

IN THE FEDERAL SHARIAT COURT

(Original Jurisdiction)

PRESENT

**MR. JUSTICE DR. FIDA MUHAMMAD KHAN
MR. JUSTICE RIZWAN ALI DODANI
MR. JUSTICE SHEIKH AHMAD FAROOQ**

SHARIAT PETITION NO. 03/L OF 2008

Mrs. Ambreen Tariq Awan, Advocate d/o Tariq Ismail Awan,
R/o. 10/G Model Town, Lahore

.... Petitioner

Versus

Federal Government of Pakistan through Secretary M/o Law & Justice,
Islamabad.

..... Respondent

Counsel for the petitioner ... Nil

Counsel for the Federation ... Mr. Muhammad Nazir Abbasi,
Advocate

For NADRA ... Mr. Saqib Jamal,
Manager (Legal)

For Religious Affairs ... Hafiz Abdul Qudoos,
Asstt: Director

Date of Institution ... 30.10.2008

Date of hearing ... 30.04.2013

Date of decision ... 14.6.2013

JUDGMENT

DR. FIDA MUHAMMAD KHAN, Judge.- Petitioner

Mrs. Ambreen Tariq Awan has through this petition, challenged sections 7, 17 and 27 of Guardian and Wards Act 1890 on the ground that these sections are repugnant to the Injunctions of Islam. The impugned sections read as under:-

“Section 7. Power of the Court to make order as to guardianship: (1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made –

(a) Appointing a guardian of his person or property or both, or
(b) Declaring a person to be such a guardian, the Court may make an order accordingly.

(2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument, or appointed or declared by the Court.

(3) Where a guardian has been appointed by will or other order instrument, or appointed or declared by the Court, and order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act.

Section -17. Matters to be considered by the Court in appointing guardian:

(1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or this property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

(4) Omitted .

(5) The Court shall not appoint or declare any person to be a guardian against his will.

Section -27. Duties of guardian of property: A guardian of the property of a ward is bound to deal therewith as carefully as a man of ordinary prudence would deal with it if it were his own, and, subject to the provisions of this Chapter, he may do all act which are reasonable and proper for the realization, protection or benefit of the property”.

2. The petitioner has placed reliance on Verses No: 2:133, 31:14 and 46:15 and a few Ahadith of the Holy Prophet (S.A.W). She has also referred to the concept of natural guardian discussed in Hadaya page 327-703. She has prayed that the practice, which has the force of law, whereby father is accepted as a natural guardian of a minor and mother is presumed to own the right of custody alone of a minor child up to a particular age fixed according to sex of the minor be amended.

3. We may mention that this petition was fixed on several dates but got adjourned for one reason or another. The notices were

repeated but the petitioner did not appear before the Court. Syeda

Viquar-un-Nisa Hashmi, Advocate who was initially engaged by the

petitioner has withdrawn her Wakalatnama on account of her other

engagements and lack of assistance on behalf of the petitioner. This

Shariat Petition came for final hearing before us on 30.04.2013 but the

petitioner is still absent.

4. We have thoroughly examined the contents of the petition and the impugned sections which deal with the power of Court to appoint a guardian of person or property or both of a minor and undertake necessary proceedings for his/her welfare. It will be appreciated that a Court, according to the injunctions of Islam, is the final authority to administer justice and give due rights to every individual who needs the same at any time. Dispensation of Justice to every person, according to law, is its primary duty. However, a Court has to decide cases according to the facts and circumstances of each case and determine what would be just and beneficial for protection and safeguarding the interests of a minor.

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5. In this connection we may refer to the following Verses of Holy Quran which enjoin justice, fair and transparent, with no discrimination on any ground whatsoever:

وَإِنْ حَكَمْتَ فَأَحْكُم بَيْنَهُم بِالْقِسْطِ إِنَّ اللَّهَ يُحِبُّ الْمُقْسِطِينَ-

But if you judge, judge between them with justice. Surely, Allah loves those who do justice. (5: 42)

قُلْ أَمَرَ رَبِّي بِالْقِسْطِ-

Say, My Lord has ordered me to do justice.

إِنَّ اللَّهَ يَأْمُرُكُمْ أَنْ تُؤَدُّوا الْأَمَانَاتِ إِلَىٰ أَهْلِهَا وَإِذَا حَكَمْتُمْ بَيْنَ النَّاسِ أَنْ تَحْكُمُوا بِالْعَدْلِ إِنَّ اللَّهَ نِعِمَّا يَعِظُكُمْ بِهِ إِنَّ اللَّهَ كَانَ سَمِيعًا بَصِيرًا-

Surely, Allah commands you to deliver trusts to those entitled to them, and that, when you judge between people, judge with justice. Surely, excellent is the exhortation Allah gives you. Surely, Allah is All-Hearing, All-Seeing. (4:58)

إِنَّ اللَّهَ يَأْمُرُ بِالْعَدْلِ وَالْإِحْسَانِ وَإِيتَاءِ ذِي الْقُرْبَىٰ وَيَنْهَىٰ عَنِ الْفَحْشَاءِ وَالْمُنْكَرِ وَالْبَغْيِ يَعِظُكُمْ لَعَلَّكُمْ تَذَكَّرُونَ-

Allah enjoins to do justice and to adopt good behavior and to give relatives (their due rights), and forbids shameful acts, evil deeds

and oppressive attitude. He exhorts you, so that you may be mindful.(16:90)

وَإِذَا قُلْتُمْ فَاعْدِلُوا وَلَوْ كَانَ ذَا قُرْبَىٰ وَبِعَهْدِ اللَّهِ أَوْفُوا ذٰلِكُمْ

وَضُكُّكُمْ بِهِ لَعَلَّكُمْ تَذَكَّرُونَ ﴿١٥٢﴾

And be just when you speak, even though the one (against whom you are speaking) is a relative; and fulfill the covenant of Allah. This is what He has enjoined upon you, so that you may observe the advice.(6:152)

6. As is crystal clear from the above, it is the duty of persons in authority (legislature/ judges/ executive) to appoint or terminate guardianship of person and property belonging to minors or disabled persons according to the norms of justice, principles of "Ihsan" and, besides, also forbid harmful acts, evil deeds, oppressive conduct and fulfill the Commands of Allah as laid down in the Holy Quran and Sunnah of the Holy Prophet (SAW). Islamic Shariah empowers the ruler or Imam, through "Shura", to enact laws according to requirements of various circumstances and to employ sound and legally valid methodology in matters which come within the purview of permissible matters (i.e. "Mubah"), if not specifically mentioned or prohibited in the "Nass" (text) of Holy Quran or Sunnah. An "Imam" is thus vested with powers which he shall exercise for the welfare or "Maslaha" of "Ummat". This concept is based on the legal maxim, "التصرف على الرعية منوط بالصلحة". "The ruling of

a person in authority on its subject must be based on public interest.

(Article 58 of mejjella al ahkam al 'adliyah)

It may be relevant here to refer in this connection to the views of Dr.

Wahba Zuhalee, a great living Muslim Jurist of international repute.

He writes:

إذا لم يوجد أب ولا جد ولا وصيها، انتقلت الولاية للقاضي، له من الولاية العامة،
فله أن يتصرف بنفسه في أموال القاصر بما فيه المصلحة. لكن العجل جرى على أن القاضي
لا يشرف بنفسه على أموال الصغار، بل يعين وصياً من قبله يسمى (وصي القاضي) أو
(الوصي المعين) .-

“If the minor/Qasir has no father or grand father alive or if they have not appointed any “wasi”, then right for appointing of guardian shifts to judges, for the reason that they have general authority over them. A judge has therefore, the authority to take action in his property for his welfare but since this would be difficult for him to perform and supervise each and every act himself, he may appoint guardians to supervise the property of minors in his capacity as Wasi of Qadi. (Al fiqh al Islami wa Adellatuh vol. 7 page 759.)”


7. We may also mention that the Verses relied upon by petitioner are not at all related to the issue under consideration. The sections impugned by her which clearly authorizes the Court to appoint a guardian or a person for the person or property or both for safeguarding interests of the minor, are just for his/her welfare and the

Court is duty bound to consider all facts and circumstances of each case and pass an appropriate order in accordance with the norms of justice as deemed appropriate for the welfare of a minor. Regarding the juristic opinions mentioned in Hedaya, referred to by petitioner, it may be sufficient to mention that jurisdiction of Federal Shariat court is restricted to consideration of repugnancy of a law only in the light of Injunctions of Islam as contained in Holy Quran and Sunnah of the Holy Prophet (SAWS) .This court is not at all authorized to decide Shariat petitions in the light of the juristic opinions of *Fuqaha* .Article 203D(1) of the Constitution ~~clear~~ which specifies the power, Jurisdiction and functions of this court is quite clear in this respect.

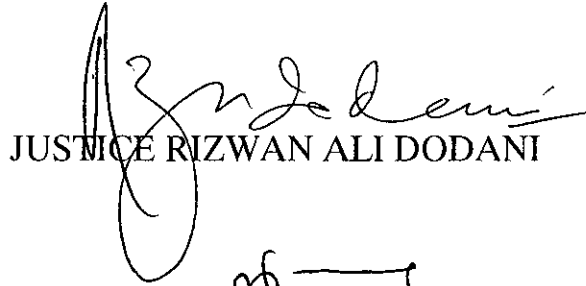
8. In the light of Verses of the Holy Quran, Sunnah of the Holy Prophet (SAWS), we may conclude that courts are empowered to appoint or remove guardians, keeping in view the Islamic principles of Justice and, accordingly, a person in authority is empowered to enact laws in conformity with the Injunctions of Islam.

9. Since the petitioner has not been able to cite any particular text from the original sources which expressly or even impliedly prevents a Court in respect of exercising its power to appoint a guardian or terminate his guardianship, the impugned sections can not be declared repugnant to the Injunctions of Islam.

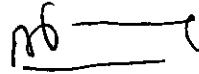
10. In view of the above the instant petition has no force and being misconceived is, therefore, dismissed accordingly.



JUSTICE ALLAMA DR.FIDA MUHAMMAD KHAN



JUSTICE RIZWAN ALI DODANI



JUSTICE SHEIKH AHMAD FAROOQ



Announced in open Court
at Islamabad on 14th June 2013

Mujeeb-ur-Rehman/*

Fit for reporting.

