

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

**PRESENT:**

Mr. Justice Syed Mansoor Ali Shah  
Mrs. Justice Ayesha A. Malik

**CIVIL PETITION NO.240 of 2021**

[Against order dated 12.01.2021 passed by the Lahore High Court  
Rawalpindi Bench, Rawalpindi in W.P. No.3800/2019]

Raja Muhammad Owais ...Petitioner(s)

Versus

Mst. Nazia Jabeen and others ...Respondent(s)

For the Petitioner(s) : Mr. Muhammad Siddique Awan, ASC  
along with Petitioner

For Respondents No.1 : Ms. Sarkar Abbas, ASC along with  
to 5 Respondents

Date of Hearing : 05.10.2022

**JUDGMENT**

**AYESHA A. MALIK, J.-** The Petitioner has impugned order dated 12.01.2021 of the Lahore High Court, Rawalpindi Bench (**the High Court**) whereby judgment by the Appellate Court dated 08.11.2019, was set aside and judgment dated 25.04.2019 passed the Senior Civil Judge, Rawalpindi, was restored.

2. Brief facts are that the Petitioner and Respondent No.1 were married and had four children, namely, Faizan Ullah Raja, Rabia Awais, Ayesha Awais and Ummama Awais; their ages today are 8 years, 13 years, 16 years and 17 years, respectively. Their marriage was dissolved on 30.01.2017. An application for custody under Section 25 of the Guardians and Wards Act, 1890 (**Act**) was filed by Respondent No.1, the mother

on 08.11.2017 for the custody of the four children wherein she disclosed the fact that she had remarried. During the pendency of the custody application, two of the children, namely, Ummama Awais and Ayesha Awais left their father's home and moved in with their mother on 15.11.2017. They did this of their own choice and as a consequence thereof, the mother moved an application under section 22-A/22-B Cr.P.C. seeking a direction to refrain the Petitioner-father from causing harassment to her and the family members, which was disposed of by a learned Additional Sessions Judge/Ex-Officio Justice of Peace, Rawalpindi on 25.11.2017. The Senior Civil Judge (Family Division), Rawalpindi, vide consolidated judgment dated 25.04.2019 accepted her application for custody of the children. This judgment was challenged before the Appellate Court which set aside the judgment of the Senior Civil Judge and awarded custody of the children to the father vide judgment dated 08.11.2019. The mother assailed the judgment of the Appellate Court through Writ Petition No.3800 of 2019 and the impugned order set aside the said judgment by upholding the judgment of the Senior Civil Judge, awarding custody of the children to the mother.

3. The basic contention of the father is that the mother has lost her right to custody given her second marriage. The learned counsel argued that in this case the father has not remarried; he has a respectable job and is able to care for the children; that his family consists of his brother & his wife and his mother. They reside in the same house and are able to help

him in taking care of the children. The father appeared in person and stated that the man the mother has married already has another wife with four children and amongst these children, he has four sons who are adults, ages between 20 to 24 years whilst his daughters are young between the ages 13 to 17 years. Hence, he stated that his four children should live with him and not with the step-father and step-brothers, which is not acceptable.

4. On behalf of the mother, the learned counsel confirmed that she has remarried and that the husband does have another family. However, she clarified that the families live in separate houses and that the husband visits Respondent No.1 in her home. She stated that Respondent No.1 is independent and runs a successful business with her husband; that the children are happy with the mother and they have all opted to live with her as they made their statements before the Senior Civil Judge that they are desirous of living with the mother. The impugned order has considered both the judgments of the Senior Civil Judge and the Appellate Court and concluded that while the Senior Civil Judge decided the issue of custody in favour of the mother based on the facts of the case while considering the second marriage of the mother, the Appellate Court did not consider the facts properly and set aside the judgment solely on the ground that she had remarried.

5. The impugned order has relied on the financial independence of the mother, her education and the fact that the

children wish to live with the mother. On the issue of the second marriage, the High Court found that the welfare of the minors lies in all four children living together, with the mother. The Petitioner contests these findings essentially on the ground of Respondent No.1's second marriage and the fact that the person whom Respondent No.1 is remarried has another wife and family.

6. The basic issue is with reference to the custody sought by the mother for her four children. The emphasis by the father is on the mother's second marriage which it is argued disentitles her to custody under the Islamic Law. D.F. Mullah in *Mohammadan Law* in Para 352 provides that the mother is entitled to the custody (*hizanat*) of her male child until he has completed the age of seven years and of her female child until she has attained puberty. Para 352 *ibid* provides that this right continues whilst she is divorced from the father of the child, however, in the event she marries a second time, custody then belongs to the father. Para 354 of *Mohammadan Law* provides that the mother, who is otherwise entitled to the custody of a child, loses the right of custody if she marries a person not related to the child within the prohibited degrees which are specified in paras 260-261 of *Mohammadan Law*. So as per the principles of *Mohammadan Law* by D.F. Mullah where she remarries, she can be disqualified for custody. Section 17 of the Act requires the Court to consider the welfare of the minor when appointing a guardian and welfare will be decided based on the age, sex and religion of the minor, as well as the character and

capacity of the guardian and the preference of the minor where they are old enough to state their preference intelligently. 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 Mohammdan Law* are not absolute and are subject to the welfare of the child. In *Muhammad Siddique v. Lahore High Court, Lahore thorough Registrar and others* (PLD 2003 SC 887), it was held that although the general rule is that the mother on contracting a second marriage forfeits her right of custody, this rule is not absolute and if it is in the interest of the child, custody should be given to the mother. The Court further held that it is the welfare of the minor that must be considered while determining custody and there is no absolute rule or fixed criteria on the basis of which welfare of the minor can be determined or custody can be awarded. In *Mst. Shahista Naz v. Muhammad Naeem Ahmed* (2004 SCMR 990), this Court concluded that the right of *Hizanat* having the force of Injunctions of Islam is an accepted principle of Islamic Law and a female on account of re-marriage may be disqualified to exercise this right, but a mother on account of re-marriage is not absolutely disqualified to be entrusted the custody of a minor child rather she may lose the preferential right of custody. The Court further held that there is no denying the fact that there can be no substitute for the mother of the minor child especially of tender age, therefore, the consideration for grant or refusal of custody will always be the welfare of the

minor. In this case, the mother even on contracting second marriage was entitled to retain custody of the minor. Again while looking at the Islamic provisions on custody of minor, this Court concluded in Mst. Hameed Mai v. Irshad Hussain (**PLD 2002 SC 267**) that the question of custody of a minor child will always be determined on the basis of the welfare of the minor and notwithstanding the father's right for custody under Muslim Personal Law, this right is subject to the welfare of the minor. Again in Shabana Naz v. Muhammad Saleem (**2014 SCMR 343**), Paras 352 and 354 of the *Mohammadan Law* were considered and the Court concluded that although *Mohammadan Law* provides that the mother is disentitled to custody if she re-marries, 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.

7. The aforesaid judgments clearly dispel the stance taken by the father that on account of the mother's second marriage, she has lost the right of custody over her four children. Time and again, this Court has held that the paramount consideration where custody is concerned is the welfare of the minor, 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 well-being of the child.

8. The United Nations Convention on the Rights of the Child, 1989 (**UNCRC**) is an international treaty which sets out the rights of children, be it economic, social, health or family. The UNCRC was ratified by Pakistan in 1990 with reservations that it will adopt the Convention, subject to the requirements of the Islamic Law. However, in 1997, the ratification became absolute as the reservation was withdrawn. The UNCRC recognizes that the child should grow up in an environment of love, happiness and understanding. Article 3 provides that in all actions concerning children whether by courts of law or public, or private welfare institution amongst others, the best interest of the child shall be a primary consideration. Article 7 provides that every child has right to be cared for by their parents and Article 9 requires that in the event of separation between the parents, the child should be in contact with both parents unless either one can cause any harm. Article 12 provides that a child

capable of forming his or her own view should be able to express it and it should be given due weightage. This Article suggests that children's preferences can be a guiding factor in custody cases, hence, encouraging their participation and opinion in custody matters. This is essential because 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 parents. Hence, a second marriage of the mother cannot become a stand alone reason to disqualify her right to custody.

9. In this case, the Senior Civil Judge (Family Division) considered the welfare of the children based on their ages and gender. The mother is an educated woman running a private school. She lives in her own house and is able to care for the children. One of the factors that prevailed with the Senior Civil Judge was the wishes of the four children as they made their statement in Court that they were desirous of living with their mother. In order to ascertain the desire of the children as of today, we asked each of the children, who are present in Court, about their preference. We were informed by each of the children that they desired to live with their mother. We find that



the children were confident and were able to easily express their wishes. The desire as expressed by the children is relevant particularly when the child is able to express his or her mind on preference. Although, this cannot be the sole factor, it is a relevant factor and we find that the Appellate Court totally ignored this aspect of the matter particularly with reference to Ummama Awais and Ayesha Awais, who of their own free will, left their father's home to reside with their mother on 15.11.2017 and have since been living with their mother.

10. Under the circumstances, we find no illegality in the impugned judgment. Consequently, no case for grant of leave is made out. Petition is dismissed.

**JUDGE**

**JUDGE**

Islamabad  
05.10.2022  
'APPROVED FOR REPORTING'  
Azmat/\*