

**Form No:HCJD/C-121**  
**ORDER SHEET**  
**IN THE LAHORE HIGH COURT LAHORE**  
**JUDICIAL DEPARTMENT**

**W.P. No.5237/2019**

**Mst. Rabyia Ilyyas                      Vs.      ASJ, etc.**

<b>S.No.of order/ Proceeding</b>	<b>Date of order/ Proceeding</b>	<b>Order with signature of judge, and that of parties or counsel, where necessary.</b>
--	--	--

<b>08.02.2019</b>	<b>Mr. Ashiq Hussain, Advocate for petitioner. Mr. Fayyaz Ahmad Mahr, AAG. Mr. Ghulam Hussain Awan, Advocate for respondents No.3 &amp; 4 Rasheed ASI with record.</b>
-------------------	--

Through this petition filed in terms of Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, read with section 491 of the Code of Criminal Procedure, 1898, the petitioner has made the following prayer;-

- a. Under the submissions made above it is, therefore, most respectfully prayed that instant writ petition may kindly be accepted and impugned orders dated 07.01.2019 & 17.01.2019 may kindly be declared as void ab initio illegal thus while setting aside the impugned orders the respondent No.2 may kindly be directed to recover the deteneu namely Azan aged about 03 years son of petitioner from the illegal, unlawful and improper custody of the respondents No.3-4 and also produce the detenu before this Hon'ble Court in the interest of justice, equity and fair play for dealing the detenu in accordance with law.*
- b. It is further prayed that in view of Rule Nisi the respondent No.2 may kindly be directed after effecting recovery of the detenu from the private respondents, to hand over custody of the detenu, to the petitioner immediately and without any further delay till final disposal of the main case.*

*c. Any other relief which this Hon'ble Court deems fit and proper may also be awarded to the petitioner.*

2. In pursuance of order dated 28.01.2019, the minor Muhammad Azan has been produced before this Court by his paternal-parents respondents No.3 and 4.

3. Learned counsel appearing on behalf of respondents No.3 & 4 argued that the petitioner herself handed over the custody of the minor to the respondents before a learned Judge Family Court, Sialkot, wherein matter of maintenance allowance and recovery of dowry articles was pending and the parties reached into an agreement, wherein the petitioner herself waived her right of '*Hizanat*' and handed over the custody of the minor to the respondents. Learned counsel also argued that earlier, the petitioner had filed an application u/s 491 Cr.P.C. before the learned Addl. Sessions Judge, Siaklot and the same was dismissed vide order dated 07.01.2019 on the ground that actually, the petitioner had herself handed over the custody of the minor to the attorney of father of the alleged detenu.

4. On the other hand, learned counsel appearing on behalf of the petitioner strongly controverted the arguments of the learned counsel for the respondents No.3 & 4 and states that the learned Family Court has got no jurisdiction to decide the custody of the minor, when it was seized with the

suit for maintenance allowance and recovery of dowry articles etc. The crux of his arguments was, if the petitioner had herself handed over the custody to the respondents through a compromise, even then she cannot be deprived of her right of 'Hizanat'. In this regard the Court is guided by the dictum laid down by the august Supreme Court of Pakistan in case Mst. RAZIA REHMAN vs. STATION HOUSE OFFICER and others (PLD 2006 Supreme Court 533), wherein, in a similar situation, the august Supreme Court observed as under:-

*"It is not denied that according to the Muslim Personal Law, the mother has the preferential right of HIZANAT (temporary custody of the minor) till the minor attains the age of seven in the case of males and the age of puberty in the case of a female minors. It is also not denied that the minors in question have still not reached the said ages. It is also an un-deniable fact that according to the law of the land, any agreement reached between the two parents, inter alia, regarding the custody of the minor children is neither valid in law nor even enforceable. Therefore, even if it be presumed that the petitioner-lady had, through some alleged compromise which she is however, denying, waived her right of HIZANAT, the said compromise or agreement had no binding force in the eyes of law. Nothing could be brought on record e.g. the petitioner having re-married or not being of a good moral character which could have dis-entitled the petitioner, mother to her right of HIZANAT vis-a-vis the two minor children.*

The august Supreme Court of Pakistan has also held in the case titled MUNAZZA BIBI vs. SHO

Police Station City Chichawatni, District Sahiwal and 2 others (2012 P.Cr.L.J. 1567), wherein custody of the minor was handed over to the mother despite the fact that she made a consenting statement relinquishing her right of *Hizanat*.

5. As far as objection of learned counsel for the respondents No.3 & 4 that the similar petition filed by the petitioner had been dismissed by the learned Addl. Sessions Judge, wherein custody of the minor was refused to her and in the situation, the instant petition is not maintainable is concerned, the august Supreme Court of Pakistan in the case of Mst. Razia Rehman (supra) has also observed that an earlier decision in a habeas corpus matter could never be permitted to operate as *res judicata* with respect to any subsequent petition.

6. Another aspect of the case is that the father of the minor is stated to be out of country and the minor is living with his paternal grand-parents, so keeping in view the above circumstance and tender age of the minor Muhammad Azan, the petitioner, who is the real mother, cannot be deprived of her right to *Hizanat* under the circumstances and the alleged compromise or agreement has no binding force in the eyes of law.

7. For what has been discussed above, this petition is **allowed**, the impugned orders dated 07.01.2019 & 17.01.2019 passed by the learned Addl. Sessions Judge, Sialkot are set aside and the custody of the minor Muhammad Azan aged about

03 years is ordered to be handed over to the petitioner/real mother. Anyhow, the respondents No.3 & 4 would be at liberty to invoke the jurisdiction of the learned Guardian Court for regularization of the custody of the minor, if so advised.

**(Muhammad Waheed Khan)**  
**Judge**

*Approved For Reporting*

***Judge***

\*Mumtaz\*