

**ORDER SHEET**  
**IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA**  
**Constitutional Petition No.S-21 of 2022 (New)**  
**Civil Appeal No.S-10 of 2021 (Old)**

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| DATE | ORDER WITH SIGNATURE OF HON'BLE JUDGE |
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01. For orders on office objection "A"
02. For orders on maintainability of main case.

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| Petitioner:      | Mst. Munwar Khatoon<br>Through Mr. Idrees Ahmed Mangi, Advocate                           |
| Respondent No 1: | Moula Bux Bhagat<br>Called absent<br>Mr. Munwar Ali Abbasi,<br>Assistant Advocate General |
| Date of Hearing: | 22-08-2025  |
| Date of Order:   | 22.08.2025  |

**ORDER**

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**Nisar Ahmed Bhanbhro, J:** Through the instant Constitution Petition, the petitioner has challenged the concurrent findings of the Courts below, wherein the Guardianship Application No 21 of 2018 Re: "Moula Bux Versus Mst. Munwar Khatoon" for grant of custody of minors Adeel, Adil, Kamran and Dua was allowed by the court of learned Family Judge, Larkana, (Learned Trial Court) vide order dated 02-11-2020 and Guardianship Appeal No.15/2020 Re: "Mst Munwar Khatoon Versus Moula Bux" filed by the Petitioner was dismissed by the Court of Learned 3<sup>rd</sup> Additional District Judge/MCAC Larkana, (Learned Appellate Court) vide its judgment dated 24-05-2021 (impugned judgment and order).

2. Chronicle of the case of the Petitioner is that she was married to Respondent Moula Bux about fourteen years ago and out of the wedlock she mothered four children every one namely Adeel, Adil, Kamran and Dua. The marriage between the parties dissolved in the year 2014, thereafter, Petitioner contracted Second Marriage with Muhammad Khamiso Bhutto. Out of the second marriage, she has two children. Respondent claimed the custody of minors, on the ground that he was natural guardian of the minors being biological father. The minors were residing in the house of Muhammad Khamiso Bhutto the second husband of Petitioner, who was not taking proper care of minors. The welfare of minors lied with

the Respondent being father. The Petitioner had contracted second marriage and minors were not in comfortable condition in the house of second husband of their mother.

3. Petitioner on notices, appeared before Learned Trial Court, filed her objections to the application, wherein she averred that minors were residing with her in a comfortable condition. Petitioner was not a good father; he did not take care of the minors during subsistence of marriage. She was affording the expenses of minors. The welfare of the minors was attached with her; therefore, she was entitled to retain custody of minors.

4. Out of the divergent pleadings of the parties, Learned Trial Court framed following issues:

- i. Whether, applicant is entitled for custody of his minor children namely Adeel, Adil, Kamran and Dua ?
- ii. Where does the welfare of minor lie?
- iii. What should the decree be?

5. In support of respective claims Respondent / Applicant examined himself and one Arbab and Petitioner / Opponent examined herself, then parties closed evidence.

6. Learned Trial Court, after hearing the parties through respective Learned Counsels allowed the Guardianship Application vide order dated 02.11.2020, granting custody of minors to the Respondent / Applicant.

7. Petitioner filed Guardianship Appeal No.15/2020 Re: “Mst Munwar Khatoon Versus Moula Bux” before the Court of Learned District & Sessions Judge Larkana, which was assigned to Learned Appellate Court for disposal in accordance with law. Learned Appellate Court vide judgment dated 24.05.2021 dismissed the appeal and maintained the order dated 02.11.2020 passed by the Learned Trial Court.

8. Petitioner preferred Civil Appeal, against the concurrent findings of the Courts below. This matter when came up for hearing before this Court, Learned Counsel was confronted as to the maintainability of Second Appeal. Learned Counsel conceding to the legal position of maintainability of second appeal made an oral submission for conversion of the proceedings in constitutional petition, which was acceded to vide order dated 21.01.2022 and appeal was converted into Constitution Petition, office was directed to act accordingly.

9. On 08.04.2025, the matter came up for hearing before this Court, wherein it was observed that Respondent Moula Bux had failed to appear before the Court. The matter

was adjourned to 28.04.2025 with a note of caution that if none appeared the matter shall be heard and decided on the basis of available record. On 28.04.2025 Respondent Moula Bux appeared and sought time, which was granted. On 19.05.2025 Mr Ayaz Hussain Kalhoro appeared before the Court, filed vakaltnama on behalf of Respondent Moula Bux. Today none has appeared on behalf of Respondent, on first call during earlier part of the day matter was taken up and kept set aside for want of appearance but on the second call Respondent was called absent. Hence this matter is being decided with the Assistance of Learned Counsel for the Petitioner and Learned Assistant Advocate General.

10. Mr. Idrees Ahmed Mangi Learned Counsel for the Petitioner contended that the Petitioner was mother of the minors. She was taking tender care of the minors. He contended that the minors were happy with their mother. She was providing them food, clothes and quality education to the extent of her resources. He contended that the Respondent being father has failed to perform his obligations and in order to avoid payment of maintenance of minors he preferred guardianship application. He contended that the second marriage of the Petitioner would not disentitle her right of custody of minors. He argued that the concurrent findings of the Courts below were perverse, suffered from serious misreading of the evidence on record, warranted interference. He prayed to set aside the impugned judgment and order.

11. Learned Assistant Advocate General has conceded to the submissions made by learned counsel for the petitioner and argued that in the facts and circumstances of the case, the impugned judgment and order were not sustainable and be set aside and custody of minors be retained with mother.

12. Heard Learned Counsel for the Petitioner, Learned Assistant Advocate General and perused material available on record.

13. From the analysis of the concurrent findings of the Courts below, it transpired that the reason that weighed before the courts below to pass the impugned judgment and order for grant of rights of custody of minors in favor of father was that Petitioner Mst. Munwar Khatoon had contracted 2<sup>nd</sup> marriage, thus she had lost the right of Hizanat for the custody of minors. The Learned Courts below did not take into consideration the point of welfare of minor, which is the paramount consideration for awarding the custody of minors in favor of any of the parents contesting for the custody.

14. The Guardian and Wards Act, 1890 outlines the factors to be taken into consideration for grant of custody of minors. Prime and paramount consideration while deciding application for custody of the minor is the welfare and betterment of the minor(s)

and nothing else. Section 17 of the Guardians and Wards Act, 1890 envisages the matters which are to be considered to decide the question of the custody of minors. Section 17 reads as under:

**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) .....

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

15. The above provision of law, make it crystal clear that prime and foremost consideration to decide the question of custody of a minor is his or her welfare and betterment. Welfare of the minor would overweigh all other considerations. It is also apparent from the bare reading of section 17(2) of the Act that character and capacity of the proposed guardian as well as age and sex, is also an important factor to be considered while determining the welfare of the minor. In the present case Respondent Moula Bux per the averments was a retired government servant dependent upon pension and a person of advanced age, having first wife and children. At the same time, though Petitioner was of the middle age but she was capable of taking care of the minors. The Learned Trial Court though framed a particular issue regarding the welfare of minors but failed to render its deliberations on the said issue and decided it conjunctively with issue No 1 which related to the entitlement of custody of minors. The Petitioner in objections to the application and in her evidence deposed that she was taking care of minors. She was affording the expenses of minors and they were getting education. Such important piece of the evidence was not controverted by the Respondent and remained unrebutted but no findings as to welfare of minors was given in the impugned judgment and order.

16. No doubt, under Islamic sharia, mother loses the right of Hizanat on contracting second marriage. The right of Hizanat with respect to a male child, appertains to the mother, until he becomes 7 years of age and female child until she attains the age of puberty. Since

the law has set welfare of the minors a paramount consideration for the custody of minors, therefore, the attachment and affection of the minors with either of the parents is relevant when they become of grown-up age.

17. The perusal of the impugned order and judgment revealed that no inquiry in terms of section 17 of Guardian and Wards Act was made, though at the time of rendering decision by the courts below admittedly the minors Adeel, Adil, Kamran and Dua, were aged about 12, 10, 08 and 06 years respectively, and in present digital age the children of such age are so sharp and intelligent that they easily form an opinion and understanding of choice of preference from either of the two parents. Since this court is seized with the matter under its constitutional jurisdiction conferred with corrective and supervisory powers, therefore, can examine the case on the threshold of section 17 of the Act.

18. In the case of Mst. TALAT NASIRA versus Mst. MUNAWAR SULTANA and 2 others reported as 1985 S C M R 1367 Honorable Supreme Court of Pakistan granted leave against the order passed by Learned High Court to consider the question of welfare of minors:

*6. From the perusal of the order of the Guardian Judge, it seems that the main consideration that prevailed with him was the factum of second marriage contracted by the petitioner with a stranger. Prima facie, however, the learned Judge did not give due regard to the wishes of the minor himself and seems to have disregarded the same on considerations, which, in our opinion, require re-examination. It is axiomatic that in the matter of appointment of a guardian the welfare of the minor coupled with his own wish, particularly when he can make a reasonable preference on account of his age, is the primary consideration for a Court of law for the decision of such cases. It was stated before us that the minor is now thirteen years of age and he appeared to us to be capable of making an intelligent preference on the question in dispute. The other point that requires consideration is whether in case of a male child, marriage of his mother with a stranger would be a relevant consideration for depriving her of the custody of the minor.*

19. Since the matter pertains to the issue of custody of minors, who are of grown-up age, the choice of the minors therefore would be one of the relevant factors to decide the custody. The minors Adeel aged about 15 years; Adil aged about 13 years and Kamran aged about 12 years were present before the court along with their mother today. They were well dressed, they on inquiry stated that they were getting education in government schools and were being financially supported by their mother. On inquiry as to their

preference, they stated that since the separation of their parents, their father has not turned up to meet them, therefore, they have got no love, attraction or affection for him and they intend to reside with their mother. As far as the custody of minor baby Dua is concerned, she is aged about 8 years. Minor Dua is residing in the house of Petitioner along with her 03 other brothers, though under Sharia she cannot be allowed to reside in the house of her step father but when her biological father has left interest in pursuing the matter, she cannot be deprived of the custody of her mother.

20. The minors have categorically stated that they intend to live with their mother and since last about 11 years when the spouses separated through divorce the father has not turned up to meet them, therefore, it will go against the welfare of minors to grant their custody to Respondent father, as the right of the custody is not an absolute right but dependent upon the welfare of minors.

21. In the case of RASHID HUSSAIN Versus ADDITIONAL DISTRICT JUDGE, ISLAMABAD (EAST) and others P L D 2022 Supreme Court 32, Honorable Supreme Court has held that:

*Today, the minor children were present in the Court. They were brought before the Court under the orders and they were very well dressed up showing mature manners and they plainly refused to accompany their own father, rather they categorically stated to reside with the maternal grandparents. It is not a matter of surprise that their body language clearly demonstrated a sign of hatred towards him. It only happened because the father of the minor children has not performed his legal, moral and religious obligation in the manner as it is provided in an Islamic society. Though there is no denial of this fact that the petitioner has remarried and there is a daughter born out of the wedlock but this aspect cannot be considered as a valid ground to defeat the preferential right of the father, rather it can have only persuasive value with respect to other aspects which compel deviation, if any, as per the dictates of justice and "welfare of the minor". Further, Articles 2 and 2A of the Constitution of the Islamic Republic of Pakistan, 1973 clearly envisage that Islamic social order has to be observed while leading life within the four corners of the law. In an Islamic culture, the father has been bestowed with so many responsibilities towards his children. Even the mother of the children can claim compensation of breast feeding from her husband which is well within the tenants of Islamic fiqah. Where this responsibility has been ignored, how a father while forgetting his obligations towards minor children and that too at a belated stage, can claim the guardianship on the basis of bald claims.*

22. It is an established law that father is a natural guardian of his minor child/ children, but indeed the court has to be satisfied while appointing the father as a guardian that the welfare of minor lies in the fact that he be appointed as a guardian and the custody of minor be delivered accordingly. There are many factors, which may not entitle the father to the custody of minors primary being when father deliberately fails to maintain and provide for the healthy bringing up of his child/children. As discussed supra, Mohammadan Law delineates that the mother disentitles herself from the custody of minor(s) if she re-marries, however, this is not an absolute rule. If there are exceptional circumstances to justify, such rule can be departed even in a situation of a second marriage. If the welfare of the minor lies with the mother, then she should be given preference. In the present case, the conduct of the father evidenced that he was not serious in getting the custody of minors. Per statement of the minors that father has not come to meet them during last about 11 years, in such a situation the custody of minors cannot be handed over to the father due to his attitude of dereliction.

23. In the case of Raja MUHAMMAD OWAIS Versus Mst. NAZIA JABEEN and others reported as 2022 S C M R 2123 Honorable Supreme Court of Pakistan held that even in case of second marriage the mother could be entitled for custody of minors if the welfare of minors lied with her: it was held that;

*7. The aforesaid judgments clearly dispel the stance taken by the father that on account of the mother's second marriage, she has lost the right of custody over her four children. Time and again, this Court has held that the paramount consideration where custody is concerned is the welfare of the minor, that is to consider what is in the best interest of the child. The court's jurisdiction in custody cases is in the form of parental jurisdiction which means that the court must consider all factors from the parents' ability to provide for the child including physical and emotional needs, medical care but also relevant is the parents' ability to provide a safe and secure home where the quality of the relationship between the child and each parent is comforting for the child. Hence, there is no mathematical formula to calculate the welfare of the minor, as the factors range from financial and economic considerations to the household environment, the care, comfort and attention that a child gets. Accordingly, the concept of welfare of the child is an all encompassing concept which will cover not only the manner in which the child has to be cared for but will also include the physical, mental and emotional well being of the child.*

24. Honorable Supreme Court of Pakistan has taken a unanimous view and established a legal principle that for deciding the custody of minors the paramount and foremost consideration was welfare of minors. The Guardian Court which is conferred with parental jurisdiction to decide the matters of custody of minors should always focus on the issue of welfare of minors while deciding the question of custody.

25. In the case of GUL SADEM KHAN Versus Mst. HALIMA and others reported as P L D 2025 Supreme Court 47, it was held that even in a situation of a second marriage if the welfare of the minor lies with the mother, then she should be awarded custody: it was held that;

*4. Additionally, poverty has also not been considered a valid ground for disentitling the mother from custody of the minor(s) In terms of section 7 of the Guardians and Wards Act, 1890, the paramount consideration for the court in making the order of appointment of guardian of minor is that it should be satisfied that it is for the welfare of minor. Although it is an established law that father is a natural guardian of his minor child/ children, but indeed the court has to be satisfied while appointing the father as a guardian that the welfare of minor lies in the fact that he be appointed as a guardian and the custody of minor be delivered accordingly. There are many factors, which may not entitle the father to the custody of minor and some of the factors could, where the father is habitually involved in crimes or is a drug or alcohol addict, maltreats his child/children, does not have a capacity or means to maintain and provide for the healthy bringing up of his child/children or where the father deliberately omits and fails in meeting his obligation to maintain his child/children. The factors noted above are not exhaustive and they may also not be considered as conclusive for that each case has to be decided on its own merit in keeping with the only and only paramount consideration of welfare of minor. Although Mohammadan Law delineates that the mother disentitles herself from the custody of minor(s) if she re-marries, however, this is not an absolute rule but one that may be departed from if there are exceptional circumstances to justify such departure and even in a situation of a second marriage if the welfare of the minor lies with the mother then she should be awarded custody.*

26. In the case KHAN MUHAMMAD Versus Mst. SURAYYA BIBI and others reported as 2008 S C M R 480 Honorable Supreme Court of Pakistan held that:

*It is well-settled by now that prime consideration in such-like cases is the welfare of the minor, which being question of tact has been determined by the learned Appellate Court determination whereof has been upheld by the*



*learned High Court vide judgment impugned which being well-based does not warrant interference. Even otherwise, the concurrent findings of fact as recorded by the Appellate Court and upheld by the learned High Court cannot be reversed without any lawful justification which is badly lacking in this case. It is worth mentioning that right of the father being natural guardian of minor, is subject to welfare of the minor because the overriding fundamental and paramount important consideration is always the welfare of the minors.*

27. In the case of SHABANA NAZ Versus MUHAMMAD SALEEM reported as 2014 S C M R 343 Honorable Supreme Court of Pakistan held that:

*8. It may be noted that in terms of section 7 of the Guardians and Wards Act, 1890 (the Act), the paramount consideration for the Court in making the order of appointment of guardian of minor is that it should be satisfied that it is for the welfare of minor. Although it is an established law that father is a natural guardian of his minor child/children but indeed the Court has to be satisfied while appointing the father as a guardian that the welfare of minor lies in the fact that he be appointed as a guardian and the custody of minor be delivered accordingly. There are many factors, which may not entitle the father to the custody of minor and some of the factors could be, where the father is habitually involved in crimes or is a drug or alcohol addict, maltreats his child/children, does not have a capacity or means to maintain and provide for the healthy bringing up of his child/children or where the father deliberately omits and fails in meeting his obligation to maintain his child/children. The factors noted above are not exhaustive and they may also not be considered as conclusive for that each case has to be decided on its own merit in keeping with the only and only paramount consideration of welfare of minor.*

28. In the case of MEHMOOD AKHTAR Versus DISTRICT JUDGE, ATTOCK and 2 others reported as 2004 S C M R 1839 Honorable Supreme Court of Pakistan held that:

*4. The right of custody of minor is not an absolute right rather it is always subject to the welfare of 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 the 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 minor which is the prime consideration in determination of the question of custody.*

29. This Court, under its supervisory jurisdiction sparingly interferes in the concurrent findings of the fact rendered by Courts below. However, it is not a hard and fast rule, the concurrent findings are not so sanctified that they cannot be disturbed or reversed. The powers of this Court under its constitutional jurisdiction were corrective and supervisory in nature and exercised sparingly, in particular in the cases, where from face of record there appeared a serious misreading or nonreading of the evidence or the Courts below failed to exercise its jurisdiction in accordance with law.

30. For the reasons discussed hereinabove, the Court has reached to an irresistible conclusion that the Courts below failed to exercise the jurisdiction vested in them and there was a serious misreading of the evidence on record, which prejudiced the case of Petitioner and welfare of the minors went into stake. The findings of Courts below thus required interference by this Court under its writ jurisdiction. Consequently; this petition is allowed. The order dated 02-11-2020 and judgment dated 24-05-2021 of both the Courts below are set aside. The Respondent is held not entitled to custody of minors, the guardianship application No.21/2018 Re “Moul Bux Versus Mst Munwar Khatoon” filed by the Respondent is dismissed with no order as to the cost. Mother / Petitioners is held entitled to retain the custody of minors. However, Respondent Moula Bux being father, would be at liberty to meet the minors in the school as and when he desires. The Petition stands disposed of in the above terms.

**JUDGE**

Asghar/P.A

Larkana

Dated 22.08.2025

Approved for reporting