

Judgment Sheet

IN THE LAHORE HIGH COURT
BAHAWALPUR BENCH, BAHAWALPUR
JUDICIAL DEPARTMENT

WP No. 997/2024-BWP

Mst. Robina Iqbal

Versus

Additional District Judge etc.

J U D G M E N T

Date of hearing:	11.12.2024
Petitioner by:	Mr. Afzaal Ahmed Mudaher, Advocate.
Respondent No.3 by:	Rana Rizwan Ahmed, Advocate.

Faisal Zaman Khan, J:- Through this petition, judgments dated 09.10.2023 and 09.01.2024 passed by respondent Nos.2 and 1, respectively, have been assailed. By virtue of the former judgment, a guardianship petition under Section 25 of the Guardian and Wards Act, 1890 (**Act**) filed by respondent No.3 against the petitioner has been allowed and through the latter, the same has been upheld.

2. Facts giving rise to the present petition are that marriage between the petitioner and respondent No.3 was solemnized on 14.10.2011 and from the wedlock, one daughter namely Sidra Asif alias Taha Mubeen (**minor**) was born. The marriage between the spouses was dissolved whereupon a guardianship petition under Section 25 of the Act was filed by respondent No.3 against the petitioner in which a reply was filed by the latter. Out of divergent pleadings of the parties, 03 issues were framed, evidence *pro* and *contra* was led, whereafter through judgment dated 09.10.2023, the

guardianship petition was allowed. Feeling aggrieved, petitioner filed an appeal which was dismissed through judgment dated 09.01.2024, therefore, this petition.

3. Learned counsel for the petitioner submits that on extraneous consideration, the guardianship petition has been allowed without determining the welfare of the minor which is of paramount consideration. He further submits that since the parties have remarried, therefore, their disqualification is equal, hence the petitioner cannot be held to be disentitled for custody of the minor on this score alone. He also submits that mere age of the minor cannot be a barometer to determine her custody.

4. Replying to the above, learned counsel for respondent No.3 submits that petitioner is a multi-married women thus under the Muhammadan Law she become disentitled to retain the custody of the minor. Further submits that since the minor is 12 years of age, therefore, in view of her growing age, her stay with the husband of petitioner, who is not related to the minor, would be illegal. He asserts that the petitioner while appearing as RW.1 has admitted that the minor is living with her maternal grandparents (and not with the petitioner). He also asserts that petitioner has no means to maintain the minor. Lastly submits that paramount consideration in custody cases is welfare of the minor and the other facts are subordinate to the same and since the welfare lie with the respondent, hence the courts below have rightly decided in his favour. Places reliance on the judgments reported as Shabana Naz v. Muhammad Saleem (2014 SCMR 343), Mst. Nazir v. Hafiz Ghulam Mustafa etc. (1981 SCMR 200), Dr. Muhammad Asif v. Additional District Judge, Layyah and others (2024 CLC 1520), Abdul Ghaffar v. Shoukat (2022 YLR 2482), Dewan Abdullah Ahmed Farooqui v. Court of Family Judge South Saddar Karachi and another (2022 YLR 2095), Naghma Rani v. Additional District Judge, Gujrat and 3 others (2018 CLC 767), Muhammad Alam v. Nazish Qazi and 2 others (2018 YLR 1771) and Mst. Bushra

Mughal v. Additional District Judge, Kharian and others (1999 MLD 2960). On a Court's query, learned counsel submits that respondent No.3 has also remarried.

5. Arguments heard. Record perused.

6. It has been settled by the Supreme Court of Pakistan in judgments reported as Shaista Habib v. Muhammad Arif Habib and others (PLD 2024 SC 629) Rashid Hussain v. Additional District Judge, Islamabad (East) and others (PLD 2022 S.C. 32), Shabana Naz v. Muhammad Saleem (2014 SCMR 343), Mehmood Akhtar v. District Judge, Attock and 2 others (2004 SCMR 1839), Badrudin Roshan v. Mst. Razia Sultana and another (2002 SCMR 371) and Mst. Nighat Firdous v. Khadim Hussain (1998 SCMR 1593) that the primary and the foremost consideration for taking a decision *qua* custody of minors is their welfare.

7. The cumulative reading of the above judgments would show that there are many factors, which are required to be considered by the courts for determining the welfare of the minor, which include the age, sex and religion of the minor, character and capacity of the proposed guardian, his/her nearness of the kin with the minor, wishes, if any, of the deceased parents (if the parents of the minors are not alive) and the existing relationship of the proposed guardian with the minor. Apart from the above, the court can consider the intelligent preference of the minor, if the minor is old enough. It has also been held in the above judgments that the courts while determining the welfare can ignore the fact that father is the natural guardian, whereas, the mother has the right of Hizanat.

8. A perusal of the impugned judgment passed by respondent No.2 would show that the main factor which found force with the courts below in granting custody of the minor to respondent No.3 is that after the dissolution of marriage between the parties, petitioner has married

multiple times and this is a bad omen for the upbringing of the minor as she will also follow her footsteps.

9. In the above backdrop and keeping in view the facts of the present case, since both the parties have remarried, therefore, they suffer from the same disqualification. Even otherwise, while analyzing such circumstances, it has been held by the Supreme Court of Pakistan in judgment reported as Mst. Qurat-ulAin v. Station House Officer, Police Station Saddar Jalalpur Jattan District Gujrat and others (2024 SCMR 486) that remarriage, especially of a mother, does not disentitle her to retain the custody of the minor.

10. In the attending circumstances, since both the parties have remarried therefore the paramount consideration for granting the custody will be the welfare of the minor.

11. In the above background, a perusal of the available record would show that no circumstance has been highlighted by respondent No.3 wherefrom this could be culled out that petitioner is a delinquent mother and is not upbringing the minor properly. Keeping the welfare of the minor in consideration especially so when she is knocking the door of adolescence and with physical and hormonal changes to follow she will be having an altogether new experience and to cope with the changes she shall be requiring continuous advice for which who else can be a better advisor than the real mother as compared to the step mother, step sisters or paternal grandmother, what to talk of respondent No.3, thus in the attending circumstances of the case in hand, same lie with the petitioner as she is the real mother as compared to the father, step mother, 4 step sisters and paternal grandmother.

12. Available record would further reflect that the courts below without considering the above factors and without determining that as to whether petitioner is delinquent in upbringing of the minor or her interest is adverse to that of the minor or quoting any incident that the

behavior of the step father is detrimental towards the minor have erred in law in handing over the custody of the minor to respondent No.3.

13. It is strange to note that respondent No.2 while deciding the guardianship petition has observed that since petitioner has married multiple times, thus this conduct of her will be detrimental for the upbringing of the minor as the “daughters always follow the footsteps of the mother” (see paragraph No.15 of the judgment). The court lost sight of the fact that it is a court of law and not an expert of behavioral science or a psychologist so as to render such opinion. The courts below did not consider the fact that respondent No.3 has also married thrice, however, no observation has been made about his conduct.

14. This Court is of the view that the above observations can at best be the figment of imagination of respondent No.2, however, since it is not backed by any law or evidence, thus the same is of no value and effect.

15. With regard to the argument of learned counsel for respondent No.3 that the petitioner does not have sufficient financial sources for upbringing of the minor, it has been held by the Supreme Court of Pakistan in judgment reported as Mst. Beena v. Raja Muhammad and others (PLD 2020 S.C. 508), Mir Bat Khan v. Mst. Sherin Bibi and others (2019 SCMR 520) and Mst. Razia Bibi v. Riaz Ahmad and another (2004 SCMR 821) that poverty of a mother does not disentitle her from retaining/seeking custody of the minor.

16. As regards the disqualification of the petitioner keeping in view the provisions of Muhammadan Law, it has been held by the Federal Shariat Court in the judgment reported as Messrs Najaat Welfare Foundation through General Secretary v. Federation of Pakistan through Secretary Ministry of Law, Justice and Parliamentary Affairs, Islamabad and 4 others (PLD 2021 FSC 1) that Muhammadan Law by D.F.Mullah is a reference book and is not a statute having binding force thus Muhammadan Law can only be consulted as a reference book and

cannot be termed to be statutory law having binding effect, upon which any presumption can be drawn against a person.

17. Last but not the least, since the minor is a 12 years old girl, therefore, in order to seek her preference she was ordered to appear before the Court whereupon she appeared in person today and from her appearance, she seemed impressionable and receptive thus in order to determine her intelligent preference, she was posed certain questions which she answered intelligently and with confidence. She has been asked that with whom she is residing and wishes to stay with, upon which she in categoric and in unequivocal terms has shown her preference to live with the petitioner, her real mother with whom she at present is residing.

18. In the above circumstances, since the minor being mature enough to make an intelligence preference has acknowledged that she is living with the petitioner, her real mother and continues to live with her, therefore, despite the fact that petitioner while appearing as a witness deposed that the minor is living with her maternal grandparents, the said admission is of no effect as at present, the minor is living with the petitioner.

19. As regards the judgments cited by the learned counsel for respondent No.3 they also spell out that for custody of minors the paramount consideration is their welfare, however, the remaining findings in those judgments are with regard to the facts and circumstances of those cases, hence, they are distinguishable.

20. For what has been discussed above, since the courts below erred in law in not determining the welfare of the minor in its proper perspective and on extraneous considerations passed the impugned judgments thus this petition is **allowed** as a consequence to which the impugned judgments are set aside, resultantly, the guardianship petition under Section 25 of the Act filed by respondent No.3 stands dismissed, however, respondent No.3 is at liberty to approach the

guardian court with an application for chalking out a schedule for meeting with the minor.

(FAISAL ZAMAN KHAN)
JUDGE

Abis Ali

Approved for reporting

Judge