

ORDER SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.713/2019
Mst. Fauzia
Versus
Director General, FIA, Islamabad and others

S. No. of order / proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	22.05.2019	Agha Abdul Sattar, Advocate for the petitioner. Mr. Muhammad Nadeem Khan Khakwani, learned Assistant Attorney-General. Mr. Sadaqat Ali Jahangir, learned State Counsel. Mr. Abdul Majid Afridi, Advocate for respondents No.2 and 3.

Through the instant writ petition, the petitioner, Mst. Fauzia, seeks the recovery of her children namely, Muhammad Hassan (aged 05 years) and Husnain (aged 3.5 years) from the custody of their father/respondent No.2 (Aadil Akram).

2. The facts essential for the disposal of this petition are that the petitioner and respondent No.2 got married on 20.10.2011. The couple were blessed with two sons, whose custody is sought to be recovered by the petitioner from her former husband. It is not disputed that the marriage between the petitioner and respondent No.2 has come to an end and divorce certificate has already been issued.

3. The petitioner asserts that respondent No.2 snatched the children from her on 20.01.2019. The instant petition was filed on 21.02.2019 and taken-up for hearing on 26.02.2019, whereon notices were directed to be issued to the respondents. Vide order dated 08.04.2019, this Court directed

respondent No.2 to tender appearance before this Court along with the minors on 18.04.2019. On 18.04.2019, respondent No.2 complied with the said order and tendered appearance before this Court along with the minors on 21.05.2019. The minors were directed to be handed over to the petitioner, who was to keep them overnight. The matter was fixed for further proceedings on 22.05.2019 i.e. today.

4. The petitioner resides in Pakistan along with her father and has asserted that she is capable of taking care of her children and also to admit them in a school in Pakistan.

5. Respondent No.2 works for a living in the United Arab Emirates ("U.A.E."). He has brought on record certificates showing that the minors had been admitted in Pace International School L.L.C., Sharjah, U.A.E. Learned counsel for respondents No.2 and 3 took the position that it would be in the interests of the minors if their education was to continue in the said school.

6. Respondent No.2 has filed a petition before the learned Guardian Judge, Abbotabad under the provisions of the Guardians and Wards Act, 1890, praying for him to be appointed as his children's guardian. Respondent No.2 has no family member residing in the U.A.E. who could take care of the children while respondent No.2 is on duty.

7. The petitioner's brother had filed an application under Section 491 Cr.P.C. before the Court of the learned Sessions Judge, Abbotabad seeking the petitioner's recovery from the illegal confinement of respondent

No.2's relatives. Pursuant to the order dated 29.01.2019, the petitioner was recovered, and presently she is residing with her father. The petitioner claims to have been maltreated by respondent No.2.

8. A petition under Section 491 Cr.P.C., or a petition seeking the issuance of a writ of *habeas corpus*, is ordinarily not found to be competent where there is no element of illegal custody by the father of minors. However, in the interests of the children's welfare, the Court could pass an appropriate order in exercise of its inherent jurisdiction. A Court while deciding such petitions does not conduct a detailed inquiry or go into factual controversies. Such proceedings are summary in nature and are meant for providing immediate and efficacious relief to the aggrieved party. Orders passed in such proceedings are interim in nature and are subject to the final orders passed by a Court exercising jurisdiction under the provisions of the Guardians and Wards Act, 1890.

9. Since I find the petitioner and respondent No.2's children to be at the tender age of *hizanat*, and since respondent No.2 has no relative in the U.A.E. to attend the children when he is on duty, I am of the *prima-facie* view that it would be in the children's best interests if their interim custody is handed over to their mother i.e., the petitioner. In holding so, I have been guided by the law laid down in the following cases:-

(i) In the case of Khalida Perveed Vs. Muhammad Sultan Mehmood (PLD 2004 SC 1), it was opined as follows:-

“In our opinion in the cases pertaining to the custody of a child, the Courts are not supposed to go into the technicalities of the law and they should decide the case keeping in view the facts and circumstances of each case placed before it for the decision mainly taking into consideration welfare of the child. Although ordinarily a petition under section, 491, Cr.P.C. is not found to be competent when there is no element of illegal custody by the father of his own child but in the welfare of the child as well as to ensure that the rights which have been conferred upon the child are fully protected in a suitable manner, the Courts could also pass appropriate orders in exercise of its [inherent] jurisdiction.”

(ii) Recently, in the case of Mirjam Aberras Lehdeaho Vs. SHO, Police Station Chung, Lahore (2018 SCMR 427), the Hon'ble Supreme Court, after making reference to a number of judicial precedents, held as follows:-

“22. The Guardian Court is the final Arbiter for adjudicating the question of custody of children. However, where a parent holding custody of a minor lawfully has been deprived of such custody, such parent cannot be deprived of a remedy to regain the custody while the matter is sub judice before a Guardian Court. Therefore, in exceptional cases (like the instant case), where the High Court finds that the best interest and welfare of the minor demand that his/her custody be immediately restored to the person who was lawfully holding such custody before being deprived of the same, the Court is not denuded of jurisdiction to pass appropriate orders under section 491, Cr.P.C. directing that custody be restored to that person as an interim measure pending final decision of the Guardian Court. While the tender age of the minor is always a material consideration but it is not the only consideration to be kept in mind by the High Court. Other factors like best interest and welfare of the minor, the procedural hurdles and lethargy of the system, delays in finalization of such matters, the handicaps that the mother suffers owing to her gender and financial position, and above all the urgency to take appropriate measures to minimize the trauma,

emotional stress and educational loss of the minor are equally important and also need to be kept in mind while granting or refusing an order to restore interim custody by the High Court.”

10. In view of the above, the instant petition is allowed; the interim custody of the petitioner and respondent No.2's children has been handed over to the petitioner. It will now be for the learned Guardian Judge to finally determine as to who shall be given the custody of the children and to fix a visitation schedule for the parent who is not given the children's custody.

**(MIANGUL HASSAN AURANGZEB)
JUDGE**

Ahtesham*