

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.808 of 2025

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1. Sana Azim, female, aged about 30 years, W/o Md. Fashi-Ul-Haque, D/o Nasir Ali, Resident of Village-Madhuka, P.O., Block-Konch, P.S.-Anti, District-Gaya, Bihar-824116.
 2. Nasir Ali, male, aged about 60 years, S/o Late Azim, Resident of Village-Madhuka, P.O., Block-Konch, P.S.-Anti, District-Gaya, Bihar-824116.
 3. Smt. Sabnam @ Shabnam Jahan, Female, aged about 56 years, W/o Nasir Ali, Resident of Village-Madhuka, P.O., Block-Konch, P.S.-Anti, District-Gaya, Bihar-824116.

... .. Appellant/s

Versus

Md. Fashi-Ul-Haque, Male, aged about 36 years, S/o Ekram Ul-Haque, Resident of Mohalla- Kumhrar, P.S.-Agamkuan, Patna City, District-Patna, Bihar-800007.

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Amit Srivastava, Sr. Adv. Mr. Girish Pandey, Adv. Md. Basheer Faizi, Adv. Mr. Amit Kr. Singh, Adv. Mr. Siddharth Shankar Singh, Adv.
For the Respondent/s	:	Mr. Ravi Bhardwaj, Adv.

CORAM: HONOURABLE MR. JUSTICE NANI TAGIA
and

HONOURABLE MR. JUSTICE VIKASH KUMAR

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE VIKASH KUMAR)

Date : 09-07-2026

Heard Sri Amit Srivastava, learned Senior Advocate,
assisted by Md. Basheer Faizi, Advocate for the appellants and Sri
Ravi Bhardwaj, learned Advocate for the respondent.



2. The present appeal, under Section 47 of Guardians and Wards Acts 1890 (hereinafter to be referred as Act) has been preferred by the appellants against the Judgment and Order dated 16.04.2025, passed by the Learned Principle Judge, Family Court, Patna in Guardianship Case No. 54 of 2021, whereby the respondent's application under Section 25 of the Act was allowed and custody of the minor child, Master Daniyal Azimul Haque, was granted in favour of the respondent.

3. In present appeal, appellant no. 1 is the mother, appellant no. 2 is maternal grandfather and appellant no. 3 is maternal grandmother and respondent no. 1 is the father of the minor male child, namely Master Daniyal Azimul Haque.

4. The brief facts as per the pleadings of the respective parties are as follows:-

The appellant no. 1 was lawfully married to the respondent on 14.04.2018, in accordance with Sunni Muslim rites through a Nikah Ceremony held at Ali Nagar, Anisabad, Patna and out of the wedlock, a male child, namely Master Daniyal Azimul Haque, was born on 07.02.2019. After sometime, bitterness arose between the parties and since 05.06.2020, appellant no. 1 with her son, are living separately from the respondent. And as per respondent Father, the minor child, namely Master Daniyal Azimul



Haque is residing with appellant no. 2 and 3 and was denied with the visitation right. Thereafter, for the custody of minor son, the respondent Father on 02.11.2021 has filed Guardianship Case no. - 54 of 2021 before the learned Court of Principal Judge, Family Court, Patna.

5. From perusal of order-sheet of the proceeding of Guardianship Case no. 54 of 2021, which forms as Annexure P/3 to the rejoinder affidavit filed by appellants, it appears that on 07.04.2022, the appellants have filed their appearance and on 14.11.2022, have filed their written submission. Thereafter, there is no appearance by the appellants before the learned Court below in the proceeding of Guardianship Case no. 54 of 2021. On account of non-appearance of appellant Mother, even the two witnesses who have been examined were discharged without cross-examination. The learned Principal Judge, Family Court, Patna, vide impugned order dated 16.04.2025, allowed the application and appointed respondent Father as guardian of minor boy child and as a consequence, has given the physical custody of the minor child to the father, but in the interest of justice, directed both parties to be present along with the minor boy child on 15.07.2025 at 2 P.M. so that final result of the case may be disclosed in presence of both parties.



6. Aggrieved by the Judgment/Order dated 16.04.2025, the Mother and Maternal Grand Parents of the minor male boy has preferred present appeal under the provisions of Section 47 of the Act and contended that the learned Court below has erred in law and fact as well

6.1- by not passing an order to the extent that the suit be heard ex-parte in circumstances of non-appearance of appellants on subsequent dates in terms of Order IX Rule 6 (a) of the Civil Procedure Code.

6.2- by not framing the issues after ascertainment of variance of parties on proposition of fact and law in terms of Order XIV Rule (1)(5) of the Civil Procedure Code. And to substantiate their submission, has referred the relevant part of the order-sheet of the proceeding which forms as Annexure -P/3 to rejoinder affidavit filed on behalf of appellants.

6.3- by not adhering to the mandatory requirement of Section 17 of the Act, the learned Court below has appointed respondent father as “Guardian”. By referring the provision of Section 17 of the Act, which is reproduced hereinbelow, for the sake of brevity-

“17. Matters to be considered by the

Court in appointing guardian



(1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

(4) Sub-Section (4) omitted by Act 3 of 1951, Section 3 and Sch.

(5) The Court shall not appoint or declare any person to be a guardian against his will."

the appellants contended that :-

6.3.1. since the minor male boy is Muslim by Religion and therefore, as per provision of Section 17(1) of the Act, in his case the provisions of Mohammedan Law will have an application and accordingly, as per provision of Section 352 of the Mohammedan



Law, the Mother is entitled to the custody (hizamat) of her male child until he has completed the age of seven years.

6.3.2. as per Subsection (4) and (5) of Section 17 of the Act, the learned court below ought to have called the minor male child, who is old enough to form an intelligent preference, and have asked about his will before appointing respondent Father as Guardian vide impugned order dated 16.04.2025.

6.4. The impugned Judgment/Order is ambiguous. On one hand, the learned Court below has appointed respondent Father as guardian whereas on the other hand, has directed the appellants alongwith minor son to remain present so that final decision may be taken. In support of their contention, the appellants have relied upon Judgments passed by the Hon'ble Supreme Court in the matter of:-

Athar Hussain vs. Syed Siraj Ahmed, reported in *Manu/SC/0014/2010*

Neetu vs. Rajesh Kumar, reported in *Manu/SC/0920/2025*,

Asma Latif and others vs. Sabbir Ahmed and others, reported in *Manu/SC/0034/2024*

Neel Ratan Kundu and others vs. Abhijeet Kundu, reported in *Manu/SC/7935/2008*



Rosy Jacob Vrs Jacob A. Chakramakkal, reported in
Manu/SC/0260/1973 and

Swarn Lata Ghosh vrs. H.K. Banerjee and others,
reported in ***Manu/SC/0023/1969***.

7. The present appeal is contested by the respondent Father. Counter-affidavit filed on behalf of the respondent Father is on record. Appearing on behalf of the respondent Father, learned counsel Sri Ravi Bhardwaj, vehemently opposed the contention made by the appellants and submitted that they have no regard towards the order passed by the court of law. The respondent was given the visitation right to meet his son twice a month vide order dated 05.12.2022, but the appellants have not allowed him to meet his son. He has last met his son on 08.10.2023 and since October 2023, the appellants have not filed any application before the learned Court below. The appellants did not turn up for cross-examination of the two witnesses examined on behalf of the respondent. As such they were discharged. It has further been submitted that under the Muslim Law, the father is recognised as the sole natural guardian. The right of the mother to custody is not absolute. In provision of Section 354 of the Mohammedan Law, outlines the condition in which the female, including the mother loses custody rights and in support thereof has relied upon a



Judgment passed by the Hon'ble Supreme Court on 05.04.1973, ***reported in (1973) 1 SCC 840 (Rosy Jacob vs. Jacob A. Chakramakkal)*** also relied by the appellants herein.

8. The issue for consideration by this Court is that whether the learned Court below, while passing the impugned order, has complied with the provisions of Section 17 of the Act or not.

9. On careful analysis of submissions of respective parties on fact and law, following are the findings :-

9.1. as far as contention of the appellant as regard non-adherence of procedure under Order IX Rule 6 (a) of Civil Procedure Code, it is clear from perusal of the order-sheet of the Guardianship Case no- 54 of 2021, which forms as Annexure -P/3 to rejoinder affidavit, that the appellants upon issuance of notices vide order dated 08.03.2022, have entered their appearances through Vakalatnama and have filed their Written Statement (W.S.) on 14.11.2022, and subsequent thereto voluntarily abstained from the proceeding. In the circumstances of valid service of notice, Court below to make an order that the suit be heard ex-parte and appearance and filing of Written Statement by defendant, it is held that the learned Court below is not required to pass an order that the Guardianship Case be heard ex-parte for act of voluntary



absentism by defendant/appellant. Accordingly, the contention of the appellant is rejected.

9.2. so far as contention of the appellants as regard non-compliance of Order XIV Rule 1(5), this Court finds that the learned Court below has committed the procedural infirmity by not ascertaining upon what material proposition of fact and law the parties are at variance and thereupon ought to have proceeded to frame and record the issues. This exercise is penultimate to passing of Judgment/Order. The learned Court below has failed to frame issues in terms of Order XIV Rule 1(5) of the Civil Procedure Code and contention of the appellants in this regard is accepted.

9.3. so far as contention of the appellants as regard non-adherence of provision of Section 17 of the Act, this Court finds that the learned Court below has failed to comply with the requirement of Sub-section 5 of Section 17 of the Act, which mandates that the Court shall not appoint or declare any person to be a guardian against his will. From bare perusal of the order-sheet of Guardianship Case no- 54 of 2021, which forms as Annexure-P/3 to the rejoinder filed by appellants, it is clear that no steps have been taken by the learned Court below to ascertain the will of minor male child before appointment of respondent Father as guardian vide impugned order dated 16.04.2025. Since the minor



male child was born on 07.02.2019, the Guardianship Case no- 54 of 2021 was filed on 02.11.2021, and the impugned order has been passed on 16.04.2025. Therefore, this Court has reason to believe that the minor child boy is old enough to form an intelligent preference on the relevant date of impugned Judgment. The Judgments referred by appellants and respondent are relevant which in irrevocable terms mandates that the will of the minor child is paramount in consideration by the Court in appointing guardian. Further, there is no consideration as regard applicability of Mohammedan Law by the learned Court below. Therefore, it is held that the learned Court below has failed to adhere to the requirement of Section 17(5) of the Act.

9.4. Lastly, the contention of the appellants as regard ambiguity in order dated 16.04.2025, this Court find that the impugned order is ambiguous. The learned Court below at one hand has appointed respondent Father as guardian and on the other hand, has directed the appellant Mother to appear alongwith her minor son on 15.07.2025, so that final result of the case shall be disclosed, depicts it to be ambiguous. The submission made on behalf of the respondent Father that later part of impugned order is related with handing over and taking over of custody of minor child is rejected more or less to the fact that the learned Court



below has even failed to frame and adjudicate the issue that with whom the minor child is residing? As per respondent, he is residing with appellant no. 2 and 3 whereas the appellants in their written statement have stated that the minor child is residing with appellant no. 1.

10. For the reasons stated herein above, the impugned order dated 16.04.2025, passed in Guardianship Case no- 54 of 2021, by learned Principal Judge, Family Court, Patna is set aside, and the matter is remanded back for fresh consideration by learned Court below from the stage of framing of issues.

11. During the course of hearing, it was pointed out by the counsel for respondent Father that the appellants have no regard for judicial order, and this Court also finds from the order-sheet that the appellants have volunteered to abstain from proceeding. No one is above law. Since future of the minor child is involved in present matter, therefore, it is expected that the appellants herein will co-operate the learned Court below in adjudication and passing of proper and just order expeditiously within a period of six months from the appearance of respective parties on 20.07.2026 before the learned Court of Principal Judge, Family Court, Patna.

12. No order as to cost.



(Vikash Kumar, J)

(Nani Tagia, J) I agree.

(Nani Tagia, J)

Ashwin/-

AFR/NAFR	A.F.R.
CAV DATE	30.06.2026
Uploading Date	
Transmission Date	

