

FORM NO:HCJD/C

JUDGMENT SHEET

**IN THE ISLAMABAD HIGH COURT,
ISLAMABAD
JUDICIAL DEPARTMENT**

CRL. MISC. NO. 14-H/2012

Dr. Viktor Hacker Vs. Dr. Shahida Mansoor etc.

Date of hearing: 18-09-2012

PETITIONER BY: Mr. Ali Raza, Advocate.

RESPONDENT No.1 BY: Syed Nayyab Hassan Gardezi, Advocate.
RESPONDENTS NO. 2 & 3: Sahibzada Muhammad Raees Satti,
Standing Counsel.

IOBAL HAMEEDUR RAHMAN, C.J.:- Through the instant Crl. Misc. No. 14-H/2012, the petitioner has made the following prayers:-

- a) *that the detention of the detenues by respondent No.1 is unlawful and improper and respondent No.1 be directed to produce the minor children before this Court forthwith and the minor children may be directed to be released from their illegal confinement;*
- b) *to find the detention of the detenues by respondent No.1 as unlawful and improper and direct respondent No.1 to produce the detenues before this Court forthwith.*
- c) *that directions be issued for release of the detenues from the illegal confinement and detention.*

2. The petitioner, in the petition has alleged that he is a citizen and resident of the Republic of Austria and is employed as a Professor in the Technical University of Graz, Austria, whereas, respondent No.1 is a citizen of Pakistan. The petitioner and respondent No.1 entered into matrimonial bond on 07-08-1999 and out of the said wedlock, two minor daughters named Saida Hacker and Samia Hacker were born on 18-09-2003 and 05-05-2006 respectively. The petitioner has further alleged that he is the sole lawful custodian and guardian of the minor detenues with such sole custody having been granted to him by the District Court of Garz, Austria vide its decision dated 03-05-2012, which was further affirmed by the Provincial Court, Garz, vide its decision dated 29-06-2012. The minor detenues were unlawfully removed by the respondent No.1 from Austria and she brought them to Pakistan on 12-02-2012, in patent violation of the respective orders of the Courts in Austria, hence, the instant petition.

3. Learned counsel for the petitioner argued that in the year-2009, respondent No.1 sought divorce from the petitioner and instituted proceedings in Austria, however, divorce has not yet been effected, as such, the marriage is still in existence; that as per Austrian law Court step in with regard to custody of minors and vide order dated 8th September, 2010 custody was allowed to be joint; that vide order dated 26th July, 2010 joint custody of the minors was allowed but residence of the minors was declared to be with the mother; that respondent No.1 assailed the order dated 26th July, 2011, by filing appeal in the Provincial Court which was

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accepted and the sole custody was granted to respondent No.1 and the matter was remanded; that the appellate Court had granted sole custody to respondent No.1 subject to the condition that the minors would not be removed from the jurisdiction of the Court of Garz, Austria; that on 12th February, 2012 respondent No.1 took the minors outside the jurisdiction of the court at Garz, however, counsel for respondent No.1 continued to present her in the Court and subsequently the custody of minors was given to the petitioner vide judgment dated 3rd of May, 2012; that respondent No.1 filed appeal against the said judgment which was dismissed vide order dated 29-06-2012, however, respondent No.1 has filed an appeal before the Supreme Court of Austria, which is still pending and no injunctive order has been issued therein; that the District Court, Garz, Austria has initiated criminal proceedings and has issued arrest orders of respondent No.1. Learned counsel for the petitioner has further argued that respondent No.1 has unlawfully and in patent violation of the orders of the Courts in Austria has removed the minors; that the minor children are Austrian citizens and could not be brought to Pakistan without the lawful permission and consent of the petitioner; that respondent No.1 is illegally confining and detaining the minor children in violation of the law and against their will. Learned counsel for the petitioner has relied upon PLD 1995 Supreme Court 633, PLD 2010 Lahore 48, 1993 SCMR 1690 and 2008 YLR 2647 [Lahore].

4. Conversely, learned counsel for respondent No.1 has argued that the petitioner had converted his faith from Christianity

to Ahmadi faith; that admittedly appeal in respect of the minors is pending in the Apex Court of Austria; that petition is not maintainable firstly because the foreign Court judgment has not become conclusive and secondly that the decision on the basis of which the present petition has been filed was obtained on the back of respondent No.1; that the reason for withdrawing the custody from the mother is not appealable; that respondent No.1 was granted the custody of minors after going through a long process of four years i.e. medical test and psychological tests etc. and thereafter, she was declared fit for the sole custody of the minors; that the welfare of the minors lies with respondent No.1/mother; that it cannot be held that the judgment of the lower court in Austria is conclusive one, when appeal is pending; that the judgment passed by the Provincial Court of Austria, is against the principle of natural justice because the same as passed in absentia and the same was not passed on merits; that there was no restriction by the Court in Austria regarding taking away the minors outside the jurisdiction of the Court; that even if the judgment is conclusive one then too, this Court has no jurisdiction to entertain the matter and the proper forum is the Guardian Judge; that the matter involves a factual controversy which cannot be decided without recording of evidence; that alternate remedy is available to the petitioner and respondent No.1 was lawfully handed over the custody of minors; that this Court is not an executing Court, therefore, this petition is not maintainable. Learned counsel for respondent No.1 has relied upon 2007 YLR

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399, PLD 1983 S.C. 280, 2009 MLD 367, 2004 CLD 1407, PLJ 2004 Lahore 221, 1997 SCMR 323 and PLJ 1997 1219.

5. I have heard the learned counsel for the petitioner as well as learned counsel for respondent No.1 and perused the documents appended with the petition.

6. The petitioner through the instant petition has made two fold prayers:-

(i) that the detention of the detenues by respondent No.1 is unlawful and improper, therefore, respondent No.1 be directed to produce the minor children before this Court and the minor children may be directed to be released from illegal confinement;

(ii) that the detention of the detenues by the respondent No.1 be declared as unlawful and improper and directions be issued for the release of the detenues from illegal confinement and detention.

7. As far as, the prayer of the petitioner to the extent of production of minors before the Court is concerned, vide order dated 11-09-2012, respondent No.1 was directed to produce the minors before this Court today i.e. 18-09-2012. Respondent No.1 has produced the minors today before the court and the petitioner met with the minors.

8. The second prayer of the petitioner is regarding declaration of the custody of minors by respondent No.1, as illegal

and issuance of directions for the release of detainees/minors from illegal confinement.

9. The petitioner in the instant petition has taken the stance that as vide order/judgment dated 3rd May, 2012, District Court Garz, Republic of Austria, has awarded the sole custody of minors to him, therefore, the detention of the detainees by respondent No.1 be declared as illegal.

10. Section-13 of the Code of Civil Procedure, 1908 relates to the foreign judgment. The said Section reads as under:-

13. When foreign judgment not conclusive:- *A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except:-*

- (a) *Where it has not been pronounced by a Court of competent jurisdiction;*
- (b) **Where it has not been given on the merits of the case;**
- (c) *Where it appears on the face of the proceedings to be bounded on an incorrect view of international law or a refusal to recognize the law of Pakistan in cases in which such law is applicable;*
- (d) *Where the proceedings in which the judgment was obtained are opposed to natural justice;*
- (e) *where it has been obtained by fraud;*
- (f) *where it sustains a claim founded on a breach of any law in force in Pakistan.*

(underlining and emphasizing is mine).

From the bare reading of the above re-produced Section of Code of Civil Procedure, 1908, it is crystal clear that the judgment passed

by the District Court, Garz, Austria is not a conclusive judgment because (i) the District Court, Garz, Austria has not delivered the said judgment on merits and (ii) that the appeal against the said order is still pending in the Apex Court of Austria. Moreover, this Court while dealing with the instant petition, has no jurisdiction to decide the issue of custody of minors, coupled with the fact that at present, the minors (both female) are in custody of their real mother, therefore, by any stretch of imagination it cannot be held that the minors are in illegal confinement. It would also not be out of place to mention here that this Court while dealing with issue in hand cannot assume the jurisdiction of executing Court of the judgment passed by the District Court, Garz, Austria.

11. Petitioner has also filed the instant petition under Section 491 Cr.P.C. The proceedings under Section 491 Cr.P.C. are summary in character and the jurisdiction of High Court can be invoked under Section 491 Cr.P.C., if a person is alleged to be in illegal confinement but in the instant case, the minors are in the custody of their real mother, whereas, the petitioner, who is the real father of the minors is praying for declaring the custody of the minors by the real mother as illegal confinement, as such, the matter involved in the instant petition strictly relates to the appointment of a Guardian of the minors, therefore, as observed above, the custody of the minors by the real mother cannot be held, in any circumstances, to be an illegal custody. This Court while exercising jurisdiction under Section 491 Cr.P.C. cannot decide the question of appointment of a Guardian of the minors,

9-0

and such jurisdiction solely lies with the Guardian Judge. Moreover, in the instant case, the petitioner has not alleged that respondent No.1 has removed the minors from his custody, therefore, the ultimate course which is required to be adopted by the petitioner, is the filing of petition under Section 25 of the Guardian and Wards Act, 1890.

12. In view of what has been discussed above, the instant petition stands disposed of with the observation that the petitioner may approach Guardian Judge for the custody of minors.

CHIEF JUSTICE

M. ABID KHAN