

**JUDGMENT SHEET**  
**IN THE ISLAMABAD HIGH COURT,**  
**ISLAMABAD**

**W.P. NO. 1666 OF 2021**

**Mst. Maham Mehmood.**

**Vs.**

**Additional Sessions Judge Islamabad West, etc.**

**Petitioner by : Mr. Wahid Iqbal, Advocate.**

**Respondents by : Mr. Mudassir Hussain Malik and Ms. Sidra Ishaq, Advocates.**  
**(for respondent No. 2)**  
**Respondent No.2 along with Syeda Fatima Zohaib Shah, Minor.**  
**Mr. Sadaqat Ali Jahangir, State Counsel.**  
**Mr. Talah, A.S.I.**

**Date of hearing : 07.05.2021.**

**LUBNA SALEEM PERVEZ, J.** Instant writ petition, under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, has been moved by the petitioner Maham Mehmood wife of Syed Muhammad Zohaib Shah for setting aside order dated 16.04.2021, passed by learned Additional Session Judge-IX, West-Islamabad/Respondent No. 1, whereby the application under Section 491 Cr.P.C filed by the petitioner for recovery of minor / detenue namely Syeda Fatima Zohaib aged about 2 ½ years, was dismissed on the ground of attachment and inclination of the minor girl with her aunt and grandmother and declared the custody of the detune with Respondent No. 2 (real father) being legal and proper.

2. Facts as per petition as well as argued by the counsel for the petitioner are that the Petitioner and Respondent No. 2 got married on 09.12.2016 and from the wedlock two children Syeda Fatima Zohaib Shah and Syed Ahmed Shah were born. Syeda Fatima Zohaib is about 2 ½ years and Syed Ahmed Shah is about 02 months. The Petitioner was allegedly deserted from the house by Respondent No. 2

while snatching minor daughter Syeda Fatima Zohaib Shah, however, the infant Syed Ahmed Shah was remained with the Petitioner.

3. Learned counsel for the petitioner submitted that minor / detenue Syeda Fatima Zohaib is of tender age and is not safe in the custody of her aunt and grandmother (Respondent No.2 sister and mother); that the minor has been illegally confined by father/Respondent No. 2, whereas petitioner is not allowed to meet the minor daughter; that the impugned order dated 16.04.2021 is against the settled principle of law that the custody of minors specially the minor girls should remain with mothers; that the affection and inclination of the minor towards her aunt and grandmother has been wrongly considered for custody of the minor to Respondent No. 2 as the minor is only 2 ½ years of age and too young and innocent to understand the actual sense of affection and inclination as if she remains in the custody of any other person for few days she will show the same affection and inclination for that person; that the reasons recorded in the impugned order for dismissing the application under Section 491 Cr.PC and handing over the custody of minor girl to her father are unjust and unlawful, as such, the impugned order is liable to be set-aside. Learned counsel prayed that the custody of the minor Syeda Fatima Zohaib be handed over to the Petitioner. Learned counsel in support of his contentions placed reliance on the case law reported as *Mst. Saima Bibi Versus Raheel Butt (2014 MLD 38)* and *Karam Khatoon versus Senior Superintendent Of Police, District Khairpur (2016 MLD 29)*.

4. On the other hand, learned counsel for Respondent No. 2/Father of the minor girl submitted that the marriage between the parties is still intact; that the petitioner has not been deserted from the house by Respondent No. 2 and she left the house with her own will; that Respondent No.2 is trying his best to resume the marital relations with the Petitioner as he for the sake of his children does not want break-

up of his marriage; that the petitioner due to her stubbornness is not responding positively to his reconciliation effort; that the minor girl is very much attached to her aunt and grandmother and if the custody of the minor is handed over to the petitioner it would impact adversely on her mental and physical health. Learned counsel prayed for dismissal of titled petition.

5. Arguments heard. Record perused.

6. Admittedly, the marriage between the parties is still subsisting and apparently it seems that neither of the parties would opt to proceed for dissolving the marriage. It seems that some petty domestic dispute has flared-up which resulted in a temporary separation between the spouses and sitting in a writ jurisdiction under Article 199 of the Constitution, it is not legally permissible to dig-out and determine the facts regarding petitioner's leaving the house willfully and deliberately by taking the infant son who was about 40 days at that time along with her or she was deserted from the house while snatching of minor girl by the father / Respondent No. 2. Hence, at this juncture the question of recovery of minor girl under Section 491 Cr.PC is to be considered only. It has been held in case of *Muhammad Afzaal versus Sessions Judge, Multan (PLD 2008 Lahore 479)*. The proceedings under Section 491 Cr.PC are held to be of summary nature and confined to the recovery of minor / detainee who is allegedly kept in illegal or improper custody. That it is also well settled that custody of the minors with the father is not illegal since he is also a natural guardian of the minor children and reference in this regard can be made to judgment passed in the case re: *Mst. Abida versus S.H.O., Ratodero Police Station (District Larkana) (2014 YLR 705)*. However, under the principles of Mohammadan law, and family laws and laws relating to custody of the children applicable in the Country, the mother has a preferential right of custody of the minor especially when the minor is a female

child. In this regard, guidance has been taken from the judgment of Hon'ble Lahore High Court in case reported as *Hina Jilani Versus Sohail Butt (PLD 1995 Lahore 151)*, wherein it has been held that:-

*“under Muslim Law, the mother has a right to retain the custody of a minor girl till she attains the age of puberty and a strong presumption arise that it is in the welfare of the minor girl to hand over the custody to the mother under the Muslim Personal Law. Indeed as has been often remarked by the Courts a lap of mother is God's own cradle and Almighty Allah has not created any substitute for it. It needs no gain saying that a minor girl and that too of tender age of one year requires care, attention, love and affection which a mother can alone bestow on her daughter. We are fully recognised that under the Islamic law the father is a guardian of both of the person as also the property of the minor but the fact remains that the custody of a minor of tender age and moreso, of a female vests in the mother and on the maternal side. It is only where the mother is found to be disqualified for any reason to retain the custody of the minor that she can be deprived of the right of Hizanat. of course, the paramount consideration is always welfare of the minor but there is a strong presumption arising under the Muslim Laws that it is in the welfare of the minor daughter that she should remain in the custody of the mother.”.*

7. Moreover, in accordance with para 352 of *Mohammadan Law*, the entitlement of custody “*Hizanat*” of the male child up to the age of 7 years and of female child until she attains puberty has been given to mother and such right continues despite pronouncement of divorce from the father of the child till she marries the second husband in which case the father of the child is entitled for custody being the next natural guardian. Para 352 of *Mohammadan Law*, for ready reference is also reproduced below:-

*“352. Right of mother to custody of infant children. – The mother is entitled to the custody (hizanat) of her male child until he has completed the age of seven years and of her female child until she has attained puberty. The right continues though she is divorced by the father of the child, unless she marries a second husband in which case the custody belongs to the father.”.*

8. Thus, as per above cited provision of law as well as different pronouncements of the superior courts of the country, the law has been established that the mother of the minor children has preferential right of custody, until she becomes disqualified under the law from the custody of the minor daughter.

Moreover, the law also provides appropriate forum for deciding the entitlement of custody of minor after examining and analyzing facts and circumstances of each and every case keeping in view the welfare of the child in all aspects on the basis of evidence under Guardian and Wards Act, 1890.

9. The above are the reasons that the following short order was passed on 07.05.2021:-

*“For the reasons to be recorded later, instant petition is allowed. The temporary custody of the minor girl namely Syeda Fatima Zohaib Shah aged about 2 ½ be handed over to the petitioner, and the respondent No. 2 may approach the concerned guardian Court for the custody of minor if so advised, however, without prejudice to the decision, it is expected that the respondent No. 2/father being a natural guardian would not be deprived to meet his children.”.*

However, the order is modified to the extent that both the parties are at liberty to approach the Guardian Court for proper custody of the minor, if so advised.

**(LUBNA SALEEM PERVEZ)**  
**JUDGE**