

**IN THE HIGH COURT OF SINDH AT KARACHI**

**Present**

**Mr. Justice Muhammad Jaffer Raza**

**Constitution Petition No. S – 1168 of 2024**

Mst. Wajiha Fatima & another ..... Petitioners.

Versus

Syed Badar Abbas Jafri & others..... Respondents.

Syed Rashid Rizvi, Advocate for the Petitioner.

Mr. Ahmed Dawood, Advocate for the Respondent.

Dates of hearing : 18.03.2025 and 08.04.2025.

Date of announcement : 16.05.2025.

**J U D G M E N T**

**MUHAMMAD JAFFER RAZA – J:** The instant petition has been filed by the Petitioners impugning the judgment dated 07.08.2024 passed in the Guardian and Ward Appeal No.24/2024, (“**Appeal**”) which was dismissed. The said appeal emanated from the Guardian and Ward Application No.2593/2022 (“**Application**”) filed by Respondent No.1 which was allowed vide order dated 24.04.2024. The said order was impugned in the appeal wherein the Impugned order was passed.

2. Succinctly stated, facts of the case are that Respondent No.1 filed the Application under Section 25 of Guardians and Wards Act, 1890 (“**Act**”), seeking permanent custody of the minor. During the pendency of the Application the Petitioner contracted second marriage and it was argued by the learned counsel for the RespondentNo.1 that the minor is within the prohibited degree with the husband of the Petitioner. On the said basis the Application was allowed vide final order dated 24.04.2024 wherein permanent custody of the minor was directed to be handed over to the said Respondent. Thereafter, the said order was impugned in the above-noted Family appeal and the said appeal was dismissed vide the

Impugned judgment. The Petitioner has therefore impugned the concurrent 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 girl who is now three years old. 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 Courts below. It is further averred that Respondent No.1 has not paid any maintenance towards the minor. Further learned counsel has stated that there are no other female members residing with Respondent No.1, therefore the welfare of the minor lies with the Petitioner who is her biological mother. He has further submitted that the second marriage of the Petitioner took place on 03.10.2023, during the pendency of the Application and the said Application was only filed to harass, stifle and intimidate the Petitioner. He has relied upon the following judgments in support of his contentions: -

- **Muhammad Siddique v. Lahore High Court, Lahore through Registrar and others<sup>1</sup>;**
- **Mst. Safia Bibi v. Additional District Judge & others<sup>2</sup>;**
- **Afshan Naureen V. Nadeem Abbas Shah<sup>3</sup>;**
- **Ayesha Altaf v. Fahad Ali and 2 others<sup>4</sup>.**

4. Conversely learned counsel for the Respondent No.1 has argued that both the orders passed by the Courts below are extremely “comprehensive” and in line with the evidence of the parties adduced before the Learned Family Court. He has further argued that it is not in the welfare of the minor, being a girl, to live with the step father. 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 further argued that considering that he was not given custody of the minor

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<sup>1</sup>PLD 2003 SC 887

<sup>2</sup> 2022 CLC 262 [Lahore]

<sup>3</sup> 1997 MLD 197 [Lahore]

<sup>4</sup>2019 CLC Note 66 [Lahore]

despite orders of the Courts below, he has not paid the maintenance and neither is he bound, considering the fact that there are concurrent findings in his favour.

5. I have heard the learned counsel 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 disentitlement is not absolute. The primary and perhaps the only consideration before the Court ought to be the welfare of the minor. The succeeding paragraphs will attempt to answer the legal question framed above in light of the pronouncements of the Hon’ble Supreme Court.

7. In a recent judgment the Hon’ble Supreme Court in the case of **Asjad Ullah Versus Mst. Asia Bano**<sup>5</sup> and others held unequivocally as under: -

*“16. Insofar as the contention of the learned counsel for the petitioner that respondent 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 Mubhammadan 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 Mubhammadan Law regarding disqualification of a mother upon remarriage are not absolute. In Shabana Naz v. Mubammad 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. Earlier the Hon’ble Supreme Court in the case of **Mehmood Akhtar v. District Judge, Attock and 2 others**<sup>6</sup> categorically held as under: -

<sup>5</sup>Civil Petition No. 3920 OF 2024

<sup>6</sup>2004 SCMR 1839

“4. *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.”(Emphasis added)*

9. The Hon’ble Supreme Court in the case of **Shaista Habib Versus Muhammad Arif Habib and others**<sup>7</sup> 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 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 con notes 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**<sup>8</sup> 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 mothers 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*

<sup>7</sup>P L D 2024 Supreme Court 629

<sup>8</sup>2022 S C M R 2123

*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 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. In cases 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, especially in the present case, as the minor is a three-year-old girl. I do not consider it to be in the welfare of the minor for her custody to be granted to the Respondent and in that respect, it is held, that both the courts below have erred in passing the Impugned Judgments.

12. I have also as abundant caution, examined the parties who appeared before me. The Petitioner has categorically stated that her husband and family have accepted the minor wholeheartedly and the minor resides with her and not her maternal grandmother, as alleged by the Respondent. She has clarified that the minor was only temporarily residing with her maternal grandmother whilst the

Petitioner was occupied with her wedding ceremony. Keeping in mind the “*child-centered approach*” and guidelines given by the Honourable Supreme Court in the case of **Malik Mahmood Ahmad Khan Versus Malik Moazam Mahmood and others**<sup>9</sup> it is held that the custody of the minor shall continue to remain with the Petitioner.

13. I am mindful of the limited jurisdiction in Constitutional jurisdiction, specially pertaining to family matters. However, I am inclined to allow the instant petition within the narrow parameters as expounded in the case of **Shaista Habib Versus Muhammad Arif Habib**<sup>10</sup> 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 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. The same principle was expanded in the case of **Asjad Ullah Versus Mst. Asia Bano and others**<sup>11</sup> wherein it was held by the Hon’ble Supreme Court as under: -

*“10. It is the duty of the Court to ensure that the welfare of the minor is of paramount concern, and that the actions of the litigating parties are not motivated by personal vendettas, vanity, or emotional desires for affection, but solely in the best interest of the minor. In matters concerning the custody of a child, the Family Court is not obliged to delve into the intricacies or technicalities of the case but must focus on determining what is in the best interest of the minor.”*(Emphasis added)

<sup>9</sup>P L D 2025 Supreme Court 247

<sup>10</sup>P L D 2024 Supreme Court 629

<sup>11</sup>Civil Petition No. 3920 OF 2024

15. Before parting with the judgment, I am inclined to observe that the myth of disentanglement, upon the second marriage of a mother, is often used as a sword against them to continue with undesirable unions. This proverbial sword reeks of misogyny, vindictiveness and malice. The risk of losing the custody of a child in case of divorce and potential remarriage, obligates women to endure pain and hardship and it is often this myth which is used to control and subjugate. The myth of disentanglement has been dispelled and debunked continually by the Hon'ble Supreme Court and it is in line with the principles laid therein, that custody matters ought to be adjudicated.

16. In light of above discussion, the instant petition is allowed and both the impugned orders are set aside with no order as to cost.

J U D G E

Nadeem Qureshi "PA"