

**JUDGMENT SHEET**

**PESHAWAR HIGH COURT, PESHAWAR  
(Judicial Department)**

**Writ Petition No. 931-P of 2024 with Interim Relief.**

*Mst. Neelofar & others  
VS  
Muhammad Khan & another.*

**JUDGMENT**

Date of hearing: **18.09.2024**

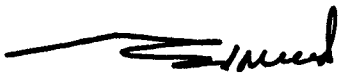
Petitioners by: Mr. Tariq Khan Hoti,  
advocate.

Respondent by: Nemo.

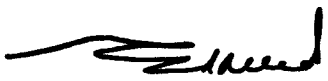
\*\*\*\*

**SHAKEEL AHMAD, J.-** The captioned Constitutional petition has been filed by the petitioner, who is mother of minors Ali Bin Ahmad, aged about seven years, Ziyad Bin Ahmad, aged about four years, challenging the validity and legal defensibility of the judgment dated 08<sup>th</sup> January 2024, passed by the learned Addl. District Judge-XVII, Peshawar, whereby and whereunder the judgment/ order dated 22<sup>nd</sup> September 2023, passed by the learned Senior Civil Judge/ Judge Family Court-III/ Guardian Judge, Peshawar, appointing the petitioner as guardian of the property and person of her minor children, was set aside and the case was remanded back to the learned Judge Family Court, Peshawar with the direction to implead Muhammad Khan, paternal grandfather of the minors as respondent and, thereafter, decision on merits.

2. The facts lying in a narrow compass, succinctly stated are that the petitioner-mother of the minors Ali Bin Ahmad aged about seven years and Ziyad Bin Ahmad aged about four years brought a petition under Section 7 of the Guardians & Wards Act, 1890, before the learned Judge Family Court/ Senior Civil Judge, Peshawar for her appointment as guardian of the person and property of the minors, named above. It was pleaded in the petition that she was married to Bashir Ahmad son of Muhammad Khan as per Muslim rites and out of the wedlock minor Ali Bin Ahmad was born on 26.11.2016 and Ziyad Bin Ahmad on 20.12.2019, which is reflected from the birth certificate issued by NADRA. According to her, her husband was serving as Assistant Professor at Islamia College University, Peshawar, who was murdered on 19.02.2023 and to this effect crime No. 19 was registered under Section 302 PPC at police station, University Campus, Peshawar. It appears from the record that in earlier round of litigation, she filed a Constitutional petition No. 1626-P of 2023, seeking recovery of her said minor children from the clutches of the respondents Muhammad Khan and Riaz Ahmad son of Muhammad Khan, who



happened to be her father-in-law and brother-in-law, respectively, and after hectic efforts, the minors were recovered by the police at the orders of this Court, and finally they were handed over to the petitioner, as is reflected from the judgment dated 17.07.2023. After due process of law, her petition was allowed in the following manner vide judgment/order dated 22.09.2023 by the learned Guardian Judge, Peshawar:-



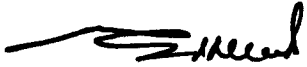
*“Petitioner being mother of the minors is suitable person for the desired Certificate. No one can take better care of the children except their real mother. Hence, the application is allowed and petitioner Mst. Neelofar w/o Bashir Ahmad is appointed as guardian of the person and property of the minor namely (i) Mr. Ali Bin Ahmad (ii) Mr. Ziad Ahmad sons of Bashir Ahmad u/s 7 of the Guardians and Wards Act, 1890, provided that she must execute a bond with two sureties in the sum of Rs. 10,00,000/- (Rupees Ten Lacs) in prescribed. Copy of the same be retained on this file. No order as to costs”*

3. Her rival contender Muhammad Khan, who is her father-in-law, challenged the said judgment/ order of the learned Judge Family Court

before the learned Addl. District Judge-XVII, Peshawar by filing Family Appeal No. 44/FCA of 2023, after providing right of audience to both the parties, the appeal was allowed by setting aside the judgment/ order of the learned Judge Family Court and remanded the case back to it, directing the learned Judge Family Court to implead the rival contender as a respondent, and thereafter, decision on merits, after recording pro and contra evidence, vide judgment dated 08.01.2024. Feeling aggrieved of the same, the petitioners have filed the instant Constitutional petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 before this Court.

4. Despite date by Court, the learned counsel representing the respondent has sent an application for adjournment of the case on the ground that he is out of station on account of his domestic engagements. The order sheets of this Court reflect that on the previous date of hearing i.e. 10.09.2024, this case was adjourned for arguments on the request of the learned counsel for the respondent on similar grounds at the cost of Rs. 10,000/- to be paid to the petitioners keeping in view, the repeated request of the respondent for

adjournment, but neither the cost was paid nor the learned counsel for the respondent put his appearance to argue the case. It is pertinent to mention here that on 27.05.2024, this case was adjourned to 24.06.2024 at the request of the special attorney of the respondent Riaz Ahmad enabling him to engage a counsel. On the said date the special attorney of the respondent appeared before the Court and sought adjournment on the ground that his counsel is indisposed and at his request the case was adjourned to 22.07.2024 with the direction to him to positively produce his counsel on the date fixed but on the said date, none appeared on behalf of the respondent, however, fresh notice was directed to be issued to him for a short date in office. This case was posted for hearing for 08.08.2024, but learned counsel for the respondent sought adjournment for want of preparation of the case and the case was again adjourned to 10.09.2024, however, again his counsel failed to argue the case on the said date and the case was adjourned to 18.09.2024 in presence of junior counsel for the respondent, subject to payment of cost of Rs. 10,000/-. Today again, the learned counsel for the respondent has sent an application for adjournment. The learned counsel for



the petitioners vehemently opposed the request for adjournment, he pointed out that the petitioner is a female, she has to come from her village all the way from Takhtbhai, District Mardan on each date of hearing, and the respondent and his son are constantly torturing her in mind and intentionally avoiding to argue the case on merits.

5. It is observed with great concern that despite availing several opportunities, the respondent and his counsel failed to argue the case, on all previous dates of hearing. The petitioner, who is a female comes from far-flung area of Tehsil Takhtbhai with the hope that her case would be decided on merits, but due to constant adjournments of the learned counsel for the respondent, this case could not be decided on merits till 10.09.2024. Once brief is accepted by the counsel, he is under legal obligation to appear before the Court and argue the case, and assist the Court fairly and justly. Unnecessary and frequent adjournments for no legal or moral justification, are unwarranted, therefore, request of the learned counsel for the respondents for adjournment is turned down and the case is being decided with the assistance of the learned counsel for the petitioners and the available record.



6. The sole question which requires determination by this Court is:-

*Whether the petitioner is entitled to be appointed as guardian for the property and person of her minor sons or not?*

7. A perusal of the record reflects that the petitioner is the real mother of the minors namely Ali Bin Ahmad and Ziyad Bin Ahmad aged about seven and four years, respectively. The father of the minors was serving as Assistant Professor in Islamia College University, Peshawar, he was murdered on 19.02.2023. Under the *Muhammadan Law*, any person, who has attained puberty is entitled to act in all matters affecting status of minor/ minors or his/ her property, but the law has been materially altered by the Majority Act, until then the Court has the power to appoint a guardian of his or her person or property or both under the Guardians & Wards Act, 1890. Application for appointment of guardian is regulated by Section 7 of the Act of 1890. Mother and father both are natural guardians. The Minors were enjoying custody of their mother and father since birth and after murder of their father on 19.02.2023, they were living with their mother/

petitioner. Prior to filing of the petition for appointment of guardian of the minors, the petitioner had filed a Constitutional petition No. 1626-P of 2023 stating therein that after the death of her husband, the respondent and his son namely Riaz Ahmad have illegally detained her minor sons, after exhausting her relief before the learned Addl. District Judge, Peshawar, and after hectic efforts, the minors were recovered and produced before the Court by the police and their custody was handed over to the petitioner on 17.07.2023. Section 17 Clauses (1), (2) and (3) of the Guardians & Wards Act, 1890 imposes a duty upon the Court in appointing a guardian to make the appointment consistently with the law to which the minor is subject. The central idea is the welfare of the minor. The main consideration is what could be conducive to the child's welfare. Welfare means his wordly, moral and spiritual well-being. In the presence of mother, the welfare of minors does not lie elsewhere. It cannot be disputed that the child of that age would feel psychologically more secured in the company of the mother rather than anyone else. The amount of love and care which a child receives from the mother cannot be expected from any other





relative, including the grandfather or uncle. Welfare of the minor would be provided by the mother with more devotion and there is no other better institution than a lap of a living mother and there cannot be no better tutor than mother. Right from birth, the minors were living with their mother and such period was spread over years and to up root the minors from their given and familiar surroundings although permissible, yet cannot be done there being nothing on record to suggest that the minors would be given beneficent treatment by their grandfather. The petitioner being mother of the minors may spare lot of time for them. The mother who always has a better understanding with her children, with whom the children enjoy the intimacy, has legal right to be the guardian of the minors. There is nothing on the record to suggest that mother is leading an immoral life or is a lady of ill-repute, on the face of the record she is an educated lady and has been leading family life, after death of her husband and there is no allegation whatsoever against her moral character.

8. A Perusal of the order of the learned Judge Family Court, Peshawar reveals that the petitioner was appointed as guardian for the property

and person of the minors, and not more than that, however, the learned appeal Court while accepting the appeal, remanded back the case for decision afresh with the direction to the learned Judge Family Court to implead grandfather of the minors as respondent, which is unwarranted. The grandfather, if he is interested in the custody of minors or the right of visitation, may seek his relief before the Court of competent jurisdiction.

9. For the foregoing reasons, I am of the view that the learned appeal Court has committed a legal error by setting aside the judgment/ order of the learned Judge Family Court, calling for interference. Consequently, the impugned judgment of the learned appeal Court is set aside and the judgment/ order of the learned Judge Family Court, Peshawar is restored with no order as to costs.

**Announced:**  
18.09.2024.



**JUDGE**

Zia/\*

S.B. Hon'ble Mr. Justice Shakeel Ahmad, J.