

Form No: HCJD/C-121  
JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD  
(JUDICIAL DEPARTMENT)

**W.P. No.3972/2020**

Raima AKhtar

Versus

Tashfeen Namdar, etc

Petitioner by : Mr M. Imran Abbasi, Advocate.

Respondents by : M/s Khurram Mehmood Qureshi, Rauf Qureshi and Zahid Hussain Mughal, Advocates.

Date of Hearing : **08-03-2021.**

**ATHAR MINALLAH, C.J.-** Through this petition, the petitioner has assailed order, dated 05.05.2020, passed by the learned Assistant Commissioner/Magistrate vested with jurisdiction of Police Station Ramna, Islamabad.

2. The facts, in brief, are that Raima Akhtar daughter of Akhtar Masood (hereinafter referred to as the "**Petitioner**") and Tashfeen Namdar son of Malik Shabbir Ahmad (hereinafter referred to as the "**Respondent**") entered into a marriage contract on 12.04.2019. They were blessed with a son i.e. Muhammad Ertugral son of Tashfeen Namdar (hereinafter referred to as the "**Minor**"). Due to marital disputes, the marriage ended up in a divorce on 25.04.2020. The Minor was in the custody of the Petitioner. An application was filed by the Respondent before the Incharge Police Station Ramna, Islamabad wherein it was alleged that the welfare and life of the Minor was exposed to harm. The Respondent had attached

some photographs alongwith the application. The Incharge Police Station, referred the matter to the Assistant Commissioner/Magistrate. The latter summoned the parties. Both the parties filed their respective affidavits. It appears from the affidavit filed by the Petitioner that she had consented to handing over custody of the Minor to the Respondent. The learned Magistrate vide the impugned order, dated 05.05.2020 directed that the Minor be handed over to the Respondent. The Petitioner filed a petition under section 491 of the Criminal Procedure Code, 1898 (hereinafter referred to as the "**Cr.P.C.**"), which was withdrawn and accordingly dismissed by the learned Additional District Judge, Rawalpindi vide order, dated 12.12.2020. The Respondent filed a petition under section 7 read with section 17 of the Guardian and Wards Act, 1890 (hereinafter referred to as the "**Act of 1890**"). The petition was allowed by the learned Guardian Judge vide order, dated 02-02-2021 and thus the Respondent was declared and accordingly appointed as guardian of the Minor. Since pursuant to order, dated 05.05.2020 the custody of the Minor was handed over to the Respondent, therefore, no petition was filed under section 25 of the Act of 1890 by the latter. The Petitioner also did not file any petition seeking custody of the suckling Minor who is stated to be eight months old. The Petitioner filed the instant petition on 22.12.2020 assailing order, dated 05.05.2020.

3. The learned counsels have been heard at great length. The learned counsel for the Respondent has mainly argued that a competent court had appointed the latter as guardian; since the custody was handed over to the Respondent, therefore, no petition was filed under section 25 of the Ac of 1890; the Petitioner also did not file any petition seeking custody of the Minor; the impugned order,

dated 05.05.2020 was passed by the learned Magistrate in exercise of powers conferred under section 100 of Cr.P.C; reliance has been placed on "Fauzia Malik vs. Sanaullah and another", **PLD 2004 Karachi 488**, "Basma Tabassam vs. Deputy Commissioner, Sheikhpura and 6 others", **1999 MLD 778**, "Fozia Bibi vs Station House Officer", **2009 P Cr. L J 588**, "Naziha Ghazali vs. The State and another", **2001 SCMR 1782**, "Ahmed Jawad Sarwar vs. Mst. Zenia" **1996 SCMR 1907**, "Smt. Pari Bai vs. Amrat Lal and others" **1997 P Cr. L J 105**, and "Naveeda Abbas vs. Additional Sessions Judge, Gujranwala and 2 others", **2015 P Cr. L J 1597**.

4. The learned counsel for the Petitioner, on the other hand, has argued that the impugned order, dated 05.05.2020 was passed without jurisdiction and thus void; the principle of laches is not attracted when an order passed by an authority is without jurisdiction and void; the Petitioner was under immense mental trauma and pressure because she was divorced on the fourth day of the birth of the Minor; the Petitioner is mother of the Minor and, therefore, allegations made against her by the Respondent are frivolous and inconceivable.

5. The learned counsels for the parties have been heard and the record perused with their able assistance.

6. It is settled law that the paramount consideration in custody cases is the welfare of the minor. Reliance is placed on "Mst. Feroze Begum v. Lt. Col. Muhammad Hussain" **1978 SCMR 299**, "Mehmood Akhtar v. District Judge, Attock and 2 others" **2004 SCMR 1839**, "Rahimullah Choudhury v. Helali Begum" **1974 SCMR 305**, and "Zahoor Ahmad v. Mst. Rukhsana Kausar and 4 others" **2000 SCMR**

**707.** Regrettably, in the instant case the welfare of the Minor has not been considered by any competent authority. A plain reading of section 100 of Cr.P.C. unambiguously shows that it does not, in any manner whatsoever, empowers the Magistrate to adjudicate upon or decide cases involving the factum of welfare of a child. It has also not been explained under what law the matter was entertained by the incharge of police station and sent to the Assistant Commissioner/Magistrate. It is not disputed that the Minor is eight months old and, therefore, the latter is a suckling baby. No court can deprive the Minor from a natural right unless compelling reasons can be established by a contesting party. Keeping in view the extraordinary circumstances involved in the case in hand, this Court vide order, dated 18.01.2021 had directed handing over of the custody of the suckling baby i.e. the Minor to the Petitioner. At present the Petitioner, who is the mother of the Minor has the custody of the latter. It would be contrary to the welfare of the Minor to deprive him from the custody of his Mother having regard to his natural needs as a suckling child. Nonetheless, this order will not prejudice any proceedings that may be initiated regarding custody of the Minor under section 25 of the Act of 1890.

7. For the above reasons, the impugned order, dated 05.05.2020 is declared to have been passed without lawful authority and is thus void. The learned Magistrate was not empowered under the law to callously deal with a matter that involved the factum of welfare of the Minor.

8. The petition is allowed and disposed of in the above terms.

**(CHIEF JUSTICE)**

Asif mughal/\*

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