

*Order Sheet*  
**IN THE HIGH COURT OF SINDH KARACHI**  
**Constitutional Petition No. S –913 of 2020**

Ali Muhammad and another

*Versus*

Mukaram Khan and others

Date of hearing & order : 07.01.2021

Ms. Safia Khan, advocate for the petitioners along with petitioners.

Respondent No1, Mukaram Khan, present in person.

**ORDER**

**ADNAN-UL-KARIM MEMON, J.** Through the instant petition, the petitioners have called in question the order dated 20.11.2020 passed by the learned VIth Additional District & Sessions Judge Karachi West in Habeas Corpus Petition No.2322/2020 whereby the custody of minors namely Baby Nazia (Fatima) aged about 6-1/2 years and Baby Iqra aged about 04-1/2 years was handed over to the respondent-father namely Mukaram Khan, temporarily, subject to furnishing his indemnity bond of Rs.200,000/-.

2. It is contended, inter-alia, by the learned counsel for the petitioners that petitioner No.2 was married with respondent No.1 and out of this wedlock, four children were born namely (1) Nazia Fatima, (2) Iqra, (3) Aiman and (04) Suleman; that due to matrimonial dispute between the parties, petitioner No.2 resorted litigation by filing Suit No.1969/2020 against the respondent No.1 for recovery of dower amount and maintenance before the learned XXV Civil & Family Judge West at Karachi. Per learned counsel, he avoided to appear before the concerned Court and failed and neglected to pay the maintenance allowance to the petitioner as well as her minor children. Per learned counsel, respondent No.1 filed habeas corpus petition bearing No.2322/2020 before the learned VIth Additional District and Sessions Judge Karachi West for recovery of his minor children, the aforesaid petition was contested and finally allowed vide order dated 20.11.2020 and the custody of the minors were handed over to the respondent No.1 on temporary basis, subject to furnishing his indemnity bond of Rs.200,000/. Learned counsel emphasized that the aforesaid order was/is illegal as the mother cannot be deprived of the custody of her minor children under the Muhammadan Law, therefore, the procedure adopted by the learned VIth Additional District & Sessions Judge Karachi West to hand over the custody of minors to respondent No.1 through habeas corpus petition was not just and proper, thus the impugned order is liable to be set aside. She lastly prayed for allowing the instant petition.

3. Respondent No.1 in compliance of the order dated 06.01.2021 passed by this Court produced the alleged detinue/minors namely Baby Nazia (Fatima) aged about 6-1/2 years Baby Iqra aged about 04-1/2 years before this Court and handed over their custody to the petitioner-mother, however, he has certain reservation so far as the welfare of the minors is concerned. Respondent No.1 states that the petitioner-mother is not in a position to take care of the minors as she has no source of income; that there is strong likelihood that she may leave premises of the learned Guardian and Wards Court concerned to her native place viz. Baara Baandai Sawat near Mingora and in the meanwhile he will be unable to meet his children, therefore, she may be directed to furnish indemnity bond of Rs.200,000/- in order to secure the welfare of minors; that he has got the right to live with his minor children and the petitioner-mother has no right to the custody of his minor children under the Guardian and Wards Act, 1890; that the father is a natural guardian of minors, therefore, he is entitled to the custody of his minor children under the law in view of the peculiar facts and circumstances of the case. At this stage, I asked him that this Court cannot regulate the custody of minors and it is for the learned Guardian and Wards Court to take care of the issue involved in the present proceedings. He replied that he shall approach the concerned Guardian and Wards Court for the custody of the minors under the law.

4. I have heard the parties and perused the material available on record.

5. Record reflects that petitioner No.2 is a real mother and natural guardian of minors namely Baby Nazia (Fatima) aged about 6-1/2 years Baby Iqra aged about 04-1/2 years. Respondent No.1 preferred Habeas Corpus Petition No.2322/2020 before the learned VIth Additional District and Sessions Judge Karachi West, which was allowed vide order dated 20.11.2020 and the custody of minors was handed over to him without direction to approach the learned Guardian and Wards Court.

6. Admittedly, the minors are female children of 6-1/2 years and 04-1/2 years old would require constant care; indeed, their mother has developed an emotional attachment with the minor children and the issue of welfare of the minors is yet to be decided by the learned Guardian and Wards Court if approached by the parties. It is well settled now that proceedings under section 491, Cr.P.C. is not available for declaring any person as guardian or for determining all the questions relating to the custody of minors because the final decision of regular custody is to be decided in the proceedings initiated by the parties claiming the custody of the minors before the Guardian and Wards Court. It is well-settled law that

paramount consideration while deciding the question of custody of the minor is the welfare of the minor which has to be seen in view the age, sex, and religion. Welfare includes his moral, spiritual, and material wellbeing. While considering what is the welfare of the minor the court shall have regard to the age, sex, religion of the minor, the character and capacity of the proposed guardian, his/her nearness of kin to the minor, and the preference of the minor if he or she is intelligent enough to make it.

7. I am of the view that the purpose of filing this petition is served as the minors have been produced before this Court and handed over to the petitioner-mother. Primarily, in the cases, concerning the custody of a child, the learned VIth Additional District and Sessions Judge Karachi West was not required to go into the intricacies/technicalities of the matter in the petition under Section 491 Cr.PC and should have confined its findings to the extent of the welfare of the child/minor which is a paramount consideration and it is for the learned Guardian and Wards Court to take appropriate measures in this regard.

8. The controversy as raised by the parties needs to be looked into by the learned Guardian and Wards Court concerned for the custody of the minors namely Baby Nazia (Fatima) aged about 6-1/2 years Baby Iqra aged about 04-1/2 years if approached and the decision thereof shall be made within a reasonable time, keeping in view the welfare of minors strictly under the law. I am satisfied with the assertion of the petitioner-mother that she has taken the custody of the minors in Court and the respondent-father has submitted that he will approach the learned Guardian and Wards Court for regulating the custody of minors in accordance with the law.

9. I have noticed that under similar circumstances Hon'ble Supreme Court vide unreported order dated 13.07.2020 passed in the case of Mst. Beena Versus Raj Muhammad, etc. (Civil Petition No. 4129/2019) has decided the issue about the custody of the minors with the following dicta.

“16. During the hearing the learned counsel for the father submitted that the right of hizanat of the child vesting in the mother is nearly over. In response to our query we were told that the judgments of the learned Family Judge and the learned Appellate Judge were not abided by, as the father retained the custody of the child. Therefore, we cannot accept such a preposterous contention because in doing so we will be rewarding those who take the law into their own hands and violate the decisions of courts vested with jurisdiction. Every judgment must be abided by unless it is suspended and/or set aside by a higher court. The father dragged out the proceedings and then unnecessarily invoked the constitutional jurisdiction of the High Court. There was no reason for the High Court to exercise its constitutional jurisdiction in terms of Article 199 of the Constitution and to

set aside perfectly well-reasoned and legal judgments. As regards the learned counsel for the father, contending that the child has an aversion to the mother, just goes to show that the father has filled the child's innocent mind with fear and/or dread, and demonstrates that he has not been fair to either the child or the mother.

17. Therefore, for the reasons mentioned above we have no hesitation in setting aside the impugned judgment of the High Court dated 16 September 2019. Consequently, the respondent No. 1 is directed to hand over the physical custody of the minor, Muhammad Rayyan, to the petitioner within seven days from the date of this order, failing which the concerned police officer and the social welfare officer will ensure compliance; a copy of this order be sent to the learned Advocate-General, Khyber Pakhtunkhwa for onward transmission of this order to the concerned and to oversee compliance. In view of the important issues decided in this petition with regard to the custody of minors the Registrar of the Peshawar High Court is directed to provide copies of this order to all family/guardian judges and Judges of the Peshawar High Court. This petition is converted into an appeal and allowed in the above terms.”

10. In view of the statement of the parties, the petitioners are directed to furnish an indemnity bond of Rs. 200,000/- before the Nazir of this Court for the aforesaid purpose and in the meanwhile petitioners shall not take away the custody of minors out of the jurisdiction of the learned Guardian and Wards Court without intimation to the concerned Court. However, the respondent-father shall have visitation rights in the intervening period subject to tentative payment of maintenance of the minors @ Rs.3000/- per month for each minor and maintenance at the rate of Rs.5000/- per month for petitioner-mother till final adjudication by the learned trial Court. On the aforesaid proposition, I am fortified by the decision rendered by the Honorable Supreme Court of Pakistan in the case of Humayun Hassan v. Arslan Humayun and another, PLD 2013 SC 557.

11. In the light of the facts and circumstances mentioned above, the instant petition has served its purpose which is hereby disposed of along with the pending application(s).

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J U D G E

Nadir\*