

ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

C.P No.S-635 of 2025

Laxmee alias Maria Versus SSP Complaint Cell Karachi South and others

DATE	ORDER WITH SIGNATURE OF JUDGE(S).
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Fresh Case

1. For orders on CMA No.5068/2025 (If granted).
2. For orders on office objection No.1 to 5 & reply of counsel thereof as flag “A”.
3. For orders on CMA No.5069/2025 (Exemption).
4. For hearing of main case.

Petitioner: Laxmee daughter of Harjee
(Maria wife of Waqar Younis)
Through Mr. Jawed Ahmed Baloch, Advocate

Respondents: Nemo for Respondents

Date of Hearing 31.07.2025

Date of Order 31.07.2025

ORDER

Nisar Ahmed Bhanbhro, J. It is the case of the petitioner that she has converted her faith from Hinduism and embraced Islam. She has contracted second marriage with one Waqar Younus after conversion. Previously, she was married with Krishan son of Veer See and out of the said wedlock, she mothered two children, namely, Urwansh Lalan aged about 03 years and Neha Devi, aged about ten years. That the minors were residing with their father and Petitioner being mother is best entitled to retain custody of minors. The Petitioner filed an application under section 491 CrPC before the Court of Learned District and Sessions Judge Karachi South, which was assigned to the Court of Learned VIIth Additional District and Sessions Judge Karachi South, who after hearing the parties dismissed the application, hence this Petition.

2. Mr. Jawed Ahmed Baloch, Learned Counsel for the Petitioner, contended that the Petitioner was impressed from the teachings of Islam, therefore, of her own choice, being sui juris, adult converted faith and embraced Islam. He contended that the Petitioner was previously married to Kirsshan son of Veer See under the Hindu Rituals and after conversion of faith, her marriage was broken. Petitioner of her own choice contracted

second marriage with Waqar Younus where she is residing happily. Respondent No 3 forcibly snatched the custody of minors from Petitioner. The minors need proper care and attention which can only be offered by the Petitioner being mother. He prayed for issuance of rule nisi for recovery of minors and shifting of the custody from Respondent No 3 to Petitioner.

3. Heard Learned Counsel for the Petitioner and perused material available on record with his able assistance.

4. Scanning of the record revealed that Petitioner converted her faith and embraced Islam. Previously she was married to Krishan and out of the wedlock she mothered two children. No where in the Petition it is alleged that the custody of minors was illegally removed from the Petitioner but it is asserted that the Petitioner is denied the meeting rights with her children and she needs permanent custody of children to seek the conversion of their faith. There is no allegation against the Respondent No 3 that he was incapable of giving proper care to the minors and intended to remove the custody of minors to an unknown place so that they may not remain in contact with their mother.

5. Record further reflected that Petitioner filed a similar nature application bearing No.2757/2025 under Section-491 CrPC before the Court of Learned Sessions Judge South Karachi which was made over to the Court of Learned VIIth Additional District and Sessions Judge, South Karachi (Trial Court). Learned Trial Court issued order for production of minors. The Respondent No.3, the ex-husband of the petitioner, brought custody of the minors. before the Trial Court on 25.07.2025. The Trial Court enquired the minors about their willingness to reside with their mother, which they refused and they chose to live with their father. It appears that Learned Trial Court conducted a detailed inquiry and dismissed the habeas corpus petition vide order dated 25.07.2025. Para 7 of the order being relevant is reproduced for the sake of convenience:

“07. Now having regards the arguments in respective interest by the counsel and perusing the material as available on record, it is observed that custody of the alleged detainees is with father/respondent No.1 since the minors been produced before the Court by the respondent No. 01, as such this retention of custody in my humble opinion cannot be dubbed as illegal or improper as father is a natural guardian. Now within application, it is contended that custody of the detainees is kept with by the father/respondent No.1 since 21 July 2025, as such they were snatched while on contrary, it has been observed that prior to filing this petition, the 2nd husband of the petitioner got moved HCP bearing No.2402/2025 for recovery of his wife/petitioner wherein alleged that detainee/petitioner went to her parents' house for meeting with her children and on appearance before the court, said petitioner got recorded her statement

which transpired that she left the abode of her second husband to meet her children, who are residing with her husband (respondent No.1 in present HCP) and thus, it makes crystal clear that there is no element of recent removal and one cannot disapprove the situation who otherwise approved it in the past, a legal principle of approbale and reprobale. One cannot take advantage of a benefit while simultaneously denying the associated obligations or conditions. Otherwise detenues also include one minor namely Neha Divi, aged 10 years, who seemed capable enough to respond rationally and thus was asked to seek her preference and she chose to go with her father and this aspect is also provided in case law reported in 2018 SCMR 427 wherein minors were given choice to make a decision with whom they wanted to live and such was respected. Further the minor aged 03 years looks comfortable and healthy with the father and no any element of imminent danger or harm is pointed out or reflected within application, otherwise as observed that all the children including detenues are residing with the father/respondent No.1 and this fact is elaborated above in light of available record. The contention that petitioner lady should be available before the decision of the instant HCP is devoid of credence in as much as is that the counsel is representing her and thus her presence would have no bearing upon the decision which otherwise is adjudged upon merits.”

Record reveals that the order passed by the Learned Trial Court was not assailed before higher forum and for the purposes of issuance of writ of habeas corpus the same attained finality.

6. The present matter involved not only the custodial rights of the minors in favor of the mother, but at the same time it involved the rights of minors to share the parental care. The right to parental care of the children is by now an undeniable and well-recognized right and cannot be taken away under ordinary circumstances. UNICEF the sister organization of the United Nations has been stressing hard for implementation of child rights, recognized under child rights conventions held time and again. Pakistan is signatory to the United Nations Convention on the Rights of the Child, 1989 (UNCRC). This international treaty was ratified by Pakistan in 1990 with reservations that it will adopt the Convention, subject to the teachings of the Islam. However, in 1997, the ratification became absolute as the reservation was withdrawn. The nations signatory to convention set out the rights of children, which included economic, social, health and family. The UNCRC recognized that the child should grow up in an environment of love, happiness and understanding. Article 3 provided 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 should be a primary consideration. Article 7 provided that every child has right to be cared for by their parents and Article 9 required 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 provided that a child capable of forming his or her own view should be able to express it and it should be given due weightage. Article 9 of the UN CRC, which is relevant to this Petition, is reproduced for ease of reference:

“ States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.”

7. The UNCRC suggested that the children cannot be left rightless and in case of separation of parents they cannot be denied access to both the parents. In case it is not possible to keep them in a joint set up then child's preferences can be a guiding factor in custody cases, hence, encouraging their participation and opinion in custody matters. 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 sole reason to disentitle her right to custody. The perusal of the order dated 25.07.2025 passed by the Learned Trial Court revealed that this right of preference or choice was given to the children but the said exercise was done in absence of petitioner. It is evident from the record that the Petitioner chose to remain absent before Trial Court of her own choice on a crucial day of proceedings as she knew that the Court had ordered for production of minors.

8. In our Country, there is no law in the field depriving mother the custody of minors when she changes faith. In the normal course, when a mother filed petition seeking the custody of minor, this court, unhesitatingly granted the relief of interim custody in favor of mother subject to a final verdict by the Guardian Court. But the situation in the present case was entirely different. Petitioner has converted faith and remarried with a Muslim man and she seeks custody of minors who profess Hindu faith and are residing with their father. The other important aspect of the case is that the second husband of Petitioner has not come forward before this Court to show his willingness to retain the custody of minor children of the petitioner from her ex-husband and look after them properly. The custody of minors with their father cannot be held as illegal under any law but the prime question for consideration in the present *lis* involves the welfare of minors and this Court under its constitutional jurisdiction cannot determine this aspect of the case, for which the proper

course available under the law is to approach the Guardian Court. This Court cannot issue a writ directing the police authorities to recover the minor and produce them before this Court when law had provided an adequate remedy under the Guardian and Wards Act 1890.

9. This view finds support from the judgment of Honorable Supreme Court in the case of Ms. Quratul Ain Versus Station House Officer Police Station Saddar Jalalpur Jattan District Gujrat and others reported in 2024 S C M R 486, wherein it has been held:

22. The tendency of the High Courts to readily and unhesitatingly resorting to extreme measures by involving law enforcement agencies in family matters cannot be appreciated, especially so where no element of criminality is there and the child is in the lawful and rightful custody of the parent. Such actions cause unnecessary trauma and harassment for the concerned parent, specially where the concerned parent is the real mother of the child. The High Court must exercise extreme care, caution, and circumspection in such matters. Only in exceptional and extraordinary circumstances, where all other methods and measures fail and an element of criminality, forced removal, kidnapping and/or abduction of the child is involved, the High Court may exercise its constitutional jurisdiction.

23. Issuance of a writ of habeas corpus in a custody matter should be an exception, and not the rule, as the GW Act provide the Guardian Court with all requisite powers to pass and enforce its orders in matters of custody of the child(ren). It is, in our opinion, inappropriate for a constitutional court to encroach upon and arrogate itself the powers of a Guardian Court, which is the court of competent jurisdiction under the law, to decide all matters relating to custody of child(ren).

10. The Guardian and Wards Act, 1890 (GWA) being the principal law in the country regulating the custody of minors provides guidelines to decide the question of custody of minor and guardianship. To decide the question of custody of minor section 17 of GWA lays down the factors to be considered for appointment of guardian, section 17 reads as under:

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."

Though the above provisions of law do not help in resolving the controversy of custody of minors when one of the parents change faith but lay down that the basic principle to determine the question of custody was welfare of the minors and secondly the preference of children if they are sufficiently grown up.

11. In the instant Petition, the petitioner claims that the welfare of the minors was best suited with her (in the custody of mother), such a question cannot be determined by this Court in its Constitutional jurisdiction and the right course available to the Petitioner is to approach the Guardian Court. It is settled principle that Guardianship Courts while dealing with matters relating to custody of minor children exercise parental jurisdiction. The Guardian Court will consider all the aspects of the case including the change of faith of the Petitioner and willingness of step father of the minors (second husband of Petitioner) to retain the custody and afford their upbringing in his house.

12. For what has been discussed herein above, no case for indulgence of this Court under its writ jurisdiction is made out. The petition therefore fails and is accordingly dismissed in *limnie* along with listed applications. The petitioner may, however, file a proper application under the provisions of Guardian and Ward Act, 1890 to seek the custody of minors if so advised. It is clarified that the Guardian Court, if approached, shall without any loss of time pass orders regarding interim arrangements of meeting of the children with the mother at least once in a week and decide the application of the petitioner for custody on merits in accordance with law without being influenced by the observations made by this Court.

JUDGE

Ayaz Gul