

ORDER SHEET
THE HIGH COURT OF SINDH KARACHI
C.P No.S-938 of 2023

DATE

ORDER WITH SIGNATURE(S) OF JUDGE (S)

For hearing of main case.

08.11.2023

Mr. Abdul Rauf, advocate for the petitioner along with petitioner.

Mr. Muhammad Asif Shaikh, advocate for respondent No.9.

Mr. Sharfuddin Jamali, AAG along with Saifullah Bughio, SHO P.S Hussainabad, Hyderabad.

Respondent No.9 Muhammad Junaid is present along with minors Eman Fatima and Eshal Fatima.

Petitioner Erum Daughter of Jawaid Ahmed Soomro has brought this lis for the recovery of her minor daughters namely Eman Fatima and Eshal Fatima aged about 06 and 4 years from the custody of respondent No.9.

Today Inspector Saifullah Bughio SHO P.S Hussainabad, Hyderabad has brought the minors to this Court and handed over their custody to the petitioner-mother.

At the outset learned counsel for the respondent No.9 has raised the question of maintainability of the instant petition on the ground that proceedings under the Guardian & Wards Appeal No. 04 of 2023 has already been decided vide order dated 01.11.2022 as such the purpose of filing this petition has already been achieved however the petitioner has invoked the jurisdiction of this Court under Article 199 of the Constitution without rhyme and reason. He next submitted that no further direction in the shape of writ is required to be issued as the parties are under litigation over the custody of minors. He prayed for dismissal of the instant petition.

The learned counsel for the petitioner has submitted that this petition is maintainable under the law as the respondent No.5 has taken over the custody of the minors in violation of the decision of the learned trial Court which amounts contempt of Court and this Court can enforce the production of the minors before this Court under Article 199 of the Constitution read with Section 491 Cr.P.C. learned counsel referred to order dated 05.10.2023 and 18.10.2023 and submitted that the aforesaid orders have not yet been complied with as such this petition can be heard and decided on merits.

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

The issue of maintainability of the petition has been raised on the plea that parties have already resorted to litigation before the learned Guardian & Wards Court and this Court lacks the jurisdiction. The petitioner has pleaded mala fide on the part of private respondents and the issue of custody of the minors though has been taken care of by the Guardian & Wards Court but in the intervening period it is alleged that the respondent No.9 took over their custody compelling this Court to order for recovery of the minors from the custody of private respondents, in such circumstances, the intervention of this Court has been sought and now the minors have been produced and handed over to petitioner-mother. Thus this petition is held to be maintainable in such scenario.

Having decided the maintainability issue it appears from the record that the petitioner is a real mother and natural guardian of the minors and has preferred this Petition for the custody of the minors, which has been handed over to her in Court. Admittedly, the minors are female children of 6/4 years old which would require constant care by her mother; indeed, her mother has developed an emotional attachment with the minor children and the issue of the welfare of the minors is yet to be decided by the learned Guardian and Wards Court for which the parties have to approach. It is well settled now that proceedings under section 491, Cr.P.C. are 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/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.

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, the controversy as raised by the parties needs to be looked into by the learned Guardian and Wards Court concerned with the custody of the minors. The parties may approach the learned Guardian & Wards Court to

regulate custody of the minors and the decision thereof shall be made within a reasonable time, keeping in view the welfare of the 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 has approached the learned Guardian and Wards Court for regulating the custody of the minors under the law.

I have noticed that under similar circumstances Supreme Court vide an 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, 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.”

The petitioner-mother is directed to furnish an indemnity bond of Rs. 500,000/- each before the Nazir of this Court for the aforesaid purpose, and in the meanwhile petitioner 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 to meet the minors weekly and the venue is to be arranged by the parties mutually in case of breach of these arrangements they shall be liable to be proceeded under the contempt of Court Ordinance 2003, in the intervening period subject to

tentative payment of maintenance of the minor @ Rs.3000/- per month 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).

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).

JUDGE

SHAHZAD SOOMRO