

**IN THE HIGH COURT OF SINDH AT KARACHI**

BEFORE:  
Mr. Justice Aftab Ahmed Gorar

C.P. No.S- 491 of 2021

Mst. Aqsa

Versus

Government of Sindh & others

Date of Hearing:	13.10.2021
Petitioner:	Through Mr. Zia-ul-Haq, Advocate
Respondent NO.1:	Through Ms. Samreen Abro, Advocate
Respondents NO.2 to 6:	Through Mr. Pervaiz Ahmed Mastoi, AAG

**J U D G M E N T.**

**AFTAB AHMED GORAR, J:-** Through this petition, the petitioner (mother) claims custody of the minors from respondent No.2 (father). Though other usual prayers are also made in the petition, however the main crux of the arguments of learned Counsel for the petitioner was to seek custody of the minors.

2. The facts in nutshell, as narrated in the petition, are that petitioner married with the respondent No.2 on 05.3.2018 and out of the wedlock two minors namely Master Muhammad Zeeshan Bhatti and Master Abdul Rehman were born. The contract of marriage could not continue due to differences amongst them, which resulted in divorce. Though the divorce is admitted by the petitioner in para-7 of the petition, however she did not place such divorce document on record with her petition. The petitioner claims that since the minors were

forcibly taken away by the respondent No.2 (father) hence she seeks custody of the minors being mother. The respondent No.2 filed counter affidavit wherein he denied the allegations made against him by the petitioner.

3. Learned Counsel for the petitioner contended that the respondent No.2 (father) snatched the minors without consent of the petitioner and permission whereas he has continuously been issuing threats to the petitioner and even did not allow the petitioner to meet with minors/children. He further contended that against such highhandedness and threats of respondent No.2, the petitioner approached respondent No.4/SO Balda Police Station but the respondent No.4 avoided entertaining the application of petitioner which clearly demonstrates that the respondent No.2 is an influential person. He further contended that there is serious apprehension of danger of life to the petitioner and her family members at the hands of the respondent No.2 therefore, also prayed for providing protection.

4. On the other hand, learned Counsel for the respondent No.2 denied the allegations made by the petitioner and stated that the divorce upon the petitioner was announced in presence of witnesses as well as family members, which paper was also signed by the petitioner. He contended that along with divorce, the petitioner at the time of divorce had also consented to handover the custody of the child Master Muhammad Umer whereas she was pregnant at the time of divorce therefore, she consented to handover the custody of second child to respondent No.2 after giving birth. He further contended that thereafter the second child was born and his custody was also handed over to the respondent No.2 by the petitioner as per her written consent who was later named as Master Muhammad Ubaid. He also submitted that after giving birth to second child, the petitioner remarried someone else and

after passage of a long period, all of sudden, now she came to claim the custody of minors. He further submitted that the legal remedy available to the petitioner for her alleged grievances is before the learned Guardian & Ward Court Further-more the Guardian & Ward proceedings initiated by the respondent No.2 has not been contested by the petitioner and she instead of approaching the Court having jurisdiction had directly approached this Court under constitutional jurisdiction, hence this petition is not maintainable and the same may be dismissed.

5. Learned AAG also adopted the arguments made by the learned Counsel for the respondent No.2 and further added that this petition is not maintainable and merits no consideration therefore, same may be dismissed.

6. I have heard the learned Counsel for the petitioner, learned Counsel for the respondent No.2, learned A.A.G and have also perused the record available before me.

7. A bare perusal of the record demonstrates that though the petitioner admits divorce in her petition but she claims that the custody of the minors were forcibly taken away by the respondent No.2, however she has neither produced any document to show the date of divorce nor denied the divorce document produced by respondent No.2. The divorce document/stamp paper annexed with the counter affidavit by the respondent No.2 shows that it is dated 30.08.2020. Since the petitioner has neither denied such divorce stamp paper nor rebutted the same in any manner, hence the same is considered to be true one. Now question arises as to why petitioner took more than a year to claim the custody of first minor Muhammad Umer for which no justification was given whereas the second minor namely Muhammad Ubaid is admittedly aged 8 months therefore, it is not appealable to mind as to how a mother could keep quiet when a newborn baby is forcibly moved by someone else for

which there is neither any answer in petition nor has this question been agitated by the learned Counsel for the petitioner during arguments.

8. Apart from the above fact, the respondent No.2 has also placed on record a “Iqrarnama” along with his counter affidavit, which shows that the petitioner herself consented to handover custody of minor Muhammad Umer first whereas the other minor was yet to born for which it was written that soon after giving birth, the petitioner would also handover the custody of new born baby to respondent No.2. No rebuttal has come on record to deny that “ Iqrarnama“ therefore, same is considered to be true one. Perusal of petition shows that the names of minors mentioned in para-4 of the petition are also incorrect as these are mentioned as “1. Master Muhammad Zeeshan Bhatti (*who is actual name of respondent No.2*) and 2. Master Abdul Rehman”. The above mistakes in names of minors show lack of interest of petitioner in minors as even she being mother did not know the actual names of the minors.

9. The petitioner in her petition claims that she had approached the respondent No.4/SO of the concerned area and made a complaint but the respondent No.4 did not heed, however she did not file copy of complaint, if any, filed to the respondent No.4 before presenting this petition in Court. The record shows that the petitioner presented the instant petition for the custody of minors on 02.06.2021 whereas the complaint filed with the respondent No.4/SO by petitioner shows date of “06.10.2021” after about eight months, which prima facie seems to be an afterthought.

10. Besides the aforesaid admitted facts, if the case of the petitioner is considered under the parameters of law, it is crystal clear that this petition is not maintainable at all. The petition mainly consists of two prayers. First prayer is allegedly issuing of threats by respondent No.2 to the petitioner for which legal remedy available to the petitioner is to

approach the concerned Police Station and in case her complaint was not being lodged, she had then to avail legal remedy under section 22-A Cr.P.C and not a constitutional petition. Whereas the other/ main prayer of the petitioner is for the custody of minors and their meeting for which the legal remedy available to the petitioner is under Guardian & Ward Act. Regretfully, the petitioner skipped both the remedies as available to her under the law and directly approached this Court under constitutional jurisdiction and even she opted not to contest the Guardian & Ward case i.e an application under section 25 of the Guardian & Wards Act filed by the respondent No.2 before the Family Judge, Sukkur. Moreover, despite queries, the Counsel for the petitioner has failed to address on the above legal points as well. In a similar case reported as ***Nazha Ghazali vs. The State & another (2001 SCMR 1782)*** the Hon'ble Supreme Court of Pakistan made following observation while dealing with a similar situation:-

*“-----Petitioner (mother) had filed the application under S.491 Cr.P.C. after 5/6 months of the alleged unlawful removal of the minor from her custody without giving any explanation as to why she had kept quiet for such a long period—Petition in such circumstances would have either filed a report with the or made a complaint to the concerned authorities against the respondent (father)---Conduct of the petitioner, prima facie showed that the minor was not removed forcibly by the respondent from her custody—Custody of the minor with this father (respondent), therefore, could not be said to be illegal or unlawful within the meaning of S.491 Cr.P.C.—No proceedings under the Guardian and Wards Act, 1890 was even pending before the Family Court---Provisions of S.491 Cr.P.C. were not available for declaring any person as guardian or for determining all the questions relating to the custody of the minor because the final decisions of the regular custody was to be decided in the proceedings initiated by the party claiming the custody of the minor before the Guardian Court—Leave to appeal was refused to the petitioner.---”*

11. The conduct of petitioner (mother) shows that the custody of the minors was not forcibly removed by the respondent No.2(father) but it is the petitioner who by her own will and consent had handed over the

custody of the minors to the respondent No.2 and such consent was also reduced in writing, which written consent of the petitioner is brought on record by the respondent No.2 with his counter affidavit. There is no denial of the petitioner in respect of above written consent. Furthermore, the petitioner has failed to provide any justification as to why the petitioner (mother) kept quiet for more than a year to claim custody of the minors despite alleged forcible removal of custody by the respondent No.2. It is pertinent to mention here that at the time of divorce, admittedly the petitioner was pregnant and gave birth to second minor namely Master Muhammad Ubaid and despite alleging forcible removal of custody of first minor Muhammad Umer, the petitioner did not take any legal step to save the custody of second minor and thereafter second minor Muhammad Ubaid was also claimed to had been taken away by the respondent No.2, even then she waited for a long period without any justification to knock the door of the Court.

12. In view of above discussion, I am of the firm view that this petition is afterthought as well as not maintainable under the law and the same is hereby dismissed along with all pending applications. However, petitioner is at liberty to avail the remedy as available to her under the law, if so advised.

Judge