HIGH COURT OF AZAD JAMMU & KASHMIR
(SHARIAT APPELLATE BENCH)

Family Appeal No. 71/2020;
Date of Institution. 21.11.2020;
Date of Decision. 25.05.2022.

Dr. Mazhar Abbas S/o Muhammad Abbas Kiani, caste Ghakhar R/o Kathyara, Tehsil Hajira, District Poonch.

Appellant

VERSUS

Dr. Taiba Manzoor D/o Manzoor Kiani, caste Ghakhar, R/o Kathyara, Tehsil Hajira, District Poonch.

Respondent

FAMILY APPEAL

Before:- **Justice Sardar Liaqat Hussain, J.**

PRESENT:
Raja Sajjad Ahmed Khan, Advocate for the appellant.
Nemo for the respondent.

JUDGMENT:

The captioned appeal has been preferred against the judgment/order of Additional District Judge/Judge Family Court, Hajira, dated 31.10.2020 & 26.07.2019 whereby application for custody of minor filed by respondent, herein, was accepted.

2. Precise facts forming background of the instant appeal are that respondent, herein, filed an application for custody of minor before Additional District Judge empowered as Judge Family Court

Hajira, on 22.05.2019. On filing of the application, non-applicant, appellant, herein, was summoned, who appeared before the Court and filed objections and refuted the claim of the applicant-respondent, herein. The learned Judge Family Court, Hajira, after due process of law and hearing the parties, accepted the application filed by respondent, Tayba Manzoor for custody of minor vide order dated 31.10.2020, hence, this appeal.

3. Raja Sajjad Ahmed Khan, Advocate, the learned counsel for the appellant has filed written arguments and also argued the case, verbally. In the written arguments, more or less, reiterated the grounds of appeal and contended that the learned Judge Family Court/Guardian Judge fell in graver error while accepting the application for custody of the minor, because earlier the suits were decided on the basis of compromise and it was agreed between the parties that the minor will live with his father and meetings of the minor with his mother were also scheduled, hence, the impugned judgment may be recalled and the custody of the minor may be handed over to the

appellant. The learned counsel contended that the trial Court did not apply its judicial mind while deciding the application because the respondent, herein, has not filed application for cancellation of panchaitnama/agreement and without cancellation of the same, the application for custody of the minor was not competent, hence, the appeal may be accepted and the impugned order may be set-aside and the custody of minor be handed over to his father, in accordance with the earlier Punchaiatnama /agreement between the parties.

4. Nobody has turned up on behalf of respondent, therefore she was proceeded, ex-parte and ex-parte arguments have been heard.

5. It is an admitted position that nobody has turned up on behalf of the respondent and in such circumstances the claim of the appellant should have been admitted as true, however, this Court is supposed to administer complete, fair and transparent justice and not to pass an order with closed eyes, therefore, I opted to give my

dispassionate thought to the arguments addressed at Bar and perused the record as well as the impugned decision with due care.

6. It appears from record that earlier Dr. Tayba Manzoor filed family suits before Additional District Judge/Judge Family Court, Hajira, which were decided in light of the agreement/Panchaitnama, executed between the parties on 15.02.2019 vide judgment & decrees dated 19.02.2019. In the Punchayatnama, it was agreed between the parties that the minor will live with his father and the meeting of the minor with his mother were also scheduled. It further reflects from record that thereafter Dr. Tayba Manzoor, applicant/respondent, herein, filed an application for custody of minor before Judge Family Court/Guardian Judge, Hajira, which after hearing was accepted and custody of the minor has been given to the respondent, herein, vide order dated 26.07.2019.

7. Firstly, I would like to take up the question of right of custody of a male minor, below 7 years.

Under the Muhammadan Law, mother is entitled to have custody of male minor up to 7 years. Para 352 of Muhammadan Law is usefully, reproduced, below:-

> "352. Right of mother to custody of infant children. The 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. The right continues though she is divorced by the father of the child, unless she marries a second husband in which case the custody belongs to father.

8. In the next para of the Muhammadan Law, in case of incompetency of mother to have custody of the minor, a series of female relations has been described, who are entitled to the custody of minor and after failure of all female relations, there comes entitlement of the father, regarding the custody of a male minor below 7 years.

9. In the present case, the mother of the minor is Doctor by profession and has not married yet, presumably for the sake of her minor son, hence, in my view, she cannot be deprived of the custody of her minor son.

10. As far the question of welfare of minor is concerned, the same also lies with the persons, entitled to the custody of minor. The proposition has been resolved by the Hon'ble apex Court of Azad Jammu & Kashmir in case titled Mst. Zakia Khatoon v. Muhammad Hayat Khan and (5) others, reported as 1998 SCR 140, wherein, at page 145 of the report, it has been observed as under:-

> "6. We have already stated that there is a ring of authorities including that of this Court that the welfare of minors would be presumed with the person who is entitled to it under the Muslim Law until and unless otherwise proved. In the instant case, the appellant has not contracted second marriage and ages of Mst. Tanzeela, Mst. Tanveera and Muhammad Idrees, minors at the time of the application wer 8,7, 4½ and 1½ respectively. The Courts below have committed an error in law declining the restoration of the custody of Mst. Tanzeela, Mst. Tanveera and Muhammad Idrees to the appellant because no tangible reasons exist which rebut the presumption arising in favor of the appellant under Muslim Law.

> The mere fact the respondents have taken the minors from the custody of the appellant and admitted them in schools at Rawalpindi is not sufficient to deny the custody to her, especially, so when, the presumption of the welfare of the minors is in her favor."

10. The point has also been considered by the Hon'ble apex Court in case titled Mst. Hukam Jan & 4 others v. Muhammad Yaseen, reported as 2016 SCR 487, wherein, at page 492 it has been observed, as follows:-

> "6……. ……. ……. It is pertinent to mention here that prime consideration for determining the question of custody is always the welfare of the minor and there could not be an absolute rule and fixed criteria for determining the same as each case has its own peculiar facts and circumstances. It may be observed here that being real father of the minor, the respondent cannot be deprived of the custody of the minor son on any other ground except the welfare of minor. As after detailed discussion we have observed in the preceding paragraph that in the prevailing circumstnces the welfare of

> the minor does not lie with the respondent-father, therefore, in our considered view the learned Shariat Court while passing the impugned judgment failed to appreciate the evidence brought on record and the relevant law in its true perspective."

11. In the instant case, the appellant has claimed nullification of the impugned order on the ground that earlier the parties had entered into a compromise and divorce was effected between them under the conditions, listed therein, which also included custody of the minor with his father. In this regard, this Court would like to observe that any agreement/Punchayatnama, either admitted or denied by the executants, in any case cannot override the statutory law and even any policy or notification issued by the Government cannot override the same. The point has been resolved by the Hon'ble apex Court in case titled Muhammad Ejaz Khan & 12 others v. Mushtaq Ahmed Khan & 10 others, reported as 2010 SCR 201, wherein, at page 205, of the report it has been observed as under:-

> "..... .... It may be observed that a policy or notification cannot override the Statutory rules framed by the Government under the Statute. Instructions and policies cannot amend the statutory rules."

12. Although, as a result of an agreement, it was agreed between the parties that the minor will live with his father, however, the Family Court has power to pass further order keeping in view the welfare of the minor. It may be added here that the panchaitnama has no value in the eye of law and also no power to override the law and rules, hence, could not create right of custody in favor of the father of minor/appellant herein.

13. Record shows that mother of the minor is a Doctor by profession and she has not contracted second marriage. The minor is a male baby, below 7 years, and respondent, herein, is real mother of the minor, who is natural guardian of the minor and she could look after and bring up him in a better way, therefore, in my considered view the learned Court below has rightly accepted the application for

appointment of guardian filed by respondent, herein, which needs no interference by this Court.

In view of above, finding no force in this appeal, it is hereby dismissed.

Muzaffarabad: -Sd-
25.05.2022. **JUDGE**

Note:-
Judgment has been written and duly signed. The office shall announce the same with due notice to the parties.

-Sd-
JUDGE

Approved for reporting.

-Sd-
JUDGE