

**HIGH COURT OF AZAD JAMMU AND KASHMIR
(Shariat Appellate Bench)**

(1) Civil Appeal No.81/2021.
Date of Institution 17.05.2021.
Date of Decision 23.05.2022.

Kh. Shahid Qadir S/O Kh. Abdul Qadir, R/O Baboo Mohallah Ward No.9 Muzaffarabad, presently Shoukat Line Gojrah, Tehsil & District Muzaffarabad.

Appellant.

VERSUS

1. Mst. Naila Maqbool D/O Kh. Maqbool Ahmad, R/O Dhairian-Bambian, Tehsil & District Muzaffarabad.
2. Public-at-large.

Respondents.

**APPEAL AGAINST ORDER OF JUDGE FAMILY
COURT, EMPOWERED AS GUARDIAN JUDGE,
MUZAFFARABAD, DATED 10.04.2021.**

(2) Civil Appeal No.98/2021.
Date of Institution 05.06.2021.

Kh. Shahid Qadir S/O Kh. Abdul Qadir, R/O Baboo Mohallah Ward No.9 Muzaffarabad, presently Shoukat Line Gojrah, Tehsil & District Muzaffarabad.

Appellant.

VERSUS

Mst. Naila Maqbool D/O Kh. Maqbool Ahmad, R/O Dhairian-Bambian, Tehsil & District Muzaffarabad.

Respondent.

**APPEAL AGAINST ORDER OF JUDGE FAMILY
COURT, EMPOWERED AS GUARDIAN JUDGE,
MUZAFFARABAD, DATED 19.05.2021.**

BEFORE:- Justice Sardar Liaquat Hussain, J.

PRESENT:

Kh. Tariq Samad, Advocate, for Appellant.
Mr. Ghulam Mustafa Qureshi, Advocate, for Respondent.

JUDGMENT : -

The captioned appeals have been preferred against the impugned orders of Judge Family Court, empowered as Guardian Judge, Muzaffarabad, dated 10.04.2021 and 19.05.2021, (hereinafter to be referred as Guardian Judge).

2. The precise facts forming background of the instant appeals are that Kh. Shahid Qadir, father of minors Khadija and Ayesha, filed an application before Guardian Judge, Muzaffarabad, for his appointment as guardian of minors, on 20.10.2020. He also moved an application on 07.11.2020 for custody of minors under section 25 of the Guardian and Wards Act, 1890 as adopted in AJ&K. Thereafter, he moved another application on 30.11.2020, stating therein that proceedings in applications, moved under Sections 12 & 25 of the Guardian and Wards Act, 1890, be initiated and respondent may be kept bound

to the extent of meeting of children with father and their pick & drop at School by him. Later on, Mst. Naila Maqbool, mother of minors, also moved an application for appointment of guardian on 27.01.2021. During pendency of the aforesaid applications, it was settled between the parties with their mutual understanding regarding meeting of the minors with father that they will meet with him twice in a month (first and last Sunday) from 9:00am to 5:00pm and case was fixed for objections upon applications of temporary custody and pick & drop vide order dated 01.02.2021. The Court below after obtaining objections and hearing arguments, dismissed the application of temporary custody, filed by father, whereas other application, filed by him for pick & drop of minors from School, was accepted and he was directed to file undertaking worth Rs.1,00,000/- regarding protection of minors, vide order dated

16.02.2021. Thereafter, on 03.03.2021 and 03.04.2021, appellant-father filed applications for implementation of orders dated 01.02.2021 and 16.02.2021, regarding meeting and pick & drop of minors, whereas respondent-mother moved applications for relaxation in the orders of meeting and pick & drop of minors, on 10.04.2021. The Court below, with mutual understanding of the parties, fixed the day of meeting Saturday instead of Sunday, vide impugned order dated **10.04.2021** and the case was fixed for objections upon the application of pick & drop on 24.04.2021. After that, on 17.04.2021, appellant-father moved another application for review/implementation upon orders dated 01.02.2021 and 16.02.2021 as well as for dismissal of applications moved by respondent-mother for relaxation in the orders of meeting and pick & drop of minors. He also filed objections against relaxation applications on 24.04.2021. The

learned Guardian Judge, after hearing arguments upon the applications of relaxation regarding meeting of minors with father as well as regarding the order of pick & drop, maintained the impugned order of meeting dated **10.04.2021**, whereas facility of pick & drop given to the minors by father-appellant, vide order dated 16.02.2021, was cancelled due to denial of minors before the Court below on 24.04.2021, vide impugned order dated **19.05.2021**. Now, appellant, father of minors, seeks cancellation of the aforesaid impugned orders dated **10.04.2021** and **19.05.2021**; hence, the instant appeals.

3. Kh. Tariq Samad, the learned Counsel for appellant, submitted in his written arguments that his client, Kh. Shahid Qadir, father of Khadija and Ayesha, minors filed two applications before Guardian Judge, Muzaffarabad, under sections 12 & 25 of the Guardians & Wards

Act, 1890, alongwith an application for pick and drop of minors. He contended that the Court below, with mutual understanding of the parties, passed order dated 01.02.2021, that minors will go to the father with the purpose of meeting twice in a month on first and last Sunday from 9:00am to 5:00pm and the case was fixed for objections upon applications of temporary custody as well as of pick & drop vide order dated 01.02.2021, and the Court below after obtaining objections and hearing arguments, dismissed the application of temporary custody, filed by his client, whereas other application, filed by him for pick & drop of minors from School, was accepted and he was directed to file undertaking worth Rs.1,00,000/- regarding protection of minors, vide order dated 16.02.2021 and he filed the same. The learned Counsel agitated that only one meeting was conducted with the minors on 16.02.2021 and thereafter respondent

declined meeting of minors with the father; therefore, he/appellant moved applications on 03.03.2021, 03.04.2021 and 17.04.2021 for implementation of orders dated 01.02.2021 and 16.02.2021, regarding meeting and pick & drop of minors, whereas respondent-mother moved applications for relaxation in the orders of meeting and pick & drop of minors, on 10.04.2021, but instead of implementation of the aforesaid orders, the Court below re-opened the matter and modified its earlier orders by fixing the day of meeting as Saturday instead of Sunday contrary to the orders dated 01.02.2021 and 16.02.2021, vide the impugned order dated 10.04.2021, and the case was fixed for objections upon the application of pick & drop on 24.04.2021. After that, on 17.04.2021, appellant-father moved another application for implementation of orders dated 01.02.2021 and 16.02.2021 as well as for dismissal of applications moved by respondent-mother

for relaxation in the orders of meeting and pick & drop of minors; however, the learned Guardian Judge, after hearing arguments upon the applications of relaxation regarding meeting of minors with father as well as regarding the order of pick & drop, modified its earlier orders and maintained the impugned order of meeting dated 10.04.2021, and facility of pick & drop given to the minors by father-appellant, vide order dated 16.02.2021, was cancelled vide the impugned order dated 19.05.2021. The learned Counsel pointed out that an appeal lies against any order of the Guardian and Wards Act; therefore, impugned orders dated 10.04.2021 and 19.05.2021 are appealable before this Court. The learned Counsel finally contended that by accepting the appeals and setting aside the impugned orders dated **10.04.2021** and **19.05.2021**, the earlier orders passed by the learned Guardian Judge dated

01.02.2021 and **16.02.2021**, regarding meeting of minors with father and their pick and drop from School by father, may be restored and the Court below be directed to implement the same earlier orders.

4. Conversely, Mr. Ghulam Mustafa Qureshi, the learned Counsel for respondent, contended in the written arguments that two counter applications for guardianship of minors are subjudice before the Guardian Judge, Muzaffarabad, which are yet to be decided on merits. The learned Counsel pointed out that the Court below, vide order dated 01.02.2021, although recorded about meeting of the minors with father that minors will go to father twice in a month on first and last Sunday from 9:00am to 5:00pm and case was fixed for objections upon applications of temporary custody and pick & drop vide order dated 01.02.2021, however, after

obtaining objections and hearing arguments, dismissed the application of temporary custody, filed by father, whereas other application, filed by him for pick & drop of minors, was accepted, vide order dated 16.02.2021, but when meeting of minors was held with father in the Court on 10.04.2021, they flatly refused to go with father and also denied to avail facility of pick and drop for school provided by father; therefore, with mutual understanding of the parties, the day of meeting of minors with father was fixed Saturday instead of Sunday and on moving application of relaxation by respondent-mother in the order of pick and drop, the case was fixed for objections vide the impugned order dated 10.04.2021. The learned Counsel further agitated that when minors appearing in the Court flatly refused to go with the father and denied to avail facility of pick and drop, then in circumstances of the case, the order of

meeting and pick and drop could be modified/reviewed, because minors cannot be compelled to go with father; hence, the Court below did not commit any illegality while passing the impugned orders. He contended that the impugned orders are interlocutory orders in which no final verdict was pronounced but ancillary orders were passed with the intention to keep the same operative till final order is passed in the pending matter; therefore, neither an appeal nor a revision lies against the impugned orders dated **10.04.2021** and **19.05.2021**; hence, instant appeals are liable to be dismissed on this score only. In support of his arguments, he relied upon PLD 1989 AJ&K 1 and PLD 2016 Lahore 73.

5. I have given my due consideration to the written arguments of the learned Advocates for parties and have gone through the record with utmost care.

6. A minute perusal of record reveals that both Kh. Shahid Qadir and Mst. Naila Maqbool, father and mother of minors Khadija and Ayesha, have claimed appointment of guardian of minors and the matter is subjudice before Guardian Judge, Muzaffarabad, which is yet to be decided after obtaining evidence from both sides. However, during pendency of the aforesaid guardianship matter, appellant-father also moved applications; one for custody of minors under section 25 of the Guardians and Wards Act, 1890, on 07.11.2020, second for initiating proceedings in applications, moved under Sections 12 & 25 of the Guardians and Wards Act, 1890, as well as for direction to respondent that he may be kept bound to the extent of meeting of children with father and their pick & drop at School by him. The Court below, with mutual understanding of the parties, settled the matter regarding meeting of the minors with their father by

declaring that minors will go to meet to father at his residence twice in a month on first and last Sunday at 9:00am and they will be returned to mother at 5:00pm, vide order dated 01.02.2021; however, the case was fixed for objections upon applications of pick & drop as well as of temporary custody on 12.02.2021. The Court below after obtaining objections and hearing arguments, dismissed the application of temporary custody, filed by father, whereas other application, filed by him for pick & drop of minors, was accepted and he was directed to file undertaking worth Rs.1,00,000/- regarding protection of minors, vide order dated 16.02.2021, and he filed the same. Thereafter, on 03.03.2021 and 03.04.2021, appellant-father also filed applications for implementation of orders dated 01.02.2021 and 16.02.2021, regarding meeting and pick & drop of minors, whereas respondent-mother moved applications for relaxation

in the orders of meeting and pick & drop of minors, on 10.04.2021, on the ground that father is Government employee, who cannot timely pick and drop the minors and moreover due to corona pandemic, traveling is dangerous to the health of minors; therefore, duration of meeting may be reduced and mother-respondent may be allowed to pick and drop the minors. The record reveals that minors were produced before the Court on 10.04.2021, who flatly refused to go to meet father at his home and also denied to avail facility of pick and drop provided by father; however, the Court below, with mutual understanding of the parties, fixed the day of meeting as Saturday instead of Sunday on 24.04.2021, vide impugned order dated **10.04.2021**, and objections were called for upon the applications of mother-respondent regarding relaxation in meeting of minors as well as their pick & drop and the case was fixed for proper order about pick and

drop of minors as well as for recording evidence of plaintiff-appellant and for meeting of minors on 24.04.2021. After that, appellant-father moved another application on 17.04.2021, for review/implementation of orders dated 01.02.2021 and 16.02.2021 as well as for dismissal of applications moved by respondent-mother for relaxation in the orders of meeting and pick & drop of minors. He also filed objections against relaxation applications on 24.04.2021. The minors, aged about 12½ and 8½ years, appeared before the Court below on 24.04.2021 and once again refused to go with the father; hence, their meeting was held in the Court hours. The learned Guardian Judge, after hearing arguments upon the applications of relaxation regarding meeting of minors with father as well as regarding the order of pick & drop, maintained the impugned order of meeting dated **10.04.2021**, whereas facility of pick & drop given to the minors

by father-appellant, vide order dated 16.02.2021, was cancelled due to denial of minors before the Court on 24.04.2021, vide impugned order dated **19.05.2021**.

7. At the very outset, I would like to take up contention of the learned Counsel for respondent that the impugned orders are interim orders in which no final verdicts were pronounced but ancillary orders were passed with the intention to keep the same operative till final order is passed in the pending matter; therefore, neither an appeal nor a revision lies against the impugned orders dated **10.04.2021** and **19.05.2021**; hence, appeals are liable to be dismissed. While on the contrary, the contention of the learned Counsel for appellant is that an appeal lies against any order of the Guardians and Wards Act, 1890; therefore, impugned orders dated **10.04.2021** and

19.05.2021 are appealable before this Court.

8. The pivotal question involved in the instant case is that as to whether the impugned orders dated **10.04.2021** and **19.05.2021**, passed by Judge Family Court/Guardian Judge, under section 12 of the Guardians and Wards Act, 1890, are appealable before this Court, whereby Guardian Judge after hearing arguments upon the applications of relaxation regarding meeting of minors with father as well as regarding the order of pick & drop of minors by father, maintained the impugned order dated **10.04.2021** regarding meeting of minors in the Court hours, whereas facility of pick & drop provided by father to the minors, vide order dated 16.02.2021, was cancelled due to denial of minors before the Court below on 24.04.2021, vide the impugned order dated **19.05.2021**. It is pertinent to observe here that

Section 5 of the Family Courts Act, 1993, postulates that "*The Family Courts shall have exclusive jurisdiction to entertain, hear and adjudicate upon matters specified in the Schedule*" and its Schedule includes matters relating to the Guardianship and custody of children; therefore, all such matters pertaining to the Guardianship and custody of children shall be governed by the Family Courts Act, 1993, and in that context Section 14(1) of the Family Courts Act provides a forum of appeal by speaking that "*Any party aggrieved by a decision or a decree passed by a Family Court under this Act may, within thirty days of the date of such decision or decree, prefer an appeal to the Shariat Court*" and this Section imposes a restriction upon filing an appeal against an interim order, whereas Section 47 of the Guardians and Wards Act, 1890, postulates that orders passed under Sections 7, 9(3), 25, 26, 28, 29, 32, 39, 40, 43, 44 & 45 of the

Guardians and Wards Act, 1890, are appealable before the High Court, and it does not indicate that any order passed under Section 12 of the Guardians and Wards Act, is appealable. However, regarding procedure, Section **21** of the Azad Jammu & Kashmir Family Courts Act, 1993, speaks that "*A Family Court shall be deemed to be District Court for the purposes of the Guardians and Wards Act, 1890, and shall follow the procedure prescribed in that Act while dealing with the matters specified in the said Act*". In my humble view, the deeming provision in the aforesaid Section 21 of the AJ&K Family Courts Act, 1993, cannot possibly lead to the conclusion that it confers on a litigant aggrieved by a judgment of a Family Court, the right of appeal contained in the Guardians and Wards Act, and provisions of Guardians and Wards Act cannot be read in isolation because the legislature by design has brought the

disputes relating to the guardianship and custody of children within the purview of the Schedule of Section 5 of the Family Courts Act, 1993; therefore, all the affairs relating to the Guardianship and custody of children shall be exclusively triable by the Family Court and provisions of Family Courts Act, 1993, have overriding effect in so far as the matters included in the aforesaid Schedule of the Family Court Act 1993, and moreover, it is settled principle of interpretation of statutes that the statute which is later in time shall prevail, thus, for filing appeals against judgments and orders of the Family Court in such matters, the provisions of the Family Courts Act, 1993, and the rules framed thereunder are to be looked into and provisions of Guardians and Wards Act, 1890, are applicable only to the extent of following the procedure for the trial of such matters and not as regards substantial right of appeal. The

aforesaid view is fortified from a case reported as **Anne Zahra v. Tahir Ali Khilji & 2 others [2001 SCMR 2000]**, wherein it has been held by the Apex Court of Pakistan as under:-

"None of the reported judgments relied upon by the learned Counsel for the petitioner has laid down that the question of territorial jurisdiction was to be decided not with reference to Family Court Act and the rules framed thereunder but on the basis of the provisions of the Guardian and Wards Act whereas the questions decided thereunder were regarding substantial rights of filing of appeal or revision against the orders of the judgment of the Family Court seized with the guardianship matter and it has been rightly held by the learned single Judge that as regards the question of appeal against the judgments and orders of the Family Courts in such matters, the provisions of the Family Court Act and the rules framed thereunder are to be looked into, for the Guardians and Wards Act would be applicable in such matters only to the extent of following the procedure for the trial of such matters and not as regards substantial right of appeal etc."

The controversy regarding an interim order passed by Guardian Judge/Judge Family Court under Section 12 of the Guardians and Wards Act came under consideration in a case titled **Mehmoona Ilyas v. Additional District Judge & others [2017 CLC (Lahore) 1747]**, whereby it was held that an order passed under section 12 of the Guardians and Wards Act falls within the purview of "decision given" and is appealable under section 14 of the Family Courts Act. The relevant caption is reproduced as under:-

"Now the question before this Court is as to whether order dated 25.06.2016 passed by learned Guardian Judge/Judge Family Court under Section 12 of the Guardians and Wards Act was a decision or an interim order. This Court while confronted with the similar situation had already pronounced that such order falls within the purview of "decision given" and is appealable under Section 14 of Family Courts Act, 1964. Reliance is placed on "Mst. Zaibun Nisa v. Muhammad Muzammil" (PLD 1972 Karachi 410). In another pronouncement "Syed Shamim Ahmad v. Mst. Riaz Fatima" (PLD 1975 Karachi

448), it was observed that expressions or decisions given in Section 14 are not in any manner qualified by any such word as final, and therefore, an order under Section 12 is a decision given and is appealable. Further reliance has been placed on "Muhammad Deen Malik and another v. IInd Additional District Judge, Karachi and 2 others" (1982 SCMR 1223) and "Sakhawat Ali and another v. Mst. Shui Khelay" (PLD 1981 Supreme Court 454)."

Thus, it is manifestly clear from the above quoted precedents as well as discussion that an order passed under Section 12 of the Guardians and Wards Act falls within the purview of "decision" and is appealable under Section 14 of the Family Courts Act, 1993. In such state of affairs, both the contention of the learned Counsel for respondent that the impugned orders are interim orders against which no appeal lies, as well as of the learned Counsel for appellant that an appeal lies against any order of the Guardians and Wards Act, 1890, are not

acceptable, hence, the same are hereby repelled.

9. The next contention of the learned Counsel for appellant is that the Court below passed order dated 01.02.2021, with mutual understanding of the parties, that minors will go to the father with the purpose of meeting twice in a month on first and last Sunday from 9:00am to 5:00pm, and also accepted his application filed for pick and drop of minors at School, vide order dated 16.02.2021, but later on, upon moving applications by respondent-mother, the earlier order of meeting was modified and the other earlier order of pick and drop was cancelled vide the impugned orders dated 10.04.2021 and 19.05.2021; hence, the impugned orders are liable to be set-aside because the learned Judge Family Court was not empowered to modified and cancel its earlier orders. It is apparent from the facts and

circumstances involved in the instant case that respondent-mother approached the Family/Guardian Court for relaxation/modification in the aforesaid earlier orders of meeting and pick & drop of minors by urging certain facts and developments, which are subsequent to the passing such orders. In this regard, it is significant to mention here that an order passed by the Family/Guardian Court in respect of the custody of the minor may be an order in the best interest and welfare of the minor at that time but on account of certain future eventuality and subsequent developments the same may not serve as such; therefore, it is for this reason that the Family/Guardian Court has been empowered to modify, set-aside or alter an earlier order and pass an appropriate order at subsequent stage to safeguard the interest and welfare of minor and an order passed earlier will not operate as a bar of jurisdiction for the Family/Guardian

Court for all future time to come and a compromise or an agreement between the parties will not absolve the Family/Guardian Court from its basic responsibility to protect and safeguard welfare and interest of the minors. The aforesaid view finds support from a case reported as **Ayesha Tahir Shafiq v. Saad Amanullah Khan & 2 others [PLD 2001 Karachi 371)**, wherein it has been held as under:-

"It may be mentioned here in this regard that an order passed by the Guardian Court in respect of the custody of the minor (consent order or otherwise) may be an order in the best interest and welfare of the minor at that point of time but due to certain future eventuality and subsequent development the same may not serve as such. It is for this reason that the Guardian Court has been empowered to modify, set-aside or alter an earlier order and pass an appropriate order at any subsequent stage to safeguard the interest and welfare of the minor and that the order passed earlier in that context will not operate as a bar of jurisdiction for the Guardian Court for all

future time to come. A compromise order, a compromise or an agreement between the parties will not absolve the Guardian Court from its responsibility to safeguard and protect the interest and welfare of the minor. More so as in the litigation before a Guardian Court the two parties participating in such proceedings are not adversaries in the strict sense but they plead their own view point before the Court to enable the Guardian Court to arrive at a just and proper conclusion on the question of welfare of the minor. For these reasons I am of the view that a Guardian Court can re-examine such issue even if a compromise, agreement or consent order in that regard is already in the field. By expressing so I do not mean to observe that such a compromise, agreement or consent order can be lightly upset/rejected by the Guardian Court while re-examining the question of the welfare of the minor in the given facts and circumstances of each case. In such a situation the Guardian Court will normally proceed with the presumption that the compromise, agreement or the consent order passed in the earlier guardianship proceedings was in the best interest and welfare of the minor and, therefore, the Court will examine the subsequent developments and allegations made basis for seeking

modification/change of such order in this background of the matter. This view of the matter is fortified from various decisions as referred by the learned Counsel for the petitioner."

10. It is pertinent to observe here that applications for appointment of guardian of the minors from both sides are subjudice before the Guardian Judge, Muzaffarabad, which, after recording evidence, are yet to be decided on merit. It is apparent from record that minors Khadija and Ayesha, aged 12½ and 8½ years, appeared before the Guardian Judge and categorically refused to go with their father and also denied to take facility of pick and drop given by father. As the minors are not willing to go with father for the purpose of meeting and avail facility of pick and drop at School provided by father; therefore, they cannot be compelled to go with father and the consent of the minors cannot be ignored keeping in view their welfare and proper

look after by the mother. My aforesaid view is supported by a reported case of the Apex Court of AJ&K titled **Muhammad Yaqoob v. Yasmeen Tahira & 4 others (2015 SCR 1470)**, wherein it was laid down as under:-

"As we have discussed above, the statements of the minors that they are not willing to go with their father and want to live with their mother, therefore, we do not compel them to live with their father as the custody of the minors is always subject to the welfare of the minors."

11. The nutshell of above discussion is that the learned Guardian Judge, Muzaffarabad, did not commit any illegality while passing the impugned orders dated **10.04.2021** and **19.05.2021**. Consequently, the appeals filed by appellant-father are hereby dismissed. A copy of the instant judgment shall be annexed with other relevant file.

Muzaffarabad,
23.05.2022.

-Sd-
JUDGE

Approved for reporting.

-Sd-
JUDGE