

ORDER SHEET
IN THE LAHORE HIGH COURT
RAWALPINDI BENCH, RAWALPINDI.
JUDICIAL DEPARTMENT

W.P. No.1421 of 2020.

Syed Amjad Hussain Shah **VS.** Ali Akash alias Asima Bibi and
five others.

S.No. of order/ proceeding	Date of order/ proceeding.	Order with signatures of Judge, and that of parties or counsel, where necessary.
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14.09.2020.	M/s. Raja Haseeb Sultan and Raja Amjad Mahmood, Advocatesforthe petitioner. Nemo for the respondent No.1 Mr. Asad Jamal, Advocate for the respondent No.6 Mr. Mujeebur Rehman Kiyani, Additional Advocate General. Mr. Qaisar Abbas Shah, Assistant Advocate General with Tahir Kazim SDPO Taxila,Tahir Mehmood SI/S.H.O Police Station Taxila , Nasir Hameed, SI/S.H.O Police Station Garden Town, Lahore and Superintendent <i>Dar ulAman</i> , Rawalpindi.
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Through this petition under Article 199 of the
Constitution of Islamic Republic of Pakistan, 1973 read
with section 491 of the Code of Criminal Procedure,
1898 the following prayer has been made by the
petitioner :

*“It is, therefore respectfully prayed that by
keeping the above circumstances, the instant Writ
Petition, may kindly be accepted & allowed, while
declaring the impugned order in question dated
30.06.2020 passed and issued by Mr. Muhammad
Azeem Akhtar, Additional Session & District Judge
Taxila, district Rawalpindi, is against the law and
facts of the case without lawful justification and
cogent reason, improper without affording proper*

hearing of petitioner and also void ab inito as well as arbitrary in nature and same ordered to be set aside/re-called being not maintainable and sustainable in the eyes of law while restoring the custody of detainee daughter namely Syed Neha Ali, aged about 16- years, by way of issuing direction to recovered (sic) the above detainee daughter namely Syeda Neha Ali, from the illegal, & improper detention and custody of respondents, particularly respondent No.1, through bailiff of court, or S.H.O. Police Station Taxila, (Respondent No.4), District Rawalpindi, and ordered to be produced the above detainee before this Honourable Court and further order to handed over the same to the petitioner , for the interest of justice, accordingly.

It is further prayed to this effect that act of respondents by the keeping the above circumstances, may kindly order to be declaring (sic) totally against the law and facts of the case, without lawful justification and cogent reason, without lawful process and fall within the ambit of criminal act of fraud, accordingly.

Any other relief which, this Honourable Court, deems fit and proper regarding production of detainee along with report of bailiff of court and further statement of detainee order to be recorded, and an criminal case also order to be registered against the culprits/respondents, for the interest of justice, accordingly.”

2. The brief facts of the case as advanced by the petitioner are that his daughter namely Neha Ali (respondent No.6), was seduced into marriage with Ali Akash alias Asima Bibi, respondent No.1 despite the

assertion that the said Ali Akash alias Asima Bibi was a female. It has been further submitted by the petitioner that Ali Akash alias Asima Bibi, respondent No.1 filed a petition seeking custody of Neha Ali (respondent No.6) which petition, as filed by Ali Akash alias Asima Bibi, respondent No.1 was allowed by the learned Additional Sessions Judge Taxila, District Rawalpindi vide his order dated 30.06.2020 and Neha Ali, respondent No.6 was allowed to accompany Ali Akash alias Asima Bibi, respondent No.1, with an observation that Ali Akash alias Asima Bibi, respondent No.1 was the husband of Neha Ali, respondent No.6.

3. During the course of the proceedings of this petition, Neha Ali, the alleged detainee, respondent No.6, was directed to appear before the Court who entered an appearance on 15.07.2020 and this Court, vide order passed on the same day, directed that the gender of Ali Akash alias Asima Bibi, respondent No.1 be determined by a medical board to be constituted by M.S DHQ, Rawalpindi. Then vide order dated 05.08.2020 non-bailable warrants of arrest were issued for the appearance of Ali Akash alias Asima Bibi, respondent No.1 and vide order dated 07.08.2020 this Court directed to place the name of Ali Akash alias Asima Bibi, respondent No.1. in the Exit Control Lists and directed to block the computerized national identity card (CNIC) of the respondent No.1. Furthermore, vide the same order dated 07.08.2020, Neha Ali, the alleged detainee, respondent No.6, was directed to be lodged at *Dar-ul-Aman* Rawalpindi till further orders. On 07.09.2020, this Court directed the Superintendent *Dar-ul-Aman* Rawalpindi to produce Neha Ali, the alleged detainee, respondent No.6, before the Court today. Ali Akash alias Asima Bibi,

respondent No.1 despite the issuance of non-bailable warrants of arrest, did not further join the proceedings of this petition.

4. In compliance of the order of this Court dated 07.09.2020 Neha Ali, the alleged detainee, respondent No.6, has been produced before the Court by the Superintendent *Dar-ul-Aman* Rawalpindi. According to the Superintendent *Dar-ul-Aman* Rawalpindi Neha Ali, the alleged detainee, respondent No.6, was not allowed to meet either party or any representative of either party during her stay at the *Dar-ul-Aman* Rawalpindi. *Mst. Neha Ali, respondent No.6 submits that she being sui juris had contracted the marriage of her own free will and consent with Ali Akash, respondent No.1, believing him to be of male gender however since then divorce has been pronounced and finalized between the former spouses and now she has no relationship with Ali Akash alias Asima Bibi, respondent No.1. Neha Ali, respondent No.6 further submits that the marriage between her and Ali Akash, respondent No.1 stands dissolved. She further submits that she being sui juris, wants to reside at a place of her own choice and continue with her studies. She submits that she is facing clear and present danger to her life at the hands of her father and brothers, hence she has no desire to live with them rather seeks protection in this regard.*

5. Learned counsels for the petitioner argued in line with their prayer in the instant petition and according to the facts narrated in the same and submitted that the custody of Neha Ali, respondent No.6, be handed over to the petitioner, her father or that she be lodged at *Dar-ul-Aman*.

6. Learned counsel for respondent No.6, while refuting the contentions of the learned counsel for the petitioner, has argued that the instant petition is not maintainable under the law and is devoid of merits.

7. The learned Additional Advocate General and the learned Assistant Advocate General argued that under section 491, Cr.P.C. this Court need not embark upon an inquiry to the veracity or genuineness of *Nikahnama* or marriage or divorce, but they concede that being a *sui juris*, Neha Ali respondent No.6 may be set at liberty and she cannot be detained or forced to live in *Dar-ul-Aman* against her wishes. The learned Additional Advocate General, however, stressed that Neha Ali respondent No.6 be not allowed to reside at *Dastak*, a shelter home at Lahore and a project of AGHS Legal Aid Cell, a legal aid organization cofounded by Ms. Hina Jilani.

8. I have heard the learned counsels for the parties and perused the record with their able assistance.

9. The High Court has two-fold jurisdiction under section 491 of the Code of Criminal Procedure 1898; (1) to deal with a person within its appellate criminal jurisdiction according to law; and (ii) to set him/her at liberty if he/she is illegally or improperly detained. Section 491 of the Code of Criminal Procedure 1898 provides as under:-

491. Power to issue directions of the nature of a habeas corpus.1) Any High Court may, whenever it thinks fit, direct

a) that a person within the limits of its appellate criminal jurisdiction be brought up before the Court to be dealt with according to law;

(b) that a person illegally or improperly detained in public or private custody within such limits beset at liberty ;

(c) that a prisoner detained in any jail situate within such limits be brought before the Court to be there examined as a witness in any matter pending or to be inquired into in such Court;

(d) that a prisoner detained as aforesaid be brought before a Court martial or any Commissioners for trial or to be examined touching any matter pending before such Court martial or Commissioners respectively ;

(e) that a prisoner within such limits be removed from one custody to another for the purpose of trial; and

(f) that the body of a defendant within such limits be brought in on the Sheriff's return of Cepi Corpus to a writ of attachment.

The question which falls for determination, however, is that if the Court finds that the person brought before it was not being illegally or improperly confined or detained what order can be passed regarding the custody of that person or that if the said person can be sent to a certain institution to reside there without that person's consent or that the custody of the said person can be handed over despite the lack of such a person's consent. It may be observed that the proceedings under section 491, Cr.P.C. are summary in character. These proceedings are not intended to go beyond the summary consideration of the questions essentially relevant to the alleged detention i.e. whether a detainee is to be set at liberty and a consequence thereof be permitted to go with the person of his or her choice or to drop the proceedings when the detention is found legal. The Court, while deciding an application under section 491, Cr.P.C. is not required to go into the question of the status of the

relationship of the parties by holding full-fledged trial of the counterclaims and it should concern itself only with the free will of the detinue. The Court may "set at liberty", but cannot restore status quo ante against the wishes of the person brought before it. Such a course will lead to curtailment of liberty for which there is no warrant under section 491 nor can such an order be sustained under section 561-A of the Code as it cannot be said that allowing a person freedom of movement is an abuse of the process of the court. A detinue can be sent to "*Dar-ul-Aman*" when she has shown apprehension of danger to her life if she is sent with either of the parties. A free person, cannot be put to physical restraint or confinement in "*Dar-ul-Aman*" for an indefinite period and that too not based on any concrete fact or allegation. Mst. Neha Ali, respondent No.6, **admittedly** being *sui juris*, cannot be detained in "*Dar-ul-Aman*" against her wishes. Article 9 of the Constitution of the Islamic Republic of Pakistan, 1973 guarantees protection of life and liberty of citizens and right to liberty is placed on a higher pedestal which is to be respected by all and sundry. It is trite that courts are guardians of liberty of citizens and under the Constitution are bound to protect such fundamental right of citizens of State. There is no cavil that the object and purpose of establishing shelter homes (*Dar-ul-Amans*) throughout the country is to provide protection to the oppressed or homeless ladies and to provide them with shelter when they feel insecure with their family members or in the society. When a woman makes a prayer for security to her life, she can be lodged at "*Dar-ul-Aman*" but still the woman has the right to make a prayer at any stage to the Superintendent of "*Dar-ul-Aman*" or to the competent Court on whose

order she has been sent to "Dar-ul-Aman" to release her and restore her right of liberty. In such a course, she cannot be further kept in "Dar-ul-Aman" under the law of the land. *Mst. Neha Ali, respondent No.6, is admittedly sui juris and, therefore, she cannot be detained by any person against her wishes.* There is no law that a female on the mere ground of her sex must invariably be treated as a person under some sort of disability. The August Supreme Court of Pakistan has held in the case of ALI MUHAMMAD Vs. The STATE and others (2013 S C M R 1484) as under

It is quite ironical and shocking that habeas corpus proceedings before the Lahore High Court, Lahore, which were meant to secure release of a person from an illegal or improper custody or confinement, had been utilized in the present case for depriving a free person of her liberty and the net result achieved was that a grown up young lady who was not found to be in any kind of confinement or under any restraint had been locked up and incarcerated within the confines of a Dar-ul-Aman for an indefinite period! Such an approach adopted and the result achieved by the learned Judge-in-Chamber of the Lahore High Court, Lahore surely ran contrary to the very essence and purpose of a writ or petition for habeas corpus which is securing freedom and not curtailing liberty. We are sure that the learned Judge-in-Chamber of the Lahore High Court, Lahore would have done better if he had sought guidance in this regard from various judgments handed down by this Court on the subject from time to time.

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In these indefensible circumstances, after having been punished only for an imagined or apprehended sin, the detainee has appeared to us to be, in the words of Shakespeare's King Lear, a woman "more sinned against than sinning". Apart from that the Constitution of Pakistan mandates that the judgments of this Court are binding on all other courts in the country but while passing the impugned order the learned Judge-in-Chamber had failed to follow the above mentioned, and many other, judgments rendered by this Court on the subject. It may be true that during the pendency of a petition filed in the nature of habeas corpus a court can pass a rule nisi regarding interim custody of the alleged detainee but it is unimaginable and unthinkable that after final disposition of such petition the alleged detainee, who was otherwise a free person, may be put to physical restraint or confinement for an indefinite period and that too not on the basis of any concrete fact or allegation but merely on the basis of an imagined possibility of commission of a sin or a crime."

The August Supreme Court of Pakistan has held in the case of Mst. Sahi Bi v. Khalid Hussain and 6 others (1973 SCMR 577) as under

"Under section 491, Cr. P. C., if a sui juris detenu is unwilling to go with her husband or guardian, the Court cannot compel her to go with them. She must be set at liberty and allowed to move freely. This position was made clear in the above-

mentioned case decided by this Court and the learned Single Judge should have set at liberty the detenu and allowed her to move freely according to her wishes.

It is, however, open to respondent No. 1 to file a suit for restitution of conjugal rights against the detenu for the redress of his grievance. So far as the proceedings under section 491, Cr. P. C. are concerned, the only course open to the High Court in the face of the unwillingness of the detenu to go with her husband was to set her at liberty.”

10. As a result of the above discussion, Mst. Neha Ali, respondent No.6, being *sui juris*, is **set at liberty** and permitted to live her life as she pleases within the dictates of law and faith. Tahir Kazim SDPO Taxila and Tahir Mehmood SI/S.H.O Police Station Taxila, present before the Court, are directed to provide Mst. Neha Ali, respondent No.6 with all the possible security and protection and ensure her safety. Furthermore, the petitioner and his family members are directed not to cause any harassment to Mst. Neha Ali, respondent No.6. It is observed that Mst. Neha Ali, respondent No.6 admittedly being *sui juris*, is competent to lead a life of her choice and no restraint can be imposed on her even at the instance of her father or brother.

11. It is further held that the observations and findings with regard to the marriage of Mst. Neha Ali, respondent No.6 and Ali Akash alias Asima Bibi, respondent No.1, as contained in the order dated 30.06.2020 passed by Mr. Muhammad Azeem Akhtar, Additional Sessions Judge Taxila, District

RawalpindiRawalpindi, to the extent of his observations regarding the marriage of Mst. Neha Ali, respondent No.6 and Ali Akash alias Asima Bibi, respondent No.1, were unwarranted and are held to be of no legal value *being beyond the scope of the application before him*, The August Supreme Court of Pakistan has already held that the disputed question of marriage cannot be decided in any proceedings under section 491 Cr.P.C. In the case of Hafiz ABDUL WAHEED Versus Mrs. ASMA JEHANGIR and another{**P L D 2004 Supreme Court 219**}, the August Supreme Court of Pakistan was pleased to observe as under:-

“There is force in the submission of the learned Attorney-General that the High Court has needlessly blown up the issue. The sole controversy before the High Court in Criminal Appeal No.98 of 1997 was whether Mst. Saima Waheed daughter of the appellant was being wrongfully confined in the place known as ‘Dastak’, run by respondent No. 1. On record, an application filed by Mst. Saima Waheed to the effect that she was living in ‘Dastak’ of her free-will is available, She also appeared before learned Judge (Justice Malik Muhammad Qayyum, as he then was) on 18-4-1996 where again she asserted that she was living in ‘Dastak’ and would like to go there. Learned Judge, however, declined to accede to this request on the ground that another learned Judge (Justice Ihsan-ul-Haq Chaudhry, as he then was) had in another habeas corpus petition directed her recovery from ‘Dastak’ and her lodging in Dar-ul-Aman. Justice Malik Muhammad Qayyum notwithstanding her protest and apprehension of serious danger to her life, directed that order of Justice Ihsan-ul-Haq Chaudhry be complied with. He, however, directed Senior Superintendent of Police, Lahore to personally ensure safety of the detinue while in ‘Dar-ul-Aman’. The learned Judges of the High

Court, with due deference, could have and ought to have avoided the needless controversy as regards the validity of the marriage which subject in any case falls within the exclusive domain of Family Court established under the West Pakistan Family Courts (Act XXXV), 1964.

24. The proceedings in the High Court originated from the petition of the appellant under section 491 of the Code of Criminal Procedure, 1898, praying:

"For the recovery and release of Mst. SaimaWhaeed, the detenue from illegal detention/custody of the respondents."

In the facts and circumstances of the case particularly in view of the stance of the alleged detenue that she was voluntarily putting up at 'Dastak', the High Court clearly transgressed its jurisdiction and by formulating the question of validity of marriage and then answering the same, assumed to itself the exclusive jurisdiction of the Family Court in such matter. The point need not be laboured further and may be concluded by observing that it was inappropriate and undesirable, if not illegal for the High Court to have determined the fate of the couple by adjudicating the validity of marriage on the touchstone of Injunctions, of Islam, in proceedings under section 491, Cr.P.C.

12. So far as the points raised by the counsel for the petitioner are concerned regarding the marriage and gender of Ali Akash alias Asima Bibi, the respondent No.1 are concerned, the same cannot be resolved in these proceedings. The petitioner is at liberty to agitate the same before the proper forums, either before the Family Court or if there is any criminal case registered according to the version of the petitioner, then in criminal case proceedings. If the petitioner approaches the concerned forum, such forum shall attend and resolve the proposition without taking any influence from this order.

13. As a corollary to the order passed by this Court dated 07.08.2020, it is also directed that the National Database & Registration Authority (NADRA) shall pass a fresh order regarding the change of entry in the column relating to **gender** made in the CNIC No. 37406-6414457-0 relating to Ali Akash alias Asima Bibi, respondent No.1, in accordance with the law (including the provisions of the *Transgender Persons (Protection of Rights) Act, 2018*) and after providing fair opportunity of hearing to all the parties concerned. The office is directed to transmit a copy of this order to the National Database & Registration Authority (NADRA) for compliance of the same. The order of this Court dated 07.08.2020 whereby it was directed to place the name of Ali Akash alias Asima Bibi, respondent No.1. in the Exit Control Lists, is recalled. The Federal Government shall be at liberty to proceed in the matter of placing the name of Ali Akash alias Asima Bibi, respondent No.1. in the Exit Control Lists in accordance with law and if need be .

14. Needless to add, it is made clear that whatever has been observed above is the result of the tentative assessment and shall not prejudice the case of either side during subsequent proceedings before any forum

15. With these observations and in these terms this petition stands disposed of.

(SADIQ MAHMUD KHURRAM)
JUDGE

Raheel

Approved for Reporting

Judge