullah Rana, Advocate.

Anwaar Hussain, J. The petitioner has assailed order of the learned Appellate Court below dated 11.06.2022 whereby the order dated 31.05.2022 passed by the learned Trial Court under Section 12 of the Guardians and Wards Act, 1890 ('**the Act**'), in the application filed by the petitioner was set aside and the findings of the learned Guardian Court, Lahore were reversed and interim custody of Muhammad Babar ('**the Minor**') who is approximately three and half years of age, was allowed to be retained by respondent No.2 ('**the respondent**').

2. Learned counsel for the petitioner submits that the order dated 31.05.2022 was interim in nature and the appeal was not maintainable and hence, the learned Appellate Court below has exercised the jurisdiction, which is not vested in it under the law and therefore, the same mandates intervention by this Court in constitutional jurisdiction. Adds that even if it is assumed that the appeal was maintainable under the law, the impugned order of the learned Appellate Court suffers from patent illegality inasmuch as the Minor is of tender age and is required to be under the continuous care of the mother (petitioner), however, the Minor has been deprived from such care and his interim custody has been granted to the father (respondent) who is a banker and unable to look after the Minor because of the nature of his job whereas the petitioner having been divorced has neither remarried nor doing any

job, just for the welfare of the Minor whose custody has been forcefully taken over by the respondent.

3. Conversely, learned counsel for respondent concedes that appeal of the respondent was not maintainable in terms of Section 47 of the Act, however, submits that the petitioner herself left the Minor whose welfare lies with the respondent, which should be taken into consideration by this Court while exercising constitutional jurisdictional as frequent changes of the interim custody of the Minor is against the law laid down in cases reported as "*Shaukat Masih v. Mst. Farhat Parkash and others*" **(2015 SCMR 731)** and "*Muhammad Hassan Arif v. Additional District Judge and others*" **(2022 MLD 323)**.

4. Arguments heard. Record perused.

5. Though learned counsel for the respondent has conceded as to non- maintainability of the appeal against order passed under Section 12 of the Act by the learned Guardian Court, in terms of Section 47 of the Act, this Court feels appropriate to first address the said issue as it is settled law that the consent of the parties neither confers nor takes away jurisdiction of the Court. In addition, if this Court reaches the same conclusion that the order passed by the Appellate Court was devoid of jurisdiction, the same in turn, restores the order of the learned Trial Court. On the other hand, if the appeal is held to be maintainable, then this Court would proceed to determine if the order of the learned Trial Court has been upended in consonance with law and facts of the case or not.

6. Section 47 of the Act deals with the appealable orders and admittedly, order passed under Section 12 of the Act is not mentioned thereunder. However, after insertion of the word 'Guardianship' in the First Schedule of The West Pakistan Family Courts Act, 1964 ("**the Act 1964**"), the remedy by way of the appeal is available against an order under Section 12 of the Act before the learned Appellate Court as per Section 14 of the Act 1964, which is reproduced as under:

> "**Appeal. –** (1) Notwithstanding anything provided in any other law for the time being in force, a decision given or a decree passed by a Family Court shall be appealable–
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> (a) to the High Court, where the Family Court is presided over by a District Judge, an Additional District Judge, or a person notified by Government to be of the rank and status of a District Judge or an Additional District Judge.
>
> (b) to the District Court, in any other case.
>
> (2) No appeal shall lie from a decree by a Family Court–
>
> (a) for dissolution of marriage, except in the case of dissolution for reasons specified in clause (d) of item (viii) of Section 2 of the Dissolution of Muslim Marriages Act, 1939,
>
> (b) for dower or dowry not exceeding rupees one hundred thousand;
>
> (c) for maintenance of rupees four thousand or less per month.
>
> (3) No appeal or revision shall lie against an interim order passed by a Family Court.
>
> (4) The appellate Court referred to in sub-section (1) shall dispose of the appeal within a period of four months."
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> ***(Emphasis supplied)***

As per Section 47 of the Act, an order under Section 12 thereof is apparently not appealable, however, provisions of the Act must be read in conjunction with the provisions of the Act 1964 as the legislature in its wisdom has brought the matters pertaining to 'Guardianship' under the jurisdiction of the Family Courts by contemplating that all the matters pertaining to 'Guardianship' shall be exclusively triable by the Family Courts created under the Act 1964 which is a latter enactment. It is settled principle of interpretation that the latter enactment shall prevail over the earlier legislation. One cannot lose sight of the fact that subsection (1) of Section 14 of the Act 1964 begins with the words

'notwithstanding anything provided in any other law for the time being in force, a decision given or a decree passed by a Family Court shall be appealable', thus the latter provision has an overriding effect. Meaning thereby that in spite of the fact that order under Section 12 of the Act is not mentioned under Section 47 thereof, an appeal can be preferred against an order passed under Section 12 as the same is a 'decision' given by a Family Court as mentioned in Section 14(1) of the Act 1964, and also not hit by Section 14(3) thereof as such decision disposes of the application under Section 12 of the Act. It is imperative to note that whether the order passed on application under Section 12 of the Act, being appealable or not came up for adjudication before a learned Division Bench of this Court in case bearing ICA No.69878 of 2022, titled *"Mst. Shabeena Younas v. Addl. District Judge, Lahore, etc"* [**2022 LHC 8087**] (reportable and available at website of this Court). While scanning catena of judgments on the subject, the said learned Division Bench held that the order passed on application under Section 12 of the Act is appealable after insertion of the word 'Guardianship' in the First Schedule of the Act 1964. Therefore, the argument of learned counsel for the petitioner as well as the conceding statement of learned counsel for the respondent is misconceived.

7. Having held that the learned Appellate Court below had the jurisdiction to entertain the appeal preferred by the respondent against the order passed by the learned Guardian Court under Section 12 of the Act, for rendering opinion of this Court on merits of the case, it would be appropriate to reproduce Section 12(1) of the Act in order to understand the scope and object of said provision *viz*. welfare of a minor. Section 12(1) reads as under:

> "12. **Power to make interlocutory order for production of minor and interim protection of person and property**. (1) The Court may direct that the person, if any, having the custody of the minor shall produce him or cause him to be produced at such place and time and before such person as it appoints, and may make such order for the temporary custody

> and protection of the person or property of the minor as it thinks proper."

A plain reading of Section 12(1) of the Act makes it crystal clear that the learned Guardian Court is empowered to make interlocutory orders for production of a minor and interim protection of his person and/or property as the Guardian Court has parental jurisdiction over him. The overarching and controlling position held by the welfare of a minor in granting his permanent custody under Section 25 of the Act is equally applicable to the grant of interim custody under Section 12 of the Act. The order under Section 12 of the Act is tentative in nature and passed at a stage when the evidence is not yet recorded. Hence, the order under Section 12 of the Act is subservient to the order passed under Section 25 thereof. However, welfare of a minor remains central even at the time of deciding application under Section 12 of the Act. In this regard, case reported as "*Zahid Mehmood and another v. Mst. Rehana*"(**1980 CLC 1027)** is referred. It is imperative to note that it defeats the legislative intent and object of the law if the paramount interest of welfare of a minor is considered supreme and dominant feature only at the time of deciding application under Section 25 of the Act and not so at the time of deciding an application under Section 12 thereof. However, the decision under Section 12 of the Act should not put on semblance or attire of an order under Section 25 thereof as the former is tentative in nature. Thus, the welfare of a minor is always to be controlling force at every stage and decision made under Section 12 is no exception.

8. Similarly, it is well settled principle of law that the combat between the parents as to custody of a minor should never be allowed to morph into a battle which makes the welfare of a minor a collateral damage rather the welfare of a minor should get precedence over the egoistic battle between the competing parents. In a clash between the rights of parents and the welfare of a minor, the latter must prevail. Similarly, to be in proper custody is a right of a child and not of either

of the parents meaning thereby that it is the welfare of minor that ought to be considered and not that of the person seeking custody.

9. In the instant case, there is no denial of the fact that marriage between the parties has already been dissolved after the petitioner was divorced by the respondent. While allowing the respondent to retain the custody of the Minor, the learned Appellate Court has put forth the following reasons:

> "08….In the respondent's application under Section 12 of the Act, the reliance was placed on the averments made in the main petition under Section 25 of the Act premised on the welfare of the Minor with the mother as with also the averments that the appellant is fulltime bank employee and as such unable to pay due attention to the Minor. It goes without saying that Section 12 of the Guardians & Wards Act, 1890, deals with emergent situations and vests the Guardian Court with powers to direct production of the minor(s) and to make such order as may be deemed proper keeping in view their welfare and the Family Court is empowered to intervene where the circumstances are extraordinary and entail an element of urgency suggesting that the given minor(s) shall suffer irreparable loss as to health, education etc. or if, otherwise, the minor(s) is/are subject to extreme environmental maladjustment. Given this criterion, the respondent's application under Section 12 of the Act divulges no emergent situation or circumstances suggesting irreparable loss to the health, education or extreme environmental maladjustment which could warrant change of interim custody of the Minor from the hands of the appellant/father with whom the Minor was living since December 2020, to the mother while the main petitions of both the sides to determine the question of welfare of the Minor are pending adjudication. Hence, the Impugned Order is not sustainable in the eye of law."
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> ***(Emphasis supplied)***

Perusal of the operative part of the impugned judgment reveals that while too much emphasis has been laid upon the fact that the Minor will not suffer if the respondent is allowed to retain the custody as no harm will be caused to health or education of the Minor, learned Appellate Court below ignored the fact that the Minor was born on 26.09.2018 and was of tender age. As per Para 3 of the guardian

petition filed by the respondent, the petitioner left the Minor on 01.05.2021 and due to her alleged bad character, the respondent divorced the petitioner on 20.08.2021 and purportedly an agreement was signed between them regarding custody of the Minor whereby she relinquished her rights in favour of the respondent *viz*. custody of the Minor. Meaning thereby that the Minor was residing with the petitioner at least till 01.05.2021, just few months before filing of guardian petition by the respondent. On the other hand, it is the case of the petitioner that she was ousted from the house by the respondent on 06.12.2020 along with the Minor and it is on 28.08.2021 at 6.00 P.M. that the respondent in the garb of meeting the Minor forcibly took the Minor. At this juncture, it is imperative to examine the validity of an agreement by the mother relinquishing her right to custody of the Minor. It is important to observe in this regard that any such agreement is neither valid nor enforceable agreement and cannot be used as a tool to deprive a mother of her right to custody. The august Supreme Court in case titled as "*Mst. Beena v. Raja Muhammad and others"* (**PLD 2020 SC 508**) held as under:

> "8…….The agreement to the extent that the mother surrendered the custody of her child or which stopped the mother to claim his custody is not lawful consideration; it is contrary to the Islamic principles governing hizanat and the law determining the custody of minors and thus forbidden. An agreement the object or consideration of which is against public policy is void, as stipulated in section 23 of the Contract Act……"

The Hon'ble apex Court went onto further observe as under:

> "The welfare of the minor cannot be relegated to the personal interest of the father and such a clause or condition is against public policy. The clause in the agreement whereby the mother agreed to give up her son's physical custody and/or not claim it is also without consideration. The welfare of a minor cannot be subsumed by the interest of his father, and if this is done it will be against public policy, and such clause or condition will be void. Such a stipulation will also be void under section 25 of the Contract Act because it is without consideration."

Thus, any clause or the agreement having effect of surrendering or relinquishing right of custody of the mother is void and unlawful being against the public policy and without consideration. Moreover, as per Para 352 of *'Muhammadan Law'* by D.F. Mulla, a mother is entitled to the custody (hizanat) of her male child until he has completed the age of seven years and of her female child until she has attained puberty. Only rider put on the right of mother is her second marriage. The august Supreme Court of Pakistan in "*Raja Muhammad Owais v. Mst. Nazia Jabeen and others*" **(2022 SCMR 2123)** went onto observe that even second marriage of the mother is not a determinative factor in this regard rather the welfare of minor is paramount consideration in determining the right of custody.

10. Having had above legal position in sight, it is well evident that the Minor was living with the mother (petitioner) as on 01.05.2021 as per contentions of the respondent himself as contained in his pleadings before the learned Guardian Court and the most crucial factor which was required to be measured up while deciding as to who should be given the interim custody of the Minor is the age of the Minor at the time of filing of the guardian petition which in the instant case was about three and half years at the time of filing of the guardian petition and is merely around four years at present and depriving the Minor of such tender age, at an interim stage, from the love and care which a mother can extend is certainly not in his best interest that has far reaching impact on mental and physical upbringing of the Minor, which is not the object of Section 12 of the Act. This was precisely the reason that persuaded the learned Guardian Court to allow the application of the petitioner under Section 12 of the Act, since it is the duty of the learned Guardian Court to secure the best interest and welfare of the Minor. Once the learned Guardian Court has exercised its jurisdiction in granting interim custody, the same should be allowed to stay, unless there are compelling circumstances to change the custody. Even other-wise, order of temporary custody of the Minor

being interim in nature, would be subject to decision in the main case. It is all the more important and in the welfare of the Minor to hand over the interim custody to the petitioner given the fact that she has been divorced by alleging and imputing bad character to her and distance between the Minor and the mother at tender age may result in hardening of such allegations in the malleable mind of the Minor even though such allegations may remain mere allegations. Therefore, the learned Appellate Court below should not have interfered in the interim custody of the Minor, given to the petitioner by the learned Guardian Court for the time being, till final determination by the learned Guardian Court, under Section 25 of the Act. During the course of arguments, much emphasis was placed by learned counsel for the respondent on case of *Shaukat Masih, supra,* which has been followed by this Court in case of *Muhammad Hassan Arif, supra* with the contention that handing over the custody of the Minor to the petitioner would amount to make the Minor ping-pong between the parents. There is no cavil to the position that the Minor should not be made to ping pong between the parents in their mutual egoistic tussle but this aspect has to be weighed in and measured up keeping in view the welfare of the Minor as it is the learned Guardian Court, in the instant case, which handed over the custody of the Minor to the petitioner/mother and the learned Appellate Court below upended the order of the learned Guardian Court, which has been impugned through the present constitutional petition and in fact, intervention by the learned Appellate Court below made the Minor ping pong. Even otherwise, this Court in view of Para 352 of *'Muhammadan Law'* by D.F. Mulla and the judgment of the august Supreme Court in case of *Raja Muhammad Owais supra* is obligated to keep the welfare of the Minor as paramount. As a general rule, it is presumed that welfare of a male child lies with the mother till he attains age of 7 years and it is upon the father to prove that the mother is not entitled to permanent custody and her case falls into exceptions, which certainly requires

recording of evidence and in the instant case the same is subject matter of the guardian petition, filed by both sides.

11. In view of the above discussion, this constitutional petition is **allowed**, the impugned judgment of learned Appellate Court is set-aside and order of the learned Guardian Court dated 31.05.2022 is restored. Meanwhile, the meeting schedule chalked out by the learned Guardian Court shall be observed. Before parting with, admittedly, respective guardian petitions of the parties, under the Act, are still pending before the learned Guardian Court, which require expeditious decision, therefore, the learned Guardian Court is directed to decide the same preferably within a period of three months from the receipt of certified copy of this judgment and if need be, the same may be heard on day-to-day basis.

(ANWAAR HUSSAIN)
Judge

Approved for reporting.

Judge

Maqsood