

**IN THE SUPREME COURT OF PAKISTAN**  
(Appellate Jurisdiction)

**Present:**

Justice Yahya Afridi, CJ  
Justice Shahid Bilal Hassan

**Civil Petition Nos.421-P of 2022**

*(Against the judgment dated 14.01.2022 of the Peshawar High Court, Bannu Bench, Bannu passed in Writ Petition No.541-B/2021)*

*Gul Sadem Khan*

... *Petitioner(s)*

*Versus*

*Mst. Halima and others*

... *Respondent(s)*

For the Petitioner(s):                      Haji Muhammad Zahir Shah, AOR  
assisted by Mr. Shah Faisal Najafi,  
ASC  
(via video-link from Peshawar)

For Respondent:                              N.R.

Date of Hearing:                                22.11.2024.

**ORDER**

**SHAHID BILAL HASSAN, J.**      This petition has been filed against the judgment dated 14.01.2022 passed in W.P.No.541-B of 2021 by Peshawar High Court, Bannu Bench, Bannu.

2.      Facts, in precision, are as such that the petitioner filed guardianship petition against the respondent No.1 for custody of minor sons namely Wali Ullah and Abdullah, which was duly resisted by the respondent. The petitioner failed to obtain favourable order as his petition was dismissed on 27.01.2021 by the learned trial Court and his appeal was disposed of vide judgment dated 17.03.2021 by the learned appellate Court with certain modifications. The petitioner

being dissatisfied filed the above said constitutional petition but the same was dismissed; hence, the instant petition.

3. We have heard learned counsel for the petitioner and have gone through the record with his able assistance. Prime and paramount consideration while deciding application for custody of the minor is the welfare and betterment of the minor(s) and nothing else<sup>1</sup>. Section 25 of the Guardians & Ward Act, 1890 enunciates that:-

***‘25. Title of guardian to custody of ward.---*** (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.”*

Similarly, the other relevant provision to decide the question of custody of a minor(s) is section 17 of the Act *ibid*, which reads:--

***‘17. Matters to be considered by the Court in appointing guardian.---*** (1) *In appointing or declaring the guardian of the 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.”*

From the above provisions of law, it is vivid and crystal clear that prime and foremost consideration is to decide the question of custody of a minor is his or her welfare and betterment. Welfare of the minor would overweigh against all other considerations. It is also apparent from the bare reading of section 17(2) of the Act that character and capacity of the proposed guardian as well as age and sex, is also an important factor to be considered while determining the welfare of the minor. In judgment<sup>2</sup> this Court has invariably held that:-

*‘The right of custody of minor is not an absolute right rather it is always subject to the welfare of the minor. The Court*

<sup>1</sup> Khan Muhammad v. Mst. Surayya Bibi and others (2008 SCMR 480)

<sup>2</sup> Mehmood Akhtar v. District Judge, Attock and 2 others (2004 SCMR 1839)

*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. 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.'*

In another judgment<sup>3</sup> a five member Bench of this Court held:-

*'It is aximatic that in the matter of appointment of a guardian the welfare of the minor coupled with his own wish, particularly when he can make a reasonable preference on account of his age, is the primary consideration for a Court of law for the decision of such cases.'*

Earlier, this Court in judgment<sup>4</sup> determined and held:-

*'6. We have given our anxious thought to all the aspects. No doubt, father is a natural guardian and mother in case of male children loses right of 'Hazzanat' after they attain age of seven (7) years. However, paramount requirement which must be kept in view for determining future arrangement of custody or temporary residence of the minors revolves around their welfare. It is settled principle that Guardianship Courts while dealing with matters relating to custody of minor children exercise parental jurisdiction. Therefore, strict adherence to procedure or rules is not pressed into service. Evidently rigid formalities and technicalities overcoming minor's welfare can be safely ignored.'*

Further, in judgment<sup>5</sup> this Court held:-

*'14. In Hedaya (2nd Edition, Vols.I-IV, page 138) in Chapter XIV of Hizanat, or "the care of infant children" and under section "In case of separation the care of the infant children belongs to the wife", it is followed by the comment that:-----  
'A mother is naturally not only more tender, but also better qualified to cherish a child during infancy, so that committing the care to her is of advantage to the child and Siddeek alluded to this, when he addressed Omar on a similar occasion, saying, 'the spittal of the mother is better for the child than honey, O Omar' which was said at a time when separation had taken place between Omar and his wife, the*

<sup>3</sup> Mst. Talat Nasira v. Mst. Munawar Sultana and 2 others (1985 SCMR 1367)

<sup>4</sup> Mst. Rubia Jilani v. Zahoor Akhtar Raja and 2 others (1991 SCMR 1834)

<sup>5</sup> Mst. Firdous Iqbal v. Shifaat Ali and others (2000 SCMR 838)

mother of Assim. The latter being then an infant at the breast. Omar desirous of taking him from the mother and these words were spoken in the presence of many of the companions, none of whom contradicted him. "

At page 139 under the title "Length of the terms of Hizanat" it is said:---

"The, right of Hizanat with respect to a male child, appertains to the mother, until he becomes independent of it himself that is to say, he becomes capable of shifting, eating, drinking and performing other natural functions without assistance after which the charge devolves upon the father, or next paternal relation. The Hizanat with respect to a boy, ceases at the end of seven years, as in general a child at that age is capable of performing all the necessary offices himself, without assistance. But the right of Hizanat with respect to a girl appertains to a mother, grandmother, and so forth; until the first appearance of the menstrual discharge, that is to say, until she attains the age of puberty, because girl has occasion to learn such manners and accomplishments as are proper to women, to the teaching of which the family relations are most competent, but after a period the charge of her properly belongs to the father, because a girl, after maturity, requires some person to superintend her conduct, and to this the father is most completely qualified "

15. As stated earlier, the main consideration which weighed with the learned Judge in Chambers of the High Court for making the order of delivery of custody of the minor to the father was only that after attaining the age of seven years, the right of 'Hizanat' of the male minor child under the Muslim Personal Law vested in the father as he is the natural guardian under section 25 of the Guardians and Wards Act, (VIII of 1890). The welfare of the minor, however, remains the paramount consideration in determining the custody of a minor notwithstanding the right of the father to get the custody after seven years of age of the male minor child. The- custody of a minor can, however, be delivered by the Court only in the interest of the welfare of the minor and not the so-called right of the one parent or another. It is true that a Muslim father is the lawful guardian of his minor child and is ordinarily entitled to his custody provided it is for the welfare of the minor.

It would, thus, be noticed that right of the father to claim the custody of a minor son is not an absolute right, in that, the father may disentitle himself to custody on account of his conduct in the light of the facts and the circumstances of each case. In the instant case, the evidence on the record showed that the respondent father who sought custody of the minor,

*neglected the child since the separation of the spouses inter se and had voluntarily left the custody to the petitioner-mother. She had brought him up and educated him till she had to opt for her second marriage. Even then she had not been negligent in the care of her minor son. She had entrusted that duty to her mother and father and minor is being properly educated till date in a local school. All along this entire period, the father never bothered even to go to meet the minor much less than providing maintenance to him, when the petitioner-mother sued him for providing maintenance allowance to the minor. It is only then that he had made an application for custody of the minor. Again the respondent-father has also taken another wife who has got one or two children out of the wedlock. The second wife of the respondent is living in the village of the respondent whereas the respondent himself is an Army Personnel in service of Pakistan Army and remains under posting from one cantonment to another. Consequently, he would also not be present in the house where he proposed to lodge his son. The minor would be exposed to the onslaughts of the step-motherly treatment of his second wife. There would be no one to stop the step-mother from the well-known step-motherly treatment. It was in these circumstances that the learned Courts below had concurrently found as a fact that the welfare of the minor lay in leaving him to the custody of the real mother through her parents rather than giving him to the respondent who is himself away from his household which had been left to the charge of the step-mother.'* (underline for emphasis)

Admittedly, in this case, the petitioner is settled abroad and he filed the petition under section 25 of the Guardian & Wards Act through special attorney i.e. Amir Hamza, who appeared as P.W.1; this fact also shows petitioner's lack of affection, love as well as care for the minors that he neither joined the proceedings during pendency of the petition nor bothered to appear before the learned appellate Court. Apart from this, there is nothing on record to suggest that the respondent No.1/mother is not taking care of the minors in a proper way and she is not getting them educated so as to become useful citizens. Moreover, the respondent No.1/mother of the minors did not enter into second marital bond for the sake of her children. Intrinsically, welfare of the minor lies to be with the respondent No.1/mother.

4. Additionally, poverty has also not been considered a valid ground for disentitling the mother from custody of the minor(s)<sup>6</sup>. In terms of section 7 of the Guardians and Wards Act, 1890, the paramount consideration for the court in making the order of

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<sup>6</sup> Mst. Razia Bibi v. Riaz Ahmad and another (2004 SCMR 821)

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.<sup>7</sup> 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.<sup>8</sup>

5. In this view of the matter, the learned Appellate Court has rightly disposed of the appeal with the observation that, *'the arrangement for custody of minors made at this time is not absolute and is subject to reconsideration if the circumstance change;*

- (i) -----
- (ii) *If minors Wali Ullah and Abdullah on attaining fourteen years of age, choose to decide to live with their father. (Reliance; 2007 CLC 1403)*

6. In addition to the above, the constitutional petition was disposed of on the request of the learned counsel for the petitioner seeking a direction to decide the fate of application (for restoration of visitation rights) pending before it expeditiously.

7. In view of the above, the impugned judgment is not open to any exception warranting interference by us. Therefore, no case for leave is

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<sup>7</sup> Shabana Naz v. Muhammad Saleem (2014 SCMR 343)

<sup>8</sup> Raja Muhammad Owais v. Mst. Nazia Jabeen and others (2022 SCMR 2123)

made out by the petitioner, consequent whereof the leave is refused and the petition in hand stands dismissed.

Chief Justice

Judge

Islamabad:  
22.11.2024  
'Approved for reporting'  
(M.A.Hassan)