IN THE HIGH COURT OF SINDH, AT KARACHI

Constitutional Petition No. S-1270 of 2024

(Muhammad Bilal Alvi Vs. Mst. Sumaiya and another)

Date of Hearing: 06.08.2025

Date of Decision: 06.08.2025

Syed Muhammad Ghufran Basit, Attorney of the Petitioner in person.
None present for the Respondent

J U D G M E N T

Muhammad Osman Ali Hadi, J.: The Petitioner through the instant Constitutional Petition has impugned the Judgment dated 26.07.2024[1] ("**Impugned Judgment"**) vide which, the learned IV[th] Additional District Judge, Karachi East allowed the Respondent No. 1's[2] 1[st] Appeal, filed under section 47 of the Guardian & Wards Act 1890 (**"GWA 1890"**) r/w section 14 of the Family Court Act 1964 (**"FCA 1964"**).

2. The 1[st] Appeal stemmed from an Application filed by Respondent No. 1 against the Petitioner before the Family Judge Karachi East (G&W No. 3330/2023) under sections 07, 10, 26 & 29 of GWA 1890 (**"the Application"**). Through the said Application, Respondent No. 1 *inter alia* sought the Guardianship Certificate of Respondent No. 2, (aged about 10 months at that time), who is the child resulting from the Petitioner and Respondent No. 1's former wedlock.

3. The prelude to events is that vide Order dated 08.03.2024 (**"the Order"**) the learned Family Judge rejected Respondent No. 1's Application seeking the guardianship certificate of the Minor. And the Petitioner was issued responsibility for all necessary documentation of the Minor. Primarily, the learned Trial / Family Judge relied upon Section 19(b) of the GWA 1890, as well as certain case law for reaching its conclusion. It is pertinent to mention that custody of the Minor was and still remains with Respondent No. 1.

4. Against the Order passed by the Family Court, Respondent No.1 filed an Appeal No.120/2024, under Section 47 of Guardian and Wards Act 1890 read with Section 14 of Family Court Act 1964, impugning the

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[1] Impugned Judgment dated 26.07.2024 at Page 15 of the Court's File
[2] Appeal No.120/2024 under Guardian and Wards Act, 1890

Family Court Order dated 08.03.2024. The said Appeal was allowed by the learned IV[th] Additional District Judge, Karachi East vide Order dated 26.07.2024 (**"the Impugned Judgment"**), on the basis that since the marriage has been dissolved (by the Order dated 08.03.2024 in Family Suit No.3329/2023), it would be extremely burdensome and impractical for Respondent No.1, who is a single parent holding custody of the Minor, to be able properly carry out parental functions without having a Guardianship Certificate. The learned Appellate Court further held that the case law relied upon by the learned Trial / Family Court was distinguishable, as the age factor of the Minor along with his welfare was not properly considered by the Family Court. The Minor was aged approximately one (1) year at that time, and would require the support of a nurturing mother. Furthermore, in the Impugned Judgment, the learned Appellate Judge also mentioned the Petitioner has filed other litigation against the Respondents, in a bid to keep them under pressure.[3]

5. I have heard the Petitioner[4] and perused documents available on record. At the outset, I have found that the Impugned Judgment does not require any interference. The previous Order passed by the Trial Court dated 08.03.2024 (overturned by the Impugned Judgement), has as erred by not providing any substantiating reasons for denying Respondent No. 1 the Guardianship Certificate, despite her being the custodian and true mother of the Minor.

6. This is especially bizarre, considering the same Family Judge had been hearing a separate suit / application between the parties,[5] which was heard alongside the instant Application, pertaining to Respondent No. 1's grievances against the Petitioner. And the Family Judge was in full knowledge that custody of the Minor was with the Mother / Respondent No. 1; and that the Petitioner had defaulted by not paying any child maintenance. It therefore appears thoughtless that the Guardianship Certificate was granted to the Petitioner as opposed to Respondent No. 1 by the Family Judge in the Order.

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[3] These other litigations which appear to have been filed by the Petitioner in order to create hurdle and pressure on Respondent No.1 have also been referred in my other judgement passed in CP-S No.1269/2024, which was also filed by the same Petitioner against Respondent No.1

[4] Through his attorney

[5] Family Suit No. 3329 of 2023

7. Respondent No. 1, being the natural guardian of the Minor, would no doubt require the Guardianship Certificate to fulfil basic requirements on the Minor's behalf, e.g. obtaining various documents that would be required by the Minor for future uses, such as for enrolment in school, obtaining a B-Form, passport etc. Denying Respondent No. 1 the Certificate created an unnecessary hurdle and burden for the Respondents. The Petitioner could withhold the Certificate from the Respondents, which would act as a constant sword over their heads. It beggar's belief that despite knowing all these factors, awarding the Guardianship Certificate to the Petitioner could be considered in the best interests of the Minor / Respondent No. 2. It was incumbent upon the Trial / Family Judge to properly have considered this crucial factor before passing the Order.

8. Since the Petitioner himself has admitted (on oath) towards non-payment of maintenance since 28.11.2022 (in the connected Family Suit), his demand for pursuing a Guardianship Certificate appears suspicious. On an objective basis, where a parent refuses payment of maintenance towards their own child, their intentions cannot be considered as *bona fide*.

9. The Trial Court while passing the Order put reliance upon section 19(b) of GWA 1890, which is misplaced for reasons discussed further below.

10. Before perusing section 19(b) of GWA 1890, the learned Trial Court ought to have first taken a holistic view, and seen some of the preceding sections of the GWA 1890. *E.g.* Section 7 of the GWA 1890 reads:

> "7. **Power of the Court to make order as to guardianship.** (1) Where the Court is satisfied that it is for the welfare of minor that order should be made -
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> (a) appointing a guardian of his person or property, or both, or
>
> (b) declaring a person to be such a guardian,
>
> the Court may make an order accordingly.
>
> (2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.
>
> (3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the

guardian appointed or declared as aforesaid have ceased under the provisions of this Act."

Section 17 of the Guardian & Wards Act 1890 reads:

"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, appear 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)……..

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

11. Both these sections, along with settled judicial precedent, undoubtedly carve way for welfare of the child, which includes well-being and economic conditions, to stand as the primal factor when determining the award of guardianship and/or guardianship certificate.

12. It can be seen from the proceedings between the parties, the same learned Family Judge also held that the wife (Respondent No. 1) earns more money than the Petitioner, and accordingly the Minor is in good custody by being with her. In fact, in the said connected Family Suit, the Petitioner himself pleaded he earns only PKR 35,000/- (Rupees Thirty-Five Thousand Only) and hence did not have sufficient funds to pay maintenance.[6] Therefore, how can the Petitioner who is economically less stable than the Mother; is wilfully avoiding payment of maintenance and repeatedly dragging the Minor's mother through a prolonged litigious endeavour, be considered to be acting in the best welfare of the Minor? It would have been prudent for the Petitioner, being the father of the Minor, to have tried to ease the burden of Respondent No. 1 who is raising the Minor as a single parent, by aiding her. Contrarily, he has appeared to ensure the lives of the Respondents are tested through tougher waters.

[6] It is relevant to mention the Constitutional Petition filed by the Petitioner against concurrent findings from the accompanying Family Suit No. 3329/2023, were also dismissed by this Court in CP-S No. 1269 of 2024 vide Decision dated 06.08.2025

13. The Trial / Family Judge premised her entire Order on a narrow reading of section 19(b) GWA 1890, without considering the developing jurisprudence. Whilst section 19(b) provides:

> **"19 Guardian not to be appointed by the Court in certain cases.** Nothing in this Chapter shall authorize the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards, or to appoint or declare a guardian of the person:-
>
> (a)……..
>
> **(b)….**of a minor whose father in living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor."

This cannot be considered an absolute provision. As already stated (*ibid.*) the welfare of a minor trumps the generalization for the father to be awarded guardianship rights, both under statute and precedent.

14. In the case of *Gul Sadem Khan v Mst. Halima*,[7] the August Supreme Court exhaustively discussed this issue. They held (relevant excerpts below):

> *"3. We have heard learned counsel for the petitioner and have gone through the record with his able assistance. Prime and paramount consideration while deciding application for custody of the minor is the welfare and betterment of the minor(s) and nothing else.*
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> *……the other relevant provision to decide the question of custody of a minor(s) is section 17 of the Act ibid, which reads:-*
>
> > *"17. Matters to be considered by the Court in appointing guardian. (1) In appointing or declaring the guardian of the minor, the Court shall, subject to the provisions of this section, be guarded 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."*
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> *From the above provisions of law, it is vivid and crystal clear that prime and foremost consideration is to decide the question of custody of a minor is his or her welfare and betterment. Welfare of the minor would overweigh against all other considerations.*
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> *….In judgment this Court has invariably held that:-*

[7] PLD 2025 SC 47

"The right of custody of minor is not an absolute right rather it is always subject to the welfare of the minor. The Court in the light of law, on the subject and facts and circumstances of each case considers the question of custody on the basis of welfare of minors and there can be no deviation to the settled principle of law that in the matter of custody of minor the paramount consideration is always the welfare of minor. No doubt general principle of Muhammadan Law is that a Muslim father being the natural guardian of the minor, has the preferential right of custody of minor but this rule is always subject to the welfare of the minor which is the prime consideration in determination of the question of custody."

Earlier, this Court in judgment4 determined and held:---

6. We have given our anxious thought to all the aspects. No doubt, father is a natural guardian and mother in case of male children loses right of 'Hazzanat' after they attain age of seven (7) years. However, paramount requirement which must be kept in view for determining future arrangement of custody or temporary residence of the minors revolves around their welfare. It is settled principle that Guardianship Courts while dealing with matters relating to custody of minor children exercise parental jurisdiction. Therefore, strict adherence to procedure or rules is not pressed into service. Evidently rigid formalities and technicalities overcoming minor's welfare can be safely ignored.'

Further, in judgment this Court held:-

14. In Hedaya (2nd Edition, Vols.I-IV, page 138) in Chapter XIV of Hizanat, or "the care of infant children" and under section "In case of separation the care of the infant children belongs to the wife", it is followed by the comment that:

"A mother is naturally not only more tender, but also better qualified to cherish a child during infancy, so that committing the care to her is of advantage to the child and Siddeek alluded to this, when he addressed Omar on a similar occasion, saying, 'the spittal of the mother is better for the child than honey, O Omar' which was said at a time when separation had taken place between Omar and his wife, the mother of Assim. The latter being then an infant at the breast. Omar desirous of taking him from the mother and these words were spoken in the presence of many of the companions, none of whom contradicted him. "

At page 139 under the title "Length of the terms of Hizanat" it is said:---

"The, right of Hizanat with respect to a male child, appertains to the mother, until he becomes independent of it himself that is to say, he becomes capable of shifting, eating, drinking and performing other natural functions without assistance after which the charge devolves upon the father, or next paternal relation. The Hizanat with respect to a boy, ceases at the end of seven years, as in general a child at that age is capable of performing all the necessary offices himself, without assistance."

15. As stated earlier, the main consideration which weighed with the learned Judge in Chambers of the High Court for making the order of delivery of custody of the minor to the father was only that after attaining the age of seven years, the right of 'Hizanat' of the male minor child under the Muslim Personal Law vested in the father as he is the natural guardian under section 25 of the Guardians and Wards Act, (VIII of 1890). The welfare of the minor, however, remains the

> *paramount consideration in determining the custody of a minor notwithstanding the right of the father to get the custody after seven years of age of the male minor child.*
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> *It would, thus, be noticed that right of the father to claim the custody of a minor son is not an absolute right, in that, the father may disentitle himself to custody on account of his conduct in the light of the facts and the circumstances of each case. In the instant case, the evidence on the record showed that the respondent father who sought custody of the minor, neglected the child since the separation of the spouses inter se and had voluntarily left the custody to the petitioner-mother. She had brought him up and educated him till she had to opt for her second marriage. Even then she had not been negligent in the tare of her minor son. She had entrusted that duty to her mother and father and minor is being properly educated till date in a local school. All along this entire period, the father never bothered even to go to meet the minor much less than providing maintenance to him, when the petitioner-mother sued him for providing maintenance allowance to the minor. It is only then that he had made an application for custody of the minor.*

15. The Order passed by the Family Court has erred by refusing the Guardianship Certificate of Respondent No. 2 to Respondent No. 1. The Petitioner / Father has not paid maintenance, which he is legally bound to do. Moreover, he has dragged the mother through several litigation proceedings, as was highlighted in the Impugned Judgement. This conduct of applying undue pressure on the Minor's mother by the Petitioner, must also be admonished. Most pertinently, the Petitioner has failed to show how it would be in the Minor's better welfare to grant the Petitioner the Guardianship Certificate.

16. Throughout the arguments, the Petitioner remained unable to highlight any infirmity with the Impugned Judgement dated 26.07.2024, nor did he provide any plausible grounds or legal basis for interference with the same. He has also not addressed how the Impugned Judgement is not in the Minor / Respondent No. 2's best interest? In fact, when the Petitioner was confronted with the adverse findings against him in the (connected) Family Suit, he remained inept at offering any response. This Petition also appears to be yet another frivolous attempt by the Petitioner to wring the Respondents through the tedious litigation process as a pressurizing tactic, which cannot be condoned.

17. Accordingly, this Constitution Petition is hereby *dismissed*.

These are the reasons for my short order dated 06.08.2025.

JUDGE

M. Khan/B-K Soomro