

JUDGMENT SHEET
IN THE LAHORE HIGH COURT,
RAWALPINDI BENCH, RAWALPINDI
JUDICIAL DEPARTMENT

Writ Petition No.452 of 2024

Irfan Arshad

V/S

Mst. Zainab Noor etc.

JUDGMENT

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| Date of hearing | 10.09.2024 & 23.12.2024 |
| Petitioner(s) by | Mr. Junaid Ahmad Nawaz Raja, Advocate. |
| Respondent(s) by | M/s Asad Ullah Hassan Hashmi and Nasrullah Hassan Hashmi, Advocates assisted by Mr. Basim Naseer, Advocate. |

JAWAD HASSAN, J. Through this judgment the Court will examine the validity of the judgments [which are at variance] of the Courts below for the welfare of the minor. This constitutional petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (the “*Constitution*”) calls in question the *vires* of consolidated judgment and decree dated 30.01.2024, whereby the Additional District Judge, Rawalpindi, while allowing the appeal of the Respondent No.1, modified the judgment passed by Senior Guardian Judge (Family Division), Rawalpindi. Besides, the Petitioner has also challenged orders dated 01.07.2024 and 02.07.2024 passed by the Family Executing Court, Rawalpindi through separate W.P.No.2050 of 2024 as the same were passed during the pendency of instant petition.

Facts of W.P.No.452 of 2024

2. A guardian petition under Section 25 of the Guardians and Wards Act, 1890 (the “*Act*”) seeking permanent custody of minor Zuria Noor (the “*minor*”), was filed by Zainab Noor (the “*Respondent No.1*”) before the Senior Civil Judge (Family Division),

Rawalpindi on 16.01.2021. The said petition was duly contested by Irfan Arshad (the “*Petitioner*”) through filing of reply. Ultimately, Guardian Petition was declined after framing of issues and recording of oral and documentary evidence adduced by both the parties vide order dated 20.07.2023 and visitation schedule for meeting of the “*minor*” with the “*Respondent No.1*” was chalked out. Being dissatisfied from above said order, the parties preferred their respective appeals before the Additional District Judge, Rawalpindi who dismissed the appeal of the “*Petitioner*” and while accepting that of the “*Respondent No.1*”, vide consolidated judgment and decree, directed to hand over custody of the “*minor*” to the “*Respondent No.1*” by also modifying the visitation schedule of the “*minor*” with the “*Petitioner*”. Then, the “*Petitioner*”, being aggrieved of above said judgment, filed this petition.

Facts of W.P.No.2050 of 2024

3. In addition to the facts narrated above, the “*Respondent No.1*” filed an application before the Family Executing Court with apprehension of removal of the “*minor*” by the “*Petitioner*” from local limits of Rawalpindi. Upon filing of said application, warrants under Section 100 of Code of Criminal Procedure, 1898 (the “*Cr.PC*”) were issued against the “*Petitioner*” on the basis of which attorney of the “*Respondent No.1*” filed petition under Section 491 of the “*Cr.PC*” before the District and Sessions Court, Lahore for recovery of the “*minor*” which was accepted vide order dated 29.06.2024 and temporary custody of the “*minor*” was handed over to special attorney of the “*Respondent No.1*” namely Humaira Iram with direction to her to produce the “*minor*” before the Family Executing Court at Rawalpindi on 02.07.2024. However, the Family Executing Court passed the orders despite stay of execution proceedings by this Court.

4. Pertinently, this Court made efforts to resolve the issue between the parties through mode of mediation as per judgments reported in “FAISAL ZAFAR and another versus SIRAJ-UD-DIN and

4 others” (2024 CLD 1) and “NETHERLANDS FINANCIERINGS MAATSCHAPPIJ VOOR ONTWIKKELINGSLANDEN N.V. (F.M.O) versus MORGAH VALLEY LIMITED and SECP” (PLD 2024 Lahore 315) and for the said purpose, with consent of the parties, mediator was appointed on 04.06.2024 but the mediation remained fruitless therefore, this petition is being decided on merit.

SUBMISSIONS OF THE PARTIES

5. Learned counsel for the Petitioner *inter alia* argues that the lower Appellate Court has committed error of law while awarding custody of the “minor” to the “Respondent No.1”; that the impugned judgment is unsound, sketchy, absurd, baseless and has been passed without appreciating the contentions of the Petitioner properly; that the “Respondent No.1” is 80 years old lady having multiple health issues and is unable to look after the “minor” and even did not appear in the witness box but this important aspect of the matter has been overlooked by the lower Appellate Court; that the family atmosphere of the “Respondent No.1” is not suitable for the “minor” as the Respondent No.1 herself is dependent on her daughters; that the “minor” needs full care and attention of a father instead of maternal grandmother, therefore, under the law the “Petitioner” is entitled to have the custody of the “minor” but the Additional District Judge, Rawalpindi has failed to properly appreciate these facts.

6. On the other hand, learned counsel for the “Respondent No.1” controverted the stance of the “Petitioner” by supporting the impugned judgment and decree passed by the lower Appellate Court pursuant to proper appreciation of the facts and circumstances of the case.

7. I have heard the arguments of learned counsel for the parties and carefully perused the record.

DETERMINATION BY THE COURT

8. The issue relates to the custody of the “minor”, who was born on 08.09.2016 and now is aged about eight years. It is an admitted fact that mother of the “minor” namely Navira Arzo took her last

breath on 04.09.2020. The matter in controversy was duly encapsulated by Senior Guardian Judge (Family Division), Rawalpindi while framing three issues but issue No.1 is very pertinent which reads as under :-

1. *Whether the welfare of the minor lies with the petitioner? OPP*

9. In order to prove her case, Humaira Iram appeared as Special Attorney on behalf of the “Respondent No.1” as AW-1 and in her support, she produced Muhammad Saeed husband of the Respondent No.1 as A-W2. In documentary evidence, affidavit of the “Respondent No.1” was produced as Exh.P-1, special power of attorney of Humaira Iram as Exh.P2, pictures of the “minor” as Exh.P3, WhatsApp Screen Shots of physical torture as Exh.P4, WhatsApp conversation of blackmailing as Exh.P5, Bank Statement of mother of the “minor” as Exh.P6 and USB voice recording of sexual harassment as Exh.P7. On contrary, the “Petitioner” put his appearance in the witness box as RW-1 and in his support produced his affidavit as Exh.R-1, Receipts of School Fee as Exh.R-2, Three Certificate of NGS relating to the “minor” as Exh.R-3, School Report as Exh.R-4 and swimming activity of the “minor” for summer camp as Mark-A-1.

10. The Senior Civil Judge (Family Division), Rawalpindi on the basis of above said evidence, recorded his findings and resultantly proceeded to dismiss custody petition by handing over the custody of the “minor” to the “Petitioner”. However, lower Appellate Court reversed the findings and modified the judgment on the *inter alia* grounds that the “Petitioner” had strained relations with the mother of the “minor” as such had not spent quality time with the “minor”; that the “Petitioner” has contracted second marriage in the month of November, 2020; that the “Petitioner” had no knowledge regarding blood group of the “minor” and even had no knowledge about name of hospital where the “minor” was born; the “Petitioner” had not appended school leaving certificate of the “minor”; that the

“*Petitioner*” had shifted his residence from Rawalpindi to Lahore; that the “*Petitioner*” had illegally drawn amount from the bank account of the mother of the “*minor*” without getting succession certificate.

11. Before advertng to the merits of the case, the Court is of the considered view that the utmost priority of the Court in determining the custody of a minor is to see his/her welfare and well-being. This is the reason, law provides a parental jurisdiction to the Guardian Judge in such cases. The objective of the law is not just handing over the custody of the minor, but to examine all the aspects which are ancillary to it. The power and duty of the Court while considering the question of custody of a minor is to thoroughly and comprehensively take into consideration the minor's welfare. The word "welfare" in such cases is to be taken in its widest sense, which includes not only the monetary expenses of the minor but also his mental and physical health, educational needs, psychological well-being, religious and moral values. The Courts are duty bound to consider such cases in the best interest and healthy up-bringing of the minor which sometimes may yield the rights of the parents. No doubt according to certain Muslim jurists, custody of a minor son till the age of seven years may remain with the mother and in the case of minor daughter till she attains the age of puberty and thereafter, normally their custody should be restored to the father. However, it is an established principle of law that the paramount consideration in all such situations would be the betterment of the minor and even a mother may be deprived of the custody of a minor if circumstances of the case so allow. In the cases, concerning the custody of a child, the Guardian Court is not required to go into the intricacies/technicalities of the matter, rather is obliged to confine itself to the extent of the welfare of the child/minor, which is a paramount consideration.

12. The consideration for grant or refusal of custody of minors will always be determined on the basis of their welfare, 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 wellbeing of the child. 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 parent. This Court in case titled as SAJIDA REHMAT ULLAH versus GUARDIAN JUDGE-II and others (PLD 2022 183) has expounded the concept of welfare and held that welfare is a question of fact and has to be determined on the basis of the material placed before a judge and not on the presumption and is also includes material welfare as well as a sense of adequacy of care to ensure the good health and due personal right are maintained and also it signifies the stability and the security the loving and understanding care and guidance, the warm

and compassion made relationship for the essential of the full development of the child on character. The relevant portion of the judgment reads as under:

*"Welfare" is an all-encompassing word. On the one hand, "it includes material welfare, both in the sense of an adequacy of resources to provide a pleasant home and a comfortable standard of living and in the sense of an adequacy of care to ensure that good health and due personal pride are maintained."¹ On the other hand, it signifies "the stability and the security, the loving and understanding care and guidance, the warm and compassionate relationships that are essential for the full development of the child's own character, personality and talents."² In *Rahimullah Choudhury v. Sayeda Helali Begum and others* (1974 SCMR 305) the Hon'ble Supreme Court of Pakistan held that "welfare" is a question of fact and has to be determined on the basis of the materials placed before the Judge and not on presumptions.*

13. In this case, permanent custody of the “minor” is the main contest between the “Petitioner” (father) and the “Respondent No.1” (maternal grandmother). It evinces from the record that Senior Civil Judge (Family Division), Rawalpindi, vide judgment dated 20.07.2023, declined to handover permanent custody of the “minor” to the “Respondent No.1” due to her ailment and dependency over her daughters. However, at appeal stage and even before this Court, the “Respondent No.1” leveled serious allegations against the Petitioner’s character, his involvement in sexual misconduct with sister of his second wife, snatching of the minor from the maternal family in year 2020 and involvement of the “Petitioner” in murder of mother of the “minor”. Likewise, the “Petitioner” also leveled allegations against the “Respondent No.1” and her family and the atmosphere prevalent there.

14. Section 25 of the “Act” relates to transfer of the custody of minor if he leaves or is removed from the custody of a guardian of his person. Paramount and supreme consideration in custody of minor is the welfare of minor and nothing else. Any issue regarding the custody of minor is to be assessed, examined and measured by the Guardian Courts on such yard stick and the Court has to record a definite finding on the point before passing any order in the matter. The Guardian Court, while passing order, has to see the age, sex, environment under which the minor is being brought up and all the attending circumstances, position of parties and also the law to which the minor is subject. The “Respondent No.1”, after the death of real mother of the “minor”, filed petition under Section 25 of the “Act” on 16.01.2021 before the Senior Civil Judge (Family Division), Rawalpindi, contents whereof reveal that it was filed mainly on the grounds *inter alia* that the “Respondent No.1” is residing with her daughter Humaira Iram who is unmarried and educated lady having good health to look after the “minor”; that the “Respondent No.1” has superior right of custody of the “minor” after the demise of mother of the “minor”; that the “Petitioner” has contracted second marriage and the “minor” is not being looked after in a proper way.

15. The dates qua initiation of litigation between the parties are very relevant. It was all started when the mother of the “minor” namely Navira Arzoo died on 04.09.2020 and date of her death is not disputed by either of the party. It is also not disputed that the “Petitioner” and the mother of the “minor” had strained relations and as per stance of the “Respondent No.1”, the “minor” was living with her since birth and was getting education from ACE-International Academy. Perusal of custody petition filed under Section 25 of the “Act” by the Respondent No.1 before Senior Civil Judge (Family Division), Rawalpindi reveal that the “Respondent No.1” did not mention the fact of study of the “minor” at ACE-International School, Bahria Town, Rawalpindi however, the same was agitated by her in appeal and even before this Court by stating that minor Zuria attended

the complete sessions 2019-2020 and for the purpose of proving this very fact, relied on Exh.P-3 bare perusal of which reveals that it was neither a school certificate issued by the ACE International Bahria nor the receipts regarding payment of fee etc. Needless to add that though the attorney of the “Respondent No.1” during cross examination deposed that “*the “minor” was studying at ACE International Academy Bahria*” but no documentary proof in this regard was ever produced even before the Guardian Court or before the Additional District Judge, Rawalpindi. She further admitted and deposed that “*I have not produced the source of Exh.P.3 and Exh.P.4 and Exh.P.5, Exh.P.7*”. If it is considered as correct for the sake of arguments that such documents could not be exhibited or were not in possession at that time, even then the “Respondent No.1” could produce the same by filing application for production of additional documents but this opportunity, provided by law, was never availed. Further, the Additional District Judge observed that “*the minor was emotionally attached with her mother till she remained alive and did get proper education at Rawalpindi*”. Evidence produced by the “Respondent No.1” reveals that only Exh.P-3 was produced as proof of getting education at ACE International Rawalpindi, perusal of which reveals that it is only a picture of the “minor” doing some painting. No supporting document qua admission form, payment receipts etc. in the said school was ever produced. On the other hand, the “Petitioner” produced Exh.R-3, Bonafide Certificate dated 20.06.2023 certifying by NGS Preschool, Askari 11 Campus, Lahore that *Zuria Arzoo Irfan D/O Irfan Arshad I.D.No.222045 is student of NGS from last two years, session starting from August, 2021*. Besides this, the “Petitioner” produced Exh.R-2, receipts of school fee, Exh.R-4 School Report May, 2023 and swimming activity for summer camp as Mark-A1. Education is the basic element for building the character of a minor child and transforming his/her personality and even otherwise no material has been produced by the “Respondent No.1” from where

it can be seen that the “*minor*” got education from ASE International School Bahria, Rawalpindi.

16. So far as the question of shifting of the “*Petitioner*” from Rawalpindi to Lahore is concerned, it was held by the Additional District Judge, Rawalpindi that the Petitioner shifted his residence on 18.02.2021 and this observation was merely based on an order dated 17.07.2021 that was passed on an application of the “*Petitioner*” regarding lack of territorial jurisdiction of the Guardian Court at Rawalpindi. Record is indicative of the fact that the “*Respondent No.1*” filed petition under Section 25 of the “*Act*” before the Guardian Court, Rawalpindi on 16.01.2021 mentioning the address of the Petitioner as “*House No.440, Street No.15, Sector F, Phase 8, Bahria Town, Rawalpindi*”; reply of the same was submitted by the “*Petitioner*” on 19.02.2022 taking specific objection under preliminary objection No.1 that the “*minor*” was residing at Lahore with the “*Petitioner*” since 15.10.2020 and that guardian court had no territorial jurisdiction at Rawalpindi. Before filing of the reply of main guardian petition, the “*Petitioner*” moved an application for returning of main guardian petition due lack of territorial jurisdiction on the grounds that the “*minor*” was residing with him at *House No.107-B-II, Block-M, Gulberg-III, Lahore* and that the “*Petitioner*” had already filed application under Section 7 of the “*Act*” for appointment of the guardian of the “*minor*” where the “*Respondent No.1*” was appearing and pursuing the case. However, the Family Court, Rawalpindi opined the date of shifting of the “*Petitioner*” as 18.02.2021 on the basis of some rent agreement allegedly executed between the “*Petitioner*” and the house owner namely Tariq Nadeem but the said rent agreement was neither mentioned in the main guardian petition nor produced during the course of evidence rather the “*Petitioner*” during his cross-examination deposed and admitted it correct that the agreement deed of Bahria Town house Rawalpindi was in the name of his first wife namely Navira Arzo. Interestingly, when order and decree dated 20.07.2023 was assailed by the

“Respondent No.1”, she mentioned address of the “Petitioner” as “House No.440, 107/B/Block, M, Gulberg-III, Lahore” meaning thereby the “Petitioner” was residing at Lahore after the death of mother of the “minor” and if it was not so, then why the “Respondent No.1” did not mention the address that was previously mentioned in the main guardian petition.

17. The tenor of evidence produced by the “Respondent No.1” shows that custody of the “minor” is mainly claimed on the ground that the “Petitioner” contracted second marriage and on the touchstone of preferential right under Muslim Personal Law being maternal grandmother. Law is well settled that mere contracting second marriage of father or mother is not the sole criterion to determine the question of custody of the minor child. The Supreme Court of Pakistan in the case of SHABANA NAZ versus MUHAMMAD SALEEM (2014 SCMR 343), while dealing with this issue has very elaborately outlined the factors disqualifying the mother and father from the custody of minor in the following words :-

“8. It may be noted that in terms of section 7 of the Guardians and Wards Act, 1890 (the Act), 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 be, 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”.

18. Regarding the second fundamental ground taken by the “Respondent No.1” on account of preferential right being maternal grandmother as per principle of Muslim personal law, suffice is to observe that entitlement as per Muslim personal law is not the sole ground for granting custody of a minor to either side rather the determining principle to rule the question of custody of a minor in favour of any side is the question of welfare of minor. The Supreme Court in Raja MUHAMMAD OWAIS versus Mst. NAZIA JABEEN and others (2022 SCMR 2123) has also laid down the same principle in the following manner:-

“These provisions and the principles of Mohammdan Law have been examined by this Court in several judgments where it has held that the conditions contained in Paras 352 and 354 of Mullah's Mohammadan Law are not absolute and are subject to the welfare of the child”.

Similarly, the Supreme Court of Pakistan in MEHMOOD AKHTAR versus DISTRICT JUDGE ATTOCK and 2 others (2004 SCMR 1839) categorically laid down that entitlement to have custody of a minor in accordance with the Muslim Personal Law is not the sole and ultimate criteria for granting custody rather it is qualified and dependent upon the determinative factor of welfare of the minor. The Supreme Court of Pakistan in FIRDOUS IQBAL versus SHIFAAT ALI (2000 SCMR 838) also examined the question of entitlement of custody from the perspective of provisions of Muslim Personal Law as contained in Muhammdan Law by D.F.Mulla and held that notwithstanding the right for custody of minor under the personal law, this right is always subject to the welfare of the minor which is the paramount consideration for

determining the question of custody of minor. Likewise, in Mst. SEEMA CHOUDHARY versus AHSAN ASHRAF SHEIKH (PLD 2003 SC 877) the Supreme Court has held that notwithstanding the right of mother or father for the custody of male or female child under the personal law, the predominant consideration in determining the question of custody of minor is always the welfare of the minor

"There is no cavil to the proposition that notwithstanding the right of the mother or father for the custody of male or female child under the personal law, the predominant consideration in determining the question of custody of minor is always the welfare of the minor....."

19. It is well established from the above-referred judgments that the preferential right to claim custody of a minor in accordance with Para 353 and 355 of Mohammdan Law by D.F. Mulla is not the sole criteria rather it is always dependent upon the primary consideration of welfare of child. From that standpoint, now the question of custody of the minor is to be determined. The "Petitioner" is real father of the "minor" who had the custody of the "minor" from the last almost four years after the death of her mother. On the other hand, the "Respondent No.1", who filed the petition for obtaining custody of the "minor" is an old lady of about 80 years of age, who does not enjoy good health and as such is in no physical condition to look after the person and affairs of the "minor" by herself. Even in her petition for custody before the learned Guardian Judge, she has categorically stated that her real unmarried daughter is living with her and she can look after the minor in a proper manner. Plainly, the "Respondent No.1" has not stated or claimed to have the capacity to look after the "minor" by herself rather she named her real unmarried daughter to be of proper help in this regard. It cannot be lost sight that the "Respondent No.1" even did not appear before the learned Guardian Court to depose in favour of her petition rather the said daughter appeared in her stead as an attorney and recorded evidence on behalf

of the Respondent No.1. On 17.06.2023, an application for rejection of her power of attorney and for summoning the “Respondent No.1”, being petitioner, in person was dismissed by the guardian court vide order dated 22.02.2023. It is pertinent to note that in the said application, it was well mentioned that the “Petitioner” being an old lady suffered minor cardiac attack and because of her health condition she appointed her daughter as her special attorney. This is clearly suggestive of the fact that the “Respondent No.1” is an old lady with poor health condition, which even debarred her from appearing before the Court to lead evidence in support of her own petition and even the appeal filed before the lower Appellate Court against the judgment of Guardian Court that was filed by the “Respondent No.1” through the same attorney, which clearly shed light that her physical state rendered her incapable for participating in the proceedings in personal capacity and further reflective of the fact that she was dependent upon her unmarried daughter for carrying out all affairs of her life. During cross-examination the PW-1, being attorney of the “Respondent No.1” admitted that the age of petitioner is 79 years and further admitted it as correct that she tendered application on her behalf that she cannot appear before the court due to health issues, This Court in GHULAM MUSTAFA Versus SHAMIM AKHTAR and 2 others (2017 YLR Note 45) set aside the order of the lower Appellate Court wherein the custody of minor daughter was given to the grandmother and custody of minor son was allowed to be remained with the father and held the father is entitled to have custody of his daughter against the maternal grandmother who was an old lady and was suffering from blood pressure. The relevant portion of the judgment reads as under:

Being father of minors, the petitioner/father is also a natural guardian and it is more natural for the children to share their joys and worries with their natural parents. Although, respondent No.1/maternal grandmother has the preferential right to the custody of minor/daughter under personal

law but paramount consideration is the welfare of the minors. In a case reported as "Mst. Seema Chaudhry and another v. Ahsan Ashraf Sheikh and others" (PLD 2003 SC 877), the Honourable Apex Court has held that:--

"There is no cavil to the proposition that notwithstanding the right of the mother or father for the custody of male or female child under the personal law, the predominant consideration in determining the question of custody of minor is always the welfare of the minor....."

20. In the instant case, granting the custody of minor to the "Respondent No.1" will amount to handing the "minor" over to her maternal aunt for the purposes of everything because the maternal grandmother is already dependent on her and even not in a physical state of health to appear before the court for evidence or to file appeal before the learned lower appellate court. On the other hand, the "Petitioner" is real father and as such natural guardian of the minor, who is physically available to minor as well as financially capable to look after and raise her in an adequate manner and provide for a comfortable life. He is also not residing in foreign country for occupation, which could have left the minor to the mercy of stepmother but he is all available for the "minor". In contrast to ailing and old maternal grandmother, who is dependent upon her daughter for everything, the "Petitioner" being real father of the "minor" can certainly look after her in a more proper way. Concerning the approaching age of puberty and necessity of a female elder to guide the minor through that phase of physical and emotional state of life, the presence of stepmother is available in the house of "Petitioner" against whom only general allegations have been levelled by the "Respondent No.1" but no specific incident or accusation has been alleged to suggest a well discernable inference about her being inimical against the "minor". Certainly the stepmother cannot be

equivalent to real mother but when destiny has taken the “minor” to a cross-path of having real father on one side without having any children from the second wife and an 80 years old maternal grandmother with physically compromised state of health on the other, a real and willing parent, not declared unfit in any evident manner, seems more suitable for the “minor” to lead her through the path of her life then the maternal grandmother who is dependent on others to beat the path of her own life. It is not the contesting sides whose suitability is a question for determination before the Court but it is always the spectrum of welfare and best interest of the minor which guides the court to decide between the aspiring parties. Similar view has been expressed by the Supreme Court in the latest judgment SHAISTA HABIB Versus MUHAMMAD ARIF HABIB and others (PLD 2024 Supreme Court 629) wherein the court ruled as under:

“The overarching principle in cases involving the question of custody and visitation rights of the parents is, therefore, determination of the welfare of the child, i.e. to ascertain a course that would serve the best interest of the child”.

21. It is evident from the record that both the parties have leveled severe allegations against each other that is only because of getting share of properties/amount of the mother of the “minor”. The “Respondent No.1” in order to prove the conduct of the “Petitioner” relied on WhatsApp screen shots (Exh.P.4) of physical torture to mother of the “minor” who ultimately died on 04.09.2020 and murder case was also registered against the Petitioner in which he was acquitted by the competent court of law and the same has been admitted by the attorney of the “Respondent No.1” during cross examination. Her depositions read as:

“We filed a petition for custody of the minor against the Irfan Arshad/respondent; we

lodged FIR against the respondent on 14.12.2021”.

Further deposed that

“The four persons named in the FIR who were present in the incident were Irfan Arshad husband of the victim, Imran Arshad brother of Irfan Arshad, Huma Imran sister in law of Irfan and Ahmad Imran nephew of respondent Irfan Arshad. It is correct that all the persons were named in the FIR had been acquitted”.

22. Record is evident of the fact that the mother of the “minor” was died on 04.09.2020, custody petition was filed on 16.01.2021 and interestingly F.I.R. was lodged on 14.12.2021 in which the “Petitioner” and his other family members have already been acquitted by competent court of law. Hence, such kind of allegation cannot be used against the “Petitioner” as of a bad character to get the custody of the “minor”. This Court in RIZWAN ALI SAYAL versus FEDERATION OF PAKISTAN etc. (PLD 2024 Lahore 54) has elaborated the principal of honorable acquittal and hold that

“As far as argument of an honorable acquittal is concerned, the Court is of the view that all acquittals including acquittal on compromise are honorable for the reason that the prosecution has not succeeded to prove their cases against the accused on the strength of evidence of unimpeachable character. There can be no acquittals, which may be said to be dishonorable and the law has not drawn any distinction between any types of acquittals. Reliance is placed on “DR. MUHAMMAD ISLAM versus GOVERNMENT OF NWFP, etc.” (1998 SCMR 1993). The Respondent No.5 was acquitted by the Judicial magistrate vide order dated 14.12.2006 and this order of acquittal was upheld by the Additional Sessions Judge, Sargodha vide order dated 08.03.2008. It shall, therefore, be presumed that the allegations leveled against him are baseless as, he has not been declared guilty. In presence of above meaning of "acquittal"

the appellant is held to have committed no offence because the competent criminal courts have cleared him from an accusation or charge of crime. Moreover, once a person was acquitted by trial court, said person would stand shorn of stigma of any allegation and he would have to be deemed thereafter as innocent and having not committed any such crime. If acquittal of accused is not assailed before higher forum, such acquittal earned by accused from trial court, on whatsoever basis, would attain finality and pandora box of allegations could not be re-opened or used against him. In short, acquittal is an acquittal simpliciter and, must entail upon all consequences of pure acquittal. Reliance is placed on “MUMTAZ ALI SHAH versus CHAIRMAN, PAKISTAN TELECOMMUNICATION COMPANY LTD., H.Q., ISLAMABAD and 6 others” (PLD 2002 Supreme Court 1060). Additionally, order of acquittal of accused shall erase, efface, obliterate and wash away his alleged or already adjudged guilt in the matter apart from leading to setting aside of his sentence or punishment, if any. Reliance is placed on “SUO MOTU CASE NO. 03 OF 2017” (PLD 2018 Supreme Court 703)”.

23. So far as the observation of the Additional District Judge, Rawalpindi to the extent that the “*Petitioner*” operated bank account of mother of the “*minor*” and withdrew and transferred money without getting the succession certificate is concerned, learned counsel for the “*Petitioner*” stated that the “*Petitioner*” is a Chemical Engineer by profession who worked in Saudi Arabia from where he used to send money directly in the bank account of the mother of the “*minor*” from where she purchased the properties in her name and in this regard the “*Petitioner*” also filed suit for benami transaction which is still pending. Whereas the counsel for the “*Respondent No.1*” rebutted this argument and stated that the “*Petitioner*” filed suit for getting declaration of legal heirs just to grab the assets of the mother of the “*minor*”. Be that as it may, the litigation between the

parties is still pending adjudication and at this stage, this Court will refrain from passing any observation, which may otherwise prejudice the case of either side. Considering the facts and circumstances and by perusing the available record, the Court observes that absolutely nothing has been alleged against “*Petitioner*” which could disqualify or disentitle him from custody of the “*minor*”. It is admitted fact that “*Petitioner*” is Chemical Engineer and financially sound and can better look after and educate his daughter and thus does not suffer from any disqualification envisaged by law. Furthermore, the “*Petitioner*” right from inception is vigorously pursuing the remedies to obtain the custody of his daughter. Whereas the “*Respondent No.1*” (maternal grandmother) is aged about 80 years and in bad health having no source of income. The factum of ailment of the “*Respondent No.1*” is admitted by Humaira Iram, special attorney during her cross examination by stating that “*she has problems of old age and other health issues*”. The said “*Respondent No.1*” is fully dependent on her daughters, who are working ladies and most of the time they remained at their job places and one of them converted from Islam to Bahai Religion. Moreover, the “*minor*” is studying at Lahore after shifting from Rawalpindi to Lahore on 15.10.2020 and in this situation, she is getting proper study at NGS Education System, Askari II.

24. So far as order dated 02.07.2024 passed in W.P.No.2050 of 2024 is concerned whereby the Executing Court, Rawalpindi handed over the custody to the “*Respondent No.1*” till the decision of instant petition. It is noted that when the “*Petitioner*” challenged consolidated judgment and decree dated 30.01.2024 before this Court, the Court vide order dated 13.02.2024 passed *status quo* order qua custody of the “*minor*”. Instant petition was dismissed for non-prosecution on 13.06.2024; restoration of which was filed through C.M.No.1249 of 2024 wherein the Court on 27.06.2024 issued notice to the “*Respondent No.1*”. The Court vide order dated 02.07.2024 again stayed the proceedings before the Executing Court.

The “Respondent No.1” filed execution petition on 06.02.2024 for execution of consolidated judgment and decree dated 30.01.2024 wherein the Executing Court appointed bailiff for production of the “minor” on 14.02.2024. On the said date, warrant under Section 100 of the “Cr.PC” were issued for 04.03.2024 and thereafter execution petition remained pending till 06.06.2024 for awaiting the order of this Court. On 06.06.2024, the Executing Court was on leave and it was fixed for 11.07.2024. In the meanwhile, on 25.06.2024, the “Respondent No.1” filed application for early hearing of execution petition which was taken up on the same day and the Executing Court, Rawalpindi observed that *“the respondent assailed the judgment vide writ petition No.452 of 2024 at Hon’ble Lahore High Court but the same was dismissed due to non-prosecution vide order dated 13.06.2024. The execution petition has already been adjourned for 11.07.2024 in wait of order of Hon’ble Court. The custody of the minor has been shifted to the petitioner and there is apprehension of removal of minor from the jurisdiction of this court, it is therefore warrants u/s 100 Cr.PC are issued to recover the minor and produce her in the court even prior to the fixed date in execution petition”*. Besides, special attorney of the “Respondent No.1” also filed habeas petition under Section 491 of the “Cr.PC” for recovery of the “minor” before the Additional District Judge, Lahore who vide order dated 29.06.2024 allowed above said petition and handed over the custody of the “minor” to special attorney of the “Respondent No.1” with direction to produce the “minor” before the Executing Court at Rawalpindi on 02.07.2024. In the said order, the Executing Court observed as under:

“On 01.07.2024 the petitioner produced the minor before this court under apprehension of threatening of dire consequences from the judgment debtor/respondent; the petitioner Zainab Noor was allowed to carry the custody. Today, minor has been produced on the request of counsel for the respondent who produces the order of Hon’ble Lahore High

Court that the proceedings before Executing Court shall remain stayed”.

Underlining for emphasis

25. The above said order clearly indicates that order dated 02.07.2024 of this Court was produced before the Executing Court, Rawalpindi, which instead of complying with the said order, proceeded to continue execution proceedings, which is highly objectionable, hence order dated 02.07.2024 is set aside being not sustainable in the eyes of law.

26. On the comparative analysis of both the findings, the Court feel no hesitation to observe that the Additional District Judge, while exercising his appellate jurisdiction has grossly misread the evidence and wrongly interfered with the well-reasoned findings of the learned Family Judge. The constitutional jurisdiction vested in terms of Article 199 of the “*Constitution*” casts a duty upon the Court to curb the illegality or gross misreading committed by any of the courts below, while determining the rights of the parties. Reliance is placed on Hammad Ali Khan and others versus Mst. Sadia Akbar and others (2024 MLD 1445) wherein this Court held:

“Ordinarily, the High Court does not re-examine evidence or disturb findings of fact, however; it can interfere if the findings are based on non-reading or misreading of evidence, erroneous assumptions, misapplication of law, excess or abuse of jurisdiction, and arbitrary exercise of powers. Thus, this court can correct such errors as this Court’s constitutional jurisdiction is meant to supervise and serve justice, allowing it to correct any wrongs committed contrary to evidence and the law.”

The “*Petitioner*” has successfully established that exercise of appellate jurisdiction by the learned Additional District Judge is the result of in application of judicious mind and the impugned consolidated judgment is the outcome of gross misreading and non-reading of evidence.

27. For the foregoing reasons, both the writ petitions are **allowed** and consequently, consolidated judgment & decree passed by the Additional District Judge, Rawalpindi and order dated 02.07.2024 passed by the Family Executing Court are set-aside, as a sequel thereof, the judgment passed by the Senior Civil Judge (Family Division), Rawalpindi is restored with no order as to costs.

28. Before parting with the judgment, it is observed that the Family Executing Court has prime facie exceeded its limits and committed gross misconduct, while passing order dated 02.07.2024 during the pendency of this writ petition filed against the judgments at variance in which stay order was also issued, especially when it reproduced this very fact in its aforesaid order, which speaks volumes. Therefore, the District Judge, Rawalpindi is directed to probe into the matter and submit a comprehensive report to this Court through Additional Registrar (Judicial) within a month for further necessary action/proceedings.

(JAWAD HASSAN)
JUDGE

APPROVED FOR REPORTING

JUDGE