

**IN THE SUPREME COURT OF PAKISTAN**  
(Appellate Jurisdiction)

**PRESENT:**

Mr. Justice Asif Saeed Khan Khosa

Mr. Justice Ijaz Ahmed Chaudhry

**Criminal Petition No. 749-L of 2013**

(Against the order dated 04.07.2013 of the Lahore High Court, Lahore passed in Criminal Miscellaneous No. 1057-H of 2013)

***Ali Muhammad***

*...Petitioner*

*versus*

***The State, etc.***

*... Respondents*

For the petitioner:

Malik Muhammad Imtiaz Mahal, ASC  
with the petitioner and Muhammad  
Tariq present in person.

On Court's call:

Mst. Naseem Akhtar, alleged detainee

For respondent No. 2:

Muhammad Imran Khan, in person,  
with the Station House Officer of  
Police Station Qadirpur, District  
Jhang

For the State:

Mr. Mazhar Sher Awan, Additional  
Prosecutor-General, Punjab with  
Mahmood, Ahmed, S.I. and Mahmood  
Hashmat, A.S.I./I.O.

Date of hearing:

19.07.2013

**JUDGMENT**

**Asif Saeed Khan Khosa, J.:** In compliance with this Court's order dated 18.07.2013 the alleged detainee namely Mst. Naseem Akhtar has been produced before the Court from the relevant *Dar-ul-Aman*. Ali Muhammad petitioner and the two suitors of the alleged detainee, i.e. Muhammad Imran Khan (respondent No. 2) and Muhammad Tariq are also in attendance. Mst. Naseem Akhtar has stated her age to be about twenty-eight years and admittedly Ali Muhammad petitioner is her father whereas Muhammad Tariq

happens to be a maternal cousin of Mst. Naseem Akhtar. Muhammad Imran Khan respondent claims that he had got married to Mst. Naseem Akhtar on 14.05.2013 whereas Muhammad Tariq maintains that Mst. Naseem Akhtar had got married to him on 25.12.2012 and that their marriage is still intact. This assertion of Muhammad Tariq is accepted as correct not only by Ali Muhammad petitioner but also by Mst. Naseem Akhtar who has categorically and unequivocally stated before the Court that Muhammad Tariq is the only person with whom she had contracted marriage which marriage still subsists and that she had never contracted marriage with Muhammad Imran Khan respondent. Mst. Naseem Akhtar has clearly and vociferously stated that while living with her father namely Ali Muhammad petitioner she was not in any kind of confinement or under any restraint and that she wants to go back and live with her father. We have been informed by the learned counsel for the parties that Muhammad Tariq had lodged FIR No. 101 at Police Station Shah Nikdar, District Sargodha on 10.08.2013 for an offence under section 496-A, PPC in respect of an alleged enticing away of Mst. Naseem Akhtar by Muhammad Imran Khan respondent and the said criminal case is still under investigation of the local police. We have also been apprised that on 26.06.2013 Mst. Naseem Akhtar had filed a suit for jactitation of marriage against Muhammad Imran Khan respondent which suit is presently pending before the learned Judge, Family Court, Sillanwali, District Sargodha. In the said suit Mst. Naseem Akhtar has claimed that she had never got married to Muhammad Imran Khan and that the said Muhammad Imran Khan ought to be restrained from maintaining or proclaiming that Mst. Naseem Akhtar is his lawfully wedded wife.

2. The relevant facts of the case referred to above unambiguously show that the alleged detainee namely Mst. Naseem Akhtar is a grown up young lady who acknowledges Muhammad Tariq as her lawfully wedded husband and refuses to accept Muhammad Imran Khan respondent as her spouse. The said categorical stand taken by Mst. Naseem Akhtar is also supported by her father namely Ali Muhammad petitioner. In that backdrop Muhammad Imran Khan respondent had filed Criminal

Miscellaneous No. 1057-H of 2013 before the Lahore High Court, Lahore which petition had been filed under section 491, Cr.P.C. in the nature of *habeas corpus* seeking recovery of Mst. Naseem Akhtar from the custody of her father namely Ali Muhammad petitioner. On the basis of an order of the Court Mst. Naseem Akhtar was produced before a learned Judge-in-Chamber of the Lahore High Court, Lahore on 01.07.2013 and on the said date the following order had been passed by the Court:

"Mst. Naseem Akhtar, detainee, has been produced in the Court, who submits that she had contracted marriage with Muhammad Tariq on 15.12.2012 and the Nikahnama produced by the petitioner Muhammad Imran is forged one as she had not contracted marriage with him.

2. Learned counsel for the respondents wants to place on record certain documents showing that the petitioner's Nikahnama is a fake document. Counsel shall submit document on 04.07.2013.

3. In view of two Nikahnamas existed on record, it would be appropriate to send detainee to Dar-ul-Aman, Lahore, wherefrom she shall be produced in the Court on date fixed."

On the next date of hearing, i.e. 04.07.2013 the learned Judge-in-Chamber of the Lahore High Court, Lahore had disposed of the said *habeas corpus* petition with the following order:

"On the basis of existence of two Nikahnama on record in respect of Mst. Naseem Akhtar, she was lodged in Dar-ul-Aman, Lahore so that in the appropriate proceedings genuineness of the Nikahnamas could be adjudicated by the court of competent jurisdiction.

2. Learned counsel appearing on behalf of the respondents submitted that Mst. Naseem Akhtar has filed a suit for jactitation of marriage and she cannot be detained in the Dar-ul-Aman for an indefinite period, rather her abode in the Dar-ul-Aman would amount to illegal detention.

3. This contention of the learned counsel is untenable for the reason that the Court cannot allow a person to live in immoral life and for this purpose she has been sent to Dar-ul-Aman to save her from the commission of an offence. She would stay in the Dar-ul-Aman till the time her suit for jactitation of marriage is decided. In this respect a direction is issued to the learned family Court concerned for deciding the suit of Mst. Naseem Akhtar expeditiously by taking proceedings on day to day basis before proceeding on summer vacations.

4. Learned counsel for the petitioner has pointed out that the mother of Mst. Naseem Akhtar by adopting a deceitful method is also residing alongwith her daughter in the Dar-ul-Aman. If it is so, the petitioner has the remedy before the Court upon whose order the mother of the detainee had joined her in Dar-ul-Aman.

5. With these observations, this petition is disposed of."

Ali Muhammad petitioner has approached this Court through the present petition seeking release of his daughter namely Mst. Naseem Akhtar from the relevant *Dar-ul-Aman* whereat she presently stands lodged for an indefinite period as a result of the impugned order passed by the learned Judge-in-Chamber of the Lahore High Court, Lahore.

3. It is evident from the facts of the present case that Mst. Naseem Akhtar is a grown up young lady and she is not involved in any criminal case as an accused person. Her consistent stand before the Lahore High Court, Lahore and before this Court has been that she was not in any kind of confinement or under any restraint while living with her father. Although she has two rival suitors yet she has expressed a clear desire before this Court that she wishes to go and live with her father namely Ali Muhammad petitioner. We have found it to be rather disturbing that despite her eagerness to continue living with her father she had been deprived of her liberty and ordered by the learned Judge-in-Chamber of the Lahore High Court, Lahore to be lodged at a *Dar-ul-Aman* and that too for an indefinite period. It is quite ironical and shocking that *habeas corpus* proceedings before the Lahore High Court, Lahore, which were meant to secure release of a person from an illegal or improper custody or confinement, had been utilized in the present case for depriving a free person of her liberty and the net result achieved was that a grown up young lady who was not found to be in any kind of confinement or under any restraint had been locked up and incarcerated within the confines of a *Dar-ul-Aman* for an indefinite period! Such an approach adopted and the result achieved by the learned Judge-in-Chamber of the Lahore High Court, Lahore surely ran contrary to the very essence and purpose of a writ or petition for *habeas corpus* which is securing freedom and not curtailing liberty. We are sure that the learned Judge-in-Chamber of the Lahore High Court, Lahore would have done better if he had sought guidance in this regard from various judgments handed down by this Court on the subject from time to time. Some of such

foundational judgments are referred to by us in the following paragraph.

4. In the case of Muhammad Rafique v. Muhammad Ghafoor (PLD 1972 SC 6) it had been held by this Court as follows:

"Leave to appeal from the order of the High Court was granted on 10.04.1970 to examine the legality of the direction that Mst. Surraya Begum be given into the custody of the respondent against her free will.

On hearing the learned counsel for the parties and taking into consideration the provisions of sections 491, 561-A of the Code of Criminal Procedure and the Fundamental Right 1 that "No person shall be deprived of life or liberty save in accordance with law" the Court found no warrant in law for the direction given by the learned Judge about the custody of Mst. Surraya Begum.

Section 491, Cr.P.C., under which the High Court exercised jurisdiction *inter alia* provides:

"491.—(i) Any High Court may, whenever it thinks fit, direct—

(a) that a person within the limits of its appellate criminal jurisdiction be brought up before the Court to be dealt with according to law;

(b) that a person illegally or improperly detained in public or private custody within such limits be set at liberty;"  
(The other clauses of the section are not relevant to the present case).

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."

(underlining has been supplied for emphasis)

It had been held by this Court in the case of Muhammad Nazir v. The SHO Police Station, Shahpur and 3 others (1973 SCMR 351) as under:

"After hearing the learned counsel for the parties, we are satisfied that the learned Single Judge could not hand over the custody of the girl to A.S.I. Illaqa as no case has been registered against her. The case was registered against Muhammad Amir and Shah Wali. In such circumstance, no order could be passed against Mst. Fatima Bibi. It is strange that the learned Single Judge did not record the statement of the girl to find out whether she is major or minor and handed over the custody of the girl to the Illaqa Police for further investigation. This procedure is not warranted by any provision of the Criminal Procedure Code or any other law. The girl has appeared before us. Her statement has been recorded. She is major and is married to Muhammad Saeed. She wants to go with her husband. In these circumstances, the appeal is allowed and Mst. Fatima Bibi is set at liberty to go with her husband."

*(underlining has been supplied for emphasis)*

This Court had observed and held in the case of Mst. Sahi Bi v. Khalid Hussain and 6 others (1973 SCMR 577) in the following terms:

"After hearing the learned counsel for the parties, we are satisfied that under the Mohammadan Law, a *sui juris* woman cannot be forced to live with her husband against her wishes. Quranic injunction is against it. According to the Mohammadan Law, if there is disagreement between the husband and the wife, the wife is entitled to live separately from her husband. In the present case, there is disagreement between Mst. Irshad Begum and respondent No. 1 and in such circumstance, she is entitled to live with her mother.

The observation of the learned Single Judge of the High Court that if Mst. Irshad Begum is set at liberty she will lead immoral life is irrelevant for the decision of the case under section 491, Cr.P.C. Under section 491, Cr.P.C., if a *sui juris* detenu is unwilling to go with her husband or guardian, the Court cannot compel her to go with them. She must be set at liberty and allowed to move freely. This position was made clear in the above mentioned case decided by this Court and the learned Single Judge should have set at liberty the detenu and allowed her to move freely according to her wishes".

*(underlining has been supplied for emphasis)*

5. For what has been discussed above this petition is converted into an appeal and the same is allowed, the impugned order passed by the learned Judge-in-Chamber of the Lahore High Court, Lahore on 04.07.2013 in Criminal Miscellaneous No. 1057-H of 2013 is set

aside and the detenue namely Mst. Naseem Akhtar is set at liberty. She may go and live with her father namely Ali Muhammad petitioner, as desired by her.

6. Before parting with this judgment we may observe that we have felt saddened by the fact that through the impugned order an Hon'ble Judge of a High Court had allowed his responsibility of protecting a citizen's constitutional right to liberty to be overshadowed by his own subjective sense of morality. In this context we have found the following part of the impugned order to be utterly unacceptable and, if we may say so with respect, completely and unreservedly unpalatable:

"2. Learned counsel appearing on behalf of the respondents submitted that Mst. Naseem Akhtar has filed a suit for jactitation of marriage and she cannot be detained in the Dar-ul-Aman for an indefinite period, rather her abode in the Dar-ul-Aman would amount to illegal detention.

3. This contention of the learned counsel is untenable for the reason that the Court cannot allow a person to live in immoral life and for this purpose she has been sent to Dar-ul-Aman to save her from the commission of an offence. She would stay in the Dar-ul-Aman till the time her suit for jactitation of marriage is decided."

*(underlining has been supplied for emphasis)*

It is unfortunate that in his zeal and eagerness to prevent commission of an imagined or apprehended sin/crime the learned Judge-in-Chamber of the Lahore High Court, Lahore had not only chosen to ignore the Divine command but had also decided to disregard the constitutional mandate. God Almighty has forbidden even leveling of an allegation of *zina* unless four eyewitnesses are produced in support of such an allegation and if such number of eyewitnesses are not produced then the person leveling the allegation is to be whipped and flogged. In the present case the learned Judge-in-Chamber had not even leveled an allegation but had only imagined a possibility of commission of *zina* in future and had then proceeded to punish the detenue by depriving her of her liberty and putting her in the confines of a *Dar-ul-Aman* for an indefinite period. In these indefensible circumstances, after having been punished only for an imagined or apprehended sin, the

detenue has appeared to us to be, in the words of Shakespeare's King Lear, a woman "more sinned against than sinning". Apart from that the Constitution of Pakistan mandates that the judgments of this Court are binding on all other courts in the country but while passing the impugned order the learned Judge-in-Chamber had failed to follow the above mentioned, and many other, judgments rendered by this Court on the subject. It may be true that during the pendency of a petition filed in the nature of *habeas corpus* a court can pass a rule *nisi* regarding interim custody of the alleged detenue but it is unimaginable and unthinkable that after final disposition of such petition the alleged detenue, who was otherwise a free person, may be put to physical restraint or confinement for an indefinite period and that too not on the basis of any concrete fact or allegation but merely on the basis of an imagined possibility of commission of a sin or a crime. The learned Judge-in-Chamber ought to have known that it had been already clarified by this Court in the case of *Muhammad Rafique (supra)* that

" ----- 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."

It appears that in the present case the learned Judge-in-Chamber of the Lahore High Court, Lahore had transcended the legal requirements applicable or relevant to the *lis* before him and had decided to enter the realm of morality little appreciating that the field chosen by him did not lie in his domain and it lied in a domain which he ought to have consciously avoided to enter. The learned Judge-in-Chamber ought to have remembered that in the case of *Mst. Sahi Bi (supra)* this Court had already clinched this issue by declaring as under:

"The observation of the learned Single Judge of the High Court that if Mst. Irshad Begum is set at liberty she will lead immoral life is irrelevant for the decision of the case under section 491, Cr.P.C."



7. The Office is directed to send a copy of this judgment to the Registrar of the Lahore High Court, Lahore who may bring the same to the notice of the Hon'ble Judge of the said Court who had passed the order impugned through the present petition/appeal for his kind information and perusal.

Judge

Judge

Lahore  
19.07.2013  
Approved for reporting.

Arif