

**ORDER SHEET**

**IN THE LAHORE HIGH COURT,  
BAHAWALPUR BENCH, BAHAWALPUR.  
JUDICIAL DEPARTMENT**

**WRIT PETITION NO.1092 OF 2017.**

Mst. Ashfan Shahid Vs. ADJ and others

Sr. No. of order/ proceeding	Date of order/ proceeding	Order with signature of Judge, and that of parties or counsel, where necessary.
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**30.04.2018 Ch. Riaz Ahmed, Advocate alongwith the petitioner.  
Raja Muhammad Sohail Iftikhar, Advocate for the respondent No.3.**

By filing instant writ petition in terms of Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, the petitioner has assailed the judgment dated 31.01.2017 passed by learned Addl. District Judge, Bahawalpur, by which appeal of the respondent No.3 was allowed and present petitioner was ordered to hand over the custody of her sister's daughter (bhanji) Laiba Chaudhary, also known as Faria Tahreem (minor) to respondent/real father of the minor.

2. Brief facts giving rise to this family litigation, culminating into this writ petition and necessary for its fair adjudication are that Ishfaq Ahmad-respondent No.3 (respondent) was married with Sabahat Chaudhary real sister of petitioner and out of this wedlock Laiba Chaudhary, (minor) was born in the year 2012 and to the bad luck of the minor and the family, Sabahat Chaudhary died immediately after giving birth to the minor. Thereafter the minor was brought up by her maternal grandmother, but unfortunately, she also died in the year 2014 and after her death minor was being brought up by the petitioner, real maternal aunt (khala),

homeopathic doctor by profession. The petitioner moved an application before learned Guardian Judge for her appointment as guardian of the minor, whereas the respondent also moved an application under Section 25 of the Guardian and Wards Act, 1890 for custody of the minor. Both the parties contested these petitions respectively. To resolve the controversy in between the parties, learned Judge Family Court, framed following issues:-

- “1. *Whether the petitioner is entitled to obtain the custody of minor? OPA Afshan Shahid.*
2. *whether the respondent is entitled to obtain the custody of minor from the petitioner OPR Ashfaq.*
3. *Whether the petitioner has no cause of action and the petition in hand is liable to be dismissed with special costs? OPR.*
4. *Whether the respondent has no cause of action and the petition in hand is liable to be dismissed with special costs? OPA.*
5. *Relief?”*

3. After recording of evidence of the parties and hearing arguments, vide consolidated judgment and decree dated 20.07.2016 learned Judge Family Court has allowed the application of the petitioner and dismissed the cross-application of the respondent.

Being aggrieved of the aforementioned judgment and decree, the respondent filed an appeal, which was allowed vide impugned judgment dated 31.01.2017 passed by learned Addl. District Judge, Bahawalpur, while observing as under:-

*“...The evidence available on record reveals that the appellant Ashfaq Ahmad is real father of minor Laiba Chaudhry/Faria Tehreem and admittedly the*

*appellant has not contracted second marriage after the death of his wife Sabahat Chaudhry. Said Sabahat Chaudhry died at the time of birth of minor and was the real sister of respondent Afshan Shahid. It appears that right after the birth the custody of the minor was with her maternal grandmother who has also expired in 2014. The respondent has three children and elder son of the respondent was aged about 16 years at the time of recording of evidence and admittedly the minor is not within the prohibitory degree and the minor girl could not be left at the mercy of her cousins (sons of respondent) when the respondent herself is away in her medical practice. Even otherwise the handing over of custody of the minor to the respondent would disintegrate the family of appellant as two children are living with the appellant and the minor daughter Faria Tehreem/Laiba Chaudhry is living with the respondent and the children would be complete estranged to each other by the passage of time and there would be no intimacy between them. The disintegration and living away from the father and other real brother and the mental and physical capability of minor may be effected with the passage of time which cannot be measured or compensated in terms of money and it would not be in the welfare of minor in the long run to stay away from real close family members. There is nothing available on record that the appellant has any such habit on his part which is detrimental to the minor and even there is nothing which could suggest that the appellant is in any manner is unable to maintain the minor and provide him the basic necessities of life. The sisters of the respondent are also available at home who would also be in the better position to look after and take care of the minor besides the appellant. No discredit is on the part of appellant which makes him disentitle for the custody of her real daughter Faria Tehreem..."*

4. Feeling dissatisfied, disgruntled and in dis-greement with the above judgment passed by learned Addl. District Judge, Bahawalpur, the petitioner has assailed the same by filing instant writ petition mainly on the grounds of against facts, law and as such the same is not sustainable.

5. It has been maintained by learned counsel for the petitioner that the judgment handed down by learned Addl. District Judge is against facts, law and issue-wise findings were not recorded and as such the same is liable to be set-aside. Reliance has been placed on case "Asadullah Khan vs. Abdul Karim" (1997 CLC 1334 Karachi). Regarding merits of the case, it has been argued with hardihood, temerity, vehemence and vigor by learned counsel for the petitioner that the petitioner is maternal aunt of the minor, the minor is being properly brought up by her from the very date of her birth, presently the minor is admitted in "Nursery" class in Enterprise School System, Bahawalpur campus, the petitioner is running clinic alongwith her husband and as such having sufficient source of income to properly bring up the minor. In support of this contention, reliance has been placed on case "Mst. Naseem Akhtar vs. District Judge, Multan and others" (2009 SCMR 1052) & "Sardar Hussain and others vs. Mst. Parveen Umer and others" (2004 PSC 760 Supreme Court of Pakistan).

6. Whereas learned counsel for the respondent has defended the impugned judgment while humbly submitting that the same is based on proper appreciation of evidence and following the para-meters set down by the Superior Courts for custody of the minor. In support of his submissions, learned counsel for the respondent has referred recent case reported as "Nasir Raza vs. Additional District Judge, Jhelum and another" (2018 SCMR 590).

7. In the light of above submissions of learned counsel for the parties, I have examined the record and the judgment impugned herein.

8. The facts of this case are almost admitted and it is an exceptional case, in which the parties have not levelled any false accusation against each other to establish their entitlement or dis-entitlement of its opponent for custody of the minor. As concluded by both the learned courts below, the financial status of both the parties is sound, they belong to well-educated and established families and of course in such scenario the task of the Court to answer the crucial question that with whom the welfare of the minor lies is a little bit difficult. From the testimony of the petitioner (PW-1) and her father (PW-2), it is established that the petitioner and her husband are running homeopathic clinic and as such are of busy in their professional engagements. The statement of PW-2 that the petitioner is running clinic for whole day negates the petitioner's plea that she is running clinic just for three hours in evening. Of course, the petitioner has two grown up sons Abu Bakar and Hamza and one daughter. There is no evidence on record that when the petitioner and her husband are busy in clinic, who look after the minor. In such circumstances, unsupervised/unchecked company of Laiba Chaudhary minor with two of her grown up cousins, admittedly "*ghayr mahram*" under the Islamic Law, cannot be patronized and approved by this Court, so as to live with maternal aunt and any immature choice of the minor of five years cannot be given precedence over the merits of the case.

9. Whereas the respondent has two other issues Taimor Ashfaq and Aziz Maheen from his deceased wife, who are living with him and being brought up and looked after by him and their paternal aunt (*phupoo*) Naseem Bibi aging fifty years. Whereas Zainab Bibi, issueless widow, paternal aunt of the respondent is also residing under the same roof and as such these minors are being brought up by the respondent and two family elders, having love and affection for the minors under joint family system. In the present case, the minor is not only being deprived of love and affection of her real father, but also from the company of loving, affectionate brother and sister. Of course it is quite easy to permit both the parties to continue the custody of the minors with them, but any such casual approach as of the learned Judge Family Court, cannot be treated as judicious or sagacious one, while exercising parental jurisdiction in guardian matters and in the long run its result will be very drastic and tragic, as the family will remain scatter, instead of stringing it together like beads and to my view, learned Addl. District Judge, while allowing the appeal of the respondent resorted to second option. Reliance is placed on case "Tariq Mehmood and others vs. Additional District Judge and others" (2016 MLD 1767 Lahore) & "Abdul Majeed vs. Additional District Judge Talagan and 2 others" (2009 CLC 1143 Lahore).

10. The judgment impugned herein is in line with Nasir Raza's case referred supra (2018 SCMR 590) and for ready reference the principle laid down therein is reproduced hereunder:-

*"7. We have heard the learned counsel for the parties and gone through the record. There is no denial of the fact that the father is the natural*

*guardian of the children. On account of their respective ages, the right of Hizanat of the minors no longer vests in their maternal grandmother. The petitioner, who is real father of the children, is ready and willing to look after the children and has the financial resources to fulfil their material needs and educational requirements. He has neither returned to his job abroad nor remarried keeping in view the welfare and best interest of his children. His mother, a younger sister of respondent No.2, is also available in the house to help him look after and raise the children. Therefore, prima facie, the best interest and welfare of the minors lies in handing over their custody to the petitioner, the real father. There is nothing on record to suggest and it has not even been alleged that he is unfit, unable or unwilling to perform his duties as a guardian of his children. In our opinion, it would be unjust and unfair to deprive the children of the company, love and affection of their real father. Specially so, where the father does not suffer from any legal disability that may deprive him from his legal right to have custody of his children."*

11. When confronted with well reasoned judgment delivered by learned Addl. District Judge, learned counsel for the petitioner could not point out any illegality, perversity, mis-reading or non-reading of evidence or material irregularity, or jurisdictional defect in it. The resume of above discussion is that it is in the interest and welfare of the minor that her custody be handed over to her real father, so that she may enjoy love and affection of her father and also company of her elder brother and sister. Consequently, the instant writ petition, being devoid of merits, is dismissed.

**(Mujahid Mustaqeem Ahmed)**  
Judge

APPROVED FOR REPORTING.

Judge