

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

Writ Petition No. 2029/2020

Mst. Rafia Bibi

Versus

Atif Mehmood, etc.

Petitioner by:	Malik Saqib Mahmood, Advocate,
Respondents 1&2 by:	Mr. Abdul Kamran Butt, Advocate,
Respondent No.3 by:	Abdul Hameed SI,
Date of Decision:	<u>31.08.2020.</u>

FIAZ AHMAD ANJUM JANDRAN, J.- Through the instant writ petition filed under Article 199 of the Constitution read with Section 561-A of the Code of Criminal Procedure ('Cr.P.C.'), petitioner (Mst. Rafia Bibi) impugns the order dated 17.07.2020, passed by the learned Additional Sessions Judge-IV, Islamabad-East, whereby her application under Section 491 Cr.P.C for the custody of respondent No.2 Saif Ali (Minor) was disposed of with observation that the petitioner may approach the concerned Guardian Court for the custody of minor, if so desires.

2. Facts, relevant for the disposal of instant writ petition are that the petitioner contracted marriage with respondent No.1 (Atif Mehmood) on 31.05.2015; the couple blessed with a son namely Saif Ali/respondent No.2, now aged about three years; that by the passage of time, relation of spouses became strained; that efforts for compromise culminated into an agreement dated 15.06.2020, whereby respondent No.1 had to pay Rs.15000/- per month as maintenance to the petitioner; that an affidavit to this effect was also executed by the respondent No.1.

3. According to petitioner's stance, respondent No.1 after giving severe beating, expelled her out of his house by snatching the minor/respondent No.2; that she filed application under Section 491 of Cr.P.C but the same was

dismissed vide impugned order, hence, the instant writ petition.

4. Learned counsel for the petitioner contends that the petitioner being real mother is entitled to have custody of the minor, who is just three years old; that there is no substitute for love and affection of a mother; that emotional attachment made basis to discard the claim of the petitioner was due to the fact that the minor is in custody of respondent No.1/father for quite sufficient time and that this factor alone is not the paramount consideration to determine the eligibility of the petitioner to have custody of the minor. In support of his contentions, learned counsel placed reliance upon case laws reported as 2019 SCMR 116, 2001 SCMR 1782, PLD 2012 SC 758, PLD 2004 SC 1, 2020 MLD 740 (Sindh), PLD 2019 Lahore 281, 2019 PCr.LJ 890 (Sindh) and 2020 YLR 1256.

5. Learned counsel for respondents No.1&2 repelled the above submissions by arguing that the proceedings conducted by the learned ASJ, not only show the intent/wish of the minor but also the density of the interest of the petitioner towards the minor. According to learned counsel, during the proceedings before the learned ASJ, when the minor was handed over to the petitioner, he started crying and on asking of the learned Judge, he was relieved by the mother and then the minor hugged the respondent No.1. Learned counsel further submits that at that juncture petitioner herself asserted that the response of the minor had been due to the effect that he was in custody of the respondent No.1 for the last one year and for this reason, he was not acquainted with the petitioner; that the agreement/affidavit, made basis to seek direction for the recovery of minor was in fact, an undertaking by the respondent No.1 regarding payment of maintenance to the petitioner and that, too, subject to cohabitation and performing matrimonial obligations; that except for few months of his birth, the minor is living with respondent No.1 and is being nourished with

pasteurized milk, he is not a suckling baby and is in conducive and congenial atmosphere in the custody of his father and parental grandparents; that if the stance of the petitioner qua snatching of the minor is presumed to be correct, even then she moved the learned ASJ after a delay of about one month which, too, shows her lack of interest and that the courts remained open despite of pandemic of Covid-19, to entertain urgent nature work like the one at hand, therefore, this ground is also not available to the petitioner. Learned counsel concludes that the grounds warranting exercise under Section 491 Cr.P.C were not available, therefore, the learned ASJ rightly observed so, hence, the impugned order is well reasoned and does not call for any interference. Reliance is placed upon case laws reported as 2020 P.Cr.LJ Note 50 [Sindh (Hyderabad Bench)], 2015 P.Cr.LJ 1597 (Lahore), 2015 P.Cr.LJ 880 (Lahore), PLJ 2012 Cr.C (Lahore) 175. PLJ 2010 Cr.C (Lahore) 396 and PLJ 2005 Cr.C (Lahore) 1142.

6. Arguments of learned counsels appearing on behalf of the parties have been heard and record examined with their able assistance.

7. At the inception, it is necessary to mention that the learned counsel for respondents 1&2 on the preceding date i.e. 26.08.2020 and today as well persistently argued that during the proceedings before the learned ASJ, the petitioner was confronted that why the minor was hugging his father and was not inclined to go with the petitioner, she replied that the minor was with the respondent No.1 for about one year.

8. On both the stated occasions, neither the petitioner nor her counsel contradicted the fact that the minor had been with the respondent No.1 for about one year. Moreover, no ground of snatching the minor has been argued. These facts, *ipso facto*, bring the present situation out of the ambit warranting exercise of jurisdiction under Article 199 of the Constitution read with Section 561-A Cr.P.C. While forming

this view, guidance is sought from the case of **Mst. Nadia Perveen V. Mst. Almas Noreen and others** (PLD 2012 SC 758) wherein at Para-3, it is held that:-

“It has consistently been held by this Court in the cases of Muhammad Javed Umrao v. Miss Uzma Vahid (1988 SCMR 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. In the case in hand the petitioner's children were neither of very tender ages nor had they been snatched away from the petitioner and, thus, the petitioner's petition filed before the Lahore High Court, Lahore under section 491, Cr.P.C. was misconceived. The interim order passed by this Court in connection with the present petition on 20-12-2010 shows that on 7-4-2010 the learned Guardian Judge, Sialkot has already appointed the paternal grandmother of the minors as the guardian of their persons and properties. We have been informed that the said decision of the learned Guardian Judge has not so far been assailed by the petitioner before any higher court. In this view of the matter we have failed to find any occasion for interference in the matter. This petition is, therefore, dismissed and leave to appeal is refused.”

9. The learned ASJ in Para-3 of the impugned order observed that “this court is satisfied that the minor is not willing to go with his mother/petitioner due to his own free will and natural affiliation with his father and grandfather”.

The minor is living in a congenial and cordial atmosphere with his father. This fact has also been observed by this Court during the proceedings of instant petition. When the Court permitted the petitioner to take the respondent No.2/minor in her lap, the minor started crying and rushed to hug his father with full force. At this juncture, it was noticed

that the petitioner half-heartedly touched the minor. She reacted not to be so enthusiastic to keep the minor in her lap. The episode, *prima facie*, reflects that the minor is very familiar and conducive with respondent No.1/his father and his parental grandparents, who are statedly living with respondent No.1. In the case of *Mst. Laiba Sultan V. Muhammad Nawaz and others* (PLD 2018 SC 79), it is held that:-

“The attitude/behavior of the children as recorded in the impugned judgment, and the fact that the petitioner herself complained before us that even now both the children have expressed their dislike for her by twitching and biting her which, give way to apprehend that the children, at least for now, cannot live with the petitioner happily, and their custody with the petitioner shall not be conducive for their welfare and healthy development.”

10. I am also guided by the law expounded in *Fizza Mai V. Shahbaz Hasssan Khan and other* (2019 MLD 1722 Islamabad) wherein it is held that:-

“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.”

11. The Hon'ble Supreme Court of Pakistan in *Naziha Ghazali V. The State and others* (2001 SCMR 1782) has held that:-

“The application under section 491 Cr.P.C. is admittedly filed by the petitioner on 25th November, 1999 i.e. after 5/6 months, alleging unlawful removal of the minor from her custody. There is no explanation as to why the petitioner kept quiet for such long period if the minor son was removed illegally by the respondent. If the minor was removed from her custody unlawfully and without her consent, in the normal circumstances, she would have either filed report with the police or made a complaint to the concerned authorities against the respondent in accordance with law. It would prima facie appear, from the said conduct of the

petitioner that the minor was not removed forcibly from the apartment by the respondent, therefore, ex facie it cannot be said that the custody of the minor with his father, the respondent, was illegal or unlawful within the meaning of section 491, Cr.P.C. We are informed that no proceedings under the Guardians and Wards Act are pending before the Family Court. In the circumstances, there is no question of giving away the regular custody of the minor to either of the parties declaring any of them as a guardian under section 7 read with sections 12 and 25 of the Guardians and Wards Act, considering that under section 491, Cr.P.C., Court has considered if the person who is required to be produced has been illegally or improperly detained, whereas under the Guardians and Wards Act, the custody of the person of the minor is to be given to a person when it is in the welfare of the minor by appointing or declaring him to be guardian of the said minor which fact is to be determined by Guardian Court. The provisions of section 491, Cr.P.C. are not available for declaring any person as guardian or for determining all the time questions of custody of the minor because the final decision of the regular custody is to be decided in the proceedings under the Guardians and Wards Act when initiated by the party claiming the custody of the minor before the Guardian Court."

12. When facts of the present case are applied in the light of law expounded by the superior courts, it has become clear that the petitioner was not living with the minor for the last more than one year, as per her own contention; that till date she has not filed any petition for the custody of the minor; there is not a single piece of evidence on record to show that the minor was living with petitioner and was removed from her custody in illegal or improper way rather there is impression that she left the minor at her own and is living with her parents.

13. Needless to mention that the parties are close relatives and the marriage is intact. The dictums supra are fully applicable to the facts of the present case, and therefore, it is held that the petitioner has not been able to make out a case for exercising jurisdiction in terms of Section 491 Cr.P.C.

14. There is plethora of case laws on the subject that the custody of father, being natural guardian, is not illegal and improper. Reliance is placed upon 2020 PCr.LJ Note 50 [Sindh (Hyderabad Bench)]. In another reported case 2015

PCr.LJ 880, Hon'ble Lahore High Court declined to interfere in the matter where allegedly a nine years daughter was removed about one year before filing of petition.

15. The case laws relied upon by learned counsel for the petitioner entail distinct facts and circumstances. In case law reported as **2019 SCMR 116** there was a suckling baby which was forcibly taken away from the lawful custody of the mother. In **PLD 2004 SC 1** there was a minor baby girl, the mother was divorced and age of the minor was two years. As per facts of case law reported as **2020 YLR 125 Lahore**, there was a minor daughter and the mother was divorced while in **2015 PCr.LJ 1957**, the High Court refused to interfere under Section 491 Cr.P.C where there was no evidence that the minor was forcibly snatched and the learned Sessions Judge examined the minor and found comfortable and showed more affection to his father.

In **PLD 2012 Lahore 175**, petition for custody of four years child was declined being not a case of recent snatching. In case reported as, **2019 PCr.LJ 890 Sindh** the mother showed her willingness to go with the father for welfare of the minor. In case reported as **PLD 2019 Lahore 281** a compromise was effected between the parties. Thus, the referred case laws do not extend any help to the petitioner due to having distinct facts and circumstances.

16. The sequel of above discussion is that the allegation of snatching the minor is not substantiated on record; petitioner herself admitted that the minor is living with respondent No.1/his father and grandparents for the last more than one year; that as observed by the learned ASJ and by this Court as well the minor retains immense love and affection with the respondent No.1 and does not want to depart away from him; that the claim of the petitioner is not borne out of the record as she still has not opted to file an application under Section 25 of the Guardian and Wards Act,

1890 together with an application under Section 12 of the Act
ibid for having custody.

17. In view of above, the petitioner has not been able to
make out a case warranting exercise of powers under Article
199 of the Constitution read with Section 561-A Cr.P.C. The
impugned order, in the backdrop of the facts of the present
case, is well reasoned and does not call for any interference.
Consequently, the instant writ petition is accordingly
dismissed.

(FIAZ AHMAD ANJUM JANDRAN)
JUDGE

Imran