

**IN THE FEDERAL SHARIAT COURT OF PAKISTAN
(Original Jurisdiction)**

Present:

**MR. JUSTICE MUHAMMAD NOOR MESKANZAI, CHIEF JUSTICE
MR. JUSTICE SHAUKAT ALI RAKHSHANI
MR. JUSTICE DR. SYED MUHAMMAD ANWER**

Shariat Petition No.8/I of 2020

1. Hammad Hussain S/O Muhammad Hussain Pervez Butt, R/O House No. 39, Street No. 01, Sector E, DHA, Phase-1, Islamabad.
2. Muhammad Irfan Khan S/O Lal Khan Sehraee R/O H. No. CB-66/A, Gulshan Colony, Tehsil Taxila, Wah Cantt.

..... Petitioners

VERSUS

Federation of Pakistan through Secretary Law & Justice.

..... Respondent

Shariat Petition No.9/I of 2020

1. Hammad Hussain S/O Muhammad Hussain Pervez Butt, R/O House No. 39, Street No. 01, Sector E, DHA, Phase-1, Islamabad.
2. Muhammad Irfan Khan S/O Lal Khan Sehraee R/O H. No. CB-66/A, Gulshan Colony, Tehsil Taxila, Wah Cantt.

..... Petitioners

VERSUS

Federation of Pakistan through Secretary Law & Justice.

..... Respondent

For the petitioners Petitioners Hammad Hussain
& Muhammad Irfan Khan
in person

Date of receipt of Sh.Petitions 16.04.2020 & 29.04.2020
respectively

Date of hearing 29.10.2020

Date of Judgment 04.11.2020

JUDGMENT:

MUHAMMAD NOOR MESKANZAI, CJ--- The petitioners have filed Sh. Petitions No.8/I and 9/I of 2020 challenging the provisions of Sections 7 and 25 of the Guardians and Wards Act, 1890 (hereinafter called 'the Act') claiming the same being anti-people, inhuman and un-Islamic. The petitioners sought three opportunities to prepare their brief.

2. Since both the Shariat Petitions contain similar facts and revolve around similar question, therefore, are disposed of through this common judgment.

3. The arguments of the petitioners revolved around the contents of the petitions. It was contended that the provision of Sections 7 & 25 of the Act are used to be pressed into service just to deprive the natural guardian i.e. the father having the right of custody of minor on the pretext and premise of welfare of minor in a vacuum without bearing in mind that the Almighty Allah Knows the welfare of minor correctly than anybody else. It was further contended that the father enjoys an absolute right to appoint a nurse for breast feeding of his minor by referring to Surah Al-Baqarah Ayaat 223 & 233 and Surah Al-Nahl Ayat 72. Similarly, reliance was placed on the Hadeeth of the Holy Prophet (Peace And Blessing Of Allah Be Upon Him) where in a dispute between son and father the Holy Prophet (Peace And Blessing Of Allah Be Upon Him) stated to the son that you and your wealth both belong to

the father. The petitioners, thus, prayed for the following relief respectively:-

- A.** “a. *A direction may kindly be given to stop brutality through ‘illegal decisions’.*
- b. *Judicial interpretation of ‘sec 25’, answering the ‘unanswered questions’, consistent with ‘Islamic principles’ may kindly be given.*
- c. *A direction may kindly be given to assure legislation accordingly to the Judicial interpretation by this honorable court of ‘sec 25’, answering the ‘unanswered questions’, consistent with ‘Islamic principles’.*
- d. *Any other relief which deems fit and proper may also be awarded.”*
- B.** “a. *A direction may kindly be given for the assurance of declaration and appointment of guardian according to ‘Islamic principles’.*
- b) *Judicial interpretation of ‘sec 7’, answering the ‘unanswered questions’, consistent with ‘Islamic principles’ may kindly be given.*
- c) *A direction may kindly be given to assure legislation accordingly to the Judicial interpretation by this honorable court of ‘sec 7’, answering the ‘unanswered questions’, consistent with ‘Islamic principles’.*
- d) *Any other relief which deems fit and proper may also be awarded.”*

4. We have heard the petitioners and gone through the petitions, containing pages 162 & 138 respectively, but have not been able to persuade ourselves to subscribe to the petitioners for multiple reasons:-

- i) Firstly, because the provisions of Guardians and Wards Act, 1890 were examined by Council of Islamic Ideology in the year 1970 in order to ascertain as to whether the Act is repugnant to the Injunctions of Islam. The Council of Islamic Ideology, except Sections 19(a) and 39(j) found the rest of the provisions in accordance with the Injunctions of Islam. The Ministry of Religious Affairs and Minority Affairs made a reference to this Court which was taken as S.S.M. No.522/1985. This Court, on 27.06.1985, while disposing of the said petition concurred with the views of the Council of Islamic Ideology by observing:-

“The Council considered this law in 1970 on various sittings and found all its provisions except, Sections 19(a) and 39(j) in accord with the Shariah.

Similarly, we agree, in principle, with the Council that clause (j) of Section 39 of the Guardians and Wards Act, 1890 is repugnant to the general Injunction of Islam.”

- ii) Secondly, Review Shariat Petition No.2/I of 1994 was filed in this Court wherein Sections 4(1), 4(2) as well as Section 12 of the Act were challenged on the ground that these sections are repugnant to the Injunctions of Islam with the request to declare the same un-Islamic. This review petition was dismissed *in-limine* by this Court vide its order dated 17.12.1995. For the sake of convenience Order dated 17.12.1995 is reproduced as under:-

“We have heard the petitioner at length. He has challenged sub-section (1) and (2) of Section 4 and Section 12 of Guardians and Wards Act, 1890 as being inconsistent with the injunctions of Islam. We have very minutely perused the impugned sections and we do not find them as being repugnant to the Injunctions of Islam. The petitioner could also not point out any injunction which was varied by these sections. This petition is without any merits and is dismissed in limine.”

- iii) Thirdly, another petition i.e. Shariat Petition No. 3/L of 2008 was filed by Ambreen Tariq Awan, Advocate in this Court wherein Sections 7, 17 and 27 of the Guardians and Wards Act, 1890 were challenged on the ground that these sections are repugnant to the Injunctions of Holy Quran and the Sunnah of Holy Prophet (Peace And Blessing Of Allah Be Upon Him), therefore, be declared as such. This Court vide its judgment reported in PLJ 2014 FSC 99 (Ambreen Tariq Awan, Advocate Vs. Federal Government of Pakistan through Secretary M/O Law & Justice, Islamabad) dismissed the petition. Operative part of the judgment is reproduced as under:-

“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.”

- iv) Fourthly, we are not here to answer the type of the Questions that have been formulated by the petitioners and termed as ‘unanswered questions’. Our mandate, as per Article 203-D of the Constitution of Islamic Republic of Pakistan, is to answer the question as to whether a particular law or provisions of the law is or is not repugnant to the Injunctions of Holy Quran and the Sunnah of the Holy Prophet (Peace And Blessing Of Allah Be Upon Him).
- (v) Fifthly, Section 25 of the Act neither enacts any law nor prescribes any rule, rather it regulates the situation where a ward leaves or is removed from the custody of a guardian of his person and the natural/certificated guardian moves the Court for return of the ward. The title of the guardianship would not entitle him/her for the return of the custody of the minor, unless he/she establishes that the return of the ward is in the interest of the minor.
- vi) Sixthly, the principle that father is natural guardian and lap of mother is cradle of God, stands subservient and subordinate to welfare of minor as contemplated by Section 25 of the Act, which is also in accordance with Islamic Jurisprudence.

vii) Seventhly, the prime purpose, paramount consideration and the ultimate object is the welfare of minor, which is a question of fact and is ensured by pressing into service the provisions of Section 25 of the Act by way of collecting material to substantially prove the fact that where the welfare of the minor lies and this process is absolutely in consonance with the spirit of the Act. True, the father being the natural guardian enjoys the right to have the custody of the minor provided the welfare of minor so demands. Reliance is placed on 1974 SCMR 305, (Rahimullah Choudhury Vs. Mrs. Syeda Helali Begum & others), relevant at page 320 is reproduced as under:-

“---The learned Judge observed that it raises a presumption of welfare of the minor, but this does not advance the argument for as against a mere presumption attributed to Muslim Law section 25 recognizes it as a right of the guardian that his ward who leaves or is removed from his custody be returned into his custody, but subject to his welfare. “Welfare” being a question of fact will, therefore, have to be resolved on the material placed before the Guardian Judge and not on the basis of any presumption.

38. We are, therefore, unable to accept the construction placed by Mr. Brohi, on section 25 of the Guardians and Wards Act. There are other reasons too. In the case of a certificated guardian the Court has in making his appointment already acted “consistently with the law to which the minor is subject”. The question to be decided under section 25 is, however, not the right of the guardian to obtain the custody of the ward as that right is given to him by the statute but the welfare of the ward. A natural or certificated guardian may turn out to be an undesirable person or the Court may find it not for the welfare of the minor

to deliver him into the custody of the guardian. It is, therefore, provided specifically that although the guardian is entitled to such custody no order will be made to that effect unless the Court is satisfied that it will be for the welfare of the ward.”

For convenience reliance is also placed on the Book Dur-Mukhtar (Vol II, pp. 276), which is reproduced as under:-

باپ کی قرابت پر کذافی الاختیار سنن ابو داؤد میں عبداللہ بن عمرؓ سے روایت ہے کہ ایک عورت نے کہا کہ یا رسول اللہ صلی اللہ علیہ وسلم یہ میرا بیٹا ہے میرا پیٹ اس کا ظرف تھا اور میری چھاتی اس کے دودھ کی مشک تھی اور میری گود اس کا گہوارہ اور جھولا تھا اور اس کے باپ نے مجھ کو طلاق دی اور چاہتا ہے کہ اس لڑکے کو مجھ سے چھین لے تو فرمایا رسول اللہ صلی اللہ علیہ وسلم نے اس کے رکھنے میں تواحق ہے جب تک کہ تو دوسرا نکاح کر لے اور اختیار شرح مختار میں سعید بن مسیب سے مروی ہے کہ عمر فاروق رضی اللہ عنہ نے اپنی زوجہ ام عاصم کو طلاق دی اور لڑکے کو لینا چاہا تو دونوں میں جھگڑا ہوا مقدمہ صدیق اکبر رضی اللہ عنہ کے پاس رجوع ہوا صدیق اکبر نے فرمایا کہ اے عمر اس کی رال لڑکے کے واسطے بہتر ہے تیرے شہد سے پھر لڑکا عورت کو دے دیا پرورش کے واسطے اور اصل اس روایت کی امام مالک کی منوط اور بیہقی اور مصنف ابن ابی شیبہ میں ہے کذافی فتح القدیر اور سنن ابوداؤد میں علی مرتضیٰ کرم اللہ وجہہ سے روایت ہے کہ زید بن حارثہؓ حضرت حمزہؓ کی دختر کو مکہ سے لائے یعنی مدینہ میں تو جعفر طیار نے کہا کہ میں اس کو پالوں گا میں احق ہوں میرے چچا کی بیٹی اور اس کی خالہ میرے پاس ہے علی مرتضیٰ نے کہا کہ میں احق ہوں کہ میرے چچا کی بیٹی ہے اور رسول اللہ کی بیٹی میرے پاس ہے وہ اس کی احق ہے پھر زید نے کہا کہ میں اس کا احق ہوں کہ میں اس کو مکہ سے لایا ہوں پھر رسول اللہ صلی اللہ علیہ وسلم نے فرمایا کہ صبیہ تو جعفر کے پاس اپنی خالہ کے ساتھ رہے گی اس واسطے کہ خالہ ماں کے برابر ہے۔

(در مختار، جلد دوم، ص 276)

5. Adverting to the Shariat Petition No.9/I of 2020, this petition with little variation contains almost the same facts. Since Section 7 of the Act has specifically been dealt with by this Court in its judgment reported in PLJ 2014 FSC 99 (Ambreen Tariq Awan, Advocate Vs. Federal Government of Pakistan through Secretary M/O Law & Justice, Islamabad) relevant portion has already been produced in

Para 4 (iii) above of this judgment. Therefore, this petition loses any significance and is not maintainable.

6. Last but not least, in fact in the garb of these petitions, the petitioners have urged their personal grudges against womenfolk by using defamatory and abusive language, terming them unconventional. Similarly, derogatory and contemptuous language, has been used against Courts by treating the delivered judgments brutal. Such an ill attitude and uncalled for approach of the petitioners is inappropriate, unjustified, unwarranted and seriously objectionable, therefore, stand deprecated and they are warned to remain careful for future.

7. In view of the above discussion, both the Shariat Petitions i.e. Sh. Petition No.8/I/2020 & Sh. Petition No.9/I/2020 are dismissed *in-limine*.

8. These are the reasons for our short order dated 29.10.2020.

MR. JUSTICE MUHAMMAD NOOR MESKANZAI
CHIEF JUSTICE

MR. JUSTICE SHAUKAT ALI RAKHSHANI
JUDGE

MR. JUSTICE DR. SYED MUHAMMAD ANWER
JUDGE

Dated, Islamabad, the
4th November, 2020
*Imran/***