

ORDER SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

C.P. NO.S-2070 of 2017

DATE	ORDER WITH SIGNATURE OF JUDGE(S)
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Date of Hearing : 02.03.2018.

Date of Order : 02.03.2018.

Mr. Badal Gahoti, Advocate for petitioner.

Mr. Aslam Baig Leghari, Advocate for respondents No.6 to 8.

Mr. Allah Bachayo Soomro, Additional A.G

ORDER

AGHA FAISAL, J:

The present petition has been filed against

the impugned order dated 15.11.2017 (hereinafter referred to as the "Impugned Order"), passed by the learned Sessions Judge, Hyderabad, in Criminal Miscellaneous Application No.328 of 2017, filed under Section 491 Cr.P.C. The relevant portion of the Impugned Order is reproduced herein below:

"It is settled principle of law that paramount consideration being welfare of the minors the applicant being real mother is entitled to the custody of her minor daughter and she had been unlawfully snatched from the custody of applicant. Minor being in custody of Opponent No.1 for about one year, possibility of her brain wash or harassment caused to her could not be ruled out and her preference to live with the Opponent No.1 could not be termed as an independent and intelligent preference. Such issue could only be decided by the Guardian Judge and not by this Court under the summary jurisdiction under section 491 Cr.P.C. The reference in this contest is placed on the case of Mst. Sarwar Kalhoro Vs. Mukhtiar Ali Kalhoro, reported in 1999 P.Cr.L.J-1711.

I am also fortified by case law reported in 2017 MLD 427 (Sindh) (Re-Shanza Ali Vs. Aamir Shujaat and 2 others) wherein it has been observed as under:-

"It is now well settled principle of law that jurisdiction of Courts under the Guardian and Wards act, 1890, in respect of the custody of minors and for recovery/production of minors u/s. 491 Cr.P.C. are

entirely different and there is no question of one excluding the other, overlapping the other or destroying the other in as much as, there is not repugnancy between the said two provisions. The provisions of section 491 Cr.P.C provide efficacious and speedy relief for release of the persons kept under illegal and improper custody. In the matter pertaining to custody of minors of tender age, this court is empowered to issue directions under section 491 Cr.P.C. and can pass an order regarding temporary custody without prejudice to the right of parties for final determination of the dispute pertaining to custody of minors by the Guardian and Wards Court.”

In above case in hand admittedly, Opponent No.1 having first wife, therefore, this Court is empowered to pass appropriate order, ensure that the rights conferred upon the minor child be fully protected in a suitable manner, particularly when minor is of tender age and the Habeas Corpus petition in such cases is held maintainable and the reliance in this regard is placed upon 2017 MLD 427 (Sindh) (Re-Shanza Ali Vs. Aamir Shujaat and 2 others) wherein it has been held that mother had the preferential right to “Hizanat” (temporary custody of the minors) till the minor attains the age of puberty in the above case of female child. Admittedly, the Opponent No.1 is married with a lady stranger to minor and thereby applicant compelled to seek custody of minor and the contention raised by counsel for Opponent No.1 she herself left the minor with the Opponent No.1 by consent would be no ground to deprive the applicant being real mother because the consent or any sort of agreement with regard to the custody and Guardianship of minors is not a valid agreement and could not be enforced and had no binding force in the eye of law as held in above referred case law reported in 2017 MLD 427.

I am also fortified by case law reported in 2016 P.Cr.L.J 44 [Lahore] (Re-Tahira Parveen Vs. Station House Officer Police Station Mansoorabad, District Faisalabad) wherein it is held that father was living with his first wife, thus, it would not be appropriate to send the minor in laps of step mother, likewise in above case in hand Opponent No.1 being father residing with his first wife, therefore, the custody of minor with father at this juncture is improper and illegal particularly when the applicant having right of “Hizanat” to keep the custody of minor baby Mariyam.

In view of above facts and circumstances and relying on the case law quoted hereinabove, the custody of minor Mariyam is handed over to the applicant being their real mother subject to execution of P.R Bond in the sum of Rs.1,00,000/- (One Lac rupees) with direction that the custody of minor should not be transferred/removed from her home District Matiari. However, Opponent No.1 if intends to seek her custody, he is at liberty to move the Guardian and Wards Court having jurisdiction. Consequently, the above application stands disposed of.

2. The relief sought in the present petition is delineated herein below:
- “a) That, this Honourable court may be pleased to declare the order dated 15.11.2017 passed by learned Sessions Judge, Hyderabad, in Cr. Misc. Application No.328 of 2017 U/s. 491 Cr.P.C Re: Mst. Shahzadi Vs. Muhammad Yaqoob and others as null, void ab initio, unlawful and without lawful jurisdiction and same may be set aside.
 - b) That, this Honourable court may be pleased to direct the respondent No.4 to recover minor baby Mariyam d/o Muhammad Yaqoob from the custody of respondents No.6 to 8, produce her before this Honourable court and custody of the minor may be handed over to petitioner being real father and natural guardian of minor baby girl.
 - c) That, this Honourable Court may be pleased to direct the respondents No.2 & 5 to provide legal protection to the petitioner and his family inmates and ensure that no harassment as well as harm shall be caused to petitioner at the hands of respondents No.6 to 8.
 - d) Any other relief which this Honourable Court deems fit and proper may please be awarded to the applicant.
3. The facts of the case are as follows:
- (i) The petitioner got married to the respondent No.6 on 21.02.2008 and together they had a baby girl, age 04 years at the time of the institution of the present petition.
 - (ii) The marriage of the petitioner and the respondent No.6 was dissolved vide judgment dated 20.05.2017, by the learned Court of the Civil and Family Judge-I, Hala, in Family Suit No.10 of 2017 filed by the respondent No.6 against the petitioner.
 - (iii) The issue regarding the custody of the minor appear to have become contentious between the petitioner and the respondent No.6 and the said differences resulted in Criminal Miscellaneous Application No.328 of 2017 being filed before the Court of the learned Sessions Judge, Hyderabad, under Section 491 Cr.P.C.
 - (iv) The learned Sessions Judge handed over the temporary custody of the minor girl to the mother, subject to the imposition of conditions and directed that such

temporary custody shall be subject to the final determination of the matter before the Guardian and Wards Court having appropriate jurisdiction.

- (v) The petitioner has filed the present petition after having been aggrieved by the aforesaid order, yet has already instituted a Guardian and Wards Application in respect of the minor mentioned herein before the Court of the learned Family Judge-I Hala, being Guardian Application No.14 of 2017.

4. The learned Counsel for the petitioner stated that notwithstanding the fact that the custody of the minor was a matter already pending before the Court of appropriate jurisdiction, it was imperative that the Impugned Order be set aside and that the temporary custody of the minor be given to the petitioner, and not to the respondent No.6 who is the real mother of the minor girl.

5. The learned Counsel cited the case of *MST. NADIA PERVEEN V/S. MST. ALMAS NOREEN & OTHERS*, reported as *PLD 2012 Supreme Court 758*, and drew the Court's attention to the following passage:

"It has consistently been held by this Court in the cases of Muhammad Javed Umrao v. Miss Uzma Vahid (1988 SCMR 1891), Nisar Muhammad and another v. Sultan Zari (PLD 1997 SC 852), Mst. Khalida Perveen v. Muhammad Sultan Mehmood and another (PLD 2004 SC 1) and Nazhia Ghazali v. The State and another (2001 SCMR 1782) that the matter of custody of minor children can be brought before a High Court under section 491 Cr.P.C. only if the children are of very tender ages they have quite recently been snatched away from lawful custody and there is a real urgency in the matter and also that in such a case the High Court may only regulate in the matter and also that in such a case the High Court may only regulate interim custody of the children leaving the matter of final custody to be determined by a Guardian Judge. In those cases this Court had repeatedly emphasized that in such matters the jurisdiction of a High Court under section 491 Cr.P.C. is to be exercised, sparingly and such exercise may be undertaken only in exceptional and extraordinary cases of real urgency keeping in view that even a Guardian Judge has the requisite powers of recovery of minor children and regulating their interim custody. In the case in hand the petitioner's children

were neither of very tender ages nor had they been snatched away from the petitioner and, thus, the petitioner's petition filed before the Lahore High court, Lahore under section 491 Cr.P.C was misconceived. The interim order passed by this Court in connection with the present petition on 20.12.2010 shows that on 7.4.2010 the learned Guardian Judge, Sialkot has already appointed the paternal grandmother of the minors as the guardian of their persons and properties. We have been informed that the said decision of the learned Guardian Judge has not so far been assailed by the petitioner before any higher court. In this view of the matter we have failed to find any occasion for interference in the matter. This petition is, therefore, dismissed and leave to appeal is refused."

6. The learned Counsel further cited the case of *NAZIHA GHAZALI V/S. THE STATE & ANOTHER*, reported as 2001 SCMR 1782, and placed the reliance on the following passage:

"On perusal of the record, it would appear that the petitioner has alleged in the criminal miscellaneous application that the respondent forcibly took away the minor Shahrukh Ghazali in the third week of June, 1999. The respondent has stated in paragraph 10 of his counter-affidavit that he took his son with the consent of the petitioner and shifted him to the house of his parents in the last week of May, 1999 where he has been residing and that the petitioner enjoyed free and unhindered access to the minor and she has cordial relations with his family and she has been visiting respondent's house regularly. In paragraph 12 of the counter-affidavit, the respondent has denied that he was illegally detaining the minor. It is an admitted position that the minor is in the custody of the respondent either from May or June, 1999. The application under section 491 Cr.P.C. is admittedly filed by the petitioner on 25th November, 1999 i.e. after 5/6 months, alleging unlawful removal of the minor from her custody. There is no explanation as to why the petitioner kept quiet for such long period if the minor son was removed illegally by the respondent. If the minor was removed from her custody unlawfully and without her consent, in the normal circumstances, she would have either filed report with the police or made a complaint to the concerned authorities against the respondent in accordance with law. It would prima facie appear from the said conduct of the petitioner that the minor was not removed forcibly from the apartment by the respondent, therefore, ex facie it cannot be said that the custody of the minor with his father, the respondent, was illegal or unlawful within the meaning of section 491 Cr.P.C. We are informed that no proceedings under the Guardians and Wards Act are pending before the Family Court. In the circumstances, there is no question of giving away the regular custody of the minor to either of the parties declaring any of them as a guardian under section 7 read with section 12 and 25 of the Guardians and Wards Act, considering that under section 491 Cr.P.C. Court has

considered if the person who is required to be produced has been illegally or improperly detained, whereas under the Guardians and Wards Act, the custody of the person of the minor is to be given to a person when it is in the welfare of the minor by appointing or declaring him to be guardian of the said minor which fact is to be determined by Guardian Court. The provisions of section 491 Cr.P.C. are not available for declaring any person as guardian or for determining all the time questions of custody of the minor because the final decision of the regular custody is to be decided in the proceedings under the Guardians and Wards Act when initiated by the party claiming the custody of the minor before the Guardian Court. the facts of the cases cited by the learned counsel for the petitioner are quite different and distinguishable from the facts of the instant case, therefore, same are not of any he to the petitioner. In the circumstances, it cannot be said that the settled law of this Court has been unset by the order of the learned single Judge of the High Court.

8. In view of the reasoning stated above, we find no merit in this petition, consequently leave is refused and same is hereby dismissed. However, in the circumstances stated the respondent is directed to regularly leave the minor namely Shahrukh Ghazali with his mother the petitioner, from the evening of every Friday till the evening of ever Sunday of every week and the petitioner would return the said minor to the respondent on Sunday evening of every week without fail. It is further ordered that none of the parties shall remove the said minor out of city without prior permission of the Court. The entitlement to the custody of the minor on regular basis would depend upon the adjudication by the Guardian Court in accordance with law. With the above observation, leave to appeal is refused and the petition is dismissed.”

7. The learned Counsel also cited the case of *MRS. RANIA IBRAHIM QURESHI V/S. DISTRICT & SESSIONS JUDGE, ABBOTABAD & 02 OTHRS*, reported as 2011 P.Cr.L.J 594, wherein the Honourable Peshawar High Court had maintained as follows:

“6. Precisely allegation leveled against respondent No.2 is that petitioner was deprived of custody of minor children three weeks ago when he alongwith companions forcibly snatched them, however, fact is to the contrary in that it has been specifically asserted in Para-3 of Writ Petition that a few weeks ago, she was expelled from the house by respondent No.2 alongwith minors hence it does not appeal to common sense that the children were snatched. Else, it appears to material, whatsoever, to even remotely suggest that there existed any element of snatching minors on the part of respondent No.2.

7. *Facts and circumstances of the case indicate that Petition is, in fact, an attempt to obtain custody of minors although minors who time and again appeared in court were absolutely hale, hearty and quite comfortable in father's company. Claims and counter claims regarding suitability to retain custody and/or affluence, social status, background and emotional suitability were matters which essentially were to be decided by the competent Court under Guardians and Wards Act after recording evidence to this effect. The more so, question as to whether custody of minors was snatched from petitioner by the father or for that matter petitioner voluntarily deserted the minors to be left in custody of father also needs evidence and all these questions cannot be resolved by resorting to remedy either under section 491 Cr.P.C. or Article 199 of Constitution of 1973.*

8. *We are mindful of the fact that proceedings in the shape of Habeas Corpus are summary in nature so as to resolve controversy in respect of illegal and improper detention of a person in public or private custody by police or a private persona and the High Court is invested with powers to cause production and release of detenu but whenever dispute pertains to custody of minors in between the parties in general and husband and wife in particular, recourse to summary procedure is seldom available in that the parties can legitimately lay their respective claims under the Guardians and Wards Act hence provisions of section 491 Cr.P.C. and Art. of Constitution cannot be invoked.*

Viewing the matter from each and every angle, redressal of grievances of petitioner in given circumstances is not possible though intervention of this Court in exercise of Constitutional jurisdiction hence order passed upon application by the Court of Sessions is unexceptionable warranting to interference.

As a sequel to above discussion, there being no merit in instant petition is hereby dismissed and interim order handing over custody of minors to petitioner is recalled."

8. It was the argued on behalf of the petitioner that the Impugned Order is liable to be set aside or in the alternative modified to grant the temporary custody of the minor to the petitioner and that it should be the respondent No.6, real mother of the minor girl, who should institute an appropriate guardian and wards application before the Court of appropriate jurisdiction, wherein the ultimate custody of the minor may be determined.

9. In response, it was contended by the learned Counsel for the respondent No.6 that the said respondent was the natural guardian of the minor baby girl under the settled principles of '*Hizanaḥ*'.

10. In this regard, the learned Counsel submitted that there is no cavil to the proposition that the mother is entitled to the custody (*Hizanaḥ*) of her male child until he has completed the age of seven years and of her female child until she has attained puberty.

11. It was then contended by the learned Counsel that the learned Sessions Judge was duly empowered to determine the issue of temporary custody of the minor girl, pending final determination by the appropriate Guardian and Wards Court, and in regard thereof relied upon the following authorities of the Superior Courts:

(i) **2017 MLD 427 (Shanza Ali Vs. Aamir Shujaat & 02 others)**

"9. So far as the first point for determination is concerned, it is now well settled principle of law that the jurisdiction of Courts under the Guardians and Wards Act, 1890, in respect of the custody of minors and for recovery/production of minors under Section 491, Cr.P.C are entirely different and there is no question of one excluding the other, overlapping the other or destroying the other in as much as there is no repugnancy between the said two provisions. The provisions of Section 491, Cr.P.C, provide efficacious and speedy relief for release of the persons kept under illegal and improper custody. In the matters pertaining to custody of minor of tender age, this Court is empowered to issue directions under Section 491 Cr.P.C. and can pass an order regarding temporary custody without prejudice to the right of the parties for final determination of the dispute pertaining to the custody of minors by the Guardians and Wards Court as has been held in the following case laws:--

i) *Mst. Zameen v. Dr. Omer Mohayuddin Sheikh and others* (2013 MLD (Lahore) 1640);

(ii) *Mst. Saima Bibi v. Raheel Butt and 3 others* (2014 MLD (Lahore) 38);

- (iii) Mst. Abida v. S.H.O., Ratodero Police Station (District Larkana) and 3 others (2014 YLR (Sindh) 705);
- (iv) Mst. Reema v. S.H.O., Police Station Dari, Larkana and 4 others (PLD 2014 (Sindh) 598);
- (v) Saima Noreen v. The State and others (2015 MLD (Lahore) 833);
- (vi) Karam Khatoon v. Senior Superintendent of Police, District Khairpur and 8 others (2016 MLD (Sindh) 28).

10. In view of the above settled principle of law, I hold that this application under Section 491 Cr.P.C. is maintainable and this Court is empowered to pass appropriate orders to ensure that the rights conferred upon the minor child are fully protected in a suitable manner in the exercise of its inherent jurisdiction more particularly when the minors are of tender age as in this case the minor baby is below the age of two years.

11. Now the second point for determination is in two folds namely (1) whether an agreement between parties regarding custody and guardianship of minor being contrary to Muslim Law is enforceable in law? and (2) whether the mother of minor after executing such agreement has lost the right of 'Hizanat'? According to the Muslim Law, mother has the preferential right to 'Hizanat' (temporary custody of the minor) till the minor attains the age of seven in the case of male and the age of puberty in the case of a female. It is an established principle of law that an agreement with regard to the custody and guardianship of minors is not a valid agreement and cannot be enforced and has no binding force in the eyes of law as has been held in the following case laws:--

- (i) Mst. Tahera Begum v. Saleem Ahmed Siddiqui (PLD 1970 Karachi 619);
- (ii) Afshan Noureen v. Nadeem Abbas Shah (1997 MLD (Lahore) 197);
- (iii) Mst. Razia Rehman v. Station House Officer and others (PLD 2006 Supreme Court 533);
- (iv) Dr. Fouzia Haneef v. Dr. Raashid Javaid and 2 others (PLD 2010 Lahore 206);
- (v) Mst. Abida v. S.H.O., Ratodero Police Station (District Larkana) and 3 others (2014 YLR (Sindh) 705);
- (vi) Saima Noreen v. The State and others (2015 MLD (Lahore) 833).

12. *In view of the settled principle of law laid down in the above-noted case laws, I hold that the agreement dated 01.09.2014 between the petitioner and the respondent No.1 regarding custody of minor Fatima being in derogation of Muslim Law is null and void and hence cannot be enforced under any circumstances, consequently, the petitioner being the real mother of the minor Fatima ha right of 'Hizanat'.*

13. *There is another aspect of the matter which I noticed that the stamp paper for the said agreement was purchased on 29.08.2014 and it was typed on computer. This fact establishes without any doubt that the respondent No.1 has already managed to take away the custody of the minor Fatima immediately after the delivery from the petitioner in hospital. This agreement, on the face of it, appears unconscionable as the petitioner was in the hospital and accordingly there is a rebuttable presumption that the said agreement was entered into by coercion and undue influence. No effective rebuttal is forthcoming to show as to why the petitioner would voluntarily part with her minor daughter immediately after birth. My this considered view is fully supported by the case of Mst. Shehnaz Bibi v. Muhammad Akram and others (1995 P.Cr.L.J (Lahore) 307).*

14. *There is yet another case of Shoukat Masih v. Mst. Farhat Parkash and others (2005 SCMR 731) wherein, the Hon'ble Supreme Court of Pakistan has cancelled the guardianship certificate and direct the learned Guardian Judge to consider application submitted before him regarding custody o the relevant minor as a pending application and then to decide the matter afresh after attending to all the jurisdictional, legal and factual issues and during the interregnum the custody of the minor shall remain with her mother.*

15. *I also took judicial notice of the fact that minor baby Fatima is below two years of age and accordingly it is her fundamental right of being fed from the breast of her mother for at least two years in view of the settled principle of Muslim Law that minor who comes out of womb of the mother has a fundamental right of being fed from the breast of his/her mother and no person can deprive minor of this supreme and fundamental right. Thus, the said agreement dated 01.09.2014 is ab-initio illegal, null and void having no legal effect whatsoever.*

16. *Admittedly, baby Fatima is below two years of age and certainly would need constant care of mother and it is a universal truth that there cannot be any substitute for a mother and that the lap of mother is God's own cradle for a child and hence the custody of minor Fatima with the respondent No.1 is improper if not illegal."*

(ii) **2016 P.Cr.L.J 44 (Tahir Parveen Vs. Station House Officer, Police Station Mansoorabad, District Faisalabad.**

“6. After considering the contentions made by learned counsel for the parties, this court is of the opinion that all the arguments raised by learned counsel for respondent No.2 are not related to the instant proceedings rather the same could be raised validly before the learned Guardian Court in a petition which can be filed under section 25 of the Guardian and Wards Act, 1890. In the instant proceedings, it is only to be seen whether the custody of the father of the minor is in proper or illegal. The minor is having the age of 5-1/2 years and she was interviewed by the court. During the interview it is observed that the minor has mature understand and has answered all the questions of the court. when it was asked from the minor about the petitioner she pointed finger towards her and went to her (adopted mother) and embraced with her. This shows that the minor is still having love and affection with the petitioner, who has adopted her. No doubt the custody of respondent No.2 cannot be termed as illegal as he is also an adopted father of the minor but that custody is still improper as mother is enjoying the rights of ‘Hizanat’ of the minor and that she is living apart from the respondent. It is also informed that respondent No.2; during subsistence of his first marriage, has contracted second marriage with the petitioner and his first marriage is still intact and his first wife is living with him. In this situation, it would not be appropriate to send the detenu in the lap of step mother. The petitioner, as yet, has not remarried, so she is able to look after the minor properly. The question raised by learned counsel for respondent No.2 that petitioner has no locus standi to file the instant petition as she is the mother, who has adopted the baby is untenable as the real mother of the baby, is also present in the court and standing with the petitioner and stated that the baby from her birth was handed over to petitioner Tahira Parveen and till date she is residing with her and she is happily living there. This statement of the lady is sufficient to brush aside the contention raised by learned counsel for respondent No.2. It is the ground of respondent that petitioner is able to maintain the child, suffice it to say that it is the duty of the father to provide all those facilities to the child in the house of the petitioner, which she enjoyed while living with respondent No.2.

7. The judgment cited by learned counsel in the case of Naveed Munir (supra), has been examined and it is found that the judgment was delivered in the proceedings initiated on the application filed under sections 6 and 7 of the Guardians and Wards Act, 1890 and was not passed in the petition filed under section

491 Cr.P.C. The scope of both the proceedings is on different footing as under the former proceedings the court has to determine the welfare of the minor before deciding guardian petition and in the latter proceedings, the court had to see the custody of the minor is legal or proper. In these circumstances, judgment delivered by Apex Court, in the case of Naveed Munir (supra) is not applicable to the fact of present case. As has been observed by this court that the child is inclined to join her mother and a scene has been created in the court room in this respect, so it can easily be said that child has been removed from the custody of the petitioner in the recent past, thus this petition can be entertained. It has been brought to the notice of the court that respondent No.2 belongs from very influential family so there is every likelihood that due to that influence the cases have been registered against the family of the petitioner, as has been pointed out by counsel of the petitioner.

8. In view of the afore-noted observation, this petition is allowed and the custody of the minor baby Kashaf is ordered to be handed over to the petitioner.”

(iii) 1983 SCMR 606 (Mst. Feroze Begum Vs. Lt. Col. Muhammad Hussain)

“Under the Shariat Law, 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. The right continues though she is divorced by the father of the child. Needless to mention here that the father is the natural guardian of his minor children and the mother’s custody is a subordinate custody and is subject to the control of the father. But the mere inability to maintain the child is not a ground for depriving the mother of the custody of her children. In *Harbal v. Usman* (1) it was held that mother’s poverty is no hindrance to the custody of her minor daughter. Indeed in law it is for the father to provide for their maintenance.”

12. The learned Counsel stated that the respondent No.6 was forcibly thrown out from her marital home by the petitioner and that the minor was forcibly detained by the petitioner, to the exclusion of the mother, and that the same attracted the provisions of Section 491 Cr.P.C. In support of this argument, the learned Counsel cited the case of *SAMRA ZAMAN V/S. STATION HOUSE OFFICER, POLICE STATION GHULAM MUHAMMAD*

ABAD, FAISALABAD & 03 OTHERS, reported as 2009 YLR 1678, and drew the Court's attention to the following passage:

“4. The marriage in between the parties still continues. The petitioner has allegedly been recently expelled from the house of her husband/respondent No.3. The minors are of tender age and presently residing with the father-respondent No.3. They are naturally prone to his line as tutelage in his hand. The mother is a symbol of sacrifice for her children. There is no substitute for love and affection of the mother. The lap of the mother is a heavenly place. She has inherent right to keep her children close to her bosom and rear them up under her umbrella. The rulings referred by learned counsel for respondent No.3 being in different situations were not apt similes. Keeping in view the age of the minors, their interim custody is directed to be handed over to the petitioner-mother as she cannot be deprived of their custody until and unless decided otherwise by the Guardian Judge concerned on proper showings as to the welfare of the minors. The police officer in attendance would provide assistance for safe recourse to the residence of the petitioner.”

13. The learned A.A.G, representing the respondent No.1 to 5 being the official respondents herein, argued in favor of the Impugned Order and stated that the same was in due conformity with the law and prima facie was in the best interests of the minor girl.

14. This Court has heard the arguments of all the learned Counsel and has reviewed the record available on file.

15. The encapsulated findings of this Court upon the issues raised herein are delineated herein below:

- (i) It is an admitted position that the petitioner has already filed Guardian Application No.14 of 2017 before the learned Family Judge-I, Hala, seeking a determination of the custody of the minor baby girl. In view thereof the present petition would appear to have become infructuous.
- (ii) The petitioner's contention that the Impugned Order be set aside and that the temporary custody be given to the petitioner and then the respondent No.6 be made to

institute proceedings, seeking the permanent custody of the minor baby girl, appears to militate against the law and good conscience.

- (iii) The court of competent jurisdiction appears to be seized of this matter and the said Court is duly competent to render a determination upon the said issue. Any interference by this Court could amount to an interference in the jurisdiction of the concerned Family Court.
- (iv) The case law cited by the petitioner had a common thread which stipulated that the learned Sessions Court did have jurisdiction to award temporary custody of a minor, however such an order could be interfered with by the High Court in extraordinary or exceptional circumstances.
- (v) In the present petition, no exceptional or extraordinary circumstances have been demonstrated by the petitioner and none have become apparent upon a review of the record available before this Court.
- (vi) In view of the foregoing, this is a fit case where this Court would decline to exercise its jurisdiction and not interfere either in the Impugned Order or the guardianship proceedings pending before the concerned Court.
- (vii) The petitioner has failed to point out any infirmity, legal or otherwise, in the Impugned Order especially when it expressly stipulates that the rights of the petitioner, with regard to the custody of the minor, shall be determined by the appropriate guardian and wards Court.
- (viii) The presence of conditions attached to the Impugned Order, including the requirement of deposit of P.R Bond and the direction that the custody of the minor cannot be removed from the District of Matiari, clearly show that

the Impugned Order has been passed after due consideration and keeping in view the paramount interest of the minor.

16. In view of the foregoing, this Court came to the conclusion that the present petition was not tenable and hence the same was dismissed vide the short order dated 02.03.2018, the contents whereof are reproduced herein below:

“Heard the learned Counsel, and the Court is grateful to each of them for their assistance rendered. For the reasons to be recorded, this petition, alongwith listed application, is hereby dismissed.

17. These are the reasons for the short order dated 02.03.2018, wherein subject petition was dismissed.

18. It is stipulated that the observations made herein are of a tentative nature and shall have no impact upon the determination of any dispute between the parties before any forum of appropriate jurisdiction in due consonance with the law.

JUDGE