THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

Miscellaneous Appeal No. 1541 OF 2013

1. Parveen Begam, Divorced W/o Mahfooj Khan, Aged about 35 years,

2. Ku. Mahjabi, Aged about 11 years, Minor, D/o Mahfooj Khan, Through guardian Mahfooj Khan.

3. Sakib, Aged about 9 years, Minor, S/o Mahfooj Khan, Through guardian Mahfooj Khan.

4. Sakir, Aged about 8 years, Minor, S/o Mahfooj Khan, Through guardian Mahfooj Khan.

All above are R/o Village Kalehara, Police Station Jabera, District Damoh (M.P.).

APPELLANTS

VERSUS

Mahfooj Khan, S/o Kallan Khan, Aged about 40 years, R/o Jawahar Ward, Garhakota, District Sagar (M.P.).

RESPONDENT

Present: (1) Hon'ble Shri Justice R.S. Jha.
(2) Hon'ble Shri Justice Rajendra Mahajan.

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For Appellants : Shri Vishal Dhagat, learned counsel.

For Respondent: Shri Tribhuvan Mishra, learned counsel.

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O R D E R

(Passed on the 10th Day of August, 2016)

As per: Rajendra Mahajan, J.

The appellants have preferred this appeal under Section 47 of the Guardians and Wards Act, 1890 (hereinafter referred

to as "the Act") being aggrieved by and dissatisfied with the order dated 06.04.2013 passed by the First Additional Sessions Judge, Damoh in Guardian Case No.03/11 titled Mahfooj Khan Vs. Parveen Begam and three others, whereby the respondent has been appointed as guardian of minor appellant Nos. 2 to 4 under Section 7 of the Act by allowing the application filed by him.

2. The respondent filed an application before the court below on 27.08.2011 under the provisions of Sections 7 and 8 of the Act and as per the rights of Hizanat (Custody) of minor child prevaling in Sunni Muslims governed by the Hanafi Law. His case in brief is that he got married to appellant No.1 Parveen near about 17 years before the date of filing of the application in village Kalehara, Tehsil Jabera, District Damoh according to Muslim rites and customs. From their wedlock, appellant Parveen gave birth to appellant Nos. 2 to 4 and a daughter Chandni. At present appellant Nos. 2 to 4 are minors and they are with appellant Parveen while Chandni, who is their eldest child, lives with him. As they were staying separately, appellant Parveen had filed an application under Section 125 of the Cr.P.C. claiming maintenance for herself and appellant Nos. 2 to 4 in the Court of Judicial Magistrate First Class, Damoh, which was registered as miscellaneous criminal case No.41/2010. The aforesaid case was finally disposed of

vide order dated 05.04.2011. The learned J.M.F.C. has refused to grant maintenance to appellant Parveen on the ground that she is living in adultery but he has granted maintenance to appellant Nos. 2 to 4 to the tune of Rs.800/- (rupees eight hundred) per month each till they attain majority.

3. The respondent has alleged that in the night of 08.04.2010 in his house at Garhakota town when he was in Sagar, his daughter Chandni saw appellant Parveen having sex with his neighbour Pappu @ Majid. On being seen in a such position, she asked Chandni not to disclose her physical relationship with Pappu to her father/respondent inspite of which she narrated the entire incident to him. Thereafter, he filed complaint case No.201/2010 in the Court of Judicial Magistrate First Class, Garhakota District Sagar against Pappu for his prosecution under Section 497 of the IPC, which is still pending.

4. It is further the case of the respondent before the court below that appellant Parveen neglects to take proper care of appellant Nos. 2 to 4 and that she is leading an adulterous life which is having an adverse impact upon their lives. Appellant Nos. 2 to 4 are living with appellant Parveen in village Kalehara, where no proper education facilities are available. Moreover, she is totally illiterate, and she does not have any independent source of income. As also she maintains them upon the

allowance being granted by him as per the court-order, whereas his financial condition is very sound. Under the circumstances, he wants to keep appellant Nos. 2 to 4 with him and to provide them proper education for betterment of their future lives. On the basis of the aforesaid assertions it is prayed by him that he be appointed the guardian of appellant Nos.2 to 4 and appellant Parveen be ordered to hand over their custody to him.

5. In the written statement filed by appellant Parveen, she has not disputed the facts that she got married to the respondent as per Muslim rites and customs, that from their wedlock she gave birth to appellant Nos. 2 to 4 and Chandni, that Chandni is their eldest child and that she resides with the respondent, that she and appellant Nos. 2 to 4 are presently residing in village Kalehara, that she has no independent source of income and that she maintains appellant Nos. 2 to 4 upon the maintenance allowance being given by the respondent and that the learned J.M.F.C. has not granted her maintenance allowance. However, she has denied the remaining allegations levelled against her by the respondent. Her stand is that the respondent had contracted a second marriage. After his second marriage, whenever she demanded money from him for her maintenance and that of the children, he physically assaulted and tortured her. On 27.05.2010, the respondent beat her up

and threw her out of their marital home on the false allegations of being immoral. Ever since, under compulsion, she and appellant Nos. 2 to 4 have been living with her parents in village Kalehara. She has alleged that the respondent does not want to give her maintenance allowance of Rs. 2400/- (rupees twenty four hundred) per month as per the court-order and, therefore, with the aforesaid ulterior motive, he has filed the application. She has also alleged that the respondent has three children with his second wife and, therefore, he and his second wife would not take proper care of appellant Nos. 2 to 4 while she, being the real mother, would take much better care of them. Hence, the overall welfare of appellant Nos. 2 to 4 lies with her. Upon the aforestated averments, she prayed for rejection of the application filed by the respondent.

6. Upon pleadings of the parties, the court below framed issues and thereafter recorded their evidence. In support of the claim, the respondent has examined himself as AW-1 and four witnesses namely, Mahboob Khan (AW-2), Mohd. Yasin (AW-3), Shayra Begam (AW-4) and Chandni (AW-5). On the other hand, appellant Parveen examined herself as NAW-1 and her father Mohd. Yusuf (NAW-2). The learned trial Judge, having closely analyzed the evidence on record, has held that appellant Parveen is living a life of adultery and immorality. Therefore, she has lost the right of keeping appellant Nos. 2 to 4 under

her custody (Hizanat). The court below has also held that the welfare of appellant Nos. 2 to 4 would be safer and more secured in the hands of respondent taking into consideration the overall prevailing factors and circumstances. Upon the aforesaid findings, the court below has allowed the application and appointed the respondent as guardian of appellant Nos. 2 to 4 with a direction to appellant Parveen to deliver their custody to the respondent. Hence, this appeal.

7. Learned counsel appearing for the appellants has submitted that there is no cogent and acceptable evidence on record that appellant Parveen is leading an immoral life. It is submitted that the finding of the learned trial Judge in this regard is totally based upon the evidence of Chandni (AW-5). While relying upon her evidence, the learned trial Judge has lost sight of the fact that Chandni is residing with the respondent and, therefore, the plausibility is there that she has given the evidence against appellant Parveen under the pressure of the respondent. It is submitted that the respondent has contracted a second marriage and that with his second wife he has three children. Therefore, the respondent and his second wife would not look after appellant Nos. 2 to 4 properly. It is submitted that as per the evidence on record appellant No.4 Sakir is mentally challenged. It is urged that in the circumstance, appellant Parveen would take proper and much

better care of appellant Nos. 2 to 4 being their real mother. It is submitted that this issue has not been properly considered by the court below and, therefore, the learned trial Judge has not decided the application in right perspective and has committed perversity and illegality. Thus, the impugned order is liable to be set aside. In the alternate, it is submitted that in case this Court upholds the impugned order, then visiting rights be given to appellant Parveen as the impugned order is lacking in this regard.

8. In reply, learned counsel appearing for the respondent has submitted that there is overwhelming evidence on record to the effect that appellant Parveen is living in adultery. Therefore, the learned trial Judge has rightly decided that she has lost the right of custody of the appellant Nos. 2 to 4. It is submitted that the learned trial Judge having examined the matter from all aspects/angles has recorded a proper finding that the welfare of appellant Nos. 2 to 4 lies with the respondent and, therefore, their custody is given to the respondent by appointing him their guardian. Thus, no interference with the impugned order is required to be made by this Court and the appeal be dismissed being meritless.

9. We have rendered our anxious consideration to the rival submissions made by the learned counsel for the parties at the Bar and perused the entire material on record.

10. The first point that arises for our consideration is whether appellant Parveen is living in adultery?

11. Respondent Mahfooj (AW-1) has testified that in pursuit of his business appellant Parveen and he went to Bhopal with their children Chandni and Ku. Mahjabi who is appellant No.2 herein. They stayed in Bhopal for about two years and six months. At that time, appellant Parveen ran away with a man. Thereupon, he lodged a report of her elopement at Police Station Jahangirabad, Bhopal on 19.08.1998. On the third day, she came back and, thereafter, he brought her and the children to his native place Garhakota, where he convened a Panchayat of his community in respect of her elopement. In the Panchayat, the Panchs directed her to live with her parents in village Kalehara. Some months later, he went to Indore for doing business. There, he contracted a second marriage with Sabra, who is the daughter of his maternal uncle and who is a divorcee with a child. When appellant Parveen's father heard about his second marriage, he sent her back with the children to live in his company. At that time, it was decided that appellant Parveen and appellant Nos. 2 to 4 and his second wife Sabra with her children would live in places namely Garhakota and Sagar respectively. He would regularly visit both the places in order to accompany them. His daughter Chandni (AW-5) told him that in his absence one neighbour Pappu @ Majid used to

visit their house and that she saw appellant Parveen having sex with him in a completely naked state. Thereafter, he filed a criminal complaint Ex.P-1 for the prosecution of said Pappu under Section 497 of the IPC in the Court of Judicial Magistrate First Class, Garhakota. Upon his complaint, criminal case No.201/10 is registered in the court against Pappu and the case is still pending. He has further deposed that appellant Parveen had filed an application under Section 125 Cr.P.C. seeking maintenance for herself and appellant Nos.2 to 4 from him in the Court of Judicial Magistrate First Class, Damoh, which was registered as miscellaneous criminal case No.41/10. In that case, the court passed final order on 05.04.2011, the certified copy of which is Ex.P-4. By recording a finding that appellant Parveen is living in adultery, the learned J.M.F.C. has refused to grant her maintenance.

12. The aforesaid evidence of the respondent is corroborated in material particulars by Mahbood Khan (AW-2), Mohd. Yasin (AW-3), Shayra Begam (AW-4) and Chandni (AW-5). It is pertinent to mention here that Shayra Begam is the wife of respondent's elder brother. She has specifically stated in para-4 of her deposition that appellant Parveen has illicit relations with some men. She has also stated that she tried her best to impress upon her not to have physical intimacy with other men, but in vain.

13. Chandni (AW-5) has stated in her evidence that when she lived with her mother/appellant Parveen in Garhakota, our neighbour Pappu used to visit our house in the absence of her father/respondent. One night, when she came back from the residence of her aunt Shayra (AW-4) after watching the T.V., she saw Pappu and her mother naked on the bed in an intimate state. She narrated the incident to her aunt Shayra. It is pertinent to mention herein that her aforesaid statement is corroborated by Shayra (AW-4) in para-2 of her deposition. Having perused meticulously and carefully the statement of Chandni, especially her cross-examination, we find that there is nothing in her cross to draw even a remote inference that the statement given by her against her mother is under the influence or pressure of the respondent. As per her deposition, she was about 16 years old at the time of recording her statement before the trial court. Thus, she was mature enough at that time to understand and anticipate the consequences thereof and adverse impact of the same upon the life of her mother. We, therefore, hold that her evidence is reliable on the point of the immoral and adulterous character of appellant Parveen. It is worth noting that the learned J.M.F.C. in para-7 of the order of maintenance Ex.P-4 has also given a finding that appellant Parveen is living in adultery. In para-15 of the written statement, it is mentioned that appellant Parveen had filed a revision against the order denying maintenance to her.

However, the revisional court has dismissed her revision. The record clearly indicates that both the said courts dealing with the maintenance case have placed reliance upon the evidence of Chandni while recording a finding that appellant Parveen is living in adultery.

14. From a perusal of the statements of respondent, Mahboob Khan (AW-2), Mohd. Yasin (AW-3) and Shayra Begam (AW-4), we find that there is nothing in their cross-examinations to discredit their evidence on the point of adulterous life of appellant Parveen.

15. Appellant Parveen (NAW-1) and her father Mohd. Yusuf (NAW-2) have simply denied the fact that appellant Parveen is living in adultery with Pappu in their evidence. However, they have not given any cogent reason to discredit the statements of the witnesses of respondent especially of Chandni (AW-5). Hence, their statements of denial when weighed against unshakeable and positive evidence adduced by the respondent pales into insignificance.

16. In the light of aforesaid discussion, we hold that appellant Parveen is leading an adulterous life. Thus, the finding given by the learned trial Judge in this regard is affirmed.

17. Now, the second point that arises for our consideration is whether the learned trial Judge is justified in appointing and

declaring the respondent as guardian of appellant Nos. 2 to 4.

18. Admitted facts of the case amongst others are that appellant Parveen and the respondent are biological parents of appellant Nos. 2 to 4 and that they are Sunni Muslims governed by the Hanafi Law. Hence, it will be first seen what are the provisions of grant of custody of minor children in the Hanafi Law. As per renowned Author Mulla on Mohomedan Law and the ratio laid down by this Court in Wazid Ali Vs. Rehana Anjum (AIR 2005 M.P. 141), a Hanafi mother is entitled to the custody of her minor male child until he has completed the age of seven years and of her minor female child until she has attained puberty i.e. age of 15 years. This right continues though she is divorced by the father of the child, unless she remarries in which case the custody belongs to the father. Failing the mother, the custody of the child belongs to other female relations i.e. maternal grand-mother, paternal grand-mother, full sister and so on in that order. According to Mulla, a female including the mother, who is otherwise entitled to the custody of a child, loses the right of custody (i) if she remarries a person not related to the child within the prohibited degrees, or (ii) if she goes and resides during the subsistence of the marriage, at a distance from the father's place of residence; or (iii) if she is leading an immoral life or (iv) if she neglects to take proper care of the child. In view of the said tenets of the

Hanafi Law, the learned trial Judge has rightly disqualified appellant Parveen from the guardianship of appellant Nos. 2 to 4 on the ground that she is living an immoral life.

19. We are fully aware of the propositions of law that while deciding the issue of custodial rights and appointment of guardian under the Act, the welfare of the child has also to be considered and has to be given due weightage keeping the facts and circumstances of the case in mind and the personal law. But Section 17 of the Act provides that if there is a conflict between the personal law to which the child is subject and the consideration of his/her welfare, the latter must prevail. In this regard, references may be made to the decisions rendered in the cases namely Chandrakala Menon Vs. Upin Menon 1993 (2) SCC 6; Shiela B. Das Vs. P.R. Sugasree AIR 2006 SC 1343; Nil Ratan Kundu and another Vs. Abhijit Kundu 2008 (9) SCC 413; Anjali Kapoor Vs. Rajiv Baijal 2009 III M.P.J.R. (SC) 169; Ali Munnisan Vs. Mukhtar Ahmad AIR 1975 All. 67; Hassan Bhat Vs. Ghulam Mohd. AIR 1961 J & K 5.

20. In the decisions reported in Mohammed Mehboob Khan Vs. Rahmit Bi and others (1977 V-II W.N. 79) and Rajkumar Vs. Indrakumari (1972 J.L.J. 1045), this Court has observed that the dominant factor for consideration of the court is the welfare of the child, which is not to be measured only in terms of money and physical comforts. The word "Welfare" must be

taken in its widest sense so as to embrass the material and physical well-being; the education and upbringing; happiness and moral welfare. The court must consider every circumstance bearing upon these considerations.

21. In a decision reported in R.V. Srinath Prasad Vs. Nandamuri Jayakrishna (AIR 2001 SC 1056), the Supreme Court has emphasized that the custody of child is a sensitive issue. It is also a matter involving the sentimental attachment. Such a matter is to be approached and tackled carefully. A balance has to be struck between attachment and sentiment of the parties towards the child and the welfare of child is a paramount importance.

22. Now, we apply the propositions of law aforenoted to the factual matrix of the case while proceeding to decide the second issue.

23. Respondent Mahfooj Khan (AW-1) has testified in paras-3 and 7 of his deposition that appellant Parveen is grossly negligent in taking care of appellant Nos. 2 to 4 and that her loose morals are also having an adverse impact upon their character. He has further testified that she is not paying attention towards their education. She and the remaining appellants are residing in village Kalehara, where the education facilities are only up to primary level i.e. 5th standard. Hence, the future of appellant Nos. 2 to 4 is in the dark if they remain

with her. He is in the business of shoe-selling and thereby he earns Rs.5,000/- to 6,000/- per month. With this income he would provide them good education while keeping them with him in Garhakota, where there are facilities for higher education as it is a big town.

24. On the other hand, appellant Parveen (NAW-1) has denied in her deposition that she is negligent in looking after appellant Nos. 2 to 4. She has further deposed that the respondent has three children with his second wife and that he lives with them. In the circumstance, if appellant Nos. 2 to 4 reside with them, then they would not get love and affection and care as she has been showering upon them. They will certainly get discriminatory treatment from them. She has also stated that appellant No.4 Sakir is mentally challenged, therefore, he needs special care which only she can provide to him being her mother. She has alleged that the respondent has filed the application with an ulterior motive which is that in case appellant Nos. 2 to 4 reside with them, then he need not pay her maintenance allowance of Rs.2400/- (rupees twenty four hundred) per month as fixed by the J.M.F.C. Court. Appellant Parveen in paras-9, 12, 13 and 15 of her cross examination has admitted that she is totally illiterate and that she can only put her signature. She has further admitted that she does not have any independent source of income and that

she is not doing any job to earn money. Appellant Nos. 2 to 4 and she live on the maintenance allowance being granted by the respondent. She could not state as to what level of education is available in village Kalehara. She has admitted the facts that when she was living with the respondent at Garhakota, appellant No.3 Sakib used to study in a private school and that the children of respondent's second wife are getting education in a convent school. Appellant Parveen's father Yusuf (NAW-2) has admitted in his cross examination almost all the material facts that have been admitted by appellant Parveen in her deposition.

25. Neither appellant Parveen nor her father Yusuf (NAW-2) has given any cogent and reliable evidence much less medical evidence to prove that appellant Sakir is mentally challenged. Hence, their evidence on the status of health of appellant Sakir is not reliable. Appellant Parveen had deposed before the trial court on 05.02.2013 and that time she has stated in para-10 of her evidence that the ages of appellant Nos. 2 to 4 are 14, 11 and 9 years respectively. Hence, it may be said that by this time each of them has become older by about two years. Therefore, they do not need the day to day care of appellant Parveen. On the other hand, it is the right time that they should get higher education for the betterment of their future lives. Hence, we give primacy to their higher education and moral values of life

over and above the love and affection. Taking into consideration the admissions made by appellant Parveen in her cross-examination, we may say with certitude that she is not in a position to provide appellant Nos. 2 to 4 higher education. In this view of the matter, we hold that the learned trial Judge has rightly appointed the respondent as guardian of appellant Nos. 2 to 4.

26. Upon the perusal of the impugned order, we find that the learned trial Judge has not granted visitation rights to appellant Parveen when appellant Nos.2 to 4 will be in custody of the respondent. Since appellant Parveen is their mother and and she is also the legally wedded wife of the respondent as their marriage still subsists and as they have so far been in her custody and care, we deem it just, proper and humane to grant her visiting rights in recognition of her motherhood. Accordingly, we grant her visitation right as under:

(i) The respondent shall allow appellant Parveen to spend sufficient time with appellant Nos. 2 to 4 at the time of their birthdays, festivals and all such other occasions which require celebrations such as good performance by them in the domain of education, sports and any other remarkable activity as also at the time of their illness.

(ii) The respondent shall not prevent appellant Nos. 2 to

4 from taking all sorts of gifts from appellant Parveen.

(iii) The respondent shall permit appellant Parveen to take appellant Nos. 2 to 4 to outings, movies, gardens and treats subject to the consent of appellant Nos. 2 to 4.

(iv) If any of appellant Nos. 2 to 4 expresses his/her desire to meet appellant Parveen, then the respondent shall not prevent them from doing so.

(v) Apart from the aforesaid rights, as the relationship between the parties still subsists, they shall be at liberty to make any other additional arrangements relating to residence and visitation that may be mutually agreed and decided by them.

27. In view of the discussion supra, the impugned order is confirmed with the addition of the aforestated visitation rights. Consequently, this appeal is dismissed. The parties are directed to bear their own costs of litigation.

(R.S. Jha)
Judge

(Rajendra Mahajan)
Judge

sp/-