

Form No: HCJD/C-121

**JUDGMENT SHEET**

**IN THE ISLAMABAD HIGH COURT, ISLAMABAD**  
**JUDICIAL DEPARTMENT**

I.C.A. No.86 of 2011

Muhammad Faraz

***VERSUS***

Mehfeez and others.

**Date of Hearing:** 23.1.2012.

**Petitioner by:** Mr. Sajjad Haider Mailk, Advocate

**Respondent by:** Mr. Tahir Afzal Abbasi, Advocate

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**MUHAMMAD AZIM KHAN AFRIDI, J:-** Muhammad Faraz son of Muhammad Naseem R/o Dhoke Sanjalian, Post Office Bhara Kahu Tehsil and District Islamabad, has preferred the instant Intra Court Appeal u/s 3 of Law Reforms Ordinance, 1972, seeking annulment of judgment and order passed by Hon'ble Single Judge-in-Chamber, in W.P.No.370/2011 titled Mst. Mehfeez and others Vs. Muhammad Faraz.

2. Brief and relevant facts for the disposal of the instant Intra Court Appeal are that Mst. Mehfeez D/o Muhammad Azram hereinafter referred to as respondent No.1 filed W.P.No.370/2011 under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, hereinafter referred to as Constitution, challenging therein order dated 13.1.11 passed by learned Additional District & Sessions Judge, Islamabad, (respondent No.3), who dismissed the petition of respondent No.1 for the custody of minors namely Waqas Ahmad, Aleeza Bibi and Awais Ahmad instituted under Section 491 Cr.P.C. The said writ petition was accepted by the Hon'ble Single Judge of this Court vide judgment and order dated 21.4.11 and directed the appellant to handover the said minors to respondent No.1 forthwith. That the said judgment and order is contrary to the facts and law as the respondent No.1 has left the minors in June, 2009 and that the

appellant was upbringing, educating and maintaining them since then. That a petition u/s 7 of Guardian & Wards Act, was pending in the Court of Guardian Judge Islamabad, which has become infructuous due to the afore-stated judgment and order. That due to pendency of the said petition before the Guardian Judge, Hon'ble Single Judge-in-Chamber was having no jurisdiction to entertain the writ. That the impugned judgment would adversely affect the education of two minors who are admitted to school. That the said judgment and order is liable to be set-aside and writ petition would merit dismissal.

3. Learned counsel for the appellant has argued that the respondent No.1 left the minors in the month of June 2009, at her own whereafter they are brought up, educated and maintained by the appellant. That the proper forum for adjudication of the controversy between the parents was a petition under Guardian & Wards Act, which is already in progress before the learned Guardian Judge Islamabad. That the impugned judgment and order passed by the Hon'ble Single Judge, was contrary to the facts of the case and attitude and conduct of respondent No.1 towards the minors. That the matter should have been left for the decision of the Guardian Judge, and that the Hon'ble Single Judge-in-Chamber should have, at the most, directed expeditious disposal of the petition pending in the Court of learned Guardian Judge, Islamabad. That the impugned judgment and order would adversely affect the person and career of minors as they are getting education in schools. That neither the petition u/s 491 (1) Cr.P.C. nor writ petition under Article 199 of the Constitution was competent. Reliance was placed on the case of Mst. Fouzia Bibi reported as PLJ 2010 Cr.C.(Lahore) 396.

4. On the other hand, learned counsel for the respondent No.1 argued that the impugned judgment and order of the Hon'ble Judge of this Court, is in consonance with the mandate of law. That the appellant had entered into second marriage and as such the minor children are left at the mercy of step-mother. That the respondent No.1 being mother of minors was having preferential right of "*Hizanat*". That the said judgment and order is not open to

interference in ICA. Reliance was placed on PLD 2011 Lahore 423, 2011 YLR 1021, 2010 YLR 1629 and PLD 2010 Karachi 119.

5. We have heard arguments of the learned counsel for the parties and perused the record with their assistance.

6. Undisputed facts of the case of the parties are that marriage of the appellant and respondent No.1 was solemnized in the month of February, 2004, and out of their wedlock three minor children namely Waqas Ahmad (son) aged about 6 years, Aleeza Bibi (daughter) aged about 4 years, Awais Ahmad (son) aged about 2-½ years, were born. The parties were not living and leading a comfortable and harmonious life and, with the passage of time, started developing differences with each other which ultimately culminated into hatred and ended the matrimonial life by divorce of respondent No.1. The appellant had thereafter, entered into a contract of second marriage.

7. Respondent No.1, being real mother of minors, submitted Habeas Corpus Petition u/s 491 Cr.P.C. for the recovery of the said minors before the Court of learned Sessions Judge, Islamabad, which was entrusted to and heard by learned Additional Sessions Judge, Islamabad. Dismissal of the same vide judgment dated 13.1.11 constrained respondent No.1 to file the writ under Article 199 of the Constitution, which was heard and accepted by the Hon'ble Single Judge-in-Chamber and directions were issued for handing over the custody of three minor children to the mother forthwith.

8. "Hizanat" an origination and emanation of "Hizan" signifies and denotes love, care and affection direly and constantly needed to a male child upto the age of seven years and a female child till puberty. Care, love and affection undoubtedly plays a vibrant and vital role in the making of nature and character of a person and as such "Hizanat" can be safely termed as a tribute and privilege of minor assigned and vested in mother.

9. Bond of "Hizan" can neither be disrupted nor interrupted by divorce. The same may face discontinuity either on remarriage of mother or overpassing the prescribe age i.e. seven years in case of male and attainment of age of puberty in case of a female child or when the welfare of minor i.e. the prime and paramount goal and object of well-being, becomes at stake.

10. Undisputed facts of the case of the parties would suggest that all the three children are minors and borne out of the wedlock of the appellant and respondent No.1. Respondent No.1, real mother and the minor children are vested with the privilege of Hizanat till the age of puberty in the case of female and seven years in the case of male children.

11. Section 491(b) Cr.P.C. authorizes a High Court, a Sessions Judge or an Additional Sessions Judge to issue directions of the nature of Habeas Corpus that a person illegally or improperly retained in public or private custody be set at liberty. Appellant has retained the minors contrary to the rule of "Hizanat" and as such custody of the appellant is an improper detention of minors in private custody and petition of respondent No.1 under Section 491 Cr.P.C. was competent and entertainable.

12. We, for the above reasons, were, not impressed by the arguments of learned counsel for the appellant desirous of upsetting the judgment of this Court dated 21.04.11 containing directions of handing over the minors children to the mother. Needless to mention that the learned Family Court, is invested with the jurisdiction to determine and decide the entitlement of parties for the custody of minors on the tenet and rule of welfare of minor and in case the welfare of minors is found in the person of petitioner, then rule of "Hizanat" would certainly become fruitless and useless and would therefore loose significance.

13. For the above mentioned reasons, the ICA is found devoid of merits, and is, therefore, dismissed with no order as to costs.

**(RIAZ AHMAD KHAN)**  
**JUDGE**

**(MUHAMMAD AZIM KHAN AFRIDI)**  
**JUDGE**

**Approved for reporting**

\*Qamar Khan\*