

ORDER SHEET
IN THE LAHORE HIGH COURT,
BAHAWALPUR BENCH, BAHAWALPUR
JUDICIAL DEPARTMENT

Case No: Writ Petition No. 3109-H of 2024

Sadia Aziz VS DPO etc.

S.No. of order/ Proceeding	Date of order/ Proceeding	Order with signature of Judge, and that of parties or counsel, where necessary
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02.05.2024	Mr. Muhammad Ajmal Khan Bhutta, Advocate with the petitioner. Mr. Zafar Iqbal Awan, Additional Advocate General with Mehboob, ASI. Sardar Basit Khan Baloch, Nazar Aslam and Ms. Mehreen Riaz, Advocates for respondent No.3.
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Petitioner being mother through this petition seeks custody of her minor son namely, Muhammad Shahzain reportedly in the illegal and improper custody of Zain-ul-Abideen (respondent No. 3), father of the minor (herein after called as the respondent).

2. Learned counsel for the petitioner states that on a family dispute petitioner was expelled from the house by the respondent while depriving her from the custody of minor son. In response to rule nisi issued, minor present in the Court was claimed to have been with the father by the order of learned Guardian Court passed on 27.04.2024.

Learned counsel for the petitioner states that petitioner did not have information about filing of such petition which was filed on 27.04.2024 as per record and on the same day custody of minor was secured through an ex-parte order of learned Gurdian Court. Further states that petitioner is resident of Tehsil Ali Pur, District Muzaffargarh whereas Guardian Petition was filed at District Bahawalpur. Adds that petitioner is ready to join the proceedings before the Guardian Court but minor being in tender age of less than two years requires lap of her mother, therefore, interim custody of the minor may be regulated in favour of the petitioner, which was vehemently opposed by the other side on the ground that petitioner

herself had abandoned the custody of minor and left him alone in the house of respondent; she is not in touch with him for the last two months and minor is happily living with the father; further argued that petitioner, though an acclaimed doctor preparing for FCPS, is a careless lady with busy schedule of professional duties, therefore, cannot take proper care of the minor and custody of minor with the father is also not illegal or improper.

3. The next say of respondent was that matter is pending before Guardian Court; therefore, parties may be given opportunity to contest interim custody before said court.

4. Arguments, pro and contra of proponents were heard;

5. The main stay of the respondent was that once the mother waived her right to take custody, she is precluded to make a re-attempt. Right of *hizanat* of a mother is recognized in Islam as well as in law; claim of the respondent being guardian of the minor would obviously give way to the right of *hizanat* till prescribed age of the minor under the law. The waiving of her right of *hizanat* has no binding force in the eyes of law and mother cannot be held accountable if at one occasion she had given up her right to *hizanat* on any condition. She will retain her right of *hizanat* when there is no disqualification in law of her waiver, therefore, is not disentitled for claiming right of *hizanat* again. Reliance is placed on cases reported as "Mst. HASEENA BIBI versus ABDUL HALEEM and others" (**PLD 2024 Supreme Court 291**) and "Mst. RAZIA REHMAN versus STATION HOUSE OFFICER and others" (**PLD 2006 Supreme Court 533**).

6. It is essential to highlight that there is difference between Walayat (Guardianship) and Hizanat (Custody); in Muslim Law, as in almost every other system of law, the father is the natural guardian of the person and property of his minor child but Islam recognizes the mother as having prior right of custody, obvious reason is the nourishment, sustenance, patronage and upbringing of a human child so as to make him/her a useful human being. Mother keeps a caring instinct, therefore, is the suitable person for such task. That was the reason, for

custody, the term ‘Hizanat’ has been used. The word “Hizanat” is derived from the Arabic word “Hizan” which means ‘lap of the mother’, it denotes giving a child to the mother’s lap for caring and rearing. Reliance is on case reported as “Miss HINA JILANI, DIRECTOR OF A.G.H.S. LEGAL AID CELL Versus SOHAIL BUTT” (**PLD 1995 Lahore 151**)

7. It signifies love, care and affection directly and constantly needed by a male child up to the age of seven years and female child till she attains puberty. Care, love and affection play a vibrant and vital role in developing the nature and character of a person and as such Hizanat can safely be termed as a tribute and privilege of a minor assigned and vested in the mother. The woman who holds the custody is called “Hizana” and she loses the right of hizanat in certain circumstances suggested in the law.

The Rule of Hizanat of children of tender age under Muslim law is based on the following tradition of the Holy Prophet ﷺ:

“A woman once applied to the Prophet, saying, ‘O Prophet of God! That is my son, the fruit of my womb, cherished in my bosom and suckled at my breast, and his father is desirous of taking him away from me into his own care; to which the Prophet replied, thou hast a right in the child prior to that of thy husband, so long as thou do not marry with a stranger’.”

The tradition is quoted in Hedaya (2nd Edition, Vols. I-IV, page 138) in Chapter XIV of hizanat, or the care of infant children and under section “in case of separation, the care of the infant children belongs to the wife”. It is followed by the comment that;

"A mother is naturally not only more tender, but also better qualified to cherish a child during infancy, so that committing the care to her is of advantage to the child and Siddeek alluded to this, when he addressed Omar on a similar occasion, saying, 'the spittal of the mother is better for thy child than honey, O Omar! which was said at a time when separation had taken place between Omar and his wife the mother of Assim. The latter being then an infant at the breast, Omar desirous of taking him from the mother and these words were spoken in the presence of many of the companions, none of whom contradicted him."

At page 139 under the title "Length of the term of hizanat" it is said;

"The right of hizanat with respect to a male child, appertains to the mother, until he becomes independent of it himself that is to say, he becomes capable of shifting, eating drinking and performing other

natural functions without assistance after which the charge devolves upon the father, or next paternal relation. The hizanat with respect to a boy, ceases at the end of seven years, as in general a child at that age is capable of performing all the necessary offices himself, without assistance. But the right of hizanat with respect to a girl, appertains to a mother, grand-mother, and so forth, until the first appearance of the menstrual discharge, that is to say, until she attains the age of puberty, because a girl has occasion to learn such manners and accomplishments as are proper to women, to the, teaching of which the family relations are most competent, but after that period the charge of her properly belongs to the father, because a girl, after maturity, requires some person to superintend her conduct, and to this the father is most completely qualified."

Reliance is on case reported as "RAHIMULLAH CHOUDHURY versus MRS. Sayeda HELALI BEGUM AND OTHERS" (**1974 SCMR 305**)

8. In case of conflicting views expressed in text books on Muslim Law, such as Hedaya, Fatawai-i-Alamgiri, Radd-ul-Mukhtar, Muhammadan Law by Sayyed Amir Ali, etc., how are the Courts to determine which view is correct? " The answer given by the Bench is that where there is no Quranic or Traditional Text or an Ijma' on a point of law, and if there be a difference of views between A'imma and Faqihs, a Court may form its own opinion on a point of law. Reliance is on case reported as "Mst. ZOHRA BEGUM Versus Sh. LATIF AHMAD MUNAWWAR" (**PLD 1965 (W.P.) Lahore 695**).

9. Hizanat is regulated through Muslim Personal Law of the parties; under the Shia Law mother is entitled to the custody of male child until he attains the age of two years and if female child until she attains the age of seven years. After the child has attained the above-mentioned age, the custody belongs to the father. Reliance is placed on case reported as "MAHMOODA KHATOON versus Syed ZAINUL HASNAIN RIZVI" (**PLD 1958 (W.P.) Karachi 150**). It has been observed under Shafei Law that the mother is entitled to the custody of her daughter even after she has attained puberty and until she is married. **AIR 1941 MADRAS 760**.

10. As per Para 352 of Muhammadan Law, a guiding book, mother is entitled to custody of male child until he has completed the age of seven years and her female child until she has attained puberty. The right continues though she is divorced by the father of the child;

reliance is on cases reported as “Mst. QURAT-UL-AIN versus STATION HOUSE OFFICER, POLICE STATION SADDAR JALALPUR JATTAN, DISTRICT GUJRAT and others” (**2024 SCMR 486**) and “Raja MUHAMMAD OWAIS versus Mst. NAZIA JABEEN and others” (**2022 SCMR 2123**). However, if she marries a second husband, stranger to child, in which case custody belongs to the father but subject to determination by learned Guardian Court. There are certain conditions which disqualify females for custody. Para 354 of Muhammadan Law says that a female, including the mother, who is otherwise entitled to the custody of a child, loses the right of custody in the following situations;

- (1) if she marries a person not related to the child within the prohibited degrees (Ss. 260-261), e.g., a stranger but the right revives on the dissolution of marriage by death or divorce, or,
- (2) if she goes and resides, during the subsistence of the marriage, at a distance from the father’s place of residence; or,
- (3) if she is leading an immoral life, as where she is prostitute, or
- (4) if she neglects to take proper care of the child.

11. The claim of respondent’s counsel (s) that custody of father is neither illegal nor improper, therefore, habeas petition is not maintainable. There is another way of looking at things; under section 491 of the Cr.P.C. the High Court exercises two-fold jurisdiction; firstly, to direct the production of a person who is illegally detained to be brought before the Court so as to set him at liberty and secondly, to direct the production of a person so that he be dealt in accordance with law. In the latter case, it is not essential that the detention must be by use of force; if a person has been confined in a manner not warranted by law, in that situation also the Court can issue appropriate direction under Section 491, Cr.P.C. This question was considered by the Supreme Court of Pakistan in case reported as “Muhammad Rafique v. Muhammad Ghafoor” (**PLD 1972 Supreme Court 6**) wherein it was ruled as under;

"The High Court has two-fold jurisdiction under this section: (i) to deal with a person within its appellate criminal jurisdiction according to law; and (ii) to set him at liberty if he is illegally or improperly detained. The question which falls for determination, however, is that if the Court finds that the person brought before it was not being illegally or improperly confined or detained what order can be passed regarding the custody of that person.

If the person is a minor, the Court may make over his custody to the guardian which will be dealing with him in accordance with law, but if the person is major, the only jurisdiction which the Court can exercise is to set him at liberty whether illegally or improperly detained in public or private custody or not. The Court may "set at liberty", but cannot restore *status quo ante* against the wishes of the person brought before it. Such a course will lead to curtailment of liberty for which there is no warrant under section 491 nor can such an order be sustained under section 561-A of the Code as it cannot be said that allowing a person freedom of movement is an abuse of the process of the Court.""

12. Proceedings under Section 491 of Cr.P.C can be initiated before the Sessions Judge or Additional Sessions Judges and before this Court if any person is in illegal and improper custody; similar relief can also be sought by a party under Article 199 (1)(b)(i) of the Constitution of the Islamic Republic of Pakistan, 1973 through writ of Habeas Corpus when any person is in custody without lawful authority or in unlawful manner. This Article is usually applicable on malfeasance, misfeasance and nonfeasance of any party with respect to custody of a detenu. However, High Court Rules and Orders do not create any difference in the format of petition and style of orders in both types of petitions. Chapter 4-F, Volume-V of High Court Rules & Orders consists of rules framed by the High Court under Section 491(2) of Code of Criminal Procedure, 1898 which regulate the proceedings on petitions under Section 491 Cr.P.C. They are as follows;

PART-F RULES FRAMED UNDER SECTION 491(2) OF THE CODE OF CRIMINAL PROCEDURE, 1898, TO REGULATE PROCEDURE IN CASES UNDER SECTION 491.

1. An application for an order under section 491 shall be made on an affidavit setting forth the circumstances under which the order is sought: Provided that all communications addressed to the High Court by a person in the custody of a public officer complaining of his detention or the conditions of his detention, whether supported by affidavit or not, shall be laid before a Judge for orders as applications under this rule.
2. Where the court is of the opinion that a *prima facie* case for granting the application is made out, a rule nisi may be issued calling upon the person or persons against whom the order is

sought to appear on a day to be named therein to show cause why such order should not be made and at the same time to produce in Court the body of the person or persons alleged to be illegally or improperly detained then and there to be dealt with in accordance with law: Provided that if the Court so orders, production of the body of the person alleged to be illegally or improperly detained may be dispensed with.

3. If the application for an order under clause (a) or (b) of subsection (1) of the section alleges that a person is confined under such circumstances that the confinement amounts to an offence, the Court may, at the time of issuing a rule nisi, also issue a search warrant, and the person to whom the warrant is directed may search for the person so confined; and such search shall be made in accordance therewith, and the person, if found, shall be immediately brought before the Court, which shall make such order as in the circumstances of the case may seem to be proper.
4. The provisions of sections 43, 75, 77, 79, 82, 83 and 84, Criminal Procedure Code, shall, so far as may be, apply to all such warrants issued under rule 3.
5. If the Court issuing a search warrant under rule 3 has reasons to believe that the person to whom the warrant has been directed may not be able to identify the person confined, the Court may order a person named in the warrant to accompany the person to whom the warrant is directed, to assist him in the execution of the warrant.
6. The writ or the warrant shall be served by the bailiff of the Court out of the list prepared by the Registrar in consultation with the Deputy Registrar, or by such other person as may be appointed by the Judge. Where the application is by or on behalf of a security prisoner, the writ will be served on the appropriate Government and not on the officer detaining the prisoner. A security prisoner means a person who has been detained under the orders of the Federal or Provincial Government under a law providing for preventive detention.
7. On the return day of such rule or on any day to which the hearing thereof may be adjourned, where no cause is shown or where cause is shown and disallowed, the Court shall pass an order that the person or persons illegally or improperly detained shall be set at liberty or delivered to the person entitled to his or their custody. Where cause is allowed, the rule shall be discharged.
8. The Court may, if necessary, in disposing of such rule, take evidence or direct a Court of Sessions or a Magistrate to take evidence.
9. Upon the return and production of the party on whose behalf the rule was issued, the custody of the prisoner shall be under the control and direction of the Court until the disposal of the rule. Pending the hearing, the Court may admit the prisoner to bail or remand him to the prison where he is in custody.
10. When a bailiff is deputed by the Court to produce an alleged detenu/detenus, the party requiring the production should deposit with the Treasurer in advance, an amount equal to the calculated expenses for the journeys involved keeping in view his grade of pay and the daily allowance admissible to him under

the relevant rules. The amount shall be paid to the bailiff after sanction by Deputy Registrar (Judl.) before proceeding to his destination against a receipt which shall be kept on the file of the case.

11. ***01[Omitted].
12. ***01[Omitted].
13. In case the bailiff does not submit his claim within the time mentioned in the last rule, the amount or the balance thereof should be refunded to the party concerned. In case, however, the party fails to claim refund within six weeks, the amount due to it be credited to Government under the head
 “Major head 1200000, Minor head 1230000 Law & Order Receipts, Detailed head 1231000 Justice, 1231003 Justice-General fees, fines and forfeitures (74)”
 and the treasury challan showing the credit should be attached to the file of the case. *01
14. If the writ is to be executed at State expense, the bailiff should be paid his expenses as admissible under the rules.
15. If, at any time, on sufficient ground shown to the satisfaction of the Registrar, it is proved that the bailiff submitted an exaggerated or incorrect claim or claimed expenses though they were met by the party concerned, this should be taken to be a misconduct and necessary proceedings against him be initiated under the High Court Establishment (Appointment & Conditions of Service) Rules, which may result in major penalty provided by the relevant rules.
16. To check the tendency to file frivolous habeas corpus petitions, the Court may, at its discretion, require the party concerned to deposit in advance an amount as fixed by the Court directing the issuance of rule nisi to be paid to the detenus as a compensation if the petition is found to be frivolous or vexatious. *01”
17. In disposing of any such rule, the Court may, in its discretion, make an order for the payment by one side or the other of costs of rule.
18. The forms of warrants No.1 and 2 in the Appendix to these rules shall be followed.

Such rules further clarify that Chapter-4, Part-J of above Volume deals with rules for the issue of orders/directions under Articles 199 and 202 of the Constitution of the Islamic Republic of Pakistan, 1973 and clause 27 of the letter patent. According to Part-1 of Part-J referred above, such application shall be governed by rules 1 to 18 of Chapter 4-F, Volume-V of High Court Rules and Orders, which means rules 1-18 cited above shall also be applicable on habeas petition filed under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973.

13. Keeping in view the above explanation, in appropriate cases order for recovery of minor can be issued under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, which is being issued in this case accordingly.

14. From the above discussion, it is clear that under the law mother has a preferential right for custody of a minor till the prescribed age. Even if divorce has become effective between the spouses, mother does not lose her right of hizanat except in the situations mentioned in Para 354 of Muhammadan Law subject to determination by Gurdian Court. Thus, for what has been discussed above, the circumstances warrant that minor being of tender age requires the lap of mother; therefore, interim custody of minor Muhammad Shahzain is regulated in favour of petitioner/mother who shall be bound to produce him before the learned Gurdian Court where the proceedings are pending and fixed for 15.05.2024. However, this order would be subject to final determination by the learned Gurdian Court as to the rights of parties for custody and visitation of minor.

15. **Disposed of.**

(***Muhammad Amjad Rafiq***)
Judge

Approved for reporting

Judge

Signed on: 06.05.2024.

Jamshaid*