



**IN THE HIGH COURT OF JAMMU & KASHMIR AND
LADAKH AT SRINAGAR**

Reserved on: 09.07.2026

Pronounced on: 14.08.2026

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*Whether the operative part
or full judgment is
pronounced: **Full***

FAO (MAT) No.01/2025

SANA AFTAB

... APPELLANT(S)

*Through: - Mr. Altaf Naik, Sr. Advocate, with
Mr. Shabir Ahmad Najar & Ms. Seerat, Advocates.*

Vs.

MOHTASHEM BILLAH MALIK

...RESPONDENT(S)

*Through: - Mr. Altaf Haqani, Sr. Adv. with
Mr. Shakir Haqani Mr. Asif Wani, Advocate.*

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

01. Through the medium of present judgment, the afore-titled appeal challenging judgment dated 02.01.2025 passed by the learned Additional Judge, Family Court, Srinagar (hereinafter "the trial court") delivered in a petition filed by the respondent under Section 25 of the Guardian and Wards Act, 1890, is proposed to be disposed of. Vide the impugned judgment, the learned trial court has directed that custody of minor children of the parties be entrusted to the respondent herein subject to certain conditions.



02. Before coming to the grounds of challenge projected in the memo of appeal, it would be appropriate to give a brief background of the facts and chequered history of the present case. The marriage between the parties, who profess Islam as their religion, took place in Srinagar on 28.07.2015. The respondent, who was serving as Electrical Engineer in Qatar since 2013, re-located the appellant to Qatar and both of them started living at Qatar immediately after marriage. Out of the wedlock, two sons, namely, Malik Karim Billah was born on 17.10.2017 and Malik Rahim Billah was born on 04.11.2019. However, there was a marital discord between the parties which led to dissolution of their marriage in terms of judgment dated 29.03.2022 passed by the Family Court at Qatar. The said judgment came to be passed in two cross cases bearing No.882/2021 and 1300/2021 filed by the parties against each other. The Court at Qatar, while dissolving marriage between the parties, directed handing over of physical custody of the two minor children born out of the said wedlock to the appellant herein.

03. The appellant along with the minor children, instead of staying at Qatar, shifted to Kashmir (India) in the month of August, 2022. While traveling to India along with two



minor children, the appellant, it appears, procured fresh travel documents/passports of the minor children. The respondent herein filed a petition bearing WP(Crl) No.636/2022 before this Court, wherein it was contended that the appellant has kept the two minor children in illegal custody. The said writ petition came to be disposed of by the Writ Court by declining prayer of the respondent herein.

04. Aggrieved by the order of the Writ Court, the respondent herein filed an appeal bearing LPA No.216/2022. During the pendency of the appeal, the matter was settled and the appellant herein made a statement before the Court that she will go back to Qatar well before reopening of the school of her elder son, namely, Malik Karim Billah i.e. by 2nd January, 2023, so that education of her son does not suffer. She further undertook to take necessary steps for obtaining residency permit in respect of her younger son being his sponsor because of dissolution of her marriage with the respondent herein. The appeal was, accordingly, disposed of in terms of order dated 01.12.2022 as having been settled in terms of the statement/undertaking furnished by the appellant herein.

05. It appears that though the appellant did travel to Qatar in third week of December, 2022, however, she did



not take her two minor children along with her and she returned to Kashmir immediately thereafter. This prompted the respondent to file a contempt petition before this Court which was registered as CCP(D) No.04/2023. In the contempt petition, it was alleged that the appellant herein has violated the undertaking furnished by her before the Division Bench at the time of disposal of LPA No.216/2022. The Division Bench sought explanation of the appellant and she explained that upon reaching Qatar she intended to get residency permits of the children, but because of the cases filed by the respondent against her, she had to return to India as she was being summoned by the police authorities at Qatar. She further submitted that she incurred huge expenses for travelling to Qatar and for residing over there till February 2023, which shows that she did not deliberately and willfully commit any breach of the undertaking given by her to the Court. However, the Division Bench, feeling dissatisfied with the explanation tendered by the appellant, held her guilty of having committed breach of undertaking and she was sentenced to pay a token fine of ₹100. The LPA was revived with the direction for its fresh consideration on merits.



06. It is pertinent to mention here that the respondent has contended that the amount of token fine has not been deposited by the appellant but during the course of hearing, the appellant has placed on record a copy of the receipt issued by the Registry, which clearly shows that she has deposited the amount of token fine on 14.08.2020.

07. After revival of LPA No.216/2022, the same was disposed of in terms of order dated 24.09.2024, because the respondent herein had already filed a petition under Section 25 of Guardian and Wards Act before the trial court and, as such, the LPA had lost its relevance.

08. The respondent, in his petition filed before the trial court under Section 25 of the Guardian and Wards Act, sought custody of the two minor children on the ground that the appellant by relocating the wards from Qatar to India has put their academic and other interests to jeopardy. It was contended that the elder ward, Malik Kareem Billah, was undergoing studies in a world-class school, namely, Qatar International School, where he had the opportunity to excel academically as also in other fields of life. It was further contended that the appellant by relocating the two minor wards to India has exposed them



to a completely unknown social and linguistic atmosphere, as the minor wards have been born and brought up in a culture which is alien to Kashmiri culture and that they can only speak Arabic, English and French languages, which is entirely different from the atmosphere and culture prevailing in Kashmir. This, according to the respondent, is likely to have adverse impact on the psychological growth of the minor wards. It was further contended that as per the directions of the court at Qatar, the respondent could not have relocated the minor wards from Qatar and she not only violated the said direction of the Qatar court, but she also procured fabricated travel documents of the minor wards for facilitating their travel to India. It was also contended that the appellant has flouted the undertaking given by her to the Division Bench of this Court and this demonstrates that the conduct of the appellant has been blameworthy throughout. It was further contended that the appellant, after relocating the minor wards to India, did not take any steps to admit them to any school for a considerable period of time and instead she made false claims before the Division Bench of this Court that she had admitted the children to Foundation World School, Humhama. It was been submitted that the appellant has wasted two precious



academic years of the elder son, which exhibits that she does not have capability and capacity to take care of the welfare of the children. It was the further contention of the respondent that he is an Electrical Engineer holding a lucrative job at Doha, Qatar, as such, due to his financial stability and capacity, he is in a better position to take care of the welfare of the minor children and help them in becoming successful and responsible citizens.

09. The appellant contested the petition before the learned trial court by filing her objections, wherein she contended that as per the judgment passed by the court at Qatar, the custody of the minor wards has been handed over to her, therefore, the respondent cannot maintain petition under Section 25 of the Guardian of Wards Act, seeking custody of the minor children. It was further contended that the writ petition bearing WP(Crl) No.636/2022 filed by the respondent was dismissed by this Court and the LPA Bench has also not interfered in the said order. It was alleged by the appellant that with a view to honour the voluntarily commitment made by her to the LPA Bench, she went back to Qatar, but on reaching there, the respondent continued harassing and defaming her and he also filed false and frivolous cases against her. She was called by the police at



Police Station at Qatar and was pressurized to sign certain documents which were in Arabic language. As she was unable to read and understand contents of the documents, she refused to sign those documents. Thus, according to the appellant, because of the harassment meted out to her by the respondent at Qatar, she had to leave that place. It was contended that the respondent misled the court at Qatar by claiming that he is not being allowed to meet his children which is absolutely false and frivolous. It was contended that during the proceedings of the LPA, the appellant voluntarily at all times allowed the respondent to meet his children without any objection and further allowed him to retain their temporary custody for days together. It was contended that despite directions of the court at Qatar for payment of alimony to the appellant and the minor children, the respondent has not paid any amount to them. It was contended that if the minor children are relocated to Qatar, having regard to the nature of the job which the respondent is holding, he would not get enough time to look after the education, health, study and maintenance of the children as his job requires a lot of travel outside that country. It was further contended that the minor children are citizens of India and they cannot be removed from the



territory of India without the permission of their mother. It was contended that the appellant has not removed the minor children from Qatar in an illegal manner but the court at Qatar had given custody of the children to her and the appeal filed by the respondent against the said order has also been dismissed. It was contended that after the divorce and due to the ill-treatment of respondent, the appellant lost her job at Qatar and, therefore, it was not possible for her to live and settle over there, which prompted her to relocate to India, which is her home country.

10. Regarding the breach of undertaking given to the LPA Bench, the appellant has submitted that because of the hostile environment created by the respondent at Qatar, she had no option but to leave that State. Regarding the allegation of the respondent that she is suffering from psychological disease, the appellant has submitted that these allegations are absolutely false and defamatory. According to the appellant, because of the aggressive behaviour of the respondent, the minor children had suffered trauma which required therapy from a center at Srinagar for almost a year and thereafter the children have been admitted to a reputed school, namely, Delhi Public



School, Budgam. It was contended by the appellant that the respondent father has not contributed even a penny for admission of the children in the school or for their education and medical treatment.

11. In support of his case, the respondent examined himself as well as his father as also one more witness before the learned trial court whereas the appellant, besides examining herself as a witness, has examined her father and four more witnesses in support of her case.

12. The learned trial court, after analyzing the pleadings of the parties, the evidence on record and after hearing the parties, allowed the petition of the respondent father, directing handing over of custody of the two minor children in his favour subject to certain conditions. While doing so, the learned trial court took into account the conduct of the parties, standard of living and income of the parents, and age, gender and preference of the minors.

13. The aforesaid judgment of the learned trial court was challenged by the appellant herein in the first round of litigation before this Court by way of an appeal. The appeal was allowed by this Court in terms of judgment dated 08.09.2025 and the petition filed by the respondent father



was dismissed and the order of learned trial court was set aside. This Court, while passing the judgment dated 08.09.2025, observed that custody of the minors cannot be changed merely as a punitive measure against the conduct of the appellant or due to sound financial capacity of the respondent-father. It was also observed by this Court that changing the custody of minors from that of the appellant to the respondent would disrupt the settled environment of the minors in Kashmir where they have been residing for the last two years, as the same would run contrary to their welfare.

14. The aforesaid judgment of this Court came to be challenged by the respondent father by way of SLP(C) No.28934/2025, which came to be decided by the Supreme Court in terms of its judgment dated February 4th 2026. The Supreme Court, while setting aside the judgment of this Court passed on 08.09.2025, remanded the matter to this Court for reconsideration. It is pertinent to note here that the Supreme Court has, while remanding the matter to this Court, noted certain aspects which, according to the Supreme Court, have not been taken into consideration by this Court while passing the judgment dated 08.09.2025.



The aspects noted by the Supreme Court which have not been considered by this Court are enumerated hereinbelow:

- (I) The factors like conduct of the parties, their financial capacity, standard of living as well as comfort and educational of the children, are also required to be taken into consideration as this Court in holding that such factors are not very relevant and that the custody of the minor has to depend upon their welfare alone is not entirely correct.
- (II) This Court has not considered the effect and impact of conduct of the appellant mother in relocating the minor children from Qatar to India without obtaining the original passports from father, but rather by procuring fake, duplicate or fresh passports.
- (III) The impact of judgment and order of Qatar court dated 31.10.2023, whereby the custody order in favour of the appellant mother was revoked for the reason that she misconducted herself by removing the children from the jurisdiction of the said court without the consent of the father and permission of the court, has not been taken into consideration, which is a crucial material for the purposes of determining the custody of children.
- (IV) The impact of order of the Contempt Court holding the appellant guilty of committing



violation of her undertaking given to the High Court on 01.12.2022 has not been taken into consideration.

(V) In the criminal case regarding abuse and assault filed against the respondent before the court at Qatar, a clean chit has been given to the respondent and that there is no subsisting conviction against him.

(VI) That as per the findings recorded by the Family Court, Srinagar, the minor children have shown inclination to accompany the father to Qatar and the mediation report also contains material observations with regard to the same.

15. Before dealing with the aspects pointed out by the Supreme Court in its judgment dated February 4, 2026, it would be apt to notice the legal position as regards the factors required to be taken into consideration while deciding a custody petition pertaining to minor children.

16. In the above context, it has to be borne in mind that guardianship and custody are two distinct concepts. In Mohammedan law, father is the natural guardian of a minor child but the mother is entitled to “Hizanat” of the minor child. “Hizanat” means custody. Therefore, even if father happens to be the guardian of a minor child under

Mohammedan law, still then right of custody is also vested
FAO(MAT) No.01/2025 Page **13** of **47**



with the mother. While guardianship is a wider concept, the custody is narrower in its purview. A guardian means a person having the care of the person of a minor or his property or of both his person and property whereas custody refers to actual care, upbringing and day-to-day supervision of the child. The Allahabad High Court has, in the case of **Hashmat Ali vs Smt. Suraya Begum**, AIR 1971 All 260, while discussing the concept of Hizanat under Mohammedan law, made the following observations:

7. Under the Mahomedan Law the mother is entitled to the hizanat of her male child until he has completed the age of seven years and of her female child until she has attained puberty. The right continues though she is divorced by the father of the child unless she marries a second husband in which case the custody belongs to the father.

8. The word hizanat has been translated as "custody" by the authors on Mahomedan Law (See Mulla's Principles of Mahomedan Law, Sixteenth Edition, Article 352).

9. Ameer Ali in his Mahomedan Law, Volume II, Fourth Edition, quotes Tanwir-ul-Absar by pointing out that "the hazina is the woman to whom belongs the rearing up a child". He also quotes Fata-wai Alamgiri which is to the effect that "the mother is of all persons the best entitled to the custody of her infant children during the connubial relationship as well as after its dissolution". After quoting from Radd-ul-Muhtar he points out that it will be seen that this right belongs to her qua mother, and nothing can take it away from her except her own misconduct. At page 295 he further points out that among the Hanafis the accepted doctrine is that the mother's hizanat of a male child ends with the completion of his seventh



year. At page 310 he further points out that the mother can on no account give up her right of hizanat; for even if she were to obtain a khula in lieu of abandoning her right to her child's custody, the Khula will be valid and she will retain her right of hizanat.

17. From the foregoing analysis of the legal position, it is clear that under Mohammedan law, a mother is entitled to “Hizanat” of her male child until he has completed the age of seven years. It is further clear that right of “Hizanat” continues though she is divorced by father of the child, unless she marries a second husband, in which case the custody belongs to the father. It also appears from the aforesaid analysis of legal position that the right of mother to have custody of minor children cannot be taken away from her except on account of her own misconduct or her remarriage. Thus, even after the completion of age of seven years, a mother can have the custody of minor children provided she has not remarried or she has not indulged in a conduct which has made her unfit for continuing with the custody of the minor children.

18. That takes us to the question as to what are the factors which are to be taken into account while considering the issue with regard to grant of custody of minor children. The Supreme Court has, in the case of **Rosy Jacob v.**



Jacob A. Chakramakkal, (1973) 1 SCC 840, after noticing the provisions of Section 25 of the Guardian and Wards Act, observed that the said provision is attracted only if a ward leaves or is removed from the custody of a guardian of his person and the Court is empowered to make an order for return of the ward to his guardian, if it is of the opinion that it will be for the welfare of the ward to return to the custody of his guardian. The Supreme Court further observed that the court is entrusted with a judicial discretion to order return of the ward to the custody of his guardian, if it forms an opinion that such a return is for ward's welfare. In the same case, the Supreme Court has, while considering the factors which are required to be taken into account for deciding the issue with regard to custody of the minor children, made the following observations:

“15. In our opinion, Section 25 of the Guardians and Wards Act contemplates not only actual physical custody but also constructive custody of the guardian which term includes all categories of guardians. The object and purpose of this provision being ex facie to ensure the welfare of the minor ward, which necessarily involves due protection of the right of his guardian to properly look after the ward's health, maintenance and education, this section demands reasonably liberal interpretation so as to effectuate that object. Hyper-technicalities should not be allowed to deprive the guardian the necessary



assistance from the Court in effectively discharging his duties and obligations towards his ward so as to promote the latter's welfare. If the Court under the Divorce Act cannot make any order with respect to the custody of Ajit alias Andrew and Maya alias Mary and it is not open to the Court under the Guardians and Wards Act to appoint or declare guardian of the person of his children under Section 19 during his lifetime, if the Court does not consider him unfit, then, the only provision to which the father can have resort for his children's custody is Section 25. Without, therefore, laying down exhaustively the circumstances in which Section 25 can be invoked, in our opinion, on the facts and circumstances of this case the husband's application under Section 25 was competent with respect to the two elder children. The Court was entitled to consider all the disputed questions of fact or law properly raised before it relating to these two children. With respect to Mahesh alias Thomas, however, the Court under the Divorce Act is at present empowered to make suitable orders relating to his custody, maintenance and education. It is, therefore, somewhat difficult to impute to the legislature an intention to set up another parallel Court to deal with the question of the custody of a minor which is within the power of a competent Court under the Divorce Act. We are unable to accede to the respondent's suggestion that his application should be considered to have been preferred for appointing or declaring him as a guardian. But whether the respondent's prayer for custody of the minor children be considered under the Guardians and Wards Act or under the Indian Divorce Act, as observed by Maharajan, J., with which observation we entirely agree, "the controlling consideration governing the custody of the children is the welfare of the children concerned and not the right of their



parents". It was not disputed that under the Indian Divorce Act this is the controlling consideration. The Court's power under Section 25 of the Guardians and Wards Act is also, in our opinion, to be governed primarily by the consideration of the welfare of the minors concerned. The discretion vested in the Court is, as is the case with all judicial discretions to be exercised judiciously in the background of all the relevant facts and circumstances. Each case has to be decided on its own facts and other cases can hardly serve as binding precedents, the facts of two cases in this respect being seldom — if ever — identical. The contention that if the husband is not unfit to be the guardian of his minor children, then, the question of their welfare does not at all arise is to state the proposition a bit too broadly and may at times be somewhat misleading. It does not take full notice of the real core of the statutory purpose. In our opinion, the dominant consideration in making orders under Section 25 is the welfare of the minor children and in considering this question due regard has of course to be paid to the right of the father to be the guardian and also to all other relevant factors having a bearing on the minor's welfare. There is a presumption that a minor's parents would do their very best to promote their children's welfare and, if necessary, would not grudge any sacrifice of their own personal interest and pleasure. This presumption arises because of the natural, selfless affection normally expected from the parents for their children. From this point of view, in case of conflict or dispute between the mother and the father about the custody of their children, the approach has to be somewhat different from that adopted by the Letters Patent Bench of the High Court in this case. There is no dichotomy between the fitness of the father to be entrusted with the custody of his minor children and considerations of their welfare. The father's



fitness has to be considered, determined and weighed predominantly in terms of the welfare of his minor children in the context of all the relevant circumstances. If the custody of the father cannot promote their welfare equally or better than the custody of the mother, then, he cannot claim indefeasible right to their custody under Section 25 merely because there is no defect in his personal character and he has attachment for his children—which every normal parent has. These are the only two aspects pressed before us, apart from the stress laid by the husband on the allegations of immorality against the wife which, in our firm opinion, he was not at all justified in contending. Such allegations, in view of earlier decisions, had to be completely ignored in considering the question of custody of the children in the present case. The father's fitness from the point of view just mentioned cannot override considerations of the welfare of the minor children. No doubt, the father has been presumed by the statute generally to be better fitted to look after the children — being normally the earning member and head of the family — but the Court has in each case to see primarily to the welfare of the children in determining the question of their custody, in the background of all the relevant facts having a bearing on their health, maintenance and education. The family is normally the heart of our society and for a balanced and healthy growth of children it is highly desirable that they get their due share of affection and care from both the parents in their normal parental home. Where, however, family dissolution due to some unavoidable circumstances becomes necessary the Court has to come to a judicial decision on the question of the welfare of the children on a full consideration of all the relevant circumstances. Merely because the father loves his children and is not shown to be otherwise undesirable cannot necessarily



lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him as against the wife who may also be equally affectionate towards her children and otherwise equally free from blemish, and, who, in addition, because of her profession and financial resources, may be in a position to guarantee better health, education and maintenance for them. The children are not mere chattels : nor are they mere play-things for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them. The approach of the learned Single Judge, in our view, was correct and we agree with him. The Letters Patent Bench on appeal seems to us to have erred in reversing him on grounds which we are unable to appreciate.”

19. Again, the Supreme Court has, in the case of **Nil Ratan Kundu & another v. Abhijit Kundu**, (2008) 9 SCC 413, while culling out the principles governing custody of minor children, observed as under:

“52. *In our judgment, the law relating to custody of a child is fairly well settled and it is this: in deciding a difficult and complex question as to the custody of a minor, a court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a human problem and is required to be solved*



with human touch. A court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor."

20. The aforesaid legal position has been reiterated and reaffirmed by the Supreme Court in its later judgments on a consistent basis. Reference in this regard is made to the judgement of the Supreme Court in the case of **Smriti Madan Kansagra v. Perry Kansagra**, (2021) 12 SCC 289. In the said case Supreme Court held that while exercising *parens patriae* jurisdiction, the Courts would be guided by the sole and paramount consideration of what would best subserve the interest and welfare of the child, to which all other considerations must yield. The Supreme Court further went on to observe that the courts must not allow the determination to be clouded by the *inter se*



disputes between the parties and the allegations and counter-allegations made against each other with respect to their matrimonial life. In the same judgment, the Supreme Court also observed that educational opportunities which would be available to the child is an aspect of great significance while determining the best interest of the child.

21. A Division Bench of the Karnataka High Court has, in the case of **Savitha Seetharam vs. Rajiv Vijayasathathy Rathnam**, 2020 SCC OnLine Kar 2747, while dealing with issue of custody of children, discussed the concept of shared parenting. It would be profitable to notice the following observations made by the Court:

25. We have referred to the principle of shared parenting which is defined to include shared parenting authority as well as shared parenting responsibility in the day-to-day upbringing and welfare of the children, as it has evolved over the decades, in the context of custody of minor children. The Hon'ble Supreme Court in a catena of decisions has held that in dealing with the matter concerning a minor, the Court has a special responsibility and it is the duty of the Court to consider the welfare of the minor and to protect the minor's interest. Over a period of time, the concepts of custody and visitation rights have transformed themselves into the responsibility of parents towards children. A central theme of this transformation is the emphasis on parental responsibility which requires that the child should be treated as an



individual having his or her own capabilities and limitations as well as independent opinions. A child is not an appendage of his parents. The focus of attention must actually be on the child.

26. *The United Nations Convention on the Rights of the Child, 1989, has emphasized that a child should not be separated from his or her parents against his or her will except when competent authorities, subject to judicial review, determine in accordance with applicable law and procedures, that such separation is necessary in the best interests of the child. The principle of best interest of the child is also a variable principle inasmuch as what is in the best interest of the child in one case may not be so in another case. Each case must be looked at individually by focusing on the special facts and circumstances so as to envisage the pros and cons while passing an order on the custody of the child. Article 12 of the said Convention clearly states that the views of the child who is capable of forming his or her own views must be given due weightage in accordance with age and maturity of the child by the court and other authorities. The parents or, as the case may be, the legal guardians have a primary responsibility for the upbringing and development of the child for, the best interest of the child must be their basic concern. In this regard, we have referred to the concepts of joint legal custody and joint physical custody in various over-seas jurisprudence and we find that joint physical custody is a species of joint legal custody inasmuch as the goal must be to encourage shared and co-operative parenting after the separation of parents, bearing in mind the best interests of the child which is the paramount consideration. Thus, the welfare principles which are in the interest of the child, assume importance. Therefore, prior to passing of the decree of divorce, it is necessary to seek a parenting plan post-divorce from the parties themselves. In this regard, we have also referred to the report of the Law Commission*



on adopting the shared parenting system in India where equal legal status of both parents with respect to guardianship and custody is emphasized. The Law Commission Report also highlights the factors to be considered for the best interest standards, which we have extracted and also determined the preference of the child.

27. *In India, the norm that the father is the natural guardian of the child is no longer valid and there have been instances where the mother is given the custody with visitation rights to the father or vice versa. In Kumar V. Jahgirdar v. Chethana Ramatheertha, [(2004) 2 SCC 688], (Kumar v. Jahgirdar), the Hon'ble Supreme Court observed that the mother is not always the natural guardian and the custody need always be given to her. In Rosy Jacob v. Jacob A. Chakramakkal, [(1973) 1 SCC 840], (Rosy Jacob), the Hon'ble Supreme Court observed that it is necessary to strike a just and proper balance between the requirement and welfare of the minor child and the rights of their respective parents, over them. In Gaurav Nagpal v. Sumedha Nagpal, [(2009) 1 SCC 42], (Gaurav Nagpal), while dealing with Section 26 of the Hindu Marriage Act, 1955, it was observed that with respect to the custody, maintenance and education of the minor children, orders could be passed consistently with their wishes, wherever possible. That while considering the issue of custody of minor child, the paramount consideration is the welfare of the child and not the rights of the parents under a statute for the time being in force. The departure from the principle that the father is the natural guardian of the child was more emphatic in Sheila B. Das v. P.R. Sugasee, [(2006) 3 SCC 62], (Sheila B. Das), wherein it was observed that either parent, provided he or she is financially stable and able to take care of the child, is fit to be the guardian. In the said case, the custody of the twelve year old minor daughter was given to the father (an*



advocate) with visitation rights to the mother (a doctor).

22. 257th report of Law Commission of India on guardianship and custody, which are two different terms, has discussed the considerations for deciding child custody cases. These considerations are as follows:

- a. Factors to consider for the Best Interest Standard
- b. Determining the Preference of the Child
- c. Access to Records of the Child
- d. Grand-parenting Time
- e. Mediation
- f. Relocation
- g. Decision Making
- h. Parenting Plan
- i. Visitation

Thus, shared and equal guardianship is recommended by the Law Commission. However, joint custody has been provided as an option.

23. From the foregoing analysis of the legal position on the subject, it is clear that while deciding the matters relating to minor children, the factors like conduct of the parties, conduct of the parents, their financial capacity, the comfort and education of the children, may be essential for determining the said issue but the



paramount consideration has to be the welfare of the children.

24. It has to be taken into consideration that a child wants to share his joys and sorrows with both his parents simultaneously but for warring parents, the custody of the children becomes a matter of ego, which ultimately adversely impacts the overall development of the children. While considering the matters relating to custody of the minor children, it has to be kept in mind that the child should not feel that he is a product of a broken family, as such a feeling has a negative impact on the tender mind of the child. In the absence of the association of his both parents, a child misses completeness of his relationship. Justice Roshan Dalvi of Bombay High Court, has in one of the workshops on child custody, aptly interpreted the word “FAMILY” as “father and mother I love you”. Thus, more than the legal jargon, a Court while deciding a custody matter of minor children has to take into consideration the best interests of the minor children.

25. Turning to the facts of the present case, the first aspect which the Supreme Court has, vide its judgment



dated 4th February, 2026, asked this court to consider is the conduct of the parties, their financial capacity, their standard of living and comfort and education of the children. In this regard, the contention of the respondent father is that conduct of the appellant mother has not been up to mark. Much emphasis is being laid on the instance relating to relocation of children from Qatar to India on the basis of procured duplicate passports in violation of orders of the Qatar court.

26. In the above context, it is to be noted that the court at Qatar had clearly vide its judgment, while deciding two cross lawsuits filed by the parties against each other, issued a direction for handing over custody of the children to the mother along with all personal documents, including personal and health cards, birth certificates and other identification documents of children, although it is mentioned in the body of the judgment that these documents would exclude the passports. It is true that the appellant removed the children from the State of Qatar and relocated them to India by procuring duplicate passports of the children,



which ultimately resulted in revocation of custody order in her favour by the orders of court at Qatar later on but if we have a look at the judgment of the Qatar court, a translated copy whereof has been placed on record by the respondent husband along with his pleadings, it has been clearly held by the court at Qatar that conditions of custody in favour of the mother have been met and the objections of the respondent father are devoid of any evidence. The court further observed that the allegations of the respondent that mother is psychologically ill and not eligible for custody, are unsubstantiated statements, devoid of any supporting evidence. Thus, on merits, the court at Qatar has clearly held the mother entitled to custody of the minor children. Merely on the basis of violation of a condition imposed by the court at Qatar for not relocating the children out of Qatar would not affect or alter the superior claim of the mother to have the custody of minor children, which has been vindicated on merits by judgment delivered by the court at Qatar.

27. This Court has to take into account the circumstances in which the appellant would have been



prompted to take the extreme step of violating the condition of custody of not leaving the State of Qatar. After the divorce of the appellant and termination of her employment over there, she was left alone in an alien country with nobody to support her. Under these compelling circumstances, she, in violation of the order of custody of children, relocated them to India. Although the violation of court order by the appellant cannot be condoned, yet for the purpose of considering the question as to whether her said conduct is of such a serious nature as would disentitle her to hold the custody of the minor children, the background, in which she was compelled to do so, requires a serious consideration. This Court is of the considered opinion that having regard to the facts and circumstances under which she was compelled to take such extreme step, as narrated hereinbefore, the finding of the Qatar court that she was best suited to hold the custody of the minor children would not get obliterated and her such conduct would not by itself disentitle her from holding the custody of the minor children, if otherwise, it is in best interests of their welfare.



28. The second instance, which has been highlighted by the respondent, is with regard to violation of the undertaking given by her to the LPA Bench of this Court. There is no doubt to the fact that the appellant did violate the undertaking given to the LPA Bench and for that she was also convicted and punished by imposing token fine for having committed contempt of the court. However, the question whether this conduct of the appellant would disentitle her to claim custody of the minor children, also needs to be considered in the backdrop of the facts as narrated hereinbefore.

29. The appellant did try to reconcile with the fact of settling at Qatar along with her children by proceeding to Qatar in third week of December 2022, but again she found atmosphere over there hostile against her, which prompted her to come back to India and risked the commission of the offence of contempt of court. Thus, the appellant is guilty of violating not only the conditions imposed by the court at Qatar but also the condition imposed by the LPA Bench of this Court. However, this court is of the considered opinion that



violation of the conditions imposed by this Court or by the court at Qatar would not by itself make the appellant a bad mother so as to disentitle her to claim the custody of the minor children if otherwise it is in the best interests and welfare of the children to be with their mother.

30. Learned Senior Counsel appearing for the respondent has, while highlighting the aforesaid violations made by the appellant, contended that these violations disentitle her to claim custody of the minor children. To support his contention, the learned Senior Counsel has relied upon the judgment of the Supreme Court in the case of **Smt. Surinder Kaur Sandhu vs. Harbax Singh Sandhu and another**, (1984) 3 SCC 698, wherein it has been held that if a parent obtains duplicate passport of a child on untrue representation that original passport was lost, the said conduct of the parent would disentitle him or her to the custody of the child.

31. The facts of the aforesaid case were entirely different, inasmuch as in that case the wife had obtained an order of probation for the husband, who had offered solicitation of committing murder of his wife but he abused the said



magnanimity of his wife and ran away with the child soon after the probationary period was over, after procuring duplicate passports. In the present case, the situation is different. The appellant mother has not received any magnanimity from the respondent which she has misused. In fact, the material on record shows that the respondent had filed a lawsuit against her before the court at Qatar, whereby he had sought custody of the children, separation between the parties on the grounds of damage and disagreement, with a further prayer that the appellant should pay to him fee and expenses. However, his lawsuit came to be dismissed by the court at Qatar while allowing the lawsuit filed by appellant against him. It also appears from perusal of the record that the appellant had filed a criminal case against the respondent before the court at Qatar, wherein he was found guilty of committing physical assault upon the appellant and he was sentenced to pay a fine of 5,000 riyal for remedying the damage caused to the victim-appellant herein, in terms of judgment dated 31.01.2022. Although the conviction of the respondent was set aside by the court of appeal at Qatar, yet the same has been done on technical grounds and not on merits. Therefore, the ratio laid down in the aforesaid case as relied



upon by learned Senior Counsel appearing for the respondent, cannot be made applicable to the present case.

32. That takes us to the factors relating to financial capacity and standard of living, comfort and education of the children. There is no doubt to the fact that the respondent is financially well-off and resourceful as compared to the appellant. It can also be inferred that standard of living of the respondent would be higher as compared to that of the appellant, having regard to their financial status. The question arises as to whether financial capacity and standard of living can be a determinative factor for deciding the issue relating to custody of minor children.

33. The consistent legal position that can be deduced from the judgments of the Supreme Court on the issue is that while financial capacity of respective parents can be a factor to be considered while deciding an issue with regard to custody of minor children, but it does not play a predominant role in deciding such issue. Greater economic prosperity of the father is not a guarantee of the welfare of a minor and it does not disturb the presumption in favour of the mother while deciding custody. So, merely because the respondent father earns a handsome income, does not



ipso facto make him more suitable person to hold custody of the minor children. Similarly, the standard of living of the disputant parents, would not by itself be a factor to determine the dispute regarding custody of the minor children.

34. That takes us to the avenues of education of the minor children, which the appellant can offer to them and the respondent would be able to provide to them. It has been contended by the respondent that he had managed the admission of the elder child in a reputed school at Qatar, which is of international standard whereas the appellant, instead of admitting the children to any school in Kashmir, has wasted their two academic sessions before admitting them to a school which is not of the same standard as the school in Qatar.

35. It is true that there is material on record to show that the respondent father had admitted the elder ward to a school at Qatar which is claimed to be of international standard, that would pave the way for admission of the elder ward to prestigious institutions in Britain but I do not find any cogent material on record that would go on to show that standard of education in Qatar is anything better than the standard of education in India, particularly in Kashmir.



It is a fact of common knowledge that Delhi Public School is one of the prestigious institutions in this part of the world and as per the material on record, the appellant has managed admission of the two children in the said school. It is not a case where the respondent had admitted the wards in a school located in an advanced country like America or Britain, where the standard of education is definitely higher than the standard of education in India, which prompts thousands of students go to those countries to educate themselves, but it is a case where the elder child of the parties was admitted to a school in Qatar, which may be a wealthy country, but it is definitely not an educational hub of the world and in any case, not a country which can boast of higher standard of education than India. The learned trial court, by presuming that education standard at Qatar is higher than the education standard in Kashmir, it seems, has got swayed away by the petrodollar wealth of State of Qatar.

36. Here it will be pertinent to mention that the respondent has obtained his academic and professional education in Srinagar, which enabled him to get a prestigious job in a country like Qatar and it is only because of the standard of education which we have in Kashmir that



he has been able to make a mark at an international level. So, the contention of the respondent that the standard of education in Qatar is in any way better than the standard of education in Kashmir is wholly fallacious and without any material to support.

37. The next consideration which the Supreme Court has asked this Court to take into account is the impact of relocating the children to Srinagar on the basis of duplicate passports. As has already discussed hereinbefore, the situation which prevailed in Qatar for the appellant after her divorce and after she lost job in Qatar, compelled her to leave that place and having regard to the acrimonious relationship which she was having with her husband, who had also filed cases against her and had also assaulted her, regarding which he was convicted by a criminal court in Qatar, her act of procuring duplicate passports for her children may not be legally correct but her said conduct would not disentitle her to claim custody of the minor children if it is otherwise in the interests and welfare of the children.

38. Regarding violation of condition of the Qatar court relating to removal of children from the jurisdiction of the said court without consent of the Court over there, it has

FAO(MAT) No.01/2025 Page 36 of 47



already been narrated hereinbefore that revocation of custody order on the basis of said violation is based on technicality and it does not take away the merits of the findings of the court at Qatar that the appellant mother is best suited to have the custody of the minor children.

39. That takes us to the preference of the minor children, which is absolutely crucial for decision of this case. The learned trial court, while interacting with the minor children, had gathered an impression that they are more inclined towards their father than their mother. It was also noted by the learned trial court that the children were willing to accompany their father to Qatar as they have positive attitude towards him, even though they have not lived with him for last two years. According to the learned trial court, the bond of the children with their father is genuine and something which was not tutored.

40. This Court, in the previous round of litigation while deciding the appeal, had also interacted with the minor children. In judgment dated 08.09.2025, this Court noted that upon interaction with the children, it was observed that the elder child did not express any resentment towards either of the parents. It was also observed by the Court that the said child was happy with his performance in the school



in the recent examination and the child further candidly stated that probably a maid would take care of him if he is sent to Qatar. The Court, upon interaction with the children, further observed that they were not aware about the exact situation and that answer with regard to preference of either of the parents cannot be objective from the children of such tender age as the same would depend upon the surrounding circumstances or leniency by a particular parent etc. etc.

41. It appears that while the matter was pending before the Supreme Court, the parties were sent for mediation and as per the mediation report, both children expressed an inclination towards joining their father and that they appeared comfortable with the prospect of being without their mother.

42. After conclusion of the arguments, this Court also had an occasion to interact with the two children for about 40 minutes. While the younger child appeared to be more inclined towards his father but he categorically stated that he cannot live with his father in the absence of his mother. The younger child, obviously because of his tender age, was not much aware as to what was going around, he was more



interested in playing with the things lying in the chamber and was running around here and there. However, the elder child appeared to be more rational and more receptive during his interaction with the Court. The elder child categorically stated that while he is enjoying love and affection of both his parents, including his father, and he would also love to be with both parents together but because of the divorce, it is not possible. He further stated that he has now settled down in Kashmir and made friends in his school but he would love to travel to Qatar to meet his father during vacation. He further stated that his younger brother is naughty, but he wants to be in his company.

43. Upon initial interaction with the elder son, the Court got an impression that he may have been tutored by his mother with whom he has been living for past several years but when the conversation proceeded ahead, this Court got convinced that he is expressing his opinions independently without any influence from any side. The elder child further stated that he has very little memories of his life at Qatar and that he is doing well in his studies over here. He further stated that he is satisfied with the school teachers. He was not comfortable with the idea of studying at Qatar again. From



the interaction of the Court with the children, it does appear that they have settled down with the atmosphere in Kashmir and that they are feeling comfortable in the school in which they are studying at present. While both the children are deeply in love with their father but they are not comfortable with the idea of leaving their mother and staying with their father.

44. This Court also thinks it appropriate to note the positive conduct of the appellant-mother in the upbringing and development of the two minor children. In an acrimonious marital discord between the spouses, which ends in a divorce, normally the parent who is in custody of the minor children, tutors and poisons the minds of the minor children against the other parent, which results in development of hatred in their mind towards the parent who has been deprived of the custody of the children. However, in the instant case, throughout the proceedings, this Court has noted that the appellant mother has never tutored or poisoned the minor children against their father. Whenever she was asked to hand over the temporary custody of the minor children to their father, without any order of the Court, she volunteered to hand over the custody to the father. The credit goes to the lady that she



has not allowed the minor children to get distanced from their father, either emotionally or physically. This conduct of the appellant mother needs to be appreciated and it becomes a determinative factor for deciding this custody battle.

45. As against this, it seems that the respondent-father is fighting a battle of ego with the appellant-mother. Despite order of the court at Qatar to pay alimony and maintenance to his wife and children, he has not paid any maintenance to the children. Merely because he has personally and physically attended the Court hearings by coming all the way from Qatar to Srinagar, would not go on to show that he is more suitable to have the custody of the children. As per the direction of the Qatar court, the respondent was obligated to pay 3,000 riyals as comprehensive monthly alimony for the minor children but the same has not been paid by him to the minor children.

46. It is the contention of the respondent that because the mother did not adhere to the conditions set down by the court at Qatar while handing over custody of the children to her, therefore he did not pay the monthly alimony to the children. The said argument can very well be advanced to avoid the payment of monthly alimony to the minor children



but it reflects upon the moral conduct of the father, who was obliged to take care of the expenses relating to upbringing and education of the minor children even in the absence of any court order. Instead of considering it as his moral obligation to take care of maintenance of the minor children, the respondent-father applied to the court at Qatar and got the maintenance order revoked even in respect of the minor children by procuring order dated 29.04.2025, thereby avoiding his moral responsibility of maintaining the minor children. This reflects badly upon the conduct of the respondent. When confronted with this contention, the respondent came up with an application annexing therewith the details of expenses which he has incurred on his children after their relocation to Srinagar. These expenses include the expenses of Rs.6020, Rs.3500, Rs.3850 in connection with vaccination of the minor children, Rs.3300, Rs.5000, Rs.2000, Rs.1490 and Rs.3700 in connection with ophthalmological treatment of the elder son, meaning thereby that excepting these expenses, he has not incurred even a penny on the upbringing, food, clothing and education of the children during all these years right from the year 2022 till today. Incurring an expenditure of a meagre sum of something like



Rs.30,000/ during the last four years does not mean that the respondent father has discharged his moral obligation of taking care of the needs of his children, leaving aside the alimony which he had to pay to his ex-wife.

47. It has been submitted by the respondent that he had made an offer to the Court that he would pay an alimony of Rs 25.00 lakhs and deposit the same with the Registry of the Court if children are relocated to Qatar. The offer made by the respondent father should have been unconditional and subject to the decision of the Court. A father is not expected to make offers for maintaining his children on conditions. The love of a father towards his minor children has to be unconditional and unqualified, which unfortunately the respondent father has not exhibited from his conduct.

48. There is yet another aspect of the matter which needs to be considered. The respondent father is residing in Qatar, whereas the children are citizens of India. In fact, the respondent father is also a citizen of India and it is not even the case of the respondent father that he would at any time get the permanent residency of Qatar. Therefore, if custody of the minor children is given to the respondent father, the visitation rights of appellant mother, which



cannot be denied to her, would be difficult for this Court to monitor. On this ground also, it would be practically not feasible relocate the children to Qatar. If at all, the respondent father is so much interested in being close to his children, he has always the option of taking up a job in India and remain in constant touch with the children.

49. Another factor which goes in favour of retaining the custody of the children with the appellant mother is that the children have the benefit of company of not only his maternal grandparents but also his paternal grandparents, who are also living in Srinagar. Thus, the children, while being in Srinagar, will have the benefit of guidance and company of their paternal grandparents and there would not be much difficulty for the respondent father to come to Srinagar as many times as he likes during a year and have the company of his children under the orders of this Court.

50. The contention of the respondent-father that the appellant has been instrumental in wasting two academic years of the minor children is also without any substance. As per the documents placed on record by the parties, the elder sons, who is presently aged nine years, has been promoted to 3rd standard, meaning thereby that having regard to his age, he has not lost any academic year. The

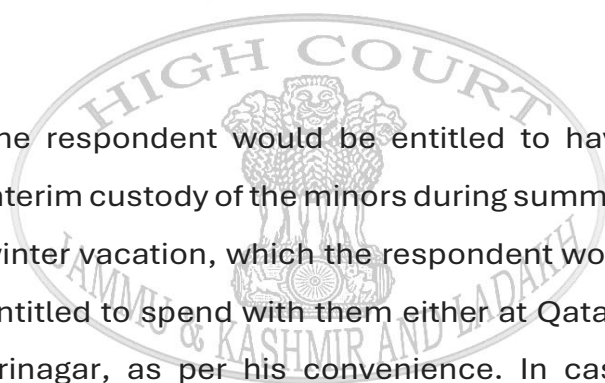


marks card of the ward reveals that in 2nd standard, he has scored 97.9% marks, which shows that he is doing exceedingly well in his studies. Relocating the children from Kashmir back to Qatar, when they have settled down in the culture and environment over here and have shown good progress in their academic pursuits, would expose them to another psychological trauma at this tender age, which would not be in the best interests of their welfare.

51. Another factor which is required to be considered is the effect of acquittal recorded by the Court of Appeal at Qatar in favour of the respondent. In this regard, a perusal of order dated 28.03.2022 passed by the Court of Appeal at Qatar would reveal that the judgment, whereby the respondent was held guilty of assaulting the appellant, has been cancelled not on merits but because the appellant had only applied for restraint order against the respondent and the public prosecutor had not brought a criminal proceeding regarding the complaint of the appellant. Thus, much would not turn on the judgment of the Appeal Court so as to materially alter the situation in favour of the respondent-father.



52. For what has been discussed hereinbefore, the impugned judgment passed by the learned trial court, being unsustainable in law, is set aside and the petition filed by the respondent father under Section 25 of the Guardian and Wards Act is dismissed. Resultantly, keeping in view the welfare of the minor children, it is directed that their custody would continue with the appellant herein. However, having regard to the right of the respondent as a guardian, the following arrangement in connection with visitation rights and temporary custody of the minors is made:

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- (1) The respondent would be entitled to have the interim custody of the minors during summer and winter vacation, which the respondent would be entitled to spend with them either at Qatar or at Srinagar, as per his convenience. In case the respondent intends to take the minor children to Qatar during vacation, he shall inform this Court and the visa of the children shall be obtained only for the period of vacation and not beyond that.
 - (2) The respondent shall also have the interim custody of the minor children on the eve of Eid, in case he happens to visit Srinagar, Kashmir, during the festival.



- (3) The respondent shall have the right to contact the minor children thrice a week on phone or video call at convenient time of the parties and the appellant shall facilitate the same without any hindrance.
- (4) The respondent father shall also be entitled to have interim custody of the children whenever he visits Kashmir for not more than two days at a stretch, of course, without interfering with the schooling of the children.

53. The aforesaid arrangement shall continue for two years in the first instance and the parties shall be at liberty to approach this Court even before the said period, if they feel any difficulty in implementation of the conditions mentioned hereinbefore or if there is any change in the circumstance.

(Sanjay Dhar)
Judge

Srinagar,
14.08.2026

"Bhat Altaf-Secretary"

Whether the **judgment** is reportable:

YES/NO