

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
C.P No.S-1232 of 2023

Date	Order with signature of Judge
------	-------------------------------

For hearing of main case.

28.11.2023

Ms. Tooba Husnain and Mr. Zeeshan Ali, advocates for the petitioner.

Mr. Muhammad Rehan, advocate for respondent No.3.

Mr. Sharfudin Jamali, Addl. A.G Sindh along with.

Mr. Abrar Khichi, Addl. P.G Sindh.

Minors Baby Kosar and Baby Fatima are produced by SI Khadim Hussain, P.S Chakiwara.

**_*_*_*_*

Petitioner Mst. Abida has brought this lis for the recovery of her granddaughters namely baby Kosar aged about 6 years and baby Fatima aged about three years from the custody of private respondent/ father and to be produced before this Court.

2. This Court vide order dated 21.11.2023 directed the SHO PS Chakiwara Karachi to procure the attendance of minors Baby Kosar and Baby Fatima who are produced by SI Khadim Hussain, P.S Chakiwara.

3. Learned counsel for the petitioner has submitted that custody of the minors has been handed over to the grandmother on the premise that the grandmother cannot be deprived of custody of the minors as the mother of the children has died and there is no one to look after the minors.

4. On the question of maintainability of this petition she submitted that this Court can exercise powers under Article 199 of the constitution of the Islamic Republic of Pakistan and the custody of minors cannot be denied to the grandmother till the minors attain the age of puberty and the minors still not reached the said ages, however, she agrees for applying the Guardian & Wards Court for proper custody of minors. In support of her contention, she relied upon the cases of Tahia Zeb v Ghaffar Ahmed and others 2017 CLC 96, Dr. Faouzia Haneef, v Dr. Rashid Jawed & others PLD 2010 Lahore 206, Barkat Bibi v Zahida Parveen 2003 YLR 1105, Mst. Rasheeda Bibi v Additional District Judge

and others **2012 CLC 784**, *Khalida Parveen v Muhammad Sultan* **PLD 2004 SC 1** and *unreported judgment of Muhammad Zaman v The State* in **C.P. No. 669 of 2019** and prayed for allowing the instant petition.

5. Since this matter has been taken up the welfare of the minors is required to be seen and to ascertain whether they are in illegal detention or otherwise, as this Court can enforce the fundamental right of the grand-mother to have custody of her minor granddaughters on the premise that learned District & Sessions Judge Karachi South has declined to hand over the custody of minors rather handed over to respondent's father and directed the petitioner to approach Guardian & Wards Court vide order 28.10.2023.

6. Today, the police officials have brought the custody of minors Baby Kosar and Baby Farima, whose custody has been restricted by the respondent's father. On the plea that he is the natural guardian of minors and both are residing with him. Further, this Court has no jurisdiction to entertain the present petition in the terms that minors are no more in illegal custody. He prayed for a direction to the petitioner-grandmother to move the trial Court for custody of minors if she intends to do so.

7. I have heard the parties and perused the material available on record and case law cited at the bar.

8. The record reflects that the petitioner is a real grand-mother and natural guardian of minors and has preferred this petition for the custody of the minors, admittedly, the minors are female aged about 3 and 6 years old, and would require constant care; as their mother has passed away and the petitioner has an emotional attachment with the minors 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.

9. 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.

10. 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.

11. I am of the view that the purpose of filing this petition is served as the minors have been produced before this Court and are no more in illegal detention as portrayed by the petitioner-grandmother.

12. 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.”

13. 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 respondent-father shall maintain the minors by paying Rs. 4,000/- each per month to grand-mother regularly till the custody issue is decided, 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).

14. 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, if the lis is filed.

JUDGE

Zahid/*