JUDGEMENT SHEET
IN THE PESHAWAR HIGH COURT, D.I.KHAN BENCH
(Judicial Department)

W.P No. 113-D/2025 with
C.M No. 93-D/2025

Saeed Khan
Versus
Mst. Rozina Bibi and others

For petitioner Muhammad Waqas, Advocate
For respondent Ghulam Mustafa Marwat, Advocate

Date of hearing: 19.11.2025

JUDGMENT

Inam Ullah Khan, J.-

1. Through the instant petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner has called in question the judgment dated 15.5.2025 of learned District Judge, Tank whereby the Civil Appeal (C.A No.60/13 of 2024) filed against the judgement and decree dated 27.7.2024 passed by learned Senior Civil Judge (Judicial)/Guardian Judge, Tank was dismissed.

2. The short-lived facts of the case are that the marriage between the petitioner and respondent No. 1 was solemnized, and out of the said wedlock, a daughter—namely, Sobia Bibi (minor) was born. From the beginning, the conduct of the petitioner remained cruel towards respondent No. 1, and he expelled her from his house after forcibly taking away the minor. The respondent No. 1 subsequently instituted a suit for dissolution of marriage, which

was decreed in her favour. During the execution proceedings, a compromise was effected between the parties, pursuant to which the petitioner took respondent No.1 back into his matrimonial home. However, after consignment of the said execution petition, he again expelled her and pronounced *talaq*. The minor has since been residing in the custody of respondent No. 1, her mother, from the time of desertion. The respondent No. 1 has thereafter contracted a second marriage with one Muhammad Altaf. Thereafter, respondent No. 1 filed an application under Section 25 of the Guardian and Wards Act, 1890 ("the Act") before the learned Senior Civil Judge/Guardian Judge, D.I.Khan ("the Trial Court"), seeking custody of the minor. Learned Trial Court, after recording the evidence of both parties and affording them ample opportunity of hearing, accepted the petition and held entitled the respondent No. 1 for custody of minor.

3. Being aggrieved of the said decision, the petitioner preferred Appeal before the learned District Judge, Tank ("the Appellate Court"). However, the findings of the Trial Court were upheld and the appeal was dismissed vide judgment dated 15.5.2025. Thereafter, the petitioner has filed the present constitutional petition, assailing the impugned judgment passed by the Appellate Court.

4. Learned counsel for the petitioner, inter alia, contended that the Courts below failed to undertake a holistic assessment of the minor's welfare as envisaged under Sections 25 of the Act. The determination was made on the assumption of maternal preference without evaluating the petitioner's superior

financial, educational, and environmental capacity to secure the minor's long-term welfare. He submits that the remarriage of respondent No. 1 and the introduction of a stepfather required careful scrutiny, which the Courts below failed to conduct. The suitability of the new home, its moral environment, and its impact on the minor were not objectively assessed, constituting a material irregularity. He argued that the Appellate Court failed to exercise its jurisdiction effectively by affirming the Trial Court's findings without independent reasoning. The judgment is non-speaking and reflects mechanical concurrence, thus warranting interference.

5. Contrarily, learned counsel for the respondent argued that both Courts correctly applied the paramountcy of welfare, noting the minor's stable, continuous, and emotionally secure residence with the mother and no material was produced by the petitioner to demonstrate any adverse circumstance warranting displacement of the minor from her existing environment. He contended that re-marriage is not a legal disqualification for custody. The Courts below were satisfied that the respondent's new home poses no risk to the minor's welfare and no credible evidence was produced by the petitioner indicating any adverse effect arising from the remarriage. He maintained that the judgments reflect concurrent findings of fact based on proper appraisal of evidence.

6. Arguments heard. Record perused.

7. The pivotal points raised in the instant petition are as under:-

1. Whether the learned Courts below failed to appreciate the welfare of the minor as the paramount

consideration under Section 25 of the Guardians and Wards Act, 1890?

2. Whether the remarriage of respondent No. 1, coupled with the living environment of her new matrimonial home, was properly evaluated by the Courts below while determining the welfare of the minor?

3. Whether the respondent No. 1 can claim custody of minor merely on the basis of being the natural guardian, particularly when she has contracted a second marriage?

4. Whether the impugned judgments suffer from misreading and non-reading of evidence, thereby warranting interference by this Court in its constitutional jurisdiction?

5. Whether the petitioner, being the natural guardian and father of the minor, has been unjustly deprived of her custody despite having better financial, educational, and moral capacity to ensure her welfare?

6. Whether the learned Appellate Court failed to exercise jurisdiction vested in it under the law, rendering the impugned judgment liable to be set aside?

Before addressing the said points/issues, it is imperative to reproduce the section 25 of the Act which is reproduced below:

> **25. <u>Title of guardian to custody of ward.---</u>**
> **(1)** If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.

Bare perusal of Section 25 of the Act reveals that, in the matter of custody for a minor, the Courts must primarily take into consideration the welfare of the minor.

8. It is a settled principle of law that the welfare and best interests of the minors shall be the prime and overriding consideration in determining an application for custody, with no other factor taking precedence as noted by the august Supreme Court in the case of ***Khan Muhammad v. Mst. Surayya Bibi and others (2008 SCMR 480)***. Now determination that what constitutes welfare of a minor is a question of fact that must be established through cogent and reliable evidence in each case rather than presumptions as observed earlier by the apex Court in the case of ***Rahimullah Choudhary v. Mrs. Sayeda Helali Begum and others*** **(1974 SCMR 305)**.

The expression "*welfare of the minor*" includes the minor's moral, spiritual, physical, psychological, educational, and material well-being. It further encompasses considerations relating to the minor's health, academic progress, religious upbringing, and overall emotional development. In determining welfare, due weight must also be given to the minor's happiness and emotional attachment to the proposed custodian.

9. A holistic examination of the record demonstrates that the pivotal question for determination remains the *welfare of the minor*, which is the controlling consideration under section 25 of the Guardians and Wards Act, 1890. In the present case, the record unequivocally reflects that the minor harbours a strong

dislike towards the petitioner and repeatedly refused to meet him during the proceedings. She appeared before this Court and clearly expressed her willingness to reside with her mother. Conversely, the petitioner, being serving in the Pakistan Army, remains away from home for extended periods, leaving little opportunity to personally attend to the minor's welfare, who would, in such circumstances, inevitably remain dependent on his parents. On the other hand, the respondent-mother has maintained uninterrupted custody of the minor since infancy, during which the minor has remained well-settled, secure, and emotionally stable in her care.

The aspect of respondent No. 1's remarriage was duly considered by the Courts below, and nothing adverse regarding the minor's safety, upbringing, or environment has been brought on record. Mere remarriage, without tangible detriment to the minor, cannot be treated as a disqualification. The apprehensions raised by the petitioner regarding the respondent's remarriage are speculative and unsupported by any adverse material. The petitioner's assertions of superior financial means or status as natural guardian, though relevant, do not override the settled and emotionally secure welfare enjoyed by the minor in maternal custody.

As elucidated in D.F. Mulla's *Principles of Muhammadan Law* (Paragraphs 352 and 354), while a mother's right to custody continues even after divorce, it may be forfeited upon remarriage, particularly if the marriage is contracted with a person who is not

related to the minor within the prohibited degrees. Nonetheless, Sections 17 and 25 of the Guardian and Wards Act, 1890 mandates that the welfare of the minor shall remain the paramount consideration in determining custody disputes. The Hon'ble Supreme Court of Pakistan has consistently held that the disqualification of the mother under Muhammadan Law upon remarriage is not absolute and must yield to the overarching principle of the minor's welfare. In ***Shabana Naz v. Muhammad Saleem (2014 SCMR 343),*** it was categorically affirmed that if the welfare of the minor is best served in the custody of the mother, such custody may be granted to her notwithstanding her remarriage.

Therefore, each case must be decided on its own facts, with the welfare of the minor remaining the paramount consideration. In such cases, if the welfare of the minor is best served by awarding custody to the mother, even after remarriage, the Court may grant her custody as held in the case of ***Raja Muhammad Owais v. Mst. Nazia Jabeen and others (2022 SCMR 2123).*** The august Supreme Court, in the case of ***Mst. Shahista Naz v. Muhammad Naeem Ahmed and another*** **(2004 SCMR 990)**, observed that the right of Hizanat having the force of Injunction of Islam is an accepted principle of Islamic Law. Moreover a female, on account of re-marriage may be disqualified to exercise this right, but a mother on account of remarriage is not absolutely disqualified to be entrusted the custody of a minor child rather she may lose her preferential right of custody.

10. In view of the above discussion, and upon meticulous examination of the impugned judgments, this Court

finds that learned Courts below have correctly applied the paramount-welfare test under section 25 of the Guardians and Wards Act, 1890. The remarriage of respondent No.1, the environment of her new matrimonial home, the minor's consistent preference, and the petitioner's service-related limitations were all duly considered and appropriately weighed. No misreading or non-reading of evidence, or failure of jurisdiction, has been demonstrated so as to justify interference under the constitutional jurisdiction of this Court. Consequently, the petition stands dismissed.

Announced
November 19, 2025
*Hasnain/**

JUDGE

Approved for Reporting

(S.B) Hon'ble Mr. Justice Inam Ullah Khan