

Form No: HCJD/C-121
ORDER SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
(JUDICIAL DEPARTMENT)

Writ Petition No. 2081 of 2021

Nisaar Bibi

Versus

Federation of Pakistan through Secretary of Interior, Islamabad and others.

S.No. of order/ proceeding	Date of order/ proceeding	Order with signature of Judge and that of parties or counsel where necessary.
(03)	23.06.2021	Mr. Sajid ur Rehman Mashwani, Advocate for the petitioner. Mr. Imran Feroz, Advocate for the respondents No. 4 and 5. Mr. Nazar Hussain Shah, Assistant Attorney General.

Through the instant petition, the petitioner being maternal grandmother seeks handing over the custody of minors to her from respondents No. 4 & 5 / paternal grandparents of the minors.

02. Succinctly stated facts of the case are that, the minors i.e. Arooj Rida / respondent No. 6, (aged about 05 years old), Kamil / respondent No. 7, (aged about 02 years and 06 months old) and Sahil / respondent No. 8, (aged about 15 months old), daughter and sons of Shahbaz, were residing with their parents and grandparents in joint

family system. Father of the minors, Shahbaz has allegedly committed murder of their mother / his wife namely Aqsa Bibi, whereupon a case vide FIR No. 260/2021 dated 15.05.2021, offence under Section 302/34 PPC, police station Bhara Khau, Islamabad was registered against Shahbaz / father of the minors. He was arrested in the case. Grandfather of the minors has also been allegedly involved in the murder case, who has obtained interim bail before arrest from the Court of competent jurisdiction.

03. As the minors are living with their paternal grandmother and after the death of their mother, petitioner being maternal grandmother is entitled for custody of the minors, therefore, she has filed the instant petition for handing over their custody to her.

04. Learned counsel for the petitioner *inter alia* contends that the minors are in danger while in custody of their paternal grandmother; the petitioner being the maternal grandmother is entitled for custody of the minors under Section 353 of

Muhammadian Law; the minors have been improperly detained after brutal murder of their mother, in the house of their grandparents; the grandfather and father of the minors are influential criminals who have brutally killed mother of the minors in broad day light, hence the petitioner being the maternal grandmother is entitled for custody of the minors.

05. Learned counsel for the contesting respondents states that the minors are living with their grandparents since their birth; there is no allegation in the petition that the minors have been snatched from the petitioner illegally or unlawfully; there is no urgency in the matter and custody of the minors can only be regulated by the Guardian Court under the Guardian and Ward Act, 1890.

06. Arguments of learned counsel for the parties have been heard and record has been perused with their able assistance.

07. In compliance of order dated 17.06.2021, passed by this Court, today the minors were produced in the Court

alongwith their paternal grandmother. There is no allegation leveled by the petitioner in the petition or during the course of arguments that the minors have been removed / snatched from custody of the petitioner. It is admitted that right from the birth, minors were residing in the house where their paternal grandparents were residing and still they are residing in the same house under the custody of their grandparents.

08. Learned counsel was asked to produce any single judgment, where the minors were not removed forcibly from the custody of their maternal grandmother, residing with paternal grandparents and by orders of the Court their custody was handed over to the maternal grandmother while exercising the discretion under Section 491 Cr.P.C or under Article 191 of the Constitution of Islamic Republic of Pakistan, whereupon learned counsel for the petitioner has conceded that there is no such judgment or case law available on the point.

09. It has been held by the Hon'ble Supreme Court of Pakistan in a case titled as "***Mst. Nadia Perveen v. Mst. Almas Noreen and others***" (**PLD 2012 Supreme Court 758**) that, "*It has consistently been held by this Court in the cases of Muhammad Javed Umrao v. Miss Uzma Vahid (1988 SCNIR 1891), Nisar Muhammad and another v. Sultan Zari (PLD 1997 SC 852), Mst. Khalida Perveen v. Muhammad Sultan Mehmood and another (PLD 2004 SC 1) and Naziha Ghazali v. The State and another (2001 SCMR 1782) that the matter of custody of minor children can be brought before a High Court under section 491, Cr.P.C. only if the children are of very tender ages they have quite recently been snatched away from lawful custody and there is a real urgency in the matter and also that in such a case the High Court may only regulate interim custody of the children leaving the matter of final custody to be determined by a Guardian Judge. In those cases this Court had repeatedly emphasized that in such matters the*

jurisdiction of a High Court under section 491, Cr.P.C. is to be exercised, sparingly and such exercise may be undertaken only in exceptional and extraordinary cases of real urgency keeping in view that even a Guardian Judge has the requisite powers of recovery of minor children and regulating their interim custody” (Emphasis supplied).

10. That in a case, where the petition was filed by the petitioner / mother of minor, after 5/6 months, alleging unlawful removal of the minor from her custody, it has been held by the Hon’ble Supreme Court of Pakistan in a case titled as “**Naziha Ghazali v. The State and another**” **(2001 SCMR 1782)** that, “*There is no explanation as to why the petitioner kept quiet for such long period if the minor son was removed illegally by the respondent. If the minor was removed from her custody unlawfully and without her consent, in the normal circumstances, she would have either filed report with the police or made a complaint to the concerned authorities*

against the respondent in accordance with law. It would prima facie appear, from the said conduct of the petitioner that the minor was not removed forcibly from the apartment by the respondent, therefore, ex facie it cannot be said that the custody of the minor with his father, the respondent, was illegal or unlawful within the meaning of section 491, Cr.P.C.” and the decision of dismissal of petition by the Hon’ble High Court was upheld by the Hon’ble Supreme Court of Pakistan.

11. Matter of custody of the minor children can be brought before High Court under Section 491 Cr.P.C only if, (i) the children are of very tender ages, (ii) the minors have quite recently been snatched away from lawful custody and (iii) there is a real urgency in the matter, the High Court can only regulate interim custody of the children leaving the matter of final custody to be determined by a Guardian Judge.

12. Since the petitioner has not been deprived of custody of the minors few days ago, neither the minors have been snatched

from the petitioner nor there is any urgency involved in the matter.

13. Therefore, keeping in view the above prospect, instant writ petition has no merit and same is hereby **dismissed**, however, the petitioner is at liberty to invoke the jurisdiction of Guardian Court for claiming the custody of minors in accordance with law.

(TARIQ MEHMOOD JAHANGIRI)
JUDGE

Bilal /-

Approved for reporting.