

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

Writ Petition No.1831/2020
Mst. Halima Yasmin
Versus
Senior Superintendent of Police and 2 others.

Petitioner by: Mr. Hassan Rashid Qamar Abbasi, Advocate.

Respondent No.3 by: Mr.Haroon-ur-Rashid, learned ASC and Malik Faisal Rafique, Advocate.
Syed Shahbaz Shah, learned State Counsel with Muhammad Malik ASI, Police Station Khanna, Islamabad.

Date of Hearing: 05.08.2020.

FIAZ AHMAD ANJUM JANDRAN, J.- Through the instant writ petition, petitioner (Mst. Halima Yasmin) seeks directions for the recovery of minor daughters namely Alina and Amina (“minors”) , from the illegal custody of respondent No.3/ex-husband.

2. Facts, relevant for the disposal of instant writ petition are that the marriage of the petitioner was solemnized with respondent No.3 (Mozammil Mumtaz) on 11.10.2013; the couple blessed with two daughters Alina and Amina; that by the passage of time, allegedly the attitude of respondent No.3 turned hostile towards the petitioner and ultimately, the latter went to her parent’s house and the bond culminated in divorce vide deed dated 04.7.2020.

3. The petitioner came up with the stance that it was on 29.6.2020 when after heated arguments, she was expelled out of the house by the respondent No.3 after snatching the minors while respondent No.3 asserted that the petitioner, after exchange of words, herself left the house by leaving the minors.

4. Learned counsel for the petitioner contends that the respondent No.3 has kept the minors in illegal/improper

custody; that the jurisdiction under Article 199 of the Constitution read with Section 491 Cr.P.C is the only efficacious remedy which cannot be denied on account of availability of alternate remedy under the Guardian and Wards Act, 1890 for seeking custody of the minors. According to the learned counsel, both the minors are female of tender age and the petitioner being real mother has the preferential right to Hizanat till the age of puberty. In support of his contentions, learned counsel placed reliance upon case laws reported as 2019 SCMR 116, 2018 SCMR 427 and 2017 MLD 427.

5. Learned counsel for respondent No.3 argued that the petitioner herself left the house by leaving the minors; that she was divorced upon her insistence; that a guardian petition filed by the respondent No.3 is already pending before the learned Guardian Judge, wherein an injunctive order qua interim custody of the minors is in the field wherein next date of hearing is fixed for arguments. It is further argued that no exceptional ground has been argued to seek extra-ordinary relief, therefore, petition is liable to be dismissed. Reliance is placed upon 1981 SCMR 301 and NLR 1995 CLJ 167.

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

7. It is settled principle of law that the jurisdiction under Article 199 of the Constitution as well as under Section 491 of Cr.P.C., is required to be exercised sparingly and such exercise may be taken only in exceptional and extra ordinary cases of real urgency keeping in view that even the Guardian Judge has the requisite powers of recovery of minor children and to regulate their interim custody. Reliance is placed upon "Mst. Nadia Parveen V. Mst. Almas Noreen and others" (PLD 2012 S.C. 758) wherein it is held that:-

“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. 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.” [Emphasis supplied]

8. In order to ascertain existence of real urgency warranting exercise of special jurisdiction, as prayed for, the record made available by the parties has been examined.

On 04.07.2020 respondent No.3 filed a guardian petition wherein on an interim application under Section 7 of the Guardian and Wards Act, 1890 the learned Guardian Judge passed an injunctive order to the effect that the minors shall not be removed from the custody of applicant till next date of hearing. After passing of the said order, petitioner filed the instant petition on 09.07.2020.

According to petitioner's own version, she was expelled out of the house on 29.06.2020 while the instant petition was filed on 09.07.2020 after about 11 days and issuance of injunctive order.

The petitioner asserted that minors were born on 15.09.2015 and 12.05.2019 while the birth certificates produced by the respondent No.3 bear date of birth of minor Alina as 12.09.2014 and that of Amina as 12.05.2017, therefore, the matter requires recording of evidence which is not permissible under the constitutional jurisdiction of this Court, rather it is the prerogative of the trial Court/Guardian Judge to determine its authenticity after taking into consideration the evidence led by the parties.

9. From the examination of record, it transpires that the marriage bond had ceased to exist vide divorce deed dated 04.07.2020 while the petitioner, as per learned counsel for the petitioner, after divorce, is observing Iddat, therefore, is not present in the Court to pursue the matter. The date of desertion i.e. 29.06.2020, is admitted as revealed through Para-5 of the petition and of the counter response submitted by the respondent No.3; the minors, since then, are in custody of respondent No.3 and that a guardian petition filed by respondent No.3 is already pending before the learned Senior Civil Judge-II/Guardian Judge, Islamabad (East), where on an application under Section 7 of the Guardian and Wards Act, an injunctive order qua the removal of the custody of the minors has already been passed and admittedly said application is now fixed for arguments.

10. As mentioned above, the minors are with the respondent No.3 since 29.06.2020, the date of desertion, and a guardian petition, filed prior in time, by the respondent No.3 is already *subjudice*, wherein on an application for regulating interim custody, an injunctive order is in field, therefore, under the principle/rule of propriety, it would not be just to regulate interim custody of the minors as it would not only

amount to frustrate the said proceedings but will also complicate the same and may result in causing prejudice to the case of either side, particularly when there exists no exceptional ground for doing so.

11. The case law relied upon by the learned counsel do not extend any help to the petitioner due to having distinct facts and circumstances.

12. Suffice it to say, no further proceedings in the instant writ petition are called for. It is thus disposed of with direction to the learned Guardian Judge, seized with the guardian petition, referred to above, to decide the application for interim custody of the minors within a period of two weeks from the receipt of this order.

13. Before parting, it is deemed necessary to mention that the observations made hereinabove are restricted and meant only for the disposal of the instant writ petition and shall have no impact upon merits of the case, pending before the learned Guardian Judge.

(FIAZ AHMAD ANJUM JANDRAN)
JUDGE

A.R.Ansari