

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Constitutional Petition No. S-1139 of 2023

Date	Order with signature of Judge
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1. For order on office objection No.4 and reply at 'A'
2. For hearing of main case

04.12.2023

Mr. Muhammad Ahmed Laghari advocate for the petitioner alongwith petitioner
Mr. Sharafudin Jamali, AAG
Mr. Siraj Ahmed Mangi Advocate for respondent No.11
Mr. Liaquat Ali Jamali advocate for respondent No.12
Ms. Zahida Parveen SSP (Investigation-II) Malir Karachi East Zone
Mr. Mushtaq Ahmed Abbasi SP, AIGP (Legal-II) CPO Sindh Karachi
Inspector Talib Hussain, SHO PS Dera Murad Jamali Balochistan
SIO Javed Ahmed Babar, PS Malir Cantt. Karachi
DSP Azam Hayat, Memon Goth Karachi
SI Munawar Abbas, PS Malir Cantt. Karachi
SI Sultan PS Malir Cantt. Karachi
Syed Mussadiq Amjad Bukhari, DSP (Legal), CPO Karachi

Through this constitution petition, petitioner Mst. Paras has sought direction to the official respondents to recover her son and daughter namely Baby Kainat, and Master Taimoor from the custody of private respondents and to be produced before this Court. This Court vide orders dated 31.10.2023, 06.11.2023, and 16.11.203 directed IGP Sindh to procure the attendance of private respondents, who are in attendance along with their counsel who have raised their 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 minors is to be regulated by the learned Guardian & Wards Court. Learned counsel for the private respondents further submitted that the petitioner/mother has no love and affection for the minors as she left the house of her husband and now she cannot claim the right of Hizanat; however added that the parties may be allowed to reconcile the matter as the marriage between them is still intact. Let them do so in the intervening period till the issue of the custody of the minor is decided by the learned Guardian & Wards Court.

2. Learned counsel for the petitioner has submitted that custody of the minors has been handed over to the mother on the premise that the mother cannot 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 minors son and daughter. 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 to recover the minors.

3. Since this matter has been taken up in which the welfare of the minors is required to be seen and to ascertain whether they are in illegal detention or otherwise as such this Court can enforce the fundamental right of the mother to have custody of her minors till the issue of regular custody of the minors is decided by the learned Guardian & Wards Court.

4. Today, the police officials have brought the custody of minors, whose custody has been handed over to the petitioner-mother in Court.

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

6. The record reflects that the petitioner is a real mother and natural guardian of minors and has preferred this petition for the custody of the minors. Admittedly, the minors would require constant care; indeed, their 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 i.e father and mother if their cause still subsists.

7. 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 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.

8. It is a well-settled law that the paramount consideration while deciding the question of custody of the minors is the welfare of the minors which has to be seen in view of 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.

9. I am of the view that the purpose of filing this petition is served as the minors have been produced before this Court and their custody has been handed over to the petitioner-mother thus they are no more in illegal detention.

10. I am satisfied with the assertion of the parties to the extent that the minors are not in illegal detention so far as their custody is concerned it is for the family/Guardian Judge to regular the custody of the minors 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.”

11. In view of the position, the petitioner is directed to approach the learned Guardian & Wards Court for regular custody of the minors 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 petitioner shall not take away the custody of the minors out of the jurisdiction of this Court till regular custody of the minors is decided by the trial Court and if the trial Court calls on the parties to produce the minors the petitioner 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).

12. 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 minors within two weeks positively after hearing the parties.

Zahid/*