

Judgment Sheet

IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANO

C.P.No.S-426 of 2024

(Mst. Marvi v/s. Hakim Ali Birahamani)

Date	Order with signature of judge
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Petitioner: Mst. Marvi D/O Murad Ali Birahmani
Through Mr. Himath Ali Gadehi, Advocate

Respondent: Hakim Ali son of Ghulam Ali Birahmani
Through Mr. Shouban Ali Mallah, Advocate

Mr. Munwar Ali Abbasi, Assistant Advocate General, Sindh.

Date of Hearing: 22.09.2025
Date of Order: 22.09.2025

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JUDGMENT

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Nisar Ahmed Bhanbhro J.- Through this petition, the petitioner has challenged the concurrent findings of the Courts below, whereby the Guardian & Wards application No 27 of 2024 (Re-Mst. Marvi v/s. Hakim Ali), filed under section 7, 10 and 25 of the Guardian and Wards Act, 1890 (G&W Act) before the Court of learned Civil/Family Judge, K.N.Shah (Trial Court) for grant of custody of minors namely Baby Naila aged about 4 years, Baby Koyal aged about 3 years and Dadlo aged about 15 months was declined vide order dated 08.05.2024 (impugned order) and Guardian & Wards Appeal No 08 of 2024 (Re-Mst. Marvi v/s. Hakim Ali), was dismissed by the Court of learned Additional District Judge-II, Dadu (Appellate Court) vide judgment dated 26.09.2024 (impugned judgment).

2. Succinctly stated, the facts of the petitioner’s case are that that the petitioner Marvi solemnized marriage with respondent Hakim Ali in year 2016. Out of the

wedlock couple parented three children namely Baby Naila aged about 4 years, Baby Koyal aged about 3 years and Dadlo aged about 15 months. The minors were residing with the parents in the house of Respondent Hakim Ali. Dispute between the parties arose due to divorce pronounced by the brother of Petitioner to the sister of Respondent, which antagonized Respondent Hakim Ali to oust petitioner. Respondent Hakim Ali retained the custody of minor children with him. Petitioner filed an application under section 491 CrPC before the Court of Learned Sessions Judge Dadu for recovery of minors but to no avail, hence she filed application under section 7 of the G&W Act for grant of custody of minors before Learned Trial Court.

3. On notices, respondent Hakim Ali appeared before Learned Trial Court, he filed objections to the application. Respondent Hakim Ali stressed that the petitioner being a lady had no source of earning, she was residing with her brother in katcha area. There is no school facility in the katcha area. Respondent being biological father of minors was a natural guardian and right person to retain the custody of minors.

4. Out of the pleadings of the parties, learned Trial Court framed three issues, which included the entitlement of the permanent custody and welfare of minors.

5. Petitioner in support of her claim examined herself and her mother namely Mst. Rasti; the Respondent examined himself, parties closed the side for evidence. The learned Trial Court on appraisal of the evidence dismissed the G&W application vide impugned order dated 08.05.2024.

6. Petitioner challenged the impugned order dated 08.05.2024 by way of Guardian and Wards Appeal No. 08 of 2024 before the Court of Learned District Judge Dadu, which was assigned to learned Appellate Court for disposal in accordance with law. Learned Appellate Court dismissed the G&W Appeal vide impugned judgment dated 26.09.2024, hence this petition.

7. Mr Himath Ali Gadehi, Learned counsel for the petitioner argued that impugned judgment and impugned order passed by both the courts below were not sustainable under the law. He argued that the courts below failed to appreciate the evidence on record. He argued that the minors were aged below 5 years and welfare of the minors lied in the lap of mother. He argued that the financial status

of the mother would not be a hurdle in granting permanent custody of minors to her. He argued that minors were aged about 4 years, 3 years and 15 months respectively and during this tender age they need mother's care. He argued that the impugned judgment and order were passed in violation of principles settled by Honorable Apex Court for grant of custody. He further argued that the Courts below did not consider the question of welfare of the minors, on this score alone the impugned judgment and impugned order were not sustainable. He prayed for allowing the petition, setting aside the impugned Judgment and impugned Order and grant of the custody of minors to the petitioner.

8. Mr. Shouban Ali Mallah, Learned counsel for the respondent argued that the respondent was ready to take the petitioner to his home, but she was unwilling to join him. The petitioner has no source of earning; she cannot provide education to the minors. He argued that the petitioner had no separate house, therefore, the Courts below rightly resolved the issue of entitlement of the custody of the minors in favour of the respondent. He prayed for dismissal of the petition.

9. Heard arguments of the counsel for the parties and perused the material made available. The petitioner has brought the case for custody of minor children Dadlo, Naila and Koyal who were aged about 15 months, 04 years and 03 years respectively at the time of filing of Guardian and Wards application. Separation of minors from mother at such tender age was a cruel act on the part of father which cannot be appreciated at all. Learned Trial Court ought to have granted interim custody of minors to the Petitioner by exercising powers conferred under section 12 of the G&W Act by fixing a meeting date with father, but learned Trial Court granted interim custody of minor Dadlo only in favor of Petitioner, which reflected the lack of parental care vested with the Guardian & Wards Court.

10. Learned Trial Court on appraisal of evidence concluded that in the present case father Hakim Ali was the suitable person to retain the custody of minors. Learned Trial Court observed as follows:

"The children named above appeared to be good looking, well dressed and they talked in well manner while questioning them over their custody issue as claimed by their applicant/mother. Furthermore, it appeared from the talk and conduct of the minor daughters that they were more attached and inclined towards their father. Finally, they flatly refused to join with their mother for sake of custody and their upbringing with her yet the opponent

was still ready to take back the applicant and arrange for her separate house along with minors to provide them a better future but the applicant lady Mst. Marvi refused to go back with her husband. However, the father of minor daughters also stated that he would always allow the mother to meet her daughters whenever she wanted."

11. Learned trial court resolved the issue of custody of minors in favor of Respondent father primarily for the reason of the conduct of the petitioner. It transpired that the respondent wanted to take petitioner back and offered to reside with him, but she refused point blank. Learned Trial Court failed to assess the reason which inclined petitioner to remain away from Respondent. In her evidence she complained about the maltreatment and torture at the hands of Respondent, which fact learned trial court lost sight of. On a query made by this Court for reason of not joining her husband, she disclosed that she was tortured by Respondent, her arm was broken and she lost working capacity of her right arm. She had become disabled to perform heavy load lifting work with that arm. She categorically stated that her husband was a cruel man and was victimizing her; therefore, she cannot go there. In her affidavit-in-evidence, she had stated that she was maltreated, wherein a suggestion was made that she has not made any complaint of maltreatment at the hands of her husband, she replied that it was correct that she did not lodge complaint of torture against her husband. The respondent in his affidavit-in-evidence did not specifically deny the fact of maltreatment and torture upon the petitioner. In such a situation, the decision of the petitioner not joining her husband /respondent appears to be correct. She could not be compelled to live in the house of her husband where she was subjected to maltreatment and torture and lost the ability of one arm to work.

12. Learned appellate Court upheld the order of learned trial Court while looking at the financial status of the petitioner that she might not be capable of upbringing the children, therefore maintained the findings of Learned Trial Court. In its findings Learned appellate Court observed that the petitioner had not contracted second marriage, she was entitled to retain the custody of minors under the concept of Hizanat, but the welfare of the minors was with the father as they were happy with him. learned appellate Court in para-10 of the impugned Judgment observed as under:

"Admittedly, the appellant has not contracted second marriage and right of Hizanat vests with her yet the welfare of minors lies with their father/respondent as they appeared to be happy with him and he can better take care of them. The

appellant herself being dependent upon her brother cannot provide the necessities of life to minors. However, she cannot be deprived right of visitation and meeting with minors which right has been admitted by the respondent and has stated before the trial Court that he will allow the appellant to meet with minors. All these facts show that the appellant is herself reluctant to rejoin her husband/respondent even for the sake of minors while the respondent is ready to take any step for betterment of minors even to re-join the appellant, thus the conduct of appellant disentitles her from right to custody of minors."

13. The other ground, which weighed before the appellate court, holding the petitioner disentitled to retain the custody of minors was source of income. The learned courts below failed to comprehend that the maintenance of the children was the responsibility of father and he cannot be absolved of such responsibility even on the account that the wife during the subsistence of marriage refused to join him even for such a reason the custody of minors cannot be handed over to father at the very tender age of 4 years, 3 years and 15 months respectively. Keeping in view the key factor that two of the minors were girls and it is the mother who is the most suitable person to upbringing the daughters. Financial status of the mother cannot deprive her the right of custody. It is well-settled that the liability of the father to maintain the minor is not only religious and moral but is also a legal obligation. It has been consistently held that the right to custody is subordinate to the paramount consideration of the welfare of the minor. The inability of the mother to financially maintain the minor cannot, by itself, deprive her of custody, as the primary duty to provide maintenance rests upon the father.

14. This view is fortified by the dicta laid down by Honorable Supreme Court of Pakistan in the case of Gul Sadem Khan Versus Mst. Halima and others reported as P L D 2025 Supreme Court 47, wherein it is 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.

15. Learned Courts below observed that the minors were inquired about their choice of preference to live with either of the parents. They chose father to live with. The provisions of Section 17 of the G&W Act, envisage the relevant factors to be considered by the Court for deciding the custody of minor and appointment of guardian. 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."

16. The bare reading of the above provision of law makes it clear that for considering the welfare of the minor the Court has to keep in mind age, sex, and religion of the minor and the character and capacity of the proposed guardian and his nearness of kin to the minor. At the same time, the Court has to look at the wishes of a deceased parent, if any, and any existing or previous relations of the proposed guardian with the minor or his property. Subsection (3) of section 17 postulates that if the minor is old enough to form an intelligent preference, the Court may consider that preference. Learned courts below invoked the provisions of section 17 (3) of G&W Act at a wrong stage. At the time when minors were inquired of the choice through intelligent preference, they were of such a tender age hardly capable to form an opinion as to their welfare.

17. This Court vide order dated 03.04.2025 directed the Respondent to bring minors before the Court. On 26.05.2025 minors were produced before this Court. They happily went into the lap of mother, looking at the wish and will of the minors they were handed over to Petitioner and till today they are in the custody of mother, residing happily and without any complaint. Looking at the tender age of the minors, their welfare lies with their mother. She was right person to take good care of them particularly when she was keeping the marriage with respondent intact and was willing to take care of children.

18. 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. Under the Shariat Law, the mother is entitled to the custody (hizanat) of her male child until he has completed the age of seven years and of her female child until she has attained puberty. 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.

19. In the present case the cruel conduct of the Respondent evidenced from the fact that he used to torture petitioner over trivial nature issues, these torturing hands may turn to the minors at any time, therefore at this delicate and tender age of the minors their proper moral upbringing and torture free atmosphere at home are of paramount importance for the minor's future growth and development, any unwarranted disturbance would likely cause irreversible harm to their personality and career. Therefore, keeping in view the welfare, betterment, and best interests of the minors, it is imperative that their custody remains with mother.

20. Normally, this Court does not interfere in the concurrent findings of the facts of the Courts below under its writ jurisdiction, unless those are perverse, arbitrary, fanciful or capricious. From reappraisal of the evidence it appeared that the Courts below failed to exercise the jurisdiction vested with them and there was an apparent error of misreading and non-reading of the evidence warranting indulgence by this Court.

21. For aforementioned reasons this petition is allowed. Consequently, the impugned order dated 08.05.2024 passed by the Court of learned Civil/Family Judge, K.N.Shah in Guardian & Wards application No 27 of 2024 (Re-Mst. Marvi v/s. Hakim Ali) and impugned judgment dated 26.09.2024 passed by the Court of learned Additional District Judge-II, Dadu in Guardian & Wards Appeal No 08 of 2024 (Re-Mst. Marvi v/s. Hakim Ali), are set aside. The Guardian & Wards Application No 27 of 2024 (Re-Mst. Marvi v/s. Hakim Ali) filed by the Petitioner is allowed and the custody of minors namely Baby Naila aged about 4 years, Baby Koyal aged about 3 years and Dadlo aged about 15 months is granted in favor of Petitioner. Since the custody of the minors, was handed over to the petitioner vide order dated 26.05.2025, which shall be retained by petitioner.

22. As the marriage between the parties is intact, respondent being real father and natural guardian is allowed to visit the minors any time at the house of the petitioner and if he intends to seek the fixation of visitation rights at any other neutral place, he is at liberty to file appropriate application before the concerned Court, which shall be decided in accordance with law. In case petitioner gets divorce and contracts second marriage, the Respondent shall be at liberty to claim the custody of minors by instituting appropriate proceedings. It is further made clear that the order for grant of custody of minors in favor of Petitioner in the instant petition shall remain in the field until the expiry of right of Hizanat, thereafter, the parties may seek adjudication of the rights of the custody of minors from the Gurdian and Wards Court, if so advised.

23. This Petition was allowed through a short order in the earlier part of the day and these are the reasons for the same.

Judge

Manzoor

Approved for reporting

Larkana

22.09.2025