

ORDER SHEET

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

C.P.No.S-1660 of 2018.

DATE	ORDER WITH SIGNATURE OF JUDGE
	1. For orders on office objection. 2. For orders on M.A-4642 of 2018. 3. <u>For hearing of main case.</u>

04.02.2019.

Mr. Manzoor Ahmed Panhwar, Advocate alongwith the petitioner.

Mr. Ali Abbas Memon, State Counsel alongwith ASI Rasool Bux Chandio of P.S Bulri Shah Karim, District Tando Muhammad Khan.

Mr. Shaukat Ali Pathan Advocate for respondent No.3.

Minor baby Salma has been produced in Court by her father (respondent No.3).

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Succinctly, the petitioner is real mother of minor Baby Salma, whose custody was handed over to the petitioner being a natural guardian under Para 352 of Muhammadan Law by the Family Judge-I, Tando Muhammad Khan in Guardianship Application No.04/2017 vide order dated 03.05.2017; whereas the custody of the minors namely Uzair Ahmed (aged about 02 years) and Zubair Ahmed (aged about 03 years), was already with the petitioner. Leaned counsel further submits that thereafter the respondent No.3 forcibly took away the custody of minors Uzair and Baby Salma from the petitioner, thus, the petitioner filed application under section 491 Cr.P.C. being CrI. Misc. A. No.44/2018 before the learned District & Sessions Judge, Tando Muhammad Khan for recovery of the said minors, where the learned Judge partly allowed and partly dismissed the said application by giving the custody of Mst. Salma to the respondent No.3 (Rafique Ahmed Kapri), however, bounding the parties to arrange meeting of the minors either with father or mother. Being aggrieved, the petitioner has filed the instant petition.

2. The learned counsel for the petitioner states that Para 352 of the Muhammadan Law entrusts the mother with the right of Hizanat, thus the petitioner is entitled for the custody of minor Baby Salma (aged about 04 years). He further states that wedlock between the parties is still intact, however, the

respondent No.3 has contracted second marriage about 06 months ago. Learned counsel relied upon the case law reported as **Mst. Madiha Younus v. Imran Ahmed** (2018 SCMR 191).

3. Learned counsel for the respondent No.3 states that the respondent No.3 has all fair means and has admitted Baby Salma in a school and is bearing all the educational expenses of the minor baby; that the minor baby has natural affinity with the respondent No.3. He further states that the welfare of the minor baby lies with the respondent/father, therefore, impugned order does not appear to be illegal or call for any interference of this Court.

4. Heard the parties, perused the material on record.

5. Admittedly, Para 352 of the Muhammadan Law, which is based upon Quranic Injunction and has entrusted the mother with right of Hizanat and no cavil could be placed on such right. Mother having provided such right by Quranic Injunction cannot be deprived of such right. A review of the impugned order shows that proper application of mind has not been made to the provisions of Para 352 of Muhammadan Law nor any consideration has been made to the case of **Mst. Madiha Younus** (Supra).

6. In the circumstances at hand, the impugned order appears to be in violation of Para 352 of Muhammadan Law and the same is hereby set aside and the respondent No.3 is directed to handover the custody of minor baby Salma to the petitioner in the Court. However, taking in view the circumstances of the case as well as the case of **Mst. Madiha Younus** (Supra), both parties are directed to arrange the meetings of the minors in the following terms:-

“i) That the minor shall remain with the petitioner Mst. Abida Parveen (mother).

ii) On every alternate weekend minor may reside with respondent No.3-Rafique Ahmed (father) i.e. respondent No.3, who will pickup the minor from the house of the petitioner on each Saturday at about 8:00 p.m. late evening and shall drop the minor at the house of the petitioner on Sunday by 01:00 p.m. in the afternoon.

iii) During summer vacations the custody of the minor to be handed over to the respondent No.3 on the 1st Sunday of the summer vacations so declared by the School/Government and shall be returned to the petitioner in evening of the 4th Sunday during the vacation so that minor may have four weeks to spend with his father i.e. respondent No.3.

iv) Winter vacations which are generally due from 21st December to 30th December. 1st week of the winter vacation shall be spent by the minor with respondent No.3 and 2nd week with the petitioner.

v) In Eid-ul-Fitr the minors will celebrate Eid with his father respondent No.3 from Chand Raat of Eid-ul-Fitar at 08:00 p.m. till second day of Eid upto 08 p.m.

vi) In Eid-ul-Adha the petitioner will allow the minor to celebrate Eid-ul-Adha with father i.e. respondent No.3 who shall pick the minor from the residence of the petitioner on the second day of Eid-ul-Adha at 11:00 a.m. in the morning till 3rd day of Eid-ul-Adha at 10:00 p.m. or earlier.

vii) On unscheduled holidays the minor may spend alternate holidays with respondent No.3-father from 10:00 a.m. to 08:00 p.m. in the evening.

viii) The respondent No.3-father shall bear all expenses of the minor i.e. school fees, uniforms, van fees as well as others miscellaneous expenses as may be needed for the minor.

ix) In addition to such expenses the respondent No.3-Father shall also provide a sum of Rs.5,000/- per month to minor for her other personal needs and requirements.

x) It may be observed that in case there is any family occasions in which the respondent No.3 desire and wish that his daughter may also attend shall inform the petitioner who shall not unreasonably stop the minor from attending such family events and or functions.

xi) It is needless to say that the minor is of such in impressionable age and both the parents shall not do any act that may prejudice her mind towards the other parents.

7. This Constitutional petition stands disposed of in above terms alongwith the pending application.

JUDGE

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