

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.2912/2018

Mrs. Hanya Usman

Versus

Federation of Pakistan through Ministry of Interior and others

Date of Hearing: 18.06.2019

Petitioner by: Pir Abdul Wahid, Advocate

Respondents by: Ch. Abdul Jabbar, learned Assistant Attorney-General with Malik Muhammad Danish, Assistant Director (Legal), Ministry of Foreign Affairs.
Dr. Sher Ali Rizvi, Advocate for respondents No.6 to 10.

MIANGUL HASSAN AURANGZEB, J:- Through the instant writ petition under Section 491 of the Criminal Procedure Code, 1898 ("Cr.P.C.") read with Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, the petitioner, Mrs. Hanya Usman, sought the recovery of the detinue, Danial Usman, aged 04 years, from his father, Usman Ashiq Hussain/respondent No.6 and others.

2. The petitioner's case was that she had married respondent No.6 in the year 2012 and the couple was blessed with two children, namely Danial Usman and Haydi Usman. Respondent No.6 works for a living in Ras Al Khaimah, United Arab Emirates ("U.A.E."). In January, 2018, respondent No.6's parents and brother asked the petitioner to allow Danial to visit U.A.E. with them for fifteen days. The petitioner agreed to this and let Danial go with his paternal grandparents to U.A.E. Fifteen days after this, the petitioner asked respondent No.6 and his parents to bring Danial back to Pakistan. Respondent No.6's parents returned to Pakistan without Danial. Respondent No.6 refused to send Danial to his mother. The petitioner continued with her efforts for Danial's return to Pakistan, but to no avail. On 20.07.2018, the petitioner filed the instant writ petition for Danial's recovery from the custody of respondent No.6 and his parents.

3. Respondent No.6's case as borne out from the written objections filed by his counsel, Dr. Sher Ali Rizvi, learned Advocate Supreme Court, was that respondent No.6 had divorced the

petitioner on 01.05.2018; that the petitioner was a psychotic and quarrelsome lady and cheated people by changing her name and age; that the instant petition was filed by the petitioner only to harass and blackmail the private respondents; that respondent No.6 had filed a suit for declaration and mandatory injunction, etc. against the petitioner before the Court of the learned Civil Judge, Islamabad on 04.12.2018, praying for the cancellation of the forged *nikahnama* prepared by the petitioner; that respondent No.6's father, Ashiq Hussain, had filed a petition under Section 491 Cr.P.C. for the recovery of Haydi (aged 02 years) from the petitioner's custody; that respondent No.6 had filed a petition under Section 25 of the Guardian and Wards Act, 1890 for the custody of Haydi; that Danial's custody with respondent No.6 was not illegal or forceful, but with the petitioner's consent; that the petitioner was not fit to be given Danial's custody; and that the petitioner had committed offences in U.A.E. and had been banned from entering the U.A.E.

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

5. This writ petition was filed before this Court on 20.07.2018. It was first taken-up for hearing on 16.10.2018. On the said date, notices were directed to be issued to the respondents. On 02.11.2018, learned counsel for respondents No.6 to 11 informed the Court that Danial Usman was in the U.A.E. with his father (respondent No.6) and would be produced before the Court on the next date of hearing. Consequently, this Court directed that Danial be produced before this Court on the next date of hearing.

6. On 03.12.2018, respondent No.8, who is respondent No.6's mother, tendered appearance before this Court and confirmed that Danial was in U.A.E. with respondent No.6. This Court directed that respondent No.6 be present in the Court on the next date of hearing.

7. On 14.12.2018, an opportunity was sought on behalf of respondent No.6 to show compliance with the said order dated 03.12.2018. This Court also issued notice to Secretary, Ministry of

Interior, with the direction to depute an officer, who deals with the cases relating to the placement of names on the Exit Control List ("E.C.L."), to tender appearance before this Court on the next date of hearing.

8. On 28.12.2018, respondent No.6 tendered appearance before this Court and undertook to produce Danial before the Court. Since respondent No.6 had left Danial in the care of his relatives in U.A.E., this Court directed that the name of respondent No.6 be placed on the E.C.L. Furthermore, respondent No.6 was directed in open Court not to leave Pakistan until the decision of this petition. A copy of the order dated 28.12.2018 was directed to be transmitted to the Section Officer (E.C.L.), Ministry of Interior, as well as the Director General, Federal Investigation Agency ("F.I.A.") and the Directorate General of Immigration and Passports.

9. On 25.01.2019, respondent No.6 did not appear before the Court. Respondent No.6's parents i.e. respondents No.7 and 8 informed the Court that respondent No.6 had proceeded to U.A.E. on 06.01.2019. This Court directed the Director General, F.I.A. and the Director General (Immigration and Passports) as well as the Section Officer (E.C.L.), Ministry of Interior, to appear before this Court and explain as to how respondent No.6 had proceeded abroad despite the direction of this Court to place his name on E.C.L.

10. On 28.01.2019, the Director Law, F.I.A. submitted a report wherein, it was stated that respondent No.6's name was placed on E.C.L. on the very same day on which the order dated 28.12.2018 was passed by this Court, but he had left the country on the same day at 11:30 a.m. This Court was also informed that respondent No.6 after attending the Court on 28.12.2018, had proceeded directly to the airport in order to proceed abroad. Respondent No.6's parents undertook that they will manage respondent No.6's return to Pakistan, if time is granted for this purpose. Consequently, this Court vide order dated 28.01.2019, gave respondent No.6 until 11.02.2019 to appear before this Court along with Danial. Furthermore, this Court directed the F.I.A. to arrange

safe passage for respondent No.6 to appear before the Court and not to arrest him.

11. On 06.03.2019, neither did respondent No.6 appear nor was Danial produced before this Court. This Court, in its order dated 06.03.2019, observed *inter-alia* that respondent No.6, by fleeing the country on the same very day on which the order for the placement of his name on E.C.L. was passed by this Court, and by breaching his undertaking, had *prima facie* abused the process of this Court and had also committed contempt of Court. This Court gave a direction for the compilation of a separate file regarding contempt proceedings against respondent No.6 and to issue notices to respondent No.6 to show cause as to why he should not be punished for contempt of Court. Furthermore, the Secretary, Ministry of Interior, was directed to take emergent steps so as to ensure respondent No.6's transfer to Pakistan so that he is produced before this Court along with Danial at the earliest.

12. On 15.03.2019, again respondent No.6 did not appear before the Court. Khawaja Shahid Rasool Siddiqui and Mr. Shehzad Siddique Alvi, learned counsel for respondent No. 8 also stopped appearing before the Court. On the said date, Mr. Qaiser Masood, Additional Director, F.I.A. and Mr. Farhan Ahmad, Section Officer (Litigation), Ministry of Interior, appeared before the Court and submitted that in order to ensure respondent No.6's attendance before this Court, this Court ought to pass an order to block respondent No.6's passport and Computerized National Identity Card ("C.N.I.C."). Consequently, this Court directed the Ministry of Interior to take steps for the blockage of respondent No.6's passport and C.N.I.C. Furthermore, the learned Assistant Attorney-General ("A.A.G.") was directed to ensure that the Ministry of Foreign Affairs cooperates with the Ministry of Interior in ensuring respondent No.6's expeditious transfer along with Danial to Pakistan.

13. On 21.03.2019, Mr. Abdur Rehman Zia, Law Officer, National Database Registration Authority, tendered appearance before this Court and submitted that respondent No.6's C.N.I.C. had been blocked whereas the learned A.A.G. submitted that the process for

blocking respondent No.6's passport had already been commenced.

14. Khawaja Shahid Rasool Siddiqui, learned counsel for respondent No. 8 is a senior member of the bar. This Court requested Mr. Siddiqui to reason with respondent No.6 not to defy the orders passed by this Court, and if respondent No.6 showed an inclination to submit to the jurisdiction of this Court and produce Danial, appropriate orders could be passed. Mr. Siddiqui sought some time to liaise with his clients in order to seek instructions.

15. On 22.03.2019, Mr. Siddiqui informed the Court that he had been unable to form contact with his clients. The learned A.A.G. informed the Court that respondent No.6 has been blacklisted for future passport facility. He brought on record letter dated 21.03.2019, issued by the Directorate General, Immigration and Passports, which shows that respondent No.6 would not be granted passport facility without the approval of the said Directorate. The learned A.A.G. was asked to ensure that an officer not below the rank of an Additional Secretary, Ministry of Foreign Affairs, tenders appearance before this Court in order to apprise the Court as to the developments in having respondent No.6 repatriated to Pakistan. It may be mentioned that after 22.03.2019, Mr. Siddiqui did not appear on any of the dates of hearing before this Court.

16. In compliance with the said order dated 22.03.2019, Mr. Zahoor Ahmed, Additional Secretary, Ministry of Foreign Affairs, tendered appearance before this Court on 29.03.2019. It was directed that a copy of the entire case file, including the order sheet be provided to him so that measures can be taken for respondent No.6's repatriation along with Danial to Pakistan.

17. On 12.04.2019, the learned A.A.G. submitted that he has been informed that prior to the blockage of respondent No.6's passport, he had proceeded to the United Kingdom.

18. On 19.04.2019, Ms. Rabia Kasuri, Director (Legal), Ministry of Foreign Affairs tendered appearance and submitted a report, according to which, the said Ministry was diligently pursuing the

matter so that the whereabouts of respondent No.6 are located and he is repatriated to Pakistan at the earliest.

19. On 26.04.2019, Ms. Kasuri submitted that the Ministry of Foreign Affairs, had formed contact with the British High Commission at Islamabad, and requested the latter for verification from the British Immigration Authority as to whether respondent No.6 had entered the United Kingdom; and that a response from the British High Commission was awaited.

20. On 03.05.2019, the learned A.A.G. informed the Court that the Embassy of U.A.E. at Islamabad had informed the Ministry of Foreign Affairs that Danial had travelled from U.A.E. to the United Kingdom on 16.03.2019. Mr. Muhammad Danish, Assistant Director, Ministry of Foreign Affairs, informed the Court that the Ministry of Foreign Affairs, had already formed contact with the British High Commission so as to locate Danial's whereabouts in the United Kingdom.

21. Given the significant nature that this case had attained, this Court was of the view that this case ought to be heard by the Division Bench of this Court. Office was directed to place the file before the Hon'ble Chief Justice for such orders as his lordship may deem appropriate.

22. Apparently, respondent No.6 and others had challenged an interlocutory order passed by this Court in this case before the Hon'ble Supreme Court in civil petition No.1167/2019. On 03.05.2019, the Hon'ble Supreme Court passed the following order:-

*“Learned counsel for the petitioners states that the petitioner is interested to pursue the matter. Let the petitioner appear on the next date of hearing alongwith minor namely Daniel Usman.
To come up after two weeks.”*

23. On 14.05.2019, this petition was taken-up by the Division Bench of this Court. Dr. Sher Ali Rizvi, Advocate Supreme Court, tendered appearance on behalf of respondents No.6 to 10 and asked for respondent No.6's passport and C.N.I.C. to be unblocked so as to enable him to travel to Pakistan and tender appearance before this Court. He also confirmed that respondent No.6 and

Danial were in United Kingdom. Given respondent No.6's past conduct reflected in the order sheet of this case, this Court was reluctant to grant the said request. This Court asked Mr. Farhan Ahmed, Section Officer, Ministry of Interior, who was in attendance on behalf of the said Ministry, whether a travel document could be issued to respondent No.6 so as to enable him to travel directly from the United Kingdom to Pakistan, without his C.N.I.C. and passport being unblocked. Mr. Ahmed sought some time to make necessary inquiries regarding this matter.

24. On 15.05.2019, Mr. Ahmed appeared on behalf of the Ministry of Interior and submitted that respondent No.6 could approach the High Commission of Pakistan in the United Kingdom so that a temporary travel document is issued to him so as to enable him to travel to Pakistan. This Court directed the F.I.A. and the Immigration Authorities to facilitate respondent No.6 and Danial to enter Pakistan and appear before this Court on 18.06.2019.

25. On 18.06.2019, respondent No.6 was present in the Court along with Danial. This Court directed respondent No.6 to forthwith handover Danial's custody to his mother i.e. the petitioner. With Danial's custody having being handed over to his mother, this petition had borne fruit.

26. The reason why we have referred to the various stages of this litigation is to highlight the fact that respondent No.6's recurring efforts to frustrate the orders passed by this Court could ultimately not succeed. It is this conduct of respondent No.6 which caused us not to believe his version set out in the written objections submitted on his behalf. Since Danial being presently four years and eight months of age is within the age of *Hizanat*, we are of the view that the petitioner has a preferential right over his custody. It is well settled that according to Muslim Personal Law, a mother has a preferential right to *Hizanat* (temporary custody of the mother) till the minor attains the age of seven in the case of male and the age of puberty in the case of female minor. Reference in this regard may be made to the law laid down in the case of "Razia Rehman Vs. Station House Officer" (PLD 2006 SC 533), "Nisar Muhammad Vs.

Sultan Zari” (PLD 1997 SC 852) and “Rabyia Ilyyas vs. Additonal Sessions Judge” (PLD 2019 Lahore 281).

27. For respondent No.6’s intransigence, the Court’s time consumed on this case could have been utilized for other deserving litigants. As a deterrent, we were inclined to punish respondent No.6 for contempt of Court. However, given the fact that Danial and his sister Haydi were minors, and needed their parents’ love and care, this Court decided to discharge respondent No.6 in the contempt proceedings (i.e. criminal original No.61/2019) that were initiated against him vide order dated 06.03.2019. Furthermore, it is ordered that respondent No.6’s passport and C.N.I.C. shall be unblocked so that he can resume his employment and provide for his children’s maintenance.

28. It goes without saying that respondent No.6 would be at liberty to institute proceedings under the provisions of the Guardian and Wards Act, 1890 for Danial’s custody and fixation of a visitation schedule.

29. We appreciate the efforts made by Dr. Rizvi in putting sense into respondent No.6, whose appearance before this Court along with Danial resulted in the closure of these proceedings.

30. Disposed of in the above terms. Respondent No.6 shall pay the petitioner’s costs.

(CHIEF JUSTICE)

(MIANGUL HASSAN AURANGZEB)
JUDGE

APPROVED FOR REPORTING

*Qamar Khan**