

ORDER SHEET
THE HIGH COURT OF SINDH KARACHI
C.P No.S-748 of 2024

DATE

ORDER WITH SIGNATURE OF JUDGE

Date of hearing and Order:- 11.07.2024

Mr. Rabnawaz Khan, advocate for the petitioner along with petitioner.

Tariq Mehmood, respondent No.7 is present in person along with Aiman Fatima 10 years, Abdul Moid 6 years and Mirha Fatima 1 year.

Inspector Muhammad Siddiq, PS Docks.

ORDER

Adnan-ul-Karim Memon, J:- The petitioner Mst. Musarrat Seema has filed this petition under Article 199 of the Constitution of the Islamic Republic of Pakistan 1973 seeking directions to the police official to produce Aiman Fatima 10 years, Abdul Moid 6 years and Mirha Fatima 1 year (suckling baby).

2. This Court vide order dated 04.07.2024 directed the SHO concerned to produce the minors namely baby Aiman Fatima aged about 10 years, and Master Abdul Moid aged about 6 years before this Court.

3. Learned counsel for the petitioner has submitted that custody of the minors has been handed over to the petitioner on the premise that the mother cannot be deprived of custody of the minors as the father of the minors has contracted a second marriage and there is no one to look after the minors.

4. On the question of the maintainability of this petition he has 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 mother till the minors attain the age of puberty and the minors still not reached the said ages, however, at this stage, the father of the minors, who is present in Court agrees for applying the Guardian & Wards Court for proper custody of minors.

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 mother to have custody of her minor son and daughter.

6. Today, the police officials have brought the custody of minors Aiman Fatima 10 years, Abdul Moid 6 years and Mirha Fatima 1 year (suckling baby), whose custody has been initially restricted by the respondent father. On the plea that he is the natural guardian of minors and is residing with him peacefully. 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-mother 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 mother and natural guardian of minors and has preferred this petition for the custody of the minors, admittedly, the minors Aiman Fatima 10 years, Abdul Moid 6 years, and Mirha Fatima 1 year (suckling baby) and would require constant care; as their father has contracted second marriage 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 and received temporary custody of the minors till the issue of permanent custody of minors is decided by the Guardian & Wards Court as the father has agreed to move the concerned Guardian & Wards Court.

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 father of the minors namely Tariq Mehmood 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 respondent-father shall maintain the minors by paying Rs. 7,000/- each per month to the petitioner-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) if any, 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

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