IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

PRESENT:
MR. JUSTICE IJAZ UL AHSAN
MR. JUSTICE SYED HASAN AZHAR RIZVI
MR. JUSTICE IRFAN SAADAT KHAN

CIVIL PETITION NO.3718 OF 2023
(Against the order/judgment of the Lahore High Court, Lahore dated 21.09.2023 passed in Writ Petition No.59365/2023)

Mst. Qurat-ul-Ain

...Petitioner

VERSUS

Station House Officer, Police Station Saddar Jalalpur Jattan, District Gujrat & others

...Respondent(s)

For the Petitioner	:	Mr. Iftikhar Ahmad Bashir, ASC a/w Petitioner-in-person
For Respondent No.3	:	Mr. Zafar Iqbal Klasoon, ASC (via V.L. Lahore)
For Respondent (Gov.)	:	Mr. Baleeghuz Zaman, Add'l AG Pb.
Other Respondents	:	Nemo
Date of Hearing	:	13.12.2023

JUDGMENT

IJAZ UL AHSAN, J-. On conclusion of the hearing, this Petition was converted into an Appeal and allowed in the following terms:

> "For detailed reasons to be recorded later, this petition is converted into an appeal and allowed in the following terms:
>
> 1. The impugned judgement/order of the Lahore High Court, Lahore dated 29.09.2023 passed in WP No.59365/2023 is set aside.
>
> 2. The concerned Guardian Court/Family Court, Gujrat seized of Guardian Petition titled "Qurat ul Ain v. Biban Bibi etc." shall ensure that the custody of the child is restored to the mother within one week of receipt of a certified copy of this order.

> 3. The Office shall ensure that a certified copy of this Order is sent to and received by the concerned Guardian Court/Family Court, Gujrat seized of Guardian Petition titled "Qurah-tul-Ain v. Biban Bibi etc." within one week.
>
> 4. The Guardian Court shall proceed with the pending Guardianship petition with all due diligence and conclude the matter as expeditiously as possible strictly in accordance in law."

Our detailed reasons are set out herein below.

2. Bibi ("**Respondent No.3**") filed a writ petition before the Lahore High Court, Lahore seeking the recovery of her granddaughter Haseeba Noor, a four-year-old minor (the "**Minor**") from the "improper custody" of her mother Mst. Qurat-ul-Ain (the "**Petitioner**") and the Petitioner's husband Nasir Bashir. It was averred in Respondent No.3's writ petition that her son i.e., Waheedullah had married the Petitioner and from this union, the minor was born. The marriage did not last and ended in divorce. Waheedullah was settled abroad and the Petitioner had contracted a second marriage while retaining custody of the minor. This second marriage had disentitled the Petitioner from retaining custody of the minor since her continued presence in a *Ghair Mehram's* house was impermissible under the law and detrimental to her welfare. In the absence of a speedy and efficacious remedy and since her father Waheedullah was not in the country, Respondent No.3 filed the writ petition seeking production of the minor before the High Court and prayed that the minor's custody be handed over to her paternal grandmother i.e., Respondent No.3. The High Court on 18.09.2023 directed that the minor be produced before the Court on the next date of hearing i.e., 21.09.2023.

In compliance of the said order, the concerned Station House Officer produced the minor before the High Court on 21.09.2023. After hearing the parties, the High Court through the impugned order/judgement ordered that the custody of the minor be handed over to Respondent No.3 as an interim arrangement and that the concerned Guardian Court shall decide the permanent custody of the minor strictly in accordance with law. Aggrieved by the High Court's decision, the Petitioner assailed the impugned judgement/order before this Court.

3. The learned counsel for the Petitioner contended that the High Court, in its constitutional jurisdiction, had effectively decided the matter of custody of the minor even though an alternative and efficacious remedy was available to Respondent No.3 in the form of a guardian petition under the Guardian and Wards Act, 1890 (the "**GW Act**"). He also contended that the father of the minor was living in Spain, had consistently failed to pay any maintenance for the minor's upkeep and had even contracted a second marriage himself. He therefore maintained that the sole ground on which the High Court had handed over custody of the minor to Respondent No.3 was that she had contracted a second marriage. He submitted that a second marriage is not an automatic disqualifier under the law insofar as the custody of a child is concerned. Reliance on this aspect was placed on a judgement of this Court reported as *Muhammad Owais v. Nazia Jabeen* (**2022 SCMR 2123**). He prayed that the impugned

order/judgement of the Lahore High Court be set aside and custody of the minor be handed over to the Petitioner till a decision is made by a Court of competent jurisdiction.

4. The learned counsel for Respondent No.3, on the other hand, defended the impugned order/judgement and submitted that in the exercise of its constitutional jurisdiction, the High Court had ample powers to hand over custody of a minor to anyone if it was in the interest of the said minor. He also pointed out that the High Court's arrangement was purely temporary and that the High Court had expressly held that its decision would be subject to the decision of a Court of competent jurisdiction.

5. We heard the learned counsel for the parties and went through the record.

6. Although the Constitution of the Islamic Republic of Pakistan, 1973 (the "**Constitution**") does away with the Latin terminology, Article 199 of the Constitution confers on the High Courts the power to pass certain orders classically and colloquially referred to as writs of Habeas Corpus, Mandamus, Quo Warranto, Certiorari, and Prohibition.

7. In her writ petition before the High Court, Respondent No.3 made the following prayer:

> "In view of the above submissions, it is most humbly prayed that this petition may kindly be accepted and the detenue/minor granddaughter of petitioner namely Haseeba Noor, daughter of Waheedullah aged 4 years my (sic) please be ordered to be recovered from the improper custody of respondents No.2 and 3 through Respondent No.1 and after production of minor before this Honourable Court her custody

be handed over to the petitioner in the welfare of minor and also in the best interest of justice, equity and fair play.

Any other relief which this Honourable Court deems fit and proper in the circumstances of the case may also kindly be granted."

8. A perusal of Respondent No.3's writ petition and her prayer reveals that she had sought, in essence, a writ of Habeas Corpus for the production of the minor. The relevant portion of Article 199 which deals with the said writ is reproduced below for ease of 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) …"

(**Underlining is ours**)

9. It is important to note that Article 199 starts with the phrase: "Subject to the Constitution, a High Court may, if it is satisfied that no other adequate remedy is provided by law, …" Therefore, the High Court's constitutional jurisdiction is subject to the satisfaction that no other adequate remedy is provided by law.

10. Habeas Corpus has been defined in various ways over the centuries but its most celebrated is that of Blackstone's in which he explained it to be a "great and

efficacious writ in all manners of illegal confinement". We need not go into the intricacy of the various definitions of the writ for we are of the view that since it was set in stone in the Magna Carta, it has retained its nature of ensuring that:

> "No Freeman shall be taken or imprisoned, or be disseized of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the land."

11. The invocation and passing of the writ of Habeas Corpus, as previously noted, is enshrined in Article 199(1)(b)(i) of our Constitution whereby any person may file an application seeking the High Court to direct 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". However, the invocation and passing of the writ is subject to the satisfaction of the High Court that no adequate remedy is provided by the law.

12. The GW Act allows a person to be appointed the guardian of a minor "if it is satisfied that it is for the welfare of the minor ..."[1] It is only once a person is appointed the guardian that they may seek recourse to Section 25 of the GW Act for recovery of custody of a ward.

13. This begs the question: Could Respondent No.3 invoke the constitutional jurisdiction of the High Court for the issuance of a writ of Habeas Corpus?

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[1] Section 7 of the GW Act.

COULD RESPONDENT NO.3 INVOKE THE CONSTITUTIONAL JURISDICTION OF THE HIGH COURT?

14. Whatever the inter se relations between the parents may be, the purpose of a writ of Habeas Corpus when it comes to the production of a child is to ensure that the child is, at any given moment, capable of being produced before a Court of law. However, "… there can be no question that a Writ of Habeas Corpus is not to be issued as a matter of course, particularly when the writ is sought against a parent for the custody of a child. Clear grounds must be made out …"[2] The writ must only be issued in favour of a person who is entitled to custody of the child. A grandmother, no matter the love she may have for her grandchildren, is not the parent of a child for the purposes of the law and must clearly specify why a writ of Habeas Corpus must be issued for the production of her grandchild(ren), especially so when it is admitted that the grandchild is in the custody of one or both parents.

15. While the Constitution states that the High Court is empowered to make an order "on the application of any person …", when a writ of Habeas Corpus is sought for the production of a child, it is not for the liberation of a detenue or a prisoner. Instead, it is, as was held by the Court of Appeal of England and Wales in *R v. Barnardo* **(1891) 1 QB 194**:[3]

> "… to determine whether the person who has the actual custody of them (infants) as childrens shall continue to have the custody of them as children. In such cases it is not a question of liberty, but of nurture, control and education."

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[2] The Supreme Court of India in *Dushyant Somal v. Sushma Somal* (**AIR 1981 SC 1026**)

[3] Which was subsequently affirmed by the Appellate Committee of The House of Lords in *Barnardo v. McHugh* **[1891] AC 388**.

16. We also note that the issuing of such a writ is subject to the satisfaction of the High Court that a minor "is not being held in custody without lawful authority or in an unlawful manner."[4]

17. The general presumption that children must always be in the custody of their parent(s) is based on "The principle … that parental right or power of control of the person and property of his child exists primarily to enable the parent to discharge his duty of maintenance, protection, and education until he [the child] reaches such an age as to be able to look after himself and make his own decisions."[5] This right to custody, however, "is a dwindling right which the courts will hesitate to enforce against the wishes of the child, and the more so the older he is. It starts with a right of control and ends with little more than advice."[6] However, where a person entitled to custody is shown to be incapable of approaching the Court or where no such person exists, the question of the right of a friend to make such an application arises.[7] In such a situation, the friend of the minor must show that:

> a) No one who is legally entitled to the custody of the minor or to represent him/her exists, or that such a person, if any, is unable to file a Habeas Corpus petition; and
>
> b) The friend is interested in the welfare of the child.

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[4] Article 199(1)(b)(i) of the Constitution.
[5] The Appellate Committee of The House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority* **[1986] AC 112**.
[6] The Court of Appeal of England and Wales in *Hewer v. Bryant* **[1970] 1 QB 357**
[7] The Calcutta High Court in *Raj Bahadur v. Legal Remembrancer* **AIR 1953 Cal. 522**.

18. In the instant case, and at the very outset, we note that Respondent No.3 failed to aver that she was filing the writ petition in her capacity as a friend of the minor. Even, if for the sake of argument, we assume that she had filed the writ petition as a friend of the minor, she had failed to aver how no one who is legally entitled to the minor's custody exists or that such a person (in this case, her father) was unable to file a petition. At no point has Respondent No.3 averred that she was authorised by her son to file the writ petition. No correspondence whatsoever was produced before either the High Court or this Court which could show that Respondent No.3 was authorised to file the writ petition as a representative of the minor's father. There is also nothing on the record which shows that Respondent No.3 was ever appointed the guardian of the minor under the GW Act especially so when a perusal of Section 8 of the GW Act shows that she was not precluded by the Act from seeking appointment as guardian since she would be covered under sub-section (b) of the said Section. We disagree with the assertion that the father of the minor being abroad rendered him unable or incapable of filing a petition seeking a writ of Habeas Corpus. We also note that a mere assertion in her petition that Respondent No.3 wants to "properly look after the detenue" is insufficient to show that she was interested in the welfare of the child.

19. This factual context goes to the root of the question. In the absence of a competently filed writ petition and the presence of an alternative remedy, the High Court ought to, in

the first place, have satisfied itself that despite these shortcomings, it was still in the best interests of the minor that she be produced before the High Court moreso: a) when it was admitted by Respondent No.3 in her petition that the minor was in the custody of her real mother; and b) an absence as to how the minor being in the custody of her own mother was "… without lawful authority or in an unlawful manner". These aspects of the case appear to have escaped the notice of the High Court.

20. Despite this, the High Court passed the following order on 18.09.2023:

> "Learned counsel for the petitioner submits that **Haseeba Noor** (minor granddaughter of the petitioner statedly aged about 4-years) is in illegal custody of respondents No.3 and 4.
>
> 2. Station House Officer, Police Station: Saddar Jalalpur Jattan, District Gujrat/respondent No.1 is directed to recover and then produce aforementioned detenue on **21.09.2023** before this Court.
>
> 3. Office is directed to communicate this Court's order to respondent No.1, telephonically."

21. A perusal of the said order reveals that at no stage had the High Court: a) satisfied itself that no alternative or efficacious remedy was available to Respondent No.3; b) shown why it had deemed the production of the child appropriate when she was admittedly with her mother; or c) on what basis the continued custody of the minor with her real mother was even prima facie "without lawful authority or in an unlawful manner" which necessitated the production of the minor before the Court.

22. The tendency of the High Courts to readily and unhesitatingly resorting to extreme measures by involving law enforcement agencies in family matters cannot be appreciated, especially so where no element of criminality is there and the child is in the lawful and rightful custody of the parent. Such actions cause unnecessary trauma and harassment for the concerned parent, specially where the concerned parent is the real mother of the child. The High Court must exercise extreme care, caution, and circumspection in such matters. Only in exceptional and extraordinary circumstances, where all other methods and measures fail and an element of criminality, forced removal, kidnapping and/or abduction of the child is involved, the High Court may exercise its constitutional jurisdiction.

23. Issuance of a writ of habeas corpus in a custody matter should be an exception, and not the rule, as the GW Act provide the Guardian Court with all requisite powers to pass and enforce its orders in matters of custody of the child(ren). It is, in our opinion, inappropriate for a constitutional court to encroach upon and arrogate itself the powers of a Guardian Court, which is the court of competent jurisdiction under the law, to decide all matters relating to custody of child(ren).

24. The contention of the learned counsel for the Petitioner would therefore appear to be correct. In the presence of an alternative remedy and the absence of any other factor that may necessitate the production of the minor before the High Court, it would appear that the sole ground on which the

High Court passed its order of 18.09.2023 was the mere contention that the Petitioner had remarried.

25. Therefore, we are of the view that the very order seeking production of the minor before the High Court was, in the peculiar circumstances of the case, without jurisdiction, or, in any event, in excess of jurisdiction.

26. However, we deem it appropriate to address the point as to why the prayer for Habeas Corpus ought not to have succeeded on the merits as well.

THE PRAYER FOR HABEAS CORPUS ON ITS MERITS

27. Ordinarily, reference is made to Paragraphs 352 and 354 of D.F. Mulla's Principles of Mahomedan Law for asserting that a mother is disentitled from custody of her minor child after a second marriage. The said paragraphs were discussed by this Court in *Shabana Naz v. Muhammad Saleem* (**2014 SCMR 343**) where this Court was of the view that:

> "11. Para 352 of the Muhammadan Law provides the mother is entitled to the custody (Hizanat) of her male child until he has completed the age of 7 years and of her female child until she has attained puberty and the right continues though she is divorced by the father of his child unless she marries a second husband in which case the custody belongs to the father.
> 12. Para 354 provides for disqualification of female from custody of the minor, which includes the mother and one of the instance laid down is that if she marries a person not related to the child within the prohibited degree e.g. a stranger but the right revives on the dissolution of marriage by death or divorce.
>
> 13. Thus, it is apparent from reading of the two paras of the Muhammadan Law that though the mother is entitled to the custody (Hizanat) of her minor child but such right discontinues when she takes second husband, who is not related to the child within the prohibited degree and is a stranger in which case the custody of minor child belongs to the father. It has been construed by the Courts in Pakistan that this may not be an absolute rule but it may be departed from, if there are exceptional circumstances to justify such departure and in making of such departure the only fact, which the Court has to

> see where the welfare of minor lies and there may be a situation where despite second marriage of the mother, the welfare of minor may still lie in her custody."
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> (**Underlining is ours**)

In a more recent pronouncement, this Court in *Muhammad Owais v. Nazia Jabeen* (**2022 SCMR 2123**) was of the view that:

> "6. The basic issue is with reference to the custody sought by the mother for her four children. The emphasis by the father is on the mother's second marriage which it is argued disentitles her to custody under the Islamic Law. D.F. Mullah in Mohammadan Law in Para 352 provides that the mother is entitled to the custody (hizanat) of her male child until he has completed the age of seven years and of her female child until she has attained puberty. Para 352 ibid provides that this right continues whilst she is divorced from the father of the child, however, in the event she marries a second time, custody then belongs to the father. Para 354 of Mohammadan Law provides that the mother, who is otherwise entitled to the custody of a child, loses the right of custody if she marries a person not related to the child within the prohibited degrees which are specified in paras 260-261 of Mohammadan Law. So as per the principles of Mohammadan Law by D.F. Mullah where she remarries, she can be disqualified for custody ... These provisions and the principles of Mohammdan Law have been examined by this Court in several judgments where it has held that the conditions contained in Paras 352 and 354 of Mullah's Mohammadan Law are not absolute and are subject to the welfare of the child. In Muhammad Siddique v. Lahore High Court, Lahore through Registrar and others (PLD 2003 SC 887), it was held that although the general rule is that the mother on contracting a second marriage forfeits her right of custody, this rule is not absolute and if it is in the interest of the child, custody should be given to the mother. The Court further held that it is the welfare of the minor that must be considered while determining custody and there is no absolute rule or fixed criteria on the basis of which welfare of the minor can be determined or custody can be awarded. In Mst. Shahista Naz v. Muhammad Naeem Ahmed (2004 SCMR 990), this Court concluded that the right of Hizanat having the force of Injunctions of Islam is an accepted principle of Islamic Law and a female on account of re-marriage may be disqualified to exercise this right, but a mother on account of re-marriage is not absolutely disqualified to be entrusted the custody of a minor child rather she may lose the preferential right of custody. The Court further held that there is no denying the fact that there can be no substitute for the mother of the minor child especially of tender age, therefore, the consideration for grant or refusal of custody will always be the welfare of the minor. In this case, the mother even on contracting second marriage was entitled to retain custody of the minor. Again while looking at the Islamic provisions on custody of minor, this Court concluded in Mst. Hameed Mai v. Irshad Hussain (PLD 2002 SC 267) that the question of custody of a minor child will always be determined on the basis of the welfare of the minor and notwithstanding the father's right for custody under Muslim Personal Law, this right is subject to the welfare of the minor. Again in Shabana Naz v. Muhammad Saleem (2014 SCMR 343),

> Paras 352 and 354 of the Mohammadan Law were considered and the Court concluded that although Mohammadan Law provides that the mother is disentitled to custody if she re-marries, this is not an absolute rule but one that may be departed from if there are exceptional circumstances to justify such departure and even in a situation of a second marriage if the welfare of the minor lies with the mother then she should be awarded custody.
>
> 7. The aforesaid judgments clearly dispel the stance taken by the father that on account of the mother's second marriage, she has lost the right of custody over her four children ..."

Similarly, the Federal Shariat Court has also held that Mulla's Principles of Mahomedan Law do not have any statutory authority or sanction behind them. In *Najaat Welfare Foundation v. Federation of Pakistan* (**PLD 2021 FSC 1**), the Shariat Court observed that:

> "... There is a plethora of judgments of the superior Courts of Pakistan, where they have differed from the so-called text books of Muhammadan Law including Mulla's book. This trend was initiated soon after independence of Pakistan. Although, in a very limited way and sporadically, this trend was there even in pre-partition era of British India. After the independence of Pakistan, this trend became a norm by the superior Courts of Pakistan to evolve their own jurisprudence inter alia in the matters of Muslim Personal law also. For example; It was stated in a judgment very clearly while deciding a matter of Hisanat, which is an issue of Muslim Personal Law as:
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> > "It would be permissible for the Courts to differ from the rules of Hisanat as quoted or stated in the text books like book of Mulla". [Reference PLD 1965 W.P. Lahore 695]. This trend kept on evolving, and is still evolving. This process is primarily based on following factors:
> >
> > (i) the superior courts are clearly of the view that the opinion contained in text book of so-called Muhammadan Law, are neither final nor binding upon the superior Courts of Pakistan. While discussing paragraphs 352 and 354 of Mulla's book the Supreme Court held:
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> > > "It has been construed by the Courts in Pakistan that this may not be an absolute rule but it may be departed from, if there are exceptional circumstances to justify such departure and in making of such departure the only fact, which the Court has to see where the welfare of minor lies and there may be a situation where despite second marriage of the mother, the welfare of minor may still lie in her custody." (2014 SCMR 343 para 13)
> >
> > (ii) It is clearly mentioned in number of judgments that the book of D.F. Mulla is just a reference and not a statutory law applicable in Pakistan, so it is optional upon the Courts to consult this book while examining any matter in issue related to Muslim Personal Law. While dilating upon paragraph 113 of the Mulla's book it was held:

> "The Quranic Command, as reflected here-in-above, in Verse No.12 of Surah Nisa has completely been ignored in the case, in hand, rather a totally contrary view is being preferred. The main sources of Shariat are; Holy Qur'an, Sunnah, Ijma and Qias and the Hon'ble Federal Shariat Court in case titled "Muhammad Nasrullah Khan v. The Federation of Pakistan and another" (Shariat Petition No.06/I of 2013) has held that, if something in any Book is proved to be different from Quran and Sunnah, that would be invalid. Muhammadan Law by D.F.Mulla, not only in the present case, but other cases also is oftenly quoted for a reference. The Hon'ble Federal Shariat Court, in the referred judgment, has held that, said law is in fact only a reference book and not a statutory law applicable in Pakistan, in the sense that the legislature has not enacted the same. It is just an option of the Court to consult the same on the basis of equity and refer to the principles mentioned in paragraphs of the said book, at times, and that too casually in some matters only. Moreover, the rules quoted in Muhammadan Law are not at all applicable, if in the opinion of the Court, they are found opposed to justice, equity and good conscience. These rules are not even referred to in situations directly covered by the Holy Quran or Sunnah or by binding Ijma and Qias. According to Para-113 of Muhammadan Law by D.F. Mulla, a childless widow takes no share in her husband's lands, but she is entitled to her one-fourth share in the value of trees and buildings standing thereon, as well as in his movable property including debts due to him though they may be secured by a usufructuary mortgage or otherwise." (PLD 2016 Lahore 865 para 6)

(iii) The superior Courts also very clearly pointed out one of the core reasons why in many cases the text books (like book of Mulla) do not give a comprehensive and clear answer to any proposition of Muslim Personal Law because it suffers from over simplification.

> "The rule enunciated in para.354 of Principles of Muhammadan Law by Mulla suffers from over simplification. Similarly the statement of law from textbooks on Muslim Law 'made by the learned Single Judge is not comprehensive. Similarly he has ignored many relevant portions of the textbooks on the subject of Hizanat." (Ref: 2000 SCMR 838).

For these reasons, as discussed earlier, a whole set of jurisprudence of Muslim Personal Law has been evolved in Pakistan by the superior Courts. A few examples are as follows:

i) A rule of custody of minor as mentioned in a paragraph-352 in Mulla's book that a son has to remain with his mother till the age of 07 is not absolute (Ref: 1989 CLC 604). There is no bar on mother or father to have custody of a minor according to Quran and Sunnah nor it is any body's preferential right. It is a question of fact and in all cases the prime consideration is the welfare of child (2000 MLD 1967, 2002 YLR 2548, PLD 2002 Lahore 283, 2004 SCMR 1839 etc.)

ii) …

iii) …

iv) …

> Mulla's "Principles of Muhammadan Law" is a reference or a text book as some times referred in our judgments like other books of this category and not a statutory book. Usually, when the Courts consult it, this exercise is just like consulting a book where the opinions of the great Muslim jurists are easy to get because opinions are mentioned in English language in an over simplified language and paragraphs of the book are numerically marked. The very style of composition of this book often create a confusion amongst the reader that it is a statute book which it is not. Perhaps this is the reason why the petitioner states in his petition that the book of D.F. Mulla comes within the purview of custom and usage which is absolutely wrong and incorrect ..."

28. We are, therefore, of the view that the law has been settled on the point that a mother remarrying does not automatically bar her under the law from the custody of her children; that the forum empowered under the law to determine a child's custody is the Guardian Court set up under the GW Act; and that the High Court cannot arrogate unto itself the power to determine the matter of the custody of a child in the exercise of its constitutional jurisdiction unless the parameters spelt out earlier by us (*infra*) are met and such power can only be exercised by the High Court in exceptional and limited circumstances, and that too for the limited purpose by letting the Guardian Court to decide the matter in accordance with the law. For the sake of clarity, these parameters are:

I. A writ petition seeking issuance of a writ of Habeas Corpus for production and custody of a child may be filed by:

   a. One or both parents of the child/minor; or
   b. The guardian(s) of the child/minor; or

   c. A friend of the child/minor provided the friend proves:

i. That no person legally entitled to the custody of the child is present or available; or

ii. The person legally entitled to the custody of the child is present and available but incapable of filing a writ petition; and

iii. The friend is doing so in the best interests of the child.

II. The High Court is satisfied that seeking remedy under the GW Act, or any other law for the time being in force, would not be an adequate remedy.

III. The production of the child before the High Court is in the best interests of the child/minor, subject to the caveats spelt out in Paragraphs No. 22 & 23 above.

IV. Handing over custody of the minor/child to the person petitioning the High Court is in the best interests of the child/minor.

29. Even otherwise, no ground has been pointed out by the learned counsel for Respondent No.3 to show how the minor being in the custody of the Petitioner was without lawful authority, in an unlawful manner or against the welfare of the minor.

THE OBJECTIVES RESOLUTION, CONSTITUTIONAL COMMANDS AND INTERNATIONAL OBLIGATIONS

30. The Objectives Resolution[8] of 1949 states that the purpose of a Pakistani Constitution would be to ensure that "… the people of Pakistan may prosper and attain their rightful and honoured place amongst the nations of the World and

[8] Which is now a substantive part of our Constitution by virtue of Article 2A.

make their full contribution towards international peace and progress and happiness of humanity."[9] This is why the Constitution recognises and protects as fundamental rights the security and equality of all citizens in Articles 9 and 25 which are reproduced for ease of reference:

> "**Article 9 Security of person.**
>
> No person shall be deprived of life or liberty save in accordance with law.
>
> **25. Equality of citizens.**
>
> (1) All citizens are equal before law and are entitled to equal protection of law.
>
> (2) There shall be no discrimination on the basis of sex.
>
> (3) …"

(**Underlining is ours**)

The people of Pakistan are not limited to a single gender but also include its women who are just as entitled to be a part of the nation's collective struggle towards international peace, progress and happiness striving for in their lives. In endeavouring to achieve these noble aspirations, the mothers of the nation must always be accorded the highest degree of respect for they mould the generations which will continue Pakistan's collective struggle. To justify divesting custody of a child from their mother on the basis of antiquated, parochial and patriarchal constructs and customs is in stark conflict with the blessed titles given to Mothers in the Holy Quran. In fact, this Court in *Beena v. Raja Muhammad* (**PLD 2020 SC 508**) has held:

> "13. The high status of motherhood is reflected in the naming of a chapter of the Holy Qu'ran after Maryam (Mary), peace be

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[9] Point 11 of the Objectives Resolution, 1949.

> upon her, the only chapter named after a woman. Almighty Allah recalls her qualities and bestows on her a number of titles: a purified (tahharaki) and chosen (istafagi) one, a sign (ayatan) of God, truthful (siddiqatun) and devoutly obedient (qanitina). The lady Maryam (peace be upon her) is mentioned 34 times in the Holy Qur'an. The mother of the Prophet Isa (peace be upon him) faced the pangs of childbirth alone. She, like the lady Haajar, overcame formidable odds to care for her child. These great ladies are acknowledged and incorporated into the Faith, enriching Islam's glorious tradition. It is for believers to ponder and reflect upon their lives, and to derive lessons from it. To be financially underprivileged, to be weighed down with a child, to give birth or to have a disability is not something to be derided. For a mother to bear the pain of childbirth, the greatest human natural pain, but then to have her child wrested away from her on the pretext that she is incapable of taking care of the child is insensitive in the extreme, and may also be characterized as hypocritical."
>
> (**citations omitted**)

31. Even on the international legal plane, women's rights have attained the status of obligations erga omnes which have since been codified in the Convention on the Elimination of All Forms of Discrimination against Women ("**CEDAW**") with Article 16 of CEDAW explicitly stating that:

> "1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
>
> (a) The same right to enter into marriage;
>
> (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
>
> (c) The same rights and responsibilities during marriage and at its dissolution;
>
> (d) <u>The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount</u>;
>
> (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
>
> (f) <u>The same rights and responsibilities with regard to guardianship</u>, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; <u>in all cases the interests of the children shall be paramount</u>;
>
> (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;

> (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.
>
> 2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory."
>
> (**Underling is ours**)

It is important to also note that discrimination in CEDAW is defined in Article 1 as:

> "For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."
>
> (**Underlining is ours**)

32. The nations of the world have also recognised that children have rights by virtue of being children. These obligations are also obligations erga omnes and have since been codified in the United Nations Convention on the Rights of the Child (the "**CRC**"). Article 9 of the CRC, which is relevant to this Petition, is reproduced for ease of reference:

> "1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
>
> 2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.
>
> 3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.
> 4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause

> while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned."
>
> (**Underlining is ours**)

Article 9 must be read with Article 37 of the CRC which clearly states that:

> "States Parties shall ensure that:
>
> (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
>
> (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
>
> (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
>
> (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action."
>
> (**Underlining is ours**)

33. The State of Pakistan acceded to CEDAW on 12.03.1996 without any reservations and ratified the CRC on 12.11.1990 with its only reservation being that the CRC's Articles will be interpreted in light of Islamic principles and values. However, a holistic reading of the relevant Islamic principles, the CRC and CEDAW lead us to the conclusion that there is no legal justification for separating a mother from her

child if the mother remarries. We frequently hear cases (the instant matter being one such case) where litigants seek to divest mothers from their children on no other ground than the fact that they have remarried. This practice must end. Our children, their mothers and both the welfare of the mother and the child are paramount. To cite and rely on antiquated, parochial and patriarchal constructs of dignity and honour in order to distance and deprive children of their own mothers has no basis in law.

34. We are clear in our minds that the ordering of the divestment of custody by the impugned judgement/order is without lawful authority. No ground, basis or justification in support of the impugned judgement/order has been shown or posited by the learned counsel for Respondent No.3.

CONCLUSION

35. An upshot of our discussion is that in the presence of an adequate remedy, the High Court was constitutionally barred from exercising jurisdiction under Article 199 of the Constitution. As a result, all proceedings in Respondent No.3's writ petition are declared to be without lawful authority.

36. We have also arrived at the conclusion that the very writ petition filed by Respondent No.3 was bereft of merit and was liable to be dismissed.

37. We were also sanguine that the concerned Guardian Court, seized of the guardian petition filed by the Petitioner, would proceed with the matter expeditiously, with

all due diligence, and conclude the matter as soon as possible without granting any unnecessary adjournments. We were also assured by the Petitioner, who was present in person, that she would retain custody of the child and she would not transfer the child to any other relative, subject to the decision of the Guardian Court.

38. We, however, observe that since the matter of custody requires the recording of evidence and findings of fact to be recorded by a Court of competent jurisdiction, our observations shall be treated as tentative and confined only to the impugned order/judgement of the Lahore High Court, Lahore before us and will not, in any manner whatsoever, influence the Guardian Court/Family Court, Gujrat seized of the guardian petition filed by the Petitioner, which shall decide the matter by independent application of mind to the facts, circumstance, and evidence produced before the same.

39. These are the detailed reasons for our short order reproduced above, whereby the petition was converted into an appeal and allowed, and the impugned judgement/order dated 21.09.2023 was set aside.

Judge

Judge

Judge

ISLAMABAD, THE
13th of December, 2023
Khalil, LC*/-

APPROVED FOR REPORTING*/-