

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT
HYDERABAD**

C.P. No.S-372 of 2024

Petitioner:	Mst. Sakina Jamali, through Mr. Shahid Hussain Sahlto Advocate
Respondent No.3:	Ghulam Abbas, through Mr. Imdad Hussain Shahani Advocate.
Date of hearing:	14.03.2025
Date of Decision:	14.03.2025

J U D G M E N T

MUHAMMAD HASAN (AKBER), J.- Through the instant petition, the Judgment dated 06.09.2024 passed by the learned Additional District Judge Sehwan passed in Guardianship Appeal No.05/2024, and the Order dated 25.05.2024 passed by the learned Family Judge-II Sehwan in Guardian & Wards Application No.01/2024, have been assailed whereby custody of both the minors (1) Master Mirchoo, 08 years and (2) Baby Sara, 09 years have been ordered to be handed over to the Respondent/ father.

2. Brief facts as stated in the petition are that the Petitioner and Respondent were married, out of which two minors viz (1) Master Mirchoo and (2) Baby Sara (henceforth "**the minors**") were borne. The marriage was dissolved by way of *khula* by the concerned Family Court in 2019, where after through a private *faisla* between the parties, the Respondent was directed to pay Rs.5,000/- as maintenance of both the minors. The Respondent (father of the minors) filed a Guardianship Application No.01/2024 under section 25 of the Guardian and Wards Act 1890 before the learned Family Judge-II Sehwan to claim the custody of both the minors, who are in the custody of their real mother, the Petitioner. After a full dressed trial and vide the impugned Order dated 25.05.2024, the Application was allowed and custody of both the minors was ordered to be handed over to the Respondent/ father within 45 days. The said Order was assailed by the Petitioner/ mother in Guardianship Appeal No.05/2024 preferred by the Petitioner before the learned Additional District Judge Sehwan, which was also dismissed vide the impugned Judgment dated 06.09.2024.

3. After filing of instant petition, the operation of the impugned Judgment was suspended by this Court, vide Order dated 30.09.2024, in the following terms:

"Learned Counsel submits that the Trial Court without determining or considering the correct ages of the two minors, who visibly appear quite young, issued an order dated 25.5.2024 (at Court File Pg. 19), directing the Petitioner (Mother) to transfer custody of the minors to Respondent No.3 (father) within 45 days. Counsel states that the Appellate Court, in its judgment dated 6.9.2024 (at Court File Pg. 57), upheld the Trial Court's decision.

Counsel contends that, while the Trial Court explicitly ordered the transfer of custody to the father, the Appellate Court made observations contrary to the record by ruling that "Both minor wards are practically living with their father under his love, care, and affection, and at this stage, disturbing their custody would significantly impact their mental development, upbringing, education, health, and welfare."

Counsel also highlights a key aspect of the Trial Court's order, noting that the father works and resides abroad, specifically in Saudi Arabia. Moreover, Counsel avers that the father has entered into a second marriage, raising concerns that, in his absence, the children would be left in the care of and at the mercy of their stepmother.

The submissions made by Counsel warrant consideration. Issue notice to private Respondent No.3 through all modes of service except publication, for a date to be scheduled by the office after two weeks. In the meanwhile, the operation of the Trial Court's order dated 25.5.2024, and the Appellate Court's judgment dated 6.9.2024, shall remain suspended."

4. In response to this Court's directions, a Detailed Report dated 09.10.2024 has also been submitted by the learned Family Judge Sehwan, informing therein that till date, in terms of the Decree dated 25.05.2024, a sum of Rs.35,000/- still remains outstanding against the Respondent on account of maintenance of the minors @ Rs.4,000/- per minor, with 10% annual increment. Such report is in the following terms:

"OFFICE OF THE CIVIL JUDGE & JM-II SEHWAN

No. 701 of / 2024

Dated: 09th October, / 2024

To,
The Assistant Registrar,
Honourable High Court of Sindh,
Circuit Court Hyderabad.

Subject: DETAILED REPORT OF PAYMENT OF
MAINTENANCE AMOUNT DEPOSITED BY
DEFENDANT GHULAM ABBAS IN FAMILY SUIT
NO.03/2024 RE-MST: SAKREENA JAMALI V/S GHULAM

ABBAS JAMALI REQUIRED IN C.P NO.S 372/2024 RE-
MST: SAKEEAN JAMALI V/S ADDITIONAL SESSIONS
JUDGE SEHWAN & OTHERS.

Respected Sir,

With reference to your honour's Court order dated 30.09.2024 passed in C.P No.5-372/2024 Re- Mst: Sakeena Jamali V/S Additional Sessions Judge, Sehwan & Others, I have the honour to submit that this Suit was admitted on 23.02.2024 in which plaintiff filed application U/S 17-A Family Court Act, 1924 with plaint, after hearing of both parties application U/S 17-A Family Court Act, 1964 was allowed on 20.03.2024 with directions to defendant to deposit the interim maintenance amount Rs: 3500/- per month for each Minor's Master Mirchoo and Baby Saira. In compliance of interim order defendant Ghulam Abbas deposited interim maintenance for three months Rs: 21,000/- and same amount was handed over to plaintiff.

It is further submitted that after completion of trail proceedings, Suit of the plaintiff was decreed on 25.05.2024 where in the defendant was directed to pay the maintenance amount Rs: 4000/- per month to each Minor with enhance 10% (percent) per annum from the date of filing of suit to Minor's Master Mirchoo and baby Saira. Minor Master Mirchoo shall be entitled to receive the maintenance amount from the defendant till he attains the age of (18) years, however baby Saira shall be entitled to receive the maintenance amount till her marriage.

It is further submitted in your honour's that as per Judgment and Decree, maintenance amount Rs: 56,000/- is already outstanding against the defendant from which he already deposited maintenance amount Rs: 21,000/- thus the maintenance amount of Rs: 35,000/- is outstanding against defendant.

The report is submitted as desired.

(Ali Asghar Babar)
Family Judge-II, Sehwan"

5. It is the case of the petitioner that while passing the impugned Order and Judgment, both the learned Courts below have failed to properly appraise the evidence and have misread and/or failed to read the evidence in its true perspective and have failed to apply their judicial mind to the facts of the case, and thus compromised the welfare of both the minors, which ought to have been extended prime consideration. Conversely, the learned counsel for Respondent has argued that both the minors are in the custody of the mother whereas the Respondent is working and is living in Saudi Arabia and occasionally visits Pakistan and only once the custody of both the minors is handed over to him, he will regularly shift to Pakistan. It was also stated that the Respondent also owns substantial agriculture lands, whereas the Petitioner does not have the financial means to maintain the minors and the Respondent was paying maintenance of the minors through a *faisla* arrived

through the elders of the community and that both the courts have rightly granted custody of both the minors to the Respondent.

6. Upon perusal of the record, it appears that at paragraph 13 of the Impugned Judgment dated 06.09.2024, surprisingly, it has been recorded by the learned Appellate Judge that, *"Both the minor wards are practically living with their father under his love, care and affection and at this stage disturbing the custody of both the minor wards would greatly affect their mental growth, up-bringing, education, health and welfare"*. Such fact was inquired from the counsel present in Court during course of hearing today as to the status of custody of the minors, and it has been unanimously reported that, both the minors were/are in the custody of the Petitioner/ mother, since much before even filing of the Guardianship application, till date. Even in the Guardianship Application 01/2024 and in the Order dated 25.05.2024, so also in the appeal, and even in the instant Petition, it has been consistently recorded by the both parties that both the minors were/ are living with the Petitioner/ mother, and it is no one's case that the minors are in the custody of their father. It appears that the learned Appellate Court has dealt with such a serious and sensitive matter of the welfare and future of two minors, in a routine manner. Such casualness raises serious doubts about the validity of the impugned Judgment and highlights absence of a conscious and judicial mind while taking the decision.

7. The second important aspect which requires attention in the matter is the fact, which is also recorded in the evidence/ cross-examination of the parties, and which has also been admitted on record, is that the Respondent/ father has contracted second marriage after dissolution of his marriage with the petitioner, and out of such marriage, two children are also borne. Surprisingly, the impugned Orders are completely silent on such an important aspect as well. The learned Judges have also failed to consider the impact of such a drastic action which would practically mean uprooting the minors from the custody of the real mother and placing them into the custody of their step-mother. Even if the step-mother is not cruel towards the children (a fact unknown as yet), she cannot be a substitute of the real mother. Needless to mention that the love and affection which a real mother can provide to her minor children cannot be provided by a father or step mother since there is no substitute and parallel to a real mother's love and affection in this world. Furthermore, no allegation of corruption or bad character against the Petitioner has been alleged, which could be made basis to disentitle her from the custody of the minors. Both the learned Courts utterly failed to consider the adverse effects of such a decision on the physical, mental and emotional health of the minors. The reasons for such a preference, the willingness and

competence of the step-mother and the factor that the step-mother already has her own two children from the Respondent, were also not considered. Surprisingly, both the learned Courts below did not even bother to record such important aspects of the matter, let alone expressing any judicial reasoning or application of mind thereon.

8. The third important aspect which has also come on record as an admitted fact is that, the Respondent is permanently working and living in Saudi Arabia, who occasionally visits Pakistan. Not only the Respondent has failed to justify in evidence as to how these two minors would live and under whom they would be taken care of, when the Respondent himself is permanently working in Saudi Arabia and remains out country during most of the year, but both the learned Courts below have also failed to discuss and judicially satisfy such an aspect. Based upon a mere hypothetical statement of the Respondent that he would shift to Pakistan, the entire lives and welfare of two minors could not be uprooted, more so when Respondent has also failed in satisfying his fitness on other aspects of the welfare of the minors. This brings us to the next important admitted fact on record to be considered that, the Petitioner herself has till-date not entered into second marriage. Per the petitioner, she has consciously taken such a decision and has sacrificed her life for the welfare and well-being of the minors so that she could properly look after the minors and devote her full time and attention towards the children. A mother is the best guardian for her minor children unless it is proved that she has married a man who is not closely related to the minor, or she lives a life of open immorality or her occupation be such as to make it difficult for her to look after the child properly. as held in '*Bang v. Mirza Muhammad and 2 others*'¹.

9. Plethora of case law available in our own jurisdiction on the subject as escaped the attention of the learned Judges on the subject of removal of custody of a minor from that of a real mother, to the care of a step mother. Starting with the primary rule that for determining the question of custody of minor, the paramount consideration is the welfare of the minor, as held in '*Safdar Hussain and others v. Mst. Parveen Umar and others*'². '*Masroor Hussain V. Additional District Judge, Islamabad and 2 others*'³ was the case wherein it was held that a step-mother by no stretch of imagination can be considered to be a sympathizer of step-child and a minor cannot be left at the

1. 2003 Y L R 1337
2. PLD 2004 SC 357
3. 2011 CLC 851

mercy of a woman who is otherwise a stranger to the minor, while the father remains away in connection with his job. In *'Muhammad Jameel V. Azmat Naveed'*⁴, it was held that when, "the petitioner has contracted second marriage and it will not be in the welfare of the minors that their custody be taken from the real mother and handed over to the step-mother." The following decisions also highlight the same aspect, viz *'Humayun Gohar Khan V. Guardian Judge, Okara and 2 others'*⁵, *'Muhammad Zulqarnain Satti V. Mst. Ismat Farooq'*⁶, *'Tahira Batool V. Additional District Judge, Mianwali and another'*⁷, *'Matloob Ahmad V. Additional District Judge, Sheikhpura and 2 others'*⁸, *'Javed Irfan V. Additional District Judge'*⁹, *'Salma V. Additional District and Sessions Judge, Faisalabad and 2 others'*¹⁰, *'Zahid Hussain V. Tahira Perveen and 2 others'*¹¹, *'SHER MUHAMMAD v. Mst. Nasreen Akhtar and others'*¹², *'Zahoor Ahmed V. Mst. Rukhsana Kausar and 4 others'*¹³, *'Shaukat Pervez Butt v. Mst. Nargis Sultana and another'*¹⁴.

10. Coming to the next aspect concerning payment of maintenance by the Respondent from the date of their birth till date, Paragraph 9 of the impugned Order dated 25.05.2025 passed by the learned Family Judge clearly records that the Respondent was totally relying upon a private *faisla*, however neither the Respondent nor his witnesses were able to prove the payment thereof in Court during evidence. Even upon query by this Court, no proof of the same could be provided to establish that since the birth of the children till date, Respondent has been properly and regularly paying maintenance of the minors and that too, a regular monthly amount which would commensurate to their proper health, education and well-being. The Detailed Report dated 09.10.2024, reproduced at paragraph 5 *ibid*, as submitted by the learned Family Judge Sehwan, also confirms that till date, in terms of the Decree dated 25.05.2024, a sum of Rs.35,000/- still remains outstanding against the Respondent on account of maintenance of the minors at Rs.4,000/- per minor, with 10% annual increment. Such a default on his part does not have a positive impact on the eligibility of the Respondent in this case. The

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| 4. | 2010 M L D 1388 |
| 5. | 2010 M L D 1313 |
| 6. | 2010 C L C 1281 |
| 7. | 2008 C L C 1595 |
| 8. | 2007 C L C 1578 |
| 9. | 2007 MLD 1089 |
| 10. | 2006 Y L R 316 |
| 11. | 2006 C L C 1766 |
| 12. | 2000 Y L R 2848 |
| 13. | 1999 M L D 1580 |
| 14. | P L D 1988 Lahore 290 |

Respondent has also failed to establish as to what would be his source of income, after he (hypothetically speaking) leaves his job in Saudi Arabia. In *'Mst. Firdaus Iqbal v. Shafat and others'*¹⁵ it has been held by the Supreme Court that right of the father to claim the custody of the minor was not an absolute one and the welfare of the minor is the paramount consideration. Neglecting his minor child and solemnizing second marriage by a father may result in his deprivation of right to claim the custody.

11. The learned counsel for the Respondent has not been able to point out any compelling reasons why custody of the minors, at this stage, should be disturbed, when they are in the formative years of their young lives and displacing them from the current environment where they are happy, settled and well adjusted. Their displacement will surely cause physical and psychological problems for the children' leaving lifelong scars on their personalities.

12. On a comparative analysis of the two possible scenarios namely custody with the mother or with the father and step-mother, I am convinced that in the facts and circumstances of this case, the welfare of both the minors clearly lies to remain with the real mother. I am also not convinced with the argument by Respondent's counsel that Petitioner does not have enough financial resources to maintain the minors, suffice it to say that poverty could not be a valid ground to disentitle a real parent to the custody of the minor, as was so held by the Supreme Court in *'Mst. Feroze Begum v. Lt.-Col. Muhammad Hussain'*¹⁶. Additionally, the case of *'Muhammad Nazir V. Additional District Judge, Mianwali and another'*¹⁷ can also be relied on the subject, wherein it was observed that,

"It is axiomatic that it is always the father who has an obligation under law to provide maintenance to his minor children. That being so, the argument that the respondent mother had weak financial position as compared to the petitioner father, is misconceived. The petitioner father has admittedly contracted a second marriage and there would be no gainsaying the fact that he will have to remain out of his house for considerable time in connection with his daily pursuits. The minor cannot be left to the surveillance of step-mother. A step mother can never be a substitute for the real mother. Real mother has inherent right to keep her minor children close to her bosom. The minor boy had been with the petitioner father and was naturally prone to toe his line as a tutelage in his hand. In these circumstances, intelligent

15. 2000 SCMR 838

16. 1978 SCMR 299

17. 2009 C L C 1010

preference of the minor while considering comparative rights of the real mother vis-a-vis the father who had already contracted a second marriage, could be legitimately pushed to oblivion and this is what the learned two Courts below had done."

13. I would conclude this discussion with the valuable expressions by His Lordship, Mr. Aminuddin Khan J. in '*Arif Fareed v. Bibi Sara and others*'¹⁸ desiring the judicial atmosphere required to deal with such cases, in the following words:

"3. Before delving in the proposition in hand, we consider it appropriate to put the things in proper perspective. The family litigation directly or indirectly causes long term effects on the emotional health of parties especially the children who become a silent victim of differences and disputes between contesting adults. The dilemma starts with our social and institutional conception of the child and childhood. The question, who is considered to be a child, and what period in a person's life can be labelled as "childhood," has undergone change over time. There are many reasons for this, including social changes and the need to define certain ages in which rights and responsibilities are attached to those falling in defined age bracket. The traditional view of children has been to see them as objects in need of protection, not as persons with the rights and capabilities of autonomous individuals. The children have often been regarded primarily as being part of the family unit, not as independently acting agents. Until the end of the 1970s, the prevalent understanding among historians was that historically, children did not constitute a category of their own. The United Nation's Convention on the Rights of the Child 1989 (CRC) is the first treaty specifically concerned with the rights of children and it marks an important shift in thinking towards a 'rights-based approach' which holds the states/ governments legally accountable for failing to meet the needs of children.

4. Therefore, when a child comes to interact with the judicial system, the response must be facilitative, cooperative and backed by child-right driven approach. The Family Courts Act, 1964 gives ample powers to the Family Court to devise its own procedure wherever it is so desired. The object of the Act is to have expeditious disposal of such matters in shortest possible time "*Farzana Rasool v. Dr. Muhammad Bashir*" (2011 SCMR 1361). The technicalities and trappings of normal practice and procedure are not suitable to the cases where very young children are the party. In the case of "*Muhammad Afzal v Hahnaz Shahzadi*" (1989 MLD 1362), the contention of husband was that since future maintenance was not claimed by (wife and children) in appeal, Appellate Court could not grant such relief on its own. Lahore High Court rightly ruled that the Family Court can grant the relief in the shape of future maintenance which if it is not claimed but they were otherwise entitled in its *loco parentus* capacity. In the instant case, it was very much

convenient for the family court to ask for the suitable amendments in the plaint or it could have itself impleaded the child as a plaintiff along with his mother and other siblings. However, in the given circumstances, we find no miscarriage of justice or that the case could have a different result if the child was technically impleaded as a party to the suit in formal manner. We reiterate that as per the Preamble of the Act, the Family Court is the forum for disposal and settlement of family disputes and matter connected there with. This disposal and settlement of dispute should not take the form and contents of adjudication. Wherever, there is a procedural convenience, subject to the command of the statute, it must be resolved in favour of the women and children."

14. Considering the above factors and applying the principles discussed *ibid* to the best interests and welfare of minor which is the supreme consideration in such cases, it appears that both the learned courts below have not dealt with the sensitive issue of welfare of two minors with the kind of attention it deserved and failed to appraise the evidence produced by the parties and the circumstances so also they have failed to carefully and judiciously consider the prime welfare of both the minors in this case. The *loco parentus* nature of the jurisdiction of the Courts while dealing with petitions in family matters, as expressed in '*Arif Fareed v. Bibi Sara and others*' *supra* by the Supreme Court, places a huge responsibility on the Courts to carefully consider all possible aspects while deciding the welfare of minors, however such compassion appears to be missing in both the impugned decision, which are based upon misreading and non-reading of material evidence and factors, and have failed to apply judicious mind to the issue. The relevant legal principles, as discussed above, were also ignored. Consequently, the impugned Judgment dated 06.09.2024 and Order dated 25.05.2024 are hereby set-aside, and the instant Petition is allowed as prayed, and the Respondent is directed to deposit with the Family Judge, the outstanding amount on account of maintenance of the minors, as recorded at para 5 *ibid*, within 30 days of this Order, and shall continue to deposit future monthly maintenance of the minors without fail, in terms of the decree, as reported by the learned Family Judge, until the same is modified in accordance with law. The instant petition is therefore disposed-off along with all pending applications in the above terms, with no order as to costs.

JUDGE