

JUDGEMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

CRIMINAL REVISION NO. 54 of 2021

Abdul Farooq and another

Vs

Mst. Maryam Farooq and others

PETITIONERS BY: Syed Javed Akbar Shah and Hafiz Syed Afzal Ahmed, Advocates.

RESPONDENTS BY: Raja Nisar ul Haq Abbasi, Advocate for respondents No. 1 and 2.
Parties in person.

DATE OF HEARING: 15.11.2021.

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BABAR SATTAR, J.- The petitioners have challenged the order passed by the learned Additional Sessions Judge, West-Islamabad dated 10.09.2021 pursuant to which petition under section 491 Cr.P.C filed by respondents No. 1 and 2 was allowed and custody of minors was handed to said respondents.

2. The petitioners and respondents No. 1 and 2 are spouses and their marriages are still intact. Petitioner No.1 and respondent No.1 were married on 15.11.2011 and have three children. It is the petitioner's case that respondent No.1 left her marital home on 14.06.2021 leaving behind three children and did not return to her matrimonial home. Petitioner No.2 and respondent No. 2 were also married on 15.11.2011 and have four children. It is the petitioner's case that respondent No.2 left her marital home on 14.08.2021 along with her daughters, Dua

Fatima and Hayat Zahra, and did not return to her matrimonial home thereafter.

3. After the learned Additional Sessions Judge allowed the petition of respondents No. 1 and 2 under section 491 Cr.P.C and ordered that the custody of minor children of respondents No. 1 and 2 be handed over to the said respondents (except the custody of Hayat Zahra who is a suckling baby and was already in the custody of respondent No.1). The order of the learned Additional Sessions Judge was not implemented and the minors are still in the custody of the petitioners.

4. Learned counsel for the petitioners submitted that respondents No. 1 and 2 are real sisters and are married to the petitioners, who are brothers and that respondents No. 1 and 2 are also first cousins of the petitioners. That respondents No. 1 and 2 left their matrimonial homes without any cause abandoning their children, except Hayat Zahra who remains in the custody of respondent No.2 being a suckling baby. That on 16.08.2021 petitioner No. 2 became aware that respondent No.2 had taken away with her Rs. 300,000/- along with a gold necklace set and gold rings of the children and handed over these valuable articles to her father who is a "notorious gambler and a drug addict" and consequently petitioner No.2 filed a criminal complaint of the incident with respondent No.3 and that in view of such criminal complaint respondents No.1 and 2 filed their petition under section 491 Cr.P.C as a counter measure. He contended that the order of the learned Additional Sessions Judge could not be implemented as the children refused to go

along with their mothers and returned to their father outside the court on the day when the impugned order was passed. He submitted that remedy under section 491 Cr.P.C was an exceptional remedy and was to be used sparingly. That none of the children were suckling babies, other than Hayat Zahra who was already in the custody of respondent No.2. That respondents No. 1 and 2 left their matrimonial homes and the children were not illegally snatched and consequently custody of the children with their fathers were not illegal. He contended that it has been held by the august Supreme Court that in cases of real urgency and determination of illegality of continuing custody of children that powers under section 491 Cr.P.C could be exercised. He relied on **Naziha Ghazali Vs. The State (2001 SCMR 1782)**, **Mst. Nadia Perveen Vs. Mst. Almas Noreen and others (PLD 2012 SC 758)**, **Mst. Seema Vs. Aftab Ahmed and others (2013 YLR 583)** and **Jahan Ara Vs. Province of Sindh through Secretary Home Department, Karachi and others (2019 MLD 1722)**. The learned counsel for the petitioners contended that the impugned order was a non-speaking order and it was for welfare of the children that their custody remains with their fathers.

4. Learned counsel for respondents No. 1 and 2 submitted that cause of action arose on 13.08.2021 and 14.08.2021 when matrimonial dispute arose between the parties. But the petition was filed on 07.09.2021 because given that marriages of respondents No. 1 and 2 with the petitioners were still subsisting, and there was an effort to resolve the matter amicably through counseling of elders in the family. He

submitted that respondents No. 1 and 2 were driven out of their matrimonial homes by the petitioners due to the abusive behavior and it was in view of the domestic abuse suffered by respondents No. 1 and 2 that they decided that they could no longer live in their matrimonial homes. That the children are still young and dependent on their mothers, who took care of them while living in their matrimonial homes, and it was the mothers who were entitled to the legal custody even if they were not living in their matrimonial homes. He submitted that ages of children ranged from less than three years up to eight years and it was in the interest of the children that they stay together with other siblings. He submitted that respondents No. 1 and 2 were lodging at the house of their father, which was a short distance away from the house of the petitioners and also from the school in which the children are admitted, and the custody of the children being handed over to respondents No. 1 and 2 would further the welfare of the children and would not undermine and disrupt the life of the children in any manner. He submitted that the unlawful conduct of the petitioners was obvious from the fact that despite a clear order passed by the learned Additional Sessions Court, the custody of the children was not handed over to respondents No. 1 and 2.

5. While allowing petition of respondents No. 1 and 2 under section 491 Cr.P.C, the learned Additional Sessions Judge recorded the following reasons.

"Petitioners are real mothers of the minors and there is no substitute of real mother. Two minors namely Ayyan Haider and Shayan Haider are beyond age of 'Hazarat' as per

entitlement of their mothers whereas other minors are within the 'hazanat' of their mothers. A daughter namely Hayat Zohra is already in custody of her mother. The minors except Ayyan Haider and Shayan Haider are of tender ages and they require company of their mothers. Undoubtedly, lap of mother is God's cradle. As far as minors Ayyan Haider and Shayan Haider are concerned, it is in their welfare to live jointly with their other siblings."

6. Section 491 of Cr.P.C states the following:

491. Power to issue directions of the nature of a habeas corpus: (1) Any High Court may, whenever it thinks fit, direct—

(a) that a person within the limits of its appellate criminal jurisdiction be brought up before the Court to be dealt with according to law;

(b) that a person illegally or improperly detained in public or private custody within such limits be set at liberty ;

(c) that a prisoner detained in any Jail situated within such limits be brought before the Court to be there examined as a witness in any matter pending or to be inquired into in such Court;

(d) that a prisoner detained as aforesaid be brought before a Court martial or any Commissioners for trial or to be examined touching any matter pending before such Court martial or Commissioners respectively ;

(e) that a prisoner within such limits be removed from one custody to another for the purpose of trial; and

(f) that the body of a defendant within such limits be brought in on the Sheriff's return of Cepi Corpus to a writ of attachment.

(1A) The High Court may, by general or special order published in the official Gazette, direct that all or any of its powers specified in clauses (a) and (b) of subsection (1) shall, subject to such conditions, if any, as may be specified in the order, be exercisable also by-

(a) a Sessions Judge; or

(b) an Additional Sessions Judge,

within the territorial limits of Sessions Division.

(2) The High Court may, from time to time, frame rules to regulate the procedure in cases under this section.

(3) Nothing in this section applies to persons detained under any law providing for preventive detention.

7. The jurisdiction of a court adjudicating a habeas corpus petition in relation to a child cannot be confused with an ordinary habeas corpus petition where the focus of the court is on the recovery of the person illegally detained in order to uphold his Article 9 rights to life and liberty. In case of a minor, his right to liberty under Article 9 of the Constitution entails a right to be in the custody of the person who ought to have the custody of the minor in accordance with law, as till such time that the minor attains the age of majority he/she has a right to be taken care of whether by parents or relatives or the State. And consequently the focus of the court in a habeas corpus petition filed on behalf of a child is not just on illegal detention but on ensuring that the interim custody of the minor pending its determination by a Guardian Court is being dealt with in accordance with law.

8. That a habeas corpus petition filed for the lawful treatment of a minor is not to be confused with abduction or illegal detention of an adult and the consideration to be borne in mind in such matter is the welfare of the minor as recognized across common law jurisdictions.

- (i) It is stated in the Halsbury's Laws of England, Fourth Edition, Vol.24 (para 511) that:

"511. ...Where in any proceedings before any court the custody or upbringing of a minor is in question, then, in deciding that question, the court must regard the minor's welfare as the first and paramount consideration, and may not take into consideration whether from any other point of view the father's claim in respect of that custody or upbringing is superior to that of the mother, or the mother's claim is superior to that of the father."

- (ii) Baily states in Habeas Corpus, Vol. I, (PP.581) that:

"The reputation of the father may be as stainless as crystal; he may not be afflicted with the slightest mental, moral or physical disqualifications from superintending the general welfare of the infant; the mother may have been separated from him without the shadow of a pretence of justification; and yet the interests of the child may imperatively demand the denial of the father's right and its continuance with the mother."

- (iii) In McGrath, Re, (1893) 1 Ch 143, it was observed that:

"The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of the child is not to be measured by money only nor merely physical comfort. The word 'welfare' must be taken in its widest sense. The moral or religious welfare of the child must be considered as well as its physical well-being. Nor can the tie of affection be disregarded."

- (iv) American Jurisprudence, Second Edition, Vol. 39 (para 148) notes that:

"Generally, where the writ of habeas corpus is prosecuted for the purpose of determining the right to custody of a child, the controversy does not involve the question of personal freedom, because an infant is presumed to be in the custody of someone until it attains its majority. The Court, in passing on the writ in a child custody case, deals with a matter of an equitable nature, it is not bound by any mere legal right of parent or guardian, but is to give his or her claim to the custody of the child due weight as a claim founded on human nature and generally equitable and just. Therefore, these cases are decided, not on the legal right of the petitioner to be relieved from unlawful imprisonment or detention, as in the case of an adult, but on the Court's view of the best interests of those whose welfare requires that they be in custody of one person or another; and hence, a court is not bound to deliver a child into the custody of any claimant or of any person, but should, in the exercise of a sound discretion, after careful consideration of the facts, leave it in such custody as its welfare at the time appears to require. In short, the child's welfare is the supreme consideration, irrespective of the rights and wrongs of its contending parents, although the natural rights of the parent are entitled to consideration."

(v) In *Howarth V. Northcott* (152 Conn. 460), the

Supreme Court of Connecticut held that:

"The employment of the forms of habeas corpus in a child custody case is not for the purpose of testing the legality of a confinement or restraint as contemplated by the ancient common law writ, or by statute, but the primary purpose is to furnish a means by which the court, in the exercise of its judicial discretion, may determine what is best for the welfare of the child, and the decision is reached by a consideration of the equities involved

in the welfare of the child, against which the legal rights of no one, including the parents, are allowed to militate.”

The law laid down in Pakistan is in sync with the jurisprudence referred to above as it is now settled that in exercise of jurisdiction under section 491 of Cr.P.C, the welfare of the child is the primary and predominant consideration.

9. It is settled by now that jurisdiction of a court under section 491 Cr.P.C is not to be confused with the jurisdiction vested in the guardian court under the Guardians and Wards Act, 1890 and consequently it is not for the court while exercising jurisdiction under section 491 Cr.P.C to determine the entitlement of the parent to retain the custody of a minor on a permanent basis.

10. It was held by the august Supreme Court in **Muhammad Javed Umrao Vs. Miss Uzma Vahid (1988 SCMR 1891)** that section 491 Cr.P.C and the provisions of Guardians and Wards Act, 1890 are neither mutually exclusive nor overlap or destroy one another. Thus to the extent of question of permanent custody of a minor, the matter falls within the domain of the guardian court pursuant to the provisions of the Guardians and Wards Act, 1890. And the remedy available under section 491 Cr.P.C is not a remedy available for declaring or determining the question of custody of a minor on a permanent basis. However, courts are obliged to exercise their jurisdiction under section 491 Cr.P.C in a proper case where the question of treatment of a minor in accordance

with law comes before the court, pending determination of custody by the guardian court.

11. It was held by the august Supreme Court in **Nisar Muhammad Vs. Sultan Zari (PLD 1997 SC 852)** that availability of a remedy under the Guardians and Wards Act, 1890 is no bar to exercise of jurisdiction under section 491 Cr.P.C and the availability of such remedy is not in and of itself a valid ground for refusing to interfere in the custody of minor by a parent who is otherwise not entitled to such custody. In para. 9 of the said judgment, the following was held:

"In the judgment of Mst. Rizwana Bokhari's case (supra), Muhammad Munir Khan. J. (as his Lordship then was) had rightly laid down the law which we are inclined to approve that on examination of the various provisions of Muslim Law, the Criminal Procedure Code, particularly its section 491, Cr.P.C. and sections 361 and 363 of the P.P.C. indicate that mother is entitled to 'hizanat' of her male child below the age of 7 years, failing that the mother's relations under Muslim Personal Law are entitled to the custody of the minor. Since the two male minors in this case are admittedly below 7 years in age and the three females have not yet attained puberty all the three being less than 8 years, the respondent is, therefore, prima facie entitled to 'hizanat' of all the 5 for the limited purpose of section 491, Cr.P.C. at the moment and the rights of the petitioners to the custody of the aforesaid minors has not accrued so far. In these circumstances, the custody of the aforesaid minors with the petitioners was, therefore, rightly declared illegal or at least improper by the learned Chief Justice of the Peshawar High Court. The learned Chief Justice was also justified to have expressed more than once that ultimate determination of entitlement of the custody shall of course lie with the Guardian Judge to whom the parties were directed to approach, if they so desired.

12. In **Naziha Ghazali Vs. The State (2001 SCMR 1782)** a petition under section 491 Cr.P.C was filed by the mother after almost six months of the accrual of the cause of action. The august Supreme Court held that there was no explanation for delay in reporting the removal of the minor from the custody of the mother. The custody of the minor with the father was found not to be illegal, especially as no proceedings for determination of custody of the minor on a permanent basis were pending before the guardian court either.

13. It was held by the august Supreme Court in **Khalida Parveen Vs. Muhammad Sultan Mehmood (PLD 2004 SC 1)** that in exercise of jurisdiction under section 491 Cr.P.C the court should not to go into technicalities of law and should decide the matter before it in view mainly of the welfare of the child and *also "ensure that the rights conferred upon the child are fully protected in a suitable manner"*.

14. It was held by the august Supreme Court in **Mst. Nadia Perveen Vs. Mst. Almas Noreen and others (PLD 2012 SC 758)** that jurisdiction under section 491 Cr.P.C is only to be exercised where the children of very tender age and have been snatched away from lawful custody quite recently and there is real urgency in the matter. In the said case the children were neither found to be of tender ages nor snatched away from the mother and it was held that the case was not made out for exercise of jurisdiction under section 491 of Cr.P.C.

15. The latest view of the august Supreme Court was recorded in **Mirjam Abberrras Lehdeaho Vs. SHO, Police**

Station Chung, Lahore and others (2018 SCMR 427),

wherein it was held that:

"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. The two provisions of law namely section 491, Cr.P.C. and section 25 of the Guardians and Wards Act deal with two different situations. As such, the question of ouster of jurisdiction of the High Court on account of provisions of sections 12 or 25 of the Guardians and Wards Act or pendency of proceedings under the said provisions does not arise. There is no overlap between the two provisions as both are meant to cater for different situations, the first to cater for an emergent situation, while the latter to give more long term decisions regarding questions relating to guardianship of minors keeping in view all factors including their best interest and welfare.

16. In a matter involving the right of a minor to be dealt with in accordance with law under section 491 of Cr.P.C, the question before the Court is not whether a child has been abducted by a parent in the ordinary sense. During the subsistence of marriage both parents have joint custody of their minor children. In the case of a matrimonial dispute or altercation between the spouses, it is not necessary that the children must be physically snatched from one parent to bring the matter within the scope of section 491 of Cr.P.C. In the event that a husband subjects his wife to abuse forcing her to leave the matrimonial home, the court cannot turn a blind eye to the circumstances in which the shared custody of the children was transformed into sole custody. In such circumstances, for purposes of section 491 Cr.P.C, it is not for the court to sit in judgment over who is at fault in the matrimonial dispute, but how would the welfare of a child be best preserved, in the interim, when joint custody of the child shared by both parents is not an option.

17. For a considerable period the "Tender Years Doctrine" has guided the exercise of discretion by courts in custody matters, where courts assumed that healthy development occurred when young children were raised by their mothers. However, contemporary psychological and sociologically research questions the assumption that the mother is necessarily the best parent for raising a child in all circumstances (see for example Santrock & Warshak, Father Custody and social Development in Boys and Girls, 35 J. Soc. Issues 112 (1979); Watts V. Watts, 77 Misc.2d 178, 181-182,

350 N.Y.S.2d 285, 289-90, (Fam.Ct.1973)). Research is now pointing to the need for evolving a more gender-neutral approach to child welfare given changing social structures and two-career families etc. One of the questions to ask while considering the child's welfare in a custody matter in order to accord continuity to such welfare is which of the parents is the primary caregiver. The parent who maintains the strongest bond with the child as a result of daily attention to the child's physical and psychological needs is regarded as the psychological parent (see J. Goldstein, A. Freud & A. Solnit, *Beyond the best interests of child* (1979)). In a nut shell, an important consideration for the court while addressing the question of interim custody in the child's welfare is ensuring the continuity of care for his/her physical and psychological needs by the parent who customarily provides such care.

18. In the instant case the respondents No. 1 and 2 appeared before the Court and submitted that they were on the receiving end of domestic abuse and when such abuse became insufferable they had no option but to seek refuge in the house of their parents. In their pleadings and submissions the petitioners have alleged that the maternal grandfather of the children (who is also the uncle of the petitioners) is a gambler and drug addict, without any record produced before the Court to substantiate such serious allegations against the father of respondents No. 1 and 2 and the father-in-law of the petitioners. The children were produced before the Court and they were interviewed in Chambers and were found by this Court to have been tutored, with the older children dissuading

their younger siblings from speaking. The children narrated what appeared to be a tutored lesson that their mothers were not nice persons and did not behave well with their fathers. The attitude of the children was clearly different when they were interviewed in the Chambers along with their mothers, as they seemed to interact well with their mothers in the absence of the petitioners. This Court has found that the brainwashing of minor children instilling ill-will against their mothers and using them as a tool in the matrimonial dispute between parents by their fathers cannot be in the welfare of the children. Notwithstanding any strain in the relationship between the parents, inciting resentment for the mother does not promote the welfare of a child and an environment in which rancor for a parent is being nurtured is not the best environment for the emotional and moral welfare of the child.

19. This Court also finds no infirmity in the reasoning of the learned Additional Sessions Judge recorded in the impugned order, which held that it was in the welfare of the siblings to stay together. Given that the younger children are more dependent on their mothers who have remained the primary caregivers to the children for their physical and psychological needs, the learned Additional District Judge rightly came to the conclusion that the children ought to be stay together in the custody of the mothers for the time being. Admittedly, a guardian petition has been filed by the petitioners before the guardian court and it was for such court to determine wherein the welfare of the children lies for granting custody in the event

that the petitioners and respondents are unable to resolve their matrimonial disputes.

20. It is expected that the learned Guardian Court will decide the question of custody within a period of sixty days, in accordance with law, without being influenced in any manner by the observations of this Court in the instant judgment. Further, in order to ensure that the petitioners have parenting time with the children pending adjudication of custody on a permanent basis by the learned Guardian Court, the petitioners may collect the children from the lodging of respondents No. 1 and 2 every Saturday at 3.00 pm and drop them back by 3.00 p.m on Sunday.

21. The revision petition is **disposed off** in the above terms.

(BABAR SATTAR)
JUDGE

Approved for reporting

Saeed.