

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Constitutional Petition No. S-1135 of 2023

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

1. For order on office objection alongwith reply at 'A'
2. For hearing of main case

11.12.2023

Mr. Shahnawaz Teevino advocate and Mr. Mujeeb-ur-Rehman advocate for the petitioner alongwith petitioner Tayyab Uddin
Ms. Seema Zaidi, Additional PG alongwith PI Salim Rind, SHO PS Steel Town Karachi
Mr. Sharafudin Jamali, AAG and Mr. Ahmed Khan Khaskheli AAG
Mst. Bakhtawar, respondent No.8 is present in person
Baby Noor-e-Harram is present in Court.

Petitioner Tayyab Uddin has brought this lis for the recovery of his minor daughter namely Noor-e-Haram aged about 7 years from the custody of Mst. Bakhtawar respondent No.8, who is the real mother of the minor and as per learned counsel for the petitioner is not entitled to custody of her minor daughter on the ground that she contracted a second marriage and left the house of the petitioner long ago as such her case falls within the ambit of principles laid down by the Supreme Court in the case of Shabana Naz v Muhammad Saleem **2014 SCMR 343**.

2. Today SHO PS Steel Town has brought the custody of minor Noor-e-Haram who seems to be attached to her mother Mst. Bakhtawar who is present in Court.

3. Learned counsel for the petitioner has submitted that custody of the minor is required to be handed over to the petitioner-father on the premise that the Mst. Bakhtawar has contracted a second marriage and is not entitled to hizanat as such the petitioner cannot be deprived of custody of the minor at this stage in terms of the Judgement passed by the Supreme Court in the case of Shabana Naz as discussed supra. In support of his contention, he relied upon the case of Naghma Rani v Additional District Judge Gujrat (2018 CLC 767), Mst. Noor Afshan v Muhammad Ghalib, 2019 CLC 1787.

4. Respondent No.8, who is present in person has submitted that the custody of the minor cannot be denied to her as she is the real mother of baby Noor-e-Haram, however, she agrees to apply the Guardian & Wards Court for proper custody of the minor. If this is the position of the case, let custody of minor Noor-e-Haram be with her mother till the issue of custody of the minor is decided by the learned Guardian & Wards Court.

5. Since this matter has been taken up, the welfare of the minor is required to be seen and to ascertain whether she is in illegal detention or otherwise, as this Court can enforce the fundamental right of the parents to have custody of their minor daughter.

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

7. The record reflects that the petitioner is a real father and natural guardian of the minor and has preferred this petition for the custody of the minor, admittedly, the minor is female aged about 7 years old, and would require constant care; as her mother has contracted second marriage but at the same time she is also the natural guardian of the minor and has an emotional attachment with the minor 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.

8. 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.

9. 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.

10. 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-father.

11. I am satisfied with the assertion of the parties to the extent that the minor is not in illegal detention so far as her 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."

12. In view of the position, the parents of minor Noor-e-Haram are directed to approach the learned Guardian & Wards Court concerned 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 petitioner-father shall maintain the minor by paying Rs. 5,000/- per month to respondent No.8-mother regularly till the custody issue is decided, and if the trial Court calls on the parties to produce the minor the respondent No.8 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).

13. 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, if the lis is filed. So far as the issue of second marriage is concerned the Supreme Court has already dilated upon the issue as such this issue is no more required by this Court to adjudicate as it is for the learned Guardian & Wards Court to see whether respondent-mother is entitled to the custody of minor even despite her second marriage which is always subject to certain principles laid by the Supreme Court in the case Shabana Naz supra.

JUDGE