

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

RFA No. 121/2026

Reserved on: - 25.09.2026

Pronounced on: - 28.09.2026

Uploaded on: - 28.09.2026

Whether the operative part or full judgment is pronounced: - full

Nisar Ahmad Bhat
S/o Gh. Ahmad Bhat
R/o Manzhama Tehsil & District Anantnag
Kashmir

.....Appellant(s)

Through:
Mr. Aswad Attar, Advocate

Versus

Rafia Jan
D/o Gh. Hassan Pahalwan
R/o Hutmarah Mattan, Anantnag
Kashmir

.....Respondent(s)

Through:

CORAM:

HON'BLE MR JUSTICE RAJESH SEKHRI, JUDGE

JUDGMENT

01. This appeal, under Section 47 of the Guardian and Wards Act, 1890 [“the Act” for short], has been directed against order dated 21.07.2026, passed by learned Principal District Judge, Anantnag [“the trial Court” for short], in file No. 157/Guardian, whereby application preferred by the petitioner for custody of his minor daughter came to be dismissed for want of jurisdiction.

02. Before a closer look at the grounds urged in the memo of appeal, it shall be expedient to have an overview of the background facts of the case, which are stated thus:

2.1. The parties entered into a wedlock. They were blessed with a baby daughter namely, Afsheen Nisar. Their marriage, however, ran into the rough weather, which gave rise to a spate of litigation between them. The parties, however, decided to end their marital ties by way of a settlement, in terms whereof the custody of the minor daughter was entrusted to respondent—mother, till the minor attains puberty or her mother remarries, whichever happens earlier and finally their marriage came to be dissolved in National Lok Adalat on 11.12.2021.

2.2 The petitioner— father approached the trial Court for custody of the ward on various grounds urged in the petition, which was resisted by the respondent— mother primarily on the ground of jurisdiction.

2.3 Respondent is affront with the contention that since after dissolution of her marriage with the petitioner, she contracted second marriage and moved along with the minor to her marital house at Srinagar, where they are residing since October, 2024 and minor is receiving education there, the petition filed by the petitioner at Anantnag, was bad for want of jurisdiction, in view of Section 9 of the Act, which provides that the petition for custody or guardianship is to be presented in the Court within whose jurisdiction the minor ordinarily resides.

2.4 Contention of the respondent found favour with the trial Court, as a result the petition, in terms of the impugned order, came to be dismissed for want of jurisdiction.

03. Learned trial Court is of the view that the plain and unambiguous mandate of Sub Section (1) of Section 9 of the Act is that the petition relating to the guardianship of a minor can be presented before the District Court, having jurisdiction over the place, where the ward ordinarily resides and the plain and ordinary meaning of the expression “the minor ordinarily resides” denotes the place where the minor actually resides in the ordinary course of life. The said expression cannot be construed in isolation and it has to be understood in the context of the actual place of residence of the person in whose lawful custody the minor ordinarily resides at the time of the institution of the petition seeking guardianship or custody of the minor. Since custody of the minor, after the dissolution of marriage of the parties, was admittedly entrusted to the respondent by mutual consent of the parties and the respondent after remarriage shifted, along with the minor to her matrimonial home at Srinagar, the legal consequences would follow from the operation of Section 9(1) of the Act, that petition relating to the custody or guardianship of the ward is to be instituted before the competent Court at Srinagar.

3.1 According to learned trial Court, although it was stated in the Lok Adalat Award that the custody of the minor shall remain with the respondent until she attains puberty or the respondent contracts the second marriage, whichever occurs earlier, but award is silent about the consequences of breach of the settlement. Trial Court is of the view that even otherwise in terms of doctrine of *Hizanat*, as recognized under personal law governing the parties, the custody of a minor daughter ordinarily remains with her mother until she attains the age of puberty.

04. Petitioner is aggrieved of the impugned order primarily on the ground that since the respondent has re-married, after dissolution of her marriage with the

petitioner, although consequences of the violation of said condition are not specified in the award, but her right of *Hizanat* immediately terminates and the consequences that per force follows, as per the tenets of *Shariat*, are that minor is to be in the custody of a person to whom the right of *Hizanat* becomes available. According to the petitioner the consequences of re-marriage of the respondent, automatically follows in terms of personal law of the parties. It is thus contention of the petitioner that impugned order is based on incorrect appreciation of law by learned trial Court.

4.1. According to the petitioner, observation of the trial Court that a child of five years is expected to be staying with his or her mother is not absolute proposition of law and in the event mother loses the right of *Hizanat* the child is expected to be ordinarily residing with a person to whom the right of *Hizanat* flows, as a consequence of the mother's re-marriage and the ordinary residence of the child is to be taken as the ordinary residence of the person to whom the right of *Hizanat* has flown in the event of remarriage of his or her mother.

4.2 Petitioner has prayed for the quashment of the impugned order.

05. Having heard Mr. Aswad Attar, learned counsel for the petitioner, I do not find any illegality and impropriety in the impugned order for the reasons to follow.

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06. The interpretation of expression, "the place where the minor ordinarily resides", appearing in sub-section 1 of Section 9 of the Act, is well enunciated and no longer remains *res-integra* now.

Section 9 (1) of the Act reads as below:-

“ 9. Court having jurisdiction to entertain application. - (1) if the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides.

2....

3....”

07. Hon’ble Supreme Court in “***Ruchi Majoo Vs. Sanjeev Majoo; (2011) 6 SCC 479***”, has clearly ruled that the solitary test for determining the jurisdiction of the court under Section 9 of the Act is the “ordinary residence” of the minor and the question whether the minor is ordinarily residing at a given place is primarily a question of intention, which in turn is a question of fact and may at best be a mixed question of law and fact.

Relevant excerpt of the Judgment, captured in para 24, is extracted below:-

“ 24. It is evident from a bare reading of the above that the solitary test for determining the jurisdiction of the court under [Section 9](#) of the Act is the ‘ordinary residence’ of the minor. The expression used is "Where the minor ordinarily resides". Now whether the minor is ordinarily residing at a given place is primarily a question of intention which in turn is a question of fact. It may at best be a mixed question of law and fact, but unless the jurisdictional facts are admitted it can never be a pure question of law, capable of being answered without an enquiry into the factual aspects of the controversy.”

08. It is manifest from ***Ruchi Majoo*** (*supra*) that the only meaning assigned to the “ordinary residence” is the residence of the person in whose care and custody the minor is expected to be, not where he or she ought to be.

09. Mr. Aswad Attar, learned counsel for the petitioner has relied upon a Judgment rendered by Gauhati High Court in ***Smti Usma Sultana Vs Fakar Uddin Ahmed***; [Tr.P (c) No. 23/2023, decided on 05.11.2024] to submit that since the respondent remarried, after dissolution of her marriage with the petitioner and shifted to her matrimonial house at Srinagar, it means that she deliberately removed the ward to Srinagar with the sole intention to oust jurisdiction of the trial Court, which is not permissible in law.

10. The argument of learned counsel for the petitioner is legally flawed, pertinently in view of what has been held by the Gauhati High Court in paras 27 and 29 of *Usma Sultana* (supra).

Relevant abstracts are extracted below:-

“27. From above, it is clear that to assume jurisdiction under Section 9 of the Guardians and Wards Act, 1890, the minor, the guardianship of whom is the subject matter of the application, must be an ordinary resident of the place over which the jurisdiction of such District Judge extends. It is also clear that the expression “ordinarily resident” has a different meaning than the expression “residence at the time of application. “The Court has to ignore recent removal, if any from a place where the minor ordinarily resides.”

(Emphasis supplied)

28. xxxx
xxxx

29. From the decisions cited in the foregoing paragraphs, it is clear that the law is settled in this regard that when a child is removed to a place from the place where he was ordinarily residing, the place of such removal will be ignored for the purpose of determining the jurisdiction of the Court to entertain an application under Guardians and Wards Act, 1890, and in spite of such removal, the minor will be deemed to have his residence at the place where he or she was ordinarily residing before such removal. The new place to which the minor might have been removed will become the place of ordinary residence of minor only after minor has settled down at that place for reasonably long period. The expression, “where the minor ordinarily resides” in the Section 9 of the Guardians and Wards Act, 1890, appears to have been deliberately used to exclude places to which the minor may be removed at or about the time of filing of the application for enforcement of guardianship and custody of the minor.”

(Emphasis supplied)

11. If we approach the present case with the aforesaid observations of the Gauhati High Court, predominantly relied by learned counsel for the petitioner, concededly the minor in the present case moved along with her mother, respondent herein, to Srinagar in 2024 after dissolution of marriage between the parties in 2021,i.e, since five years now and admittedly she is also receiving education at Srinagar, which means that the minor has not only settled down at Srinagar for a considerable time now, but also receiving education at Srinagar. In the circumstances of the case, learned trial Court

has rightly observed that contention of the petitioner that respondent deliberately removed the ward with the intention of ousting its jurisdiction is devoid of merit and cannot be sustained.

CONCEPT OF 'HIZANAT'

12. Learned counsel for the petitioner has vehemently argued that right of Hizanat in favour of the respondent immediately terminates with her remarriage and consequences per force would follow as per the tenets of Shariat, that minor is to be in the custody of a person to whom the right of Hizanat becomes available after remarriage of her mother.

13. Before we proceed to dilate upon this important issue, it may be advantageous to refer to an extract of a recent research with respect to the development in child custody litigation by Dr. Richard Gardner, which came to be referred with approval by Hon'ble Supreme Court in ***“Col. Ramnesh Pal Singh Vs. Sugandhi Aggarwal”***; reported as 2024 SCC Online 847.

13.1 Relevant extract of the reference captured in para 17 for the facility of reference is extracted below:-

“.....The American Academy of Psychoanalysis, 1985]. It has at least two psychological destructive effects:

(i) First, it puts the child squarely in the middle of a contest of loyalty, a contest which cannot possibly be won. The child is asked to choose who is the preferred parent. No matter whatever is the choice, the child is very likely to end up feeling painfully guilty and confused. This is because in the overwhelming majority of cases, what the child wants and needs is to continue a relationship with each parent, as independent as possible from their own conflicts.

(ii) Second, the child is required to make a shift in assessing reality. One parent is presented as being totally to blame for all problems, and as someone who is devoid of any positive characteristics. Both of these assertions represent one parent's distortions of reality.”

14. The expression “guardianship” or “Wilayat” connotes not mere simple physical custody of a minor upon a certain age, but also care, welfare, overall

supervision and the liability to maintain the minor. Under Muslim law, it is called *Hizanat*.

15. Under Islamic jurisprudence, it is well settled, that mother has absolute first right to the physical custody or '*Hizanat*' of her children during their tender years and father is recognized as a natural guardian or '*Wali*'. Father automatically does not hold the right to physical custody during the earlier stages of the child's life. Ordinarily, it is the mother, who is the most competent and suitable person to protect the interest of the minor and safeguard his welfare. It goes without saying that there is no substitute to the affection and love of a mother. Universal phenomenon and human approach have acknowledged that mother's affection for the child is unparalleled. However, be it noted that the entire doctrine centers on the best interest and welfare of the child rather than being an absolute parental right.

16. Hon'ble Supreme Court in ***Tejaswini Gaud & Ors. vs. Shekhar Jagdish Prasad Tewari & Ors.***; 2019 (7) SCC 42, has clearly ruled that the provisions of special statutes or personal laws may govern the rights of the parents or guardians, but the Court while deciding the child custody, is not bound by mere rights of the parents or guardians and it is the welfare of a minor, which is the supreme consideration in such cases.

17. An identical view has been expressed by Hon'ble Supreme Court in ***Vasudha Sethi & Ors. Vs. Kiran V. Bhaskar & Anr***; reported as 2023 (17) SCC 478, that the issue of custody of a minor, whether in a petition seeking Habeas Corpus or in a custody petition, has to be decided on the touchstone of the principle that welfare of a minor is of a paramount consideration and the rights of the parents to custody are irrelevant.

18. Again, a similar observation was made by the Apex Court in “***Arathy Ramachandran Vs. Bijay Raj Menon***”; ***reported in 2025 SCC Online SC 1044***, that in cases of child custody, it is the welfare of the child, which is the paramount consideration and the utmost sincerity, love and affection showered by either of the parents, by itself, cannot be a ground to decide the custody of a child.

19. Bombay High Court in ***Smt. Farzanabai Vs. Ayub Dadamiya***; ***AIR 1989 Bom. 357***, also observed that though personal law of the parties is a factor which is to be kept in mind, but under the Guardian and Wards Act, it is subject to the interest of a minor.

20. What follows from a coalesce of aforequoted judicial precedents is that when welfare of a child is pitted against personal laws of the parties or even agreement between the parents, it is the welfare of the child, in particular a girl child, which gets better off and parental rights take the back seat.

21. In view of the above, the Courts exercising their *parens patriae* jurisdictions would be guided by the paramount consideration of what would sub-serve the best interest and welfare of a minor. In other words, welfare of a minor remains the dominant consideration throughout and the term “welfare” has to be taken in its widest sense to include not only the physical wellbeing of a minor, but also his moral wellbeing.

22. For the foregoing reasons, I find myself in agreement with the observations of learned trial Court that contention of the petitioner that respondent after her remarriage at Srinagar has lost her right of custody of the ward pertains to the merits of the case, which is to be decided by the Court, competent to entertain

petition under Guardian and Wards Act, having due regard to the welfare and best interest of the minor -daughter of the parties.

23. Viewed from any angle, I do not find any illegality and impropriety in the impugned order. The order in question is lucid, well-reasoned and does not call for any interference. Hence present petition is **dismissed in limine**.

(RAJESH SEKHRI)
JUDGE

Srinagar
28.09.2026
"Mohammad Yaseen Dar"

Whether the Judgment is reportable: **Yes**
Whether the Judgment is speaking: **Yes**

