

ORDER SHEET
THE HIGH COURT OF SINDH KARACHI
C.P S-1062 of 2023

DATE	ORDER WITH SIGNATURE(S) OF JUDGE (S)
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For hearing of main case.

16.11.2023

Qazi Ayazuddin Qureshi and Ms. Zohra Qureshi advocate for the petitioner along with the petitioner.

Mr. Shafique Ahmed Advocate for the Respondent No.1

Ms. Rahat Ahsan, Addl. A.G., along with Mr. Mushtaque Ahmed Abbasi (SP), AIG Leghal-II CPO Sindh Karachi along with Rao Rafique SHO PS Aziz Bhatti Karachi.

Respondents No. 1 to 3 present in person.

Petitioner Mst. Asma Sultana Kamran has brought this lis for recovery of her minor son master Ahmed Kamran aged about 8 years from the custody of private respondents and to be produced before this Court. This Court vide order dated 01.11.2023 directed IGP Sindh to procure the attendance of Respondents No. 1 to 3, who are in attendance along with their counsel who has raised his voice of concern and relied upon the statement coupled with certain documents with the narration that this Court lacks jurisdiction to entertain the constitutional petition on the premise that the issue of custody of the minor is pending adjudication before learned Guardian & Wards Court. He further submitted that the petitioner/mother has no love and affection for the minor as she left the house of her husband and now she cannot claim the right of Hizanat; besides the minor is capable of forming a preferential right to live either with the mother or her paternal aunts for which master has formed his view to live with his paternal aunts as such this petition is liable to be dismissed.

2. Learned counsel for the petitioner has submitted that custody of the minor be handed over to the mother on the premise that the mother can not be deprived of custody in terms of dicta laid down by the Supreme Court he further submitted that the Welfare of the child lies with mother who can take care of her minor son on the question of maintainability of this petition he submitted that this Court can exercise powers under Article 199 of the constitution of the Islamic Republic of Pakistan and can set aside the order dated 07.10.2023 passed by the learned XIVth Additional Sessions, Judge Karachi East. He further submitted that the private respondents agreed before the SHO that as and when the custody of the minor is required they will hand it over to the mother. Learned counsel referred to the stated dated 26.10.2023 coupled with certain documents and submitted that

since the minor has been produced before this Court therefore judicial propriety demands that the custody of the minor to hand over to the petitioner-mother. For this private respondents have objected. On the plea that this Court can not regulate the custody of minor and the purpose of filing of this petition has been served and prayed for dismissal of the instant petition.

3. Since this matter has been taken up in which the welfare of the minor is required to be seen and to ascertain whether he is in illegal detention or otherwise this Court can enforce the fundamental right of the mother to have custody of her minor son on the premise that learned XIV Additional Sessions Judge Karachi East has declined to issue writ of Habeas Corpus in terms of Section 491 Cr. P.C. on the premise that it lacks jurisdiction.

4. Today, the police officials have brought the custody of minor master Ahmed Kamran, whose custody has been restricted by the private respondents on the premise that master Ahmed Kamran does not want to meet with his mother.

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

5. The record reflects that the petitioner is a real mother and natural guardian of a minor and has preferred this petition for the custody of the minor, admittedly, the minor is a male child of 8 years old and would require constant care; indeed, her mother has developed an emotional attachment with the minor child and the issue of the welfare of the minor is yet to be decided by the learned Guardian and Wards Court for which the parties have to approach and/or have already approached.

6. It is well settled 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 minor because the determining all the questions relating to the custody of minor because the final decision of regular custody is to be decided in the proceedings initiated by the parties claiming the custody of the minor before the guardian and Wards Court.

7. It is a well-settled law that the 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/her moral, spiritual, and material well-being. While considering what is 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, his/her nearness of kin to the minor, and the preference of the minor if he or she is intelligent enough to make it.

8. I am of the view that the purpose of filing this petition is served as the minor has been produced before this Court and is no more in illegal detention as portrayed by the petitioner-mother.

9. I am satisfied with the assertion of the parties to the extent that the minor is not in illegal detention so far as his custody is concerned it is for the family/Guardian Judge to regular the custody of the minor in terms of the law laid down by the Supreme Court in the case of *Mst. Beena Muhammad v Raja Muhammad* (PLD 2020 SC 508) with the following dicta.

“16. During the hearing, the learned counsel for the father submitted that the right of the 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, 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 position, the petitioner is directed to approach the learned Guardian & Wards Court for regular custody of the minor in terms of the law laid down by the Supreme Court in the case of *Mst. Beena* as discussed supra, and in the meantime, the private respondents shall not take away the custody of the minor out of the jurisdiction of this Court and will furnish a security bond in the sum of 500,000/- with the Nazir of this Court to the effect that they will take care of the minor till regular custody of the minor is decided by the trial Court and if the trial Court calls on the parties to produce the minor they will abide by the directions. On the aforesaid proposition, I am fortified by the decision rendered

by the 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 more particularly in terms of judgment rendered by the Supreme Court in the case of Mst. Beena as discussed supra, the instant petition has served its purpose which is hereby disposed of along with the pending application(s) with direction to the learned Guardian & Wards Court to decide the issue of custody of the minor within two weeks positively after hearing the parties.

JUDGE

Zahid/*