

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

WRIT PETITION NO.905 OF 2020

MISS RIDA BATOOL
VERSUS
KHURRAM SHAHZAD KAZMI AND 2 OTHERS

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DATE OF HEARING: 23.04.2020.
PETITIONERS BY: Miss Ammara Kazmi, Advocate.
RESPONDENT No.1 BY: Ch. Muhammad Adnan Ahmad,
Advocate.

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FIAZ AHMAD ANJUM JANDRAN, J.- This writ petition
has been filed with the following prayer:-

- 1. To set aside the order passed by learned Additional District Judge(West) Islamabad as unlawful and illegal;*
- 2. Direct respondent No.2 to recover the detainees from the aforementioned private confinement of Respondent No.1 or from an unidentified place and to produce detainees before the Honorable Court without any further delay;*
- 3. Direct respondent No.2 to take strict legal action against respondent No.1 who has illegally and unlawfully detained children at a private confinement, away from their lawful mother;*
- 4. Allow interim custody of children with petitioner being real mother until the custody of children is finally decided by the Guardian Court for the welfare and wellbeing especially the male child has speech sensitivity since birth; and*
- 5. Any other relief in the best interest of justice and welfare of the children being unlawfully and illegal detained.*

2- The facts, relevant for the disposal of the instant writ petition, are that the marriage of the petitioner and respondent No.1 was solemnized on 24.3.2010 and out of their

wedlock two children, a son & daughter namely Irtiza and Abeha were born; the spouses had been residing in Rawalpindi where they got admitted their children in Green Land School System; that the relations turned hostile which ultimately culminated in Divorce deed dated 31.8.2019.

3- As per Para 5 of the petition, petitioner alleged that the minors were removed by the respondent No.1 from their school on 29.8.2019; after about six months of the alleged incident, the petitioner moved an application under section 491 of the Criminal Procedure Code which was dismissed in limine vide impugned order dated 04.3.2020, passed by learned Additional Sessions Judge-X Islamabad-West on the grounds; that said petition was filed after six months of the alleged occurrence i.e. removal of the minors; that no plausible reason had been shown for such delay; that custody of the minors with their real father could not be described as illegal or improper; and that no urgency was shown in the matter as per the requirement of Section 491 Cr. PC.

4- Learned counsel appearing on behalf of the petitioner contends that on 29.8.2019 respondent No.1 took the minors/detenues from their school unlawfully and thereafter reconciliation negotiations between the parties remained in process, which ultimately failed. Further contends that there was no option but to file the petition for the recovery of minors under Section 491 Cr.P.C. which was dismissed by the learned Additional Sessions Judge vide impugned order.

5- Learned counsel further submitted that the custody of the minors/detenues with the respondent No.1 / father is illegal and improper for the reasons that before the said date i.e. 29.8.2019, minors were with the petitioner and were removed from her custody without due process of law; that she has only demanded interim custody and that the final adjudication would be by the Court of competent jurisdiction. In this respect made reliance upon the case law reported as 2016 P. Cr.L.J 44; 1994 MLD 1682; 2014 YLR 152; PLJ 2010 Karachi

87; 2018 SCMR 427; PLJ1981 Cr.C. (Karachi) 120; 22014 MLD 38; PLD 1957 (W.P.) Peshawar 412016 MLD 29 and an unreported judgment dated 27.11.2014, passed by the Hon'ble Lahore High in Writ Petition No.30422 of 2014.

6- On the other hand, respondent No.1 in his parawise comments raised certain preliminary objections and has strongly objected upon the territorial jurisdiction of this Hon'ble Court by alleging that the minors/detneues are studying at Sargodha, Province of the Punjab. In this respect he placed on file the educational record of the minors/detneues i.e. (i) presently Namal Education System, main campus Main Road Block 32, near Hashmi Masjid Sargodha, and (ii) previously when the alleged event happened; they were studying in Greenland School Rawalpindi, which is nearby the address of the petitioner. On the basis of referred school record, learned counsel developed his argument that this Court lacks territorial jurisdiction to adjudicate upon the matter and in both eventualities the jurisdiction lies with the Lahore High Court. Both the parties are subject to Shia School of thought on the subject and in this respect referred 2010 MLD 1035 wherein it was held that father is entitled for the custody of minor boys, who is above two years age and females above the age of seven years, so in this eventuality, he is entitled for the custody of the minors; that "talaqnama" is attested by the Notary Public at Rawalpindi and its copy is available at page 14 of the petition, clearly signifies that address of the respondent No.1 is of Sargodha while address of the petitioner is of Rawalpindi. Even the "talaqnama" is attested by the Notary Public at Rawalpindi. Same addresses are also mentioned in the Nikahnama. The Nikah was performed in Rawalpindi and that the addresses mentioned in divorce deed and Nikahanama are one and the same.

7- Arguments of learned counsel appearing on behalf of the parties have been heard and record examined with their able assistance.

8- Initially, writ petition was taken up on 17.3.2020 and on the said date notices were issued to respondents No.1 & 2. The respondent No.2/SHO G-6/1 Abpara, was also directed to produce the minors/detenues on the next day i.e. 18.03.2020 at 10:30 A.M. On 18.3.2020, respondent No.1, appeared in person along with counsel and requested for further time enabling him to bring the minors from Sargodha for their production in compliance of this Court's order. Learned counsel accompanying respondent No.1 sought permission to file power of attorney on behalf of the latter and to file report and Para-wise comments whereby he intends to challenge the maintainability of the instant writ petition, inter alia, on the ground of territorial jurisdiction of this Court. Today, minors are present in the Court and the petitioner/mother has met them.

9- Before proceeding further, it is imperative to decide the question of jurisdiction at the first and for this purpose the Court has to consult the relevant provisions of law.

10- The term territorial jurisdiction means that the territorial boundaries/limits upon which the jurisdiction of a Court is applicable/extended. The proposition that a system of law belongs to a defined territory means that it is enforceable upon all persons, things, acts and events within that territory and does not apply to persons, things, acts or events elsewhere.

11- Therefore, it can safely be held that "a legal system belongs to a defined territory means that its rules do not purport to apply extra-territorially. Having said so, it must be to qualify the proposition that a system applies only to persons, things, acts and events within a defined territory is a self evident truth. From above it seems that territoriality of law, if considered as something distinct from the territorial enforcement of law, would be an idea that fits the facts only in a very imperfect way. It does not follow from the notion of law, therefore, the established rule of propriety demands, to avoid conflict between two courts or among different courts and for

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the purpose of safe administration of justice one court should remain there, where statutes had put it and not elsewhere.

12- Now by applying the above stated legal parameters, it reveals that the petitioner seeks issuance of a writ of habeas corpus. Article 199 (1) (b) of the Constitution lays down the procedure for making an order for production of a person who is in illegal custody. The said Article is reproduced for ready reference:-

“199 Jurisdiction of High Court.- (1) Subject to the Constitution, a High Court may, if it is satisfied that no other adequate remedy is provided by law,-

(a) -----

(i) -----

(ii) -----

(b) **On the application of any person, make an order-**

(i) **directing that a person in custody within the territorial jurisdiction of the Court be brought before it so that the Court may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; or**

(ii) -----

(c) -----

(2) -----

(3) -----

(4) -----

(4A) -----

(4B) -----

(5) -----”

13- The above provision explicitly provides that any person may file an application for making an order directing that a person in custody within the territorial jurisdiction of the Court be brought before it. **The prerequisite for invoking the said provision of law is that an order to that effect can only be made for a person in custody within the territorial jurisdiction of the Court. The territorial jurisdiction signifies the limits of a Court because the law in its generality is territorial and this is fundamental hall mark foundational pillar of the English jurisprudence.**

14- This Court was established pursuant to amendment in Article 175 of the Constitution by way of the Constitution (Eighteenth Amendment) Act, X of 2010.

Article 175(2) of the Constitution signifies that “**No Court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law.**” The **territorial jurisdiction** is bestowed in this Court through Section 4 of the Islamabad High Court Act, 2010 which reads as under:-

“4. Jurisdiction. – Islamabad High Court shall have, in respect of the Islamabad Capital Territory, original, appellate, revisional and other jurisdiction, as under the Constitution or the law in force immediately before the commencement of this Act, is exercisable in respect of the said territory by the Lahore High Court:”

15- The jurisdiction bestowed in this Court is restricted/confined to the extent of the Islamabad Capital Territory, including the original, appellate, revisional and other jurisdiction, under the Constitution or the law in force. It is thus abundantly clear that this Court is competent to make an order on the application of any person to bring before it a person in custody within the territorial jurisdiction of the Islamabad Capital Territory.

16- A High Court shall exercise its jurisdiction within the territorial limits for which it is established and regulate its actions within the said territory. If one High Court exercises its jurisdiction within the sphere, domain upon which the other High Court has the jurisdiction, it will not only create disorder, anarchy but also sense of interfering into lawful domain of other High Court. When one High Court has been established for a particular territorial boundaries than to exercise the jurisdiction in the said domain, for which prerogative is of the other High Court, certainly, it would be against the law, coram non judice and without lawful authority.

17- The perusal of above provisions explicitly guides to hold that for issuance of a writ of habeas corpus on the application of any person, this Court may make an order directing that a person in custody within the territorial limits of Islamabad Capital Territory be brought before it so that the Court may satisfy itself that he/she is not being held in custody without lawful authority or in an unlawful manner.

18- The jurisdiction for issuance of a writ of habeas corpus can be exercised even when the custody was allegedly removed from within the territorial jurisdiction of the Court. The ordinary residence or for that matter the existence of the person alone within the territorial jurisdiction at the time of making of the order are not the exclusive prerequisite but the Court can also make an order when the custody was allegedly taken away from the territorial jurisdiction of that High Court. Guidance in this respect is taken from the law laid down by the Hon'ble Apex Court in case reported as "Shazia Akber Gulzai Vs. Khurram Mehboob (2019 SCMR 116.)

19- By following the basic criterion *ibid*, now I advert to the material placed on record in order to see whether the instant petition is competent in terms of Article 199 (1)(b)(i) of the Constitution.

Along-with the parawise comments, a school certificate and educational record of the alleged minors/detenues have been produced wherein the minors, at present, are studying in NAMAL Educational System, main Campus, Hashmi Masjid Sargodha. The same corroborates the version of the respondent No.1, which he had taken at the time of first appearance with the counsel that at present, the minors/detenues are studying at Sargodha, and this Court has no jurisdiction. This assertion/document has not been rebutted by the petitioner which establishes the facts that not only at present but at the time of filing of the instant habeas corpus petition and even after the alleged removal of the alleged minors /detenues from Green Land School Rawalpindi, they are

studying at Sargodha, the native place of residence of respondent No.1.

20- It is petitioner's own version that it was on 29.8.2019 when the minors were allegedly taken by their father/respondent No.1 from the school. It was so observed by the learned ASJ while refusing to exercise jurisdiction under Section 491 Cr. PC at the preliminary stage. It is also matter of record that the principle of the said school namely Greenland System had issued a certificate to the effect that the minors were taken by the father/respondent No.1 on 29.8.2019. The Greenland School even if the contention of the petitioner is deemed to be true, does not fall within the territorial limits of this Court because the same is located within the territorial limits of Rawalpindi and in this way, it cannot be said that custody of the minors was allegedly removed/taken away from within the territorial limits of this Court.

21- Admittedly, the marriage between the parties was solemnized on 24.03.2010 and the Nikahnama, available at page 13, indicates that the place of abode of the respondent No.1 is of Sargodha while that of petitioner of Pir Wadhai Rawalpindi. The divorce deed dated 31.8.2019 bear the same addresses of the ex-spouses and it was also got prepared in Rawalpindi. The serial number of the Stamp Vendor available on the reverse of the said divorce deed also bear the same addresses i.e. of petitioner at Rawalpindi and respondent No.1 at Faisal Town Sargodha.

22- For exercising power/jurisdiction under Section 491 of the Criminal Procedure Code, it is limited and conferred to the Appellate jurisdiction of this Court while under Article 199 of the Constitution; the prerequisite for exercise of jurisdiction is that the corpus must be within the jurisdiction of this Court. The powers of the appellate jurisdiction in terms of Section 491 Cr.P.C. can only be exercised in case of having territorial jurisdiction and, therefore, in both the eventualities i.e. for invoking provisions of Section 491 of Cr.P.C. or to have

recourse under Article of 199 of the Constitution, the matter at hand does not fall within the territorial jurisdiction of this Court. Guidance is taken from the law laid down in case laws reported as “Lal Bux Vs Station House Officer Police Station ‘A’ Section, Sukkur and 4 others” (PLD 2012 Sindh 288) and “Jangi and another Vs Province of Sindh through Secretary Home Department, Government of Sindh and 13 others” (2019 P Cr L J 358 Sindh).

The case law relied upon by learned counsel for the petitioner does not extend any help to the petitioner due to having distinct facts and circumstances and not on the point of jurisdiction.

23- In view of above, it is held that this Court lacks territorial jurisdiction to come in aid of the petitioner in terms of Article 199 of the Constitution or Section 491 of the Criminal Procedure Code. Consequently, the instant writ petition is dismissed for want of jurisdiction.

(FIAZ AHMAD ANJUM JANDRAN)
JUDGE

A.R.Ansari

APPROVED FO REPORTING