

Judgment sheet

IN THE HIGH COURT OF SINDH AT KARACHI

Present

Mr. Justice Muhammad Jaffer Raza

Constitution Petition No. S – 79 of 2024

Mst. Tooba Petitioner.

Versus

Abdul Malik Respondent

Ms. Shabnam Sultana, Advocate for the Petitioner.

Mr. Muhammad Ifan, Advocate for the Respondent No.1.

Dates of hearing : 09.04.2025.

Date of announcement : 19.05.2025.

J U D G M E N T

MUHAMMAD JAFFER RAZA – J: The instant petition has been filed by the Petitioner impugning the order dated 30.11.2023 passed in the Guardian and Ward Appeal No.37/2023 (**“Appeal”**) which was allowed. The said appeal emanated from the Guardian and Ward Application No.566/2022 (**“Application”**) filed by the Respondent No.1 which was dismissed vide order dated 03.02.2023. The said order was impugned in the appeal wherein the Impugned order was passed.

2. Succinctly stated, facts of the case are that the Respondent No.1 filed the Application under Section 25 of Guardians and Wards Act, 1890 (**“Act”**), seeking permanent custody of the minor boy aged 5, primarily on the ground that the Petitioner had remarried. The Application was dismissed vide final order dated 03.02.2023 wherein visitation rights were granted to the Respondent No.1. Thereafter, the said order was impugned in the above-noted Family appeal by the Respondent No.1 and the said appeal was allowed vide the Impugned judgment. The Petitioner has therefore impugned the conflicting findings of the learned Courts below in the instant petition.

3. Learned counsel for the Petitioner has contended that the second marriage of the Petitioner does not disentitle her from the custody of the minor who is of

tender age. Learned counsel has vehemently argued that the primary consideration for the Court ought to be the welfare of the minor and the same has been ignored and overlooked by the learned Appellate Court. He has argued that the visitation schedule coined by the learned Family Court is sufficient for the Respondent No.1 to foster a bond with the minor. Lastly, it was argued by the learned counsel that the Application was preferred by the Respondent No.1 was after three years of the minor's birth, which in itself reflects the Respondent No.1's intent to intimidate and harass the Petitioner. He has relied upon the following judgment in support of his contentions: -

- *Mst. Qurat-Ul-Ain Versus Station House Officer, Police Station Saddar Jalalpur Jattan, District Gujrat and others*¹

4. Conversely learned counsel for the Respondent No.1 has argued that the order passed by the learned Appellate Court is in consonance with the evidence of the respective parties recorded before the learned Family Court. The Petitioner, according to the learned counsel, is disentitled from the custody of the minor as per paragraph number 352 of Mohammadan Law. He has lastly argued that he is willing and able to take care of the minor and the welfare of the minor lies with him.

5. I have heard the learned counsels for the parties and perused the record. In order to effectively adjudicate the instant petition, it will be expedient to frame the following legal question:

“Whether second marriage of the mother automatically disentitles her from the custody of the minor?”

6. The said question has come up repeatedly before the Hon'ble Supreme Court. The Hon'ble Supreme Court has consistently held that second marriage by itself, is not a bar to retain the custody of the minor. The said disentanglement is not absolute. The primary and perhaps the only consideration before the Court ought to be the welfare of the minor.

¹ 2024 SCMR 486

7. In a recent judgment the Hon’ble Supreme Court in the case of **Asjad Ullah Versus Mst. Asia Bano**² and others held unequivocally as under: -

“16. Insofar as the contention of the learned counsel for the petitioner that Respondent No.1 No.1 has contracted a second marriage with a person who is a stranger to the minor and, therefore, is not entitled to the custody of the minor, it is by now a settled principle of law that the mere fact of a mother's remarriage does not ipso facto disentitle her from the custody of the minor.”

*17. As per D.F. Mulla's Principles of Muhammadan Law (Paragraphs 352 and 354), a mother's right of custody continues after divorce but may be forfeited upon remarriage, particularly if she marries a person not related to the minor within the prohibited degrees. However, Section 17 of the Act requires that the welfare of the minor must be of the paramount consideration. This Court has consistently held that the rules in Muhammadan Law regarding disqualification of a mother upon remarriage are not absolute. In *Shabana Naz v. Muhammad Saleem* (2014 SCMR 343), it has been affirmed that if the welfare of the minor Civil Petition No. 3920 OF 2024 lies with the mother, custody may be granted to her notwithstanding her second marriage.” (Emphasis added)*

8. The judgment in the case of **Mst. Qurat-Ul-Ain** (supra) relied upon by the learned counsel for the Petitioner, advances his contention. It was held as under: -

“13. Thus, it is apparent from reading of the two paras of the Muhammadan Law that though the mother is entitled to the custody (Hizanat) of her minor child but such right discontinues when she takes second husband, who is not related to the child within the prohibited degree and is a stranger in which case the custody of minor child belongs to the father. It has been construed by the Courts in Pakistan that this may not be an absolute rule but it may be departed from, if there are exceptional circumstances to justify such departure and in making of such departure the only fact, which the Court has to see where the welfare of minor lies and there may be a situation where despite second marriage of the mother, the welfare of minor may still lie in her custody.”

9. The Hon’ble Supreme Court in the case of **Shaista Habib Versus Muhammad Arif Habib and others**³ expounded the above-noted principle and laid down an exhaustive criterion for grant of custody in the following words: -

“The second marriage contracted by the mother also cannot become a stand-alone reason to disqualify her from obtaining the custody of the child. The question of custody involves taking into consideration the factors which are relevant to the upbringing, nursing and fostering of the child. It essentially extends to the emotional, personal and physical wellbeing of a child. The sole

²Civil Petition No. 3920 OF 2024

³P L D 2024 Supreme Court 629

object is to ensure that the overall growth and development of the child is guaranteed. The process adopted in order to determine the best interest has been described by the House of Lords connotes a process, whereby all the relevant facts, relationship, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to follow will be that which is best in the interest of the child.”(Emphasis added)

10. The above-noted proposition came up for adjudication before the Hon’ble Supreme Court in the case of **Raja Muhammad Owais Versus Mst. Nazia Jabeen and others**⁴ wherein the Hon’ble Court after tracing the history of similar judgments, expounded the principle of welfare of the minor in the following words:-

“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.

8. The United Nations Convention on the Rights of the Child, 1989 (UNCRC) is an international treaty which sets out the rights of children, be it economic, social, health or family. The UNCRC was ratified by Pakistan in 1990 with reservations that it will adopt the Convention, subject to the requirements of the Islamic Law. However, in 1997, the ratification became absolute as the reservation was withdrawn. The UNCRC recognizes that the child should grow up in an environment of love, happiness and understanding. Article 3 provides that in all actions concerning children whether by courts of law or public, or private welfare institution amongst others, the best interest of the child shall be a primary consideration. Article 7 provides that every child has right to be cared for by their parents and Article 9 requires that in the event of separation between the parents, the child should be in contact with both parents unless either one can cause any harm. Article 12 provides that a child capable of forming his or her own view should be able to express it and it should be given due weight age. This Article suggests that children’s preferences can be a guiding factor in custody cases, hence, encouraging their participation and opinion in custody matters. This is essential because custody is about the care and comfort

⁴2022 S C M R 2123

of the child and the right of the child to a family. Custody matters are always sensitive and require a great deal of care as the court has to weigh in all factors in order to determine where the welfare of the minor lies. Incases of remarriage, circumstances change, hence, while looking at the welfare of the child, the entire living arrangement and environment has to be reassessed in the context of the welfare of the child. Fundamental to this decision is the best interest of the child and not that of the parents. Hence, a second marriage of the mother cannot become a stand alone reason to disqualify her right to custody.” (Emphasis added)

11. It is evident from the perusal of the aforementioned judgments that the second marriage of the Petitioner does not disentitle the Petitioner from retaining the custody of the minor. I do not consider it to be in the welfare of the minor for his custody to be granted to the Respondent No.1 and in that respect, it is held, that learned Appellate Court erred in passing the Impugned Judgment. The learned Appellate Court gave little or no consideration to the evidence recorded by the husband of the Petitioner who vowed to maintain and reside with the minor. Keeping in mind the “child-centered approach” and guidelines given by the Hon’ble Supreme Court in the case of **Malik Mahmood Ahmad Khan Versus Malik Moazam Mahmood and others**⁵ it is held that the custody of the minor, given his tender age, shall continue to remain with the Petitioner. The visitation schedule coined by the learned Family Court for visitation of the minor with the Respondent shall be complied with by the parties in letter and spirit.

13. It is trite law that only in exceptional circumstances, interference is warranted by this court in its Constitutional jurisdiction. I find the instant case to fall within such circumstances and am inclined to allow the instant petition within the narrow parameters as expounded in the case of **Shaista Habib Versus Muhammad Arif Habib**⁶ wherein it was held as under: -

“As already noted above, while determining the welfare of the child in the context of custody disputes the court may grant the custody to a person other than the parents e.g. the grandparents or aunt, if doing so would promote the welfare and best interest of the child. As a general rule the guardian and family court is the final arbiter for determining the question of custody, except when it has made a determination in an arbitrary, capricious or fanciful manner i.e. when the fundamental principle of welfare of the child has not been considered or

⁵P L D 2025 Supreme Court 247

⁶P L D 2024 Supreme Court 629

determined in the light of the variables which are relevant in the given circumstances. If the court has ignored the welfare of the child and the latter's best interest or has given preference to some other ground then the decision would not be sustainable. The court, in its endeavor to assess and determine the welfare of a child, is not bound to follow rigid formalities, strict adherence to procedure or rules or technicalities if doing so may hamper the determination or undermine the fundamental criterion of the best interest of the child. In a nutshell, the overarching and fundamental principle that must prevail and guide a court in determining custody disputes is the welfare of a child. The court has to adopt a course that would be in the best interest of the child because his/her welfare must always be the paramount consideration." (Emphasis added)

14. In light of above discussion, the instant petition is allowed and the Impugned order of the learned Appellate Court is set aside with no order as to cost.

J U D G E

Nadeem Qureshi "PA"