

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.3169/2018

Fizza Mai

Versus

Shahbaz Hassan Khan and others

Date of Hearing: 13.06.2019

Petitioner by: Mian Imtiaz Haider, Advocate

Respondents by: Mr. Muhammad Ayaz Gondal, Advocate
for respondent No.1.

MIANGUL HASSAN AURANGZEB:- Through the instant writ petition, the petitioner (Fizza Mai) impugns the order dated 01.08.2018, passed by the Court of the learned Additional District Judge, Islamabad, whereby custody of minor, Sehrish, was handed over to her father/respondent No.1 in exercise of jurisdiction under Section 491 Cr.P.C.

2. The facts essential for the disposal of this petition are that Shahbaz Hassan Khan (respondent No.1) and Kinza Fatima had been married. The couple were blessed with a daughter, Sehrish, who is presently 09 years of age. Six days after Sehrish's birth, Kinza Fatima passed away.

3. Respondent No.1 had proceeded abroad to earn a livelihood and after his return to Pakistan he, on 31.07.2018 (i.e. eight years after Sehrish's birth), filed a petition under Section 491 Cr.P.C. seeking a direction in the nature of *habeas corpus* to Mst. Fizza Mai (petitioner) to produce Sehrish, presently aged 09 years, and for her custody to be given to him. Vide impugned order dated 01.08.2018, the Court of the learned Additional Sessions Judge, Islamabad, disposed of respondent No.1's petition under Section 491 Cr.P.C. by temporarily giving Sehrish's custody to respondent No.1 subject to the submission of surety bonds in the sum of Rs.1,00,000/- with one surety. Respondent No.1 was also directed to produce the minor before the Court of the learned Guardian Judge and not to stop the visitation of the petitioner with the minor. The Court also observed that there was much attachment between the petitioner and Sehrish.

The said order dated 01.08.2018 has been assailed by the petitioner in the instant writ petition.

4. Prior to the filing of the petition under Section 491 Cr.P.C., the petitioner's petition for being declared as Sehrish's guardian was dismissed by the Court of the learned Guardian Judge, Islamabad, vide judgment dated 31.05.2018.

5. Learned counsel for the petitioner, after narrating the facts leading to the filing of the instant petition, submitted that the petitioner has taken Sehrish's care ever since her mother's death on 10.04.2010; that respondent No.1 remained abroad for several years and had not provided any maintenance for Sehrish; that the suit for the recovery of maintenance filed by the petitioner and Sehrish against respondent No.1 was decided on 07.04.2018 on the basis of the statement given by the learned counsel for respondent No.1; that respondent No.1 was ordered to pay monthly maintenance of Rs.5,000/- for Sehrish until her marriage; that this establishes the fact that respondent No.1 was well aware as to Sehrish being in the petitioner's lawful custody; that had respondent No.1 provided maintenance for Sehrish, the occasion for filing a suit for recovery of maintenance against respondent No.1 would not have arisen; that Sehrish was not placed in illegal confinement at any material stage; that the petitioner had not forcibly taken Sehrish from respondent No.1's custody; that the provisions of Section 491 Cr.P.C. were not attracted in the case at hand; and that the welfare of Sehrish would be best served if the petitioner is given her custody. Learned counsel for the petitioner prayed for the writ petition to be allowed in terms of the relief sought therein.

6. On the other hand, learned counsel for respondent No.1 submitted that respondent No.1 returned from abroad so that he could take care of his daughter; that since the petitioner's guardian petition was dismissed by the learned Guardian Judge, it would be presumed that her custody over Sehrish was not lawful; that respondent No.1, being Sehrish's father, had got a preferential right to have her custody as compared to the petitioner, who is her maternal grandmother; and that respondent No.1 shall show absolute compliance with conditions imposed in the impugned order dated

01.08.2018 and shall ensure that there is no default in the visitation between the petitioner and Sehrish. Learned counsel for respondent No.1 prayed for the writ petition to be dismissed.

7. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance.

8. The facts leading to the filling of the instant petition have been set out in sufficient details in paragraphs 2 to 5 above and need not be recapitulated.

9. What has been challenged in the instant petition is the order dated 01.08.2018, passed by the Court of the learned Additional Sessions Judge, Islamabad, whereby Sehrish's custody was temporarily given to respondent No.1, being her father and natural guardian. Express reference in the said order dated 01.08.2018 has been made to the earlier judgment dated 31.05.2018, passed by the learned Guardian Judge, whereby the petitioner's application to be appointed as the guardian of the person of the minor, Sehrish, was dismissed. It has also been noted that no specific order had been passed by the learned Guardian Judge as regards Sehrish's custody. The petitioner's visitation with Sehrish was ordered to continue.

10. A Court, in exercise of its jurisdiction under Section 491 Cr.P.C., can direct that any person "*illegally or improperly detained*" in public or private custody within its limits be set at liberty. A petition under Section 491 Cr.P.C., or a writ of *habeas corpus* is not ordinarily found to be competent where there is no element of illegal custody of a minor. However, in the interests of the child's welfare, the Court can pass an appropriate order in exercise of its inherent jurisdiction. A Court while deciding such petitions does not conduct detailed inquiries or go into factual controversies. Such proceedings are summary in nature and aimed at 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.

11. Jurisdiction under Section 491 Cr.P.C. is exercised by a Court so as to "*restore*" the custody of the detinue to the person where it

rightfully and lawfully belongs. Before passing an order for the restoration of custody, the Court must form a *prima-facie* view that the custody from which the detinue is sought to be recovered is “*illegal and improper*”, and that there is a real urgency in the matter. Where the detinue is a minor, the snatching or removal from the custody of the applicant has to be an incident of the recent past.

12. In the case at hand, it is an admitted position that ever since Sehrish was six days of age, her custody has been with her maternal grandmother, i.e. the petitioner. There is nothing on the record to suggest that Sehrish’s upbringing by the petitioner was wanting or deficient in any manner. In the proceedings before the learned Guardian Judge, respondent No.1 had admitted that just seven months prior to the recording of his evidence, he had returned from Dubai. For eight long years, Sehrish was cared for by her maternal grandmother. Could it be said that for the eight years that Sehrish had lived with her maternal grandmother, she was in fact “*illegally or improperly detained*”? I would say, most certainly not. Since neither was Sehrish snatched by her grandmother from her father in the recent past and since there was no urgency in the matter due to the fact that Sehrish had remained in her grandmother’s custody for eight years, I am of the view that the very ingredients for the exercise of jurisdiction under Section 491 Cr.P.C. were lacking in the case at hand. In holding so, I derive guidance from the law laid down in the following cases:-

- (i) In the case of Mst. Nadia Perveen Vs. Mst. Almas Noreen (PLD 2012 SC 758), a mother of three minor children, aged 8, 10 and 12 years, had left them in the care of her deceased husband’s relatives. Subsequently, she filed a petition before the Hon’ble High Court under Section 491 Cr.P.C. for the recovery of their custody from her deceased husband’s sister. The High Court dismissed her petition on the ground that the children had not been removed from the mother’s custody and could not be said to be illegally detained by their aunt. The Hon’ble Supreme Court while dismissing the mother’s appeal held as follows:-

“3. 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.”

- (ii) In the case of Shazia Akbar Ghalzai Vs. Khurram Mehboob (2019 SCMR 116), after a father had handed over custody of his minor son to the mother, he visited the mother’s residence and took away the minor from her custody. This prompted the mother to file a petition under Section 491 Cr.P.C. before the Hon'ble High Court. The Hon'ble High Court disposed of the said petition by holding that the father had taken the minor out of its territorial jurisdiction. Pursuant to the order passed by the Hon'ble Supreme Court, custody of the minor was handed over to the mother. The Hon'ble Supreme Court allowed the mother’s appeal against the order of the Hon'ble High Court. It was held that the minor’s custody shall continue with the mother *“subject to any other order passed by a Court of competent jurisdiction in appropriate proceedings”*. The father was left to assert his rights before a Guardian Court in accordance with the law.
- (iii) In the case of Mah Rukh Bajwa Vs. Aftab Alam (2008 MLD 751), a petition filed under Section 491 Cr.P.C. by the mother of two minor children was dismissed by the Hon'ble Lahore High Court on the ground that the children were living with their paternal uncle and paternal grandmother since a few years and that the children were not snatched from their mother in the recent past. Since the children’s father had been abducted years ago, their custody with their uncle and grandmother could not be termed as illegal and improper.

(iv) In the case of Irshad Bibi Vs. District Police Officer (2019 P.Cr.L.J. 436), the Hon'ble Lahore High Court held that the matter of custody of a minor can be brought before a High Court under Section 491 Cr.P.C. only if (i) the child is of very tender age, (ii) he has quite recently been snatched away from lawful custody, and (iii) there is real urgency in the matter. In the said case, the custody of the minor, who was a 13-day old suckling baby, and had been taken away from the mother's custody a few days earlier, was ordered to be handed over to the mother in exercise of the power under Section 491 Cr.P.C. In the said report, it was *inter-alia* observed that the minor's father could approach the Guardian Court for the minor's custody.

13. Another question that needs to be answered is whether Sehrish's custody by her maternal grandmother would transform into an *"illegal or improper detention"* simply on account of the dismissal of the petitioner's application for the grant of guardianship certificate by the learned Guardian Judge. In the impugned order dated 01.08.2018, the Court of the learned Additional Sessions Judge, Islamabad, had observed that although the petitioner's guardian petition had been dismissed by the Court of the learned Guardian Judge, vide judgment dated 31.05.2018, *"regarding custody of minor, no specific order had been passed by the learned Guardian Judge that whom the custody of minor be given."* Even if it is assumed that the learned Guardian Judge had directed for Sehrish's custody to be handed over to her father/respondent No.1, the latter could not have filed a petition under Section 491 Cr.P.C. so as to enforce such an order passed by the learned Guardian Judge. In the case of Ayesha Naseer Vs. District and Sessions Judge (2011 YLR 78), even though a mother's application under the Guardians and Wards Act, 1890, for her appointment as the guardian of the person and property of her minor children had been allowed by the learned Guardian Judge, Pakpattan Sharif, her petition under Section 491 Cr.P.C. for the recovery of the children from the custody of their maternal grandparents was dismissed by the Court of the learned Sessions Judge, Pakpattan Sharif. The Hon'ble Lahore High Court did not

interfere with the said order since it could not be established with exactitude as to when the minors were removed from the custody of their mother.

14. Contest over the custody of a minor between a father and maternal grandmother is not uncommon. Courts, in exercise of jurisdiction under Section 491 Cr.P.C., tend not to interfere with a maternal grandmother's custody over minors where there is no element of snatching of the minor. Reference in this regard may be made to the following case law:-

- (i) In the case of Nadeem Iqbal Vs. Muhammad Kabir Khan (2011 YLR 348), it was held by the Hon'ble Lahore High Court that the grandmother would have a preferential right for the custody of a minor of tender age whose mother had passed away.
- (ii) In the case of Ayesha Naseer Vs. District and Sessions Judge (*supra*), a petition under Section 491 Cr.P.C. filed by a widow for the recovery of her four minor children from the custody of their maternal grandparents was dismissed by the Court of the learned Sessions Judge, Pakpattan Sharif. The widow assailed the order of the learned Sessions Judge before the Hon'ble Lahore High Court and also sought the issuance of a writ in the nature of *habeas corpus*. Earlier her application under the Guardians and Wards Act, 1890, for her appointment as the guardian of the person and property of her minor children had been allowed by the learned Guardian Judge, Pakpattan Sharif. The Hon'ble High Court did not interfere with the order passed by the learned Sessions Judge, Pakpattan Sharif, and after observing that it could not be established with exactitude as to when the minors were removed from the custody of their mother, dismissed the petition.
- (iii) In the case of Muhammad Khurshid Vs. Ihtisham (2014 PCr.LJ 1249), the petitioner/father filed a petition under Article 199 of the Constitution read with Section 491 Cr.P.C. for the custody of his minor children, aged 3½ years and 9 years, against the minors' maternal grandmother and grandfather. The petitioner's wife i.e. the minors' mother had died. After her death, the custody of the minors was handed over to their

maternal grandparents with the assurance that they would be handed back to the petitioner after ten weeks. The said petition was dismissed by the Hon'ble High Court of Sindh *inter-alia* on the ground that there was no apparent improper and illegal custody of the minors with their maternal grandparents and that an equally efficacious remedy was available under the Guardians and Wards Act, 1890. It was further observed that nothing had been brought on record to show that father could look after the minors with the same zeal as affection as the maternal grandmother.

15. In the case at hand, Sehrish was neither “removed” nor “snatched” by the petitioner from respondent No.1’s custody at any material stage. There is not even an allegation that the petitioner had taken Sehrish away from her father’s custody. There was no element of force, fraud or deceit in Sehrish’s custody by the petitioner for eight years. Since Sehrish had remained in the petitioner’s custody for eight years the question of “restoration” of her custody to respondent No.1 did not arise. All this leads me to hold that the essential pre-requisites for the exercise of jurisdiction under Section 491 Cr.P.C. were absent in the case at hand. Consequently, the impugned order dated 01.08.2018 is without jurisdiction.

16. After declaring the impugned order dated 01.08.2018 passed by the Court of the learned Additional Sessions Judge, Islamabad, to be without jurisdiction, the question that crops up is whether this Court should grant the consequential relief of directing respondent No.1 to hand over Sehrish’s custody back to the petitioner. Ever since the passing of the said order nine months ago, Sehrish has been in respondent No.1’s custody. She has been admitted to school by her father in District Jhang. The petitioner resides in Islamabad, and if Sehrish’s custody is to be returned to the petitioner, she would have to be pulled out from her school in Jhang and re-admitted to her earlier school in Islamabad. If this were to happen, Sehrish’s welfare and interest would not be best served. Respondent No.2 has returned from Dubai and undertaken to show compliance with the visitation schedule being followed pursuant to the order dated 01.08.2018. In the case of Shaukat Masih Vs. Mst. Farhat Parkash

(2015 SCMR 731), a *habeas corpus* petition filed by the mother of a minor girl was allowed by the Hon'ble High Court despite the existence of a guardianship certificate in favor of the minor's paternal grandfather. The Hon'ble Supreme Court observed that even if there were some questions regarding proper exercise of jurisdiction by the High Court in the matter, the minor could not be made into a ping pong ball and her custody shuttled during the legal battles being fought by those interested in her custody. Taking heed of the Hon'ble Supreme Court's judgment in the said case, I am not inclined to direct respondent No.1 to hand over Sehrish's custody to the petitioner. However, in the event respondent No.1 proceeds abroad, the petitioner would have the right to invoke the jurisdiction of the learned Guardian Judge, Islamabad, for Sehrish's custody under the provisions of the Guardian and Wards Act, 1890. Respondent No.1's proceeding abroad would be a contradiction to his stance that he had returned to Pakistan in order to take care of Sehrish's welfare. Disposed of in the above terms. There shall be no order as to costs.

**(MIANGUL HASSAN AURANGZEB)
JUDGE**

ANNOUNCED IN AN OPEN COURT ON _____/2019

(JUDGE)

APPROVED FOR REPORTING

*Qamar Khan**

