

ORDER SHEET
HIGH COURT OF SINDH AT KARACHI

C.P. No.S-1006 of 2025

Date	Order with signature(s) of Judge(s)
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1. For order on CMA No.6557/2025
2. For order on office objection NO.1 to 8 a/w Reply of Counsel thereof as “Flag A”
3. For order on CMA No.6558/2025
4. For hearing of main case

26.09.2025

Mr. Mohammad Azam Zardari, Advocate for the Petitioner

1. Urgency granted.
- 2-4. This petition has been filed against the respondents including the mother, who has been given custody of minor wards. According to counsel for the petitioner, the custody of minors has been given to the mother in habeas corpus petition by the learned 3rd Addl. Sessions Judge Malir, Karachi. When confronted to learned counsel for the petitioner that how this petition is maintainable as the kids aged about 6 years and 8 years are with the mother, learned counsel says that maybe minors are with other respondents.

I have considered contention of learned counsel for the petitioner; however, since according to the petitioner, minors are with the mother who under the Islamic jurisprudence is entitled to hold the custody of the minor, therefore, in this extraordinary jurisdiction no interference can be indulged. Undoubtedly, the father is also a natural guardian but according to Islamic law, the custody of minors remains with

the mother. The existence of a remedy under the Guardians and Wards Act, 1890 does not bar the invocation of jurisdiction under Section 491 of the Criminal Procedure Code, 1898, in matters concerning the custody of minors. The Supreme Court in ***Nisar Muhammad v. Sultan Zari* (PLD 1997 SC 852)** affirmed that where a parent is prima facie not entitled to custody under Muslim Personal Law, judicial intervention under Section 491, Cr.P.C. remains valid and appropriate. It was held that the mother is entitled to hizanat of her male child below the age of seven and of female children until puberty. In cases where minors fall within these age thresholds, custody with a non-entitled party may be declared illegal or improper under Section 491, Cr.P.C., pending final adjudication by the Guardian Judge. Thus, interim custody under Section 491 is governed by the principles of hizanat, and does not prejudice the ultimate determination of custody under the Guardians and Wards Act.

The jurisdiction of the High Court under Section 491 of the Criminal Procedure Code, 1898, remains intact and exercisable even during the pendency of proceedings under the Guardians and Wards Act, 1890. The Honourable Supreme Court of Pakistan in ***Mirjam Abberras Lehdeaho v. SHO, Police Station Chung, Lahore and others* (2018 SCMR 427)** authoritatively held that Section 491, Cr.P.C. is designed to address emergent situations involving unlawful or improper deprivation of custody, whereas Section 25 of the Guardians

and Wards Act provides for long-term adjudication of guardianship. In exceptional cases, where the welfare of the minor demands immediate restoration of custody to the lawfully entitled parent, the High Court is empowered to pass interim orders under Section 491, Cr.P.C., notwithstanding the pendency of proceedings before the Guardian Judge. The Supreme Court clarified that the two provisions operate in distinct domains and do not oust or overlap each other's jurisdiction, thereby preserving the High Court's authority to intervene where the best interest of the minor so demands.

Following the earlier dictum, the Supreme Court in ***Shazia Akbar Gh alzai v. State (2019 SCMR 116)*** held that no justification was advanced to deny custody to the biological mother, and that the High Court erred in declining jurisdiction under Section 491, Cr.P.C., despite the unlawful removal occurring within its territorial limits. The judgment reinforces that in cases of infants, maternal custody is presumed to serve the best interest of the child, and judicial intervention is warranted where such custody is disrupted through coercive or evasive means. Under Islamic jurisprudence, the mother is entitled to *hizanat* of her female child until she attains puberty, even after divorce. However, this custodial right is forfeited if the mother remarries a person not within the prohibited degrees of relationship to the child, as codified in D.F. Mullah's *Mohammadan Law*, Paras 352 and 354. Notwithstanding this principle, the determination of custody ultimately lies with the

Guardian Court, which is the final arbiter under the Guardians and Wards Act, 1890. The Court is empowered to assess the eligibility of the claimant and award custody considering on the facts and evidence based on the welfare of the minor. Therefore, the petition is not maintainable and is dismissed. However, the petitioner, may if he advised so, to approach the competent Guardian & Ward Court to redress his grievances.

JUDGE

Kamran/PS