

**Judgment Sheet**  
**IN THE LAHORE HIGH COURT,**  
**Bahawalpur Bench, Bahawalpur**  
**JUDICIAL DEPARTMENT**

**Writ Petition No.3974 of 2024**

**Nazia Saddique**

*Versus*

**Additional District Judge, etc.**

**JUDGMENT**

<b>Date of hearing:</b>	<b>06.03.2025</b>
<b>Petitioner by:</b>	<b>Mr. Muhammad Nouman Ali Khokhar, Advocate.</b>
<b>Respondent No.3 by:</b>	<b>Mian Hafeez Ahmad, Advocate.</b>

**SYED AHSAN RAZA KAZMI, J.** Through this Writ Petition filed under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, the Petitioner has challenged the *vires* of impugned judgments and decrees dated 06.12.2023 and 17.04.2024 passed by the learned fora below.

2. The brief facts giving rise to the instant petition are that Respondent No.3 filed a Guardian Petition u/s 25 of the Guardian & Wards Act, 1890 (the “Act”) for custody of minor namely Muhammad Rehman Khan (the “minor”) aged about 10-years at that time before the learned Guardian Judge, Haslipur with the contention that he contracted marriage with the Petitioner in the year 2012 in accordance with Muslim Family Laws and out of this wedlock, the parties were blessed with the minor. Said marriage, however, could not be sustained and Petitioner dissolved it through the decree of the Court. Respondent No.3 further contended in his petition that being a real father, he is entitled to the custody of the minor. The learned trial Court, after recording the evidence of both the parties, accepted the petition of Respondent No.3 and awarded him custody of the minor.

Feeling aggrieved, the Petitioner filed an appeal before lower appellate Court, which was dismissed *vide* judgement and decree dated 17.04.2024. Hence, this petition.

3. The learned counsel for the Petitioner contends that while passing the impugned judgments and decrees, the courts below have committed illegality and material irregularity and have not applied their judicious mind. He further maintains that the Petitioner, being the real mother, is entitled to permanent custody of the minor as she can take good care of health and education of the minor and granting custody to Respondent No.3 will impact the minor's personality, education and health as well.

4. Conversely, learned counsel appearing on behalf of Respondent No.3 contends that the Petitioner is not entitled to the custody of the minor as she has contracted second marriage, out of which, she has another child and she is financially dependent on her second husband. Further adds that he is in a better position to look after the minor.

5. Heard. Record perused.

6. The key issues involved in present dispute are whether the mother's remarriage disqualifies her from having custody of the minor and whether the mother's financial status at the time of deciding custody petition was considered properly. The lower courts granted custody of the minor to the father / Respondent No.3 based on these two factors, which are now being contested.

7. It has, by now, been well settled that in matters of custody, the primary consideration is the welfare and best interests of the minor while all other factors, including the rights and interests of the parents, are secondary. This principle is enshrined in Sections 7 and 17 of the *Act*, which emphasize that the child's welfare is the paramount concern in determining custody arrangements. Generally, a mother has the right to custody of a minor, however, this right may be forfeited if she enters into a second marriage, but this is not an absolute rule. In exceptional circumstances, the court may consider it in the best interest of the minor to keep it with the mother, even if she has remarried. The Court's primary concern is always the welfare and well-being of the child.

8. In the present case, it is an admitted fact that the minor throughout his life has been remaining with the Petitioner and shifting the custody from the mother solely due to her remarriage is not a standard or definitive decision. Such a drastic shift of the custody would likely cause significant trauma to the minor. Unfortunately, both the courts overlooked this crucial aspect and passed the impugned judgments. Guidance can be sought from the dictum laid down in the case-laws reported as "Raja MUHAMMAD OWAIS versus Mst. NAZIA JABEEN and others" (2022 SCMR 2123) & "SHAISTA BIBI versus MUHAMMAD ARIF HABIB and others" (PLD 2024 Supreme Court 629).

9. The second factor relied upon by both the courts below is appreciation of financial status of the mother. It can be observed that the lower courts erred in concluding that the Petitioner's filing of a maintenance suit implies her financial dependence, when in fact, it is the father's obligation to provide for his child's maintenance. Reliance is placed upon the case-law titled as "HUMAYUN HASSAN versus ARSLAN HUMAYUN and another" (PLD 2013 Supreme Court 557).

10. Another important factor which both the courts below failed to take into consideration is the conduct of the Respondent No.3/father. It is undisputed that marriage between the parties has been dissolved on 09.10.2014 and Petitioner contracted second marriage on 17.10.2016. It is also an admitted fact that the Petitioner filed a suit for maintenance against Respondent No.3. However, the Respondent No.3 waited until 02.06.2022, to file the instant custody petition and that too, without providing any explanation for the delay in seeking custody long after the separation or remarriage of the Petitioner. His inaction and silence following the separation and remarriage of Petitioner, coupled with his failure to attempt to meet the minor or timely filing of the custody petition, suggest a lack of genuine concern for the child's welfare. His decision to seek custody only after being sued for maintenance appears to be opportunistic and motivated by self-interest which makes him disentitled for custody of the minor.

11. In the present case, the minor has been living with his mother since his birth and enjoying good health. Respondent No.3 alleges that the minor is not attending school regularly, but, in his cross-examination, he acknowledged that the minor is attending school but he often remains absent therefrom. The AW-2 also admits that the minor is going to school regularly. Furthermore, Respondent No.3 has deposed in his cross-examination that he works from morning till evening which limits his availability for the minor who is in a tender age and requires full parental supervision.

12. In view of the above, I am compelled to conclude that both the courts below, while passing the impugned judgments and decrees, have failed to consider the above discussed critical facts and special circumstances of the case, therefore, the instant **Writ Petition is allowed** and both the impugned judgments and decrees are hereby *set aside*.

Before parting with this judgement, it is imperative to establish visitation rights to the father as his right to maintain a meaningful relationship with his son is unequivocal and considering him entitled to such rights, the learned Executing Court is directed to chalk out a proper visitation schedule to be strictly adhered to by the parties.

**(Syed Ahsan Raza Kazmi)  
JUDGE**

Announced in open Court on 09.04.2025.

JUDGE

**Approved for Reporting.**

**JUDGE**

Ejaz\*