

ORDER SHEET  
**IN THE HIGH COURT OF SINDH CIRCUIT COURT HYDERABAD**

**C.P. No. S-2026 of 2017**

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<b>DATE</b>	<b>ORDER WITH SIGNATURE OF JUDGE</b>
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Hearing of case (Priority)

1. For orders on CMA No. 3300/2018.
2. For hearing of Main case.

Date of hearing: 23.04.2018.

Date of order: .05.2018.

Mr. Tariq Mehmood, Advocate for the petitioner.  
Syed Safdar Ali, Advocate for respondent No. 1.

***MRS. KAUSAR SULTANA HUSSAIN, J:-*** Instant Constitution petition assailed the order dated 11.09.2017 passed by the learned VIIIth Additional Sessions Judge, Karachi West (respondent No. 2), whereby respondent No. 1's application under section 491, Cr.P.C. for recovery of his minor child was allowed and custody of the minor Master Sarim was given to respondent No. 1.

2. Precisely, relevant facts are that the petitioner was married to Muhammad Majid (respondent No. 1) and out of this wedlock, one male child was born. Subsequently, the marriage between the said parties was dissolved and the custody of the minor was with petitioner. The respondent No. 1 filed the Habeas Corpus Petition bearing No. 1055 of 2017 under Section 491, Cr.P.C. seeking custody of the minor on the ground that the petitioner has remarried and, therefore, she has lost her right of Hizanat. This Criminal Misc. Petition No. 1055 of 2017 was allowed, vide the impugned order and the custody of minor was handed over to respondent No. 1, hence the present petition.

3. Learned counsel for the petitioner submitted that while deciding the petition under section 491 Cr.P.C, it is to be seen as to whether detinue is in wrongful custody of any person. Learned counsel for the petitioner submitted that the question of Hizanat cannot be decided in a petition under section 491

Cr.P.C and that even after remarrying, the petitioner is still the real mother of the minor and, therefore, the custody of minor cannot be termed as illegal or wrongful. Learned counsel further argued that the proper forum to decide the question of custody of the minor as well as his maintenance and welfare is the Guardian and Wards Court. He, therefore, prayed for setting aside the impugned order. The learned counsel for the petitioner has relied upon

- i. 2015 Y L R 2465 (Sindh)*
- ii. P L D 2014 Sindh 598.*
- iii. P L D 2001 Karachi 197.*

4. On the other hand, learned counsel for respondent No. 1 contended that respondent No. 1 is the real father of minor and after remarriage of the petitioner, she lost her right of Hizanat and thus, the learned trial Court was justified in handing over the custody of the minor to respondent No. 1 for his proper maintenance and education and the respondents/petitioner are at liberty to file appropriate case for custody of the minor in the Guardian and Ward Court. He lastly prayed to dismiss the instant petition. The learned counsel for the respondent No. 1 has relied upon the following case laws in support of his contentions regarding the right of Hizanat of the mother after her remarriage with another person after divorce from ex-husband.

- i. 2005 Y L R 2414 (Lahore)*
- ii. 2010 Y L R 513 (Karachi)*
- iii. 2006 Y L R 1728 (Lahore)*
- iv. 2002 Y L R 2854 (Karachi)*

5. I have heard the learned counsel for the parties and have gone through the material available on record and the judgments on which the learned Advocates have placed reliance. From perusal of record it reveals that the petitioner and respondent No. 1 dissolved their marriage and at that time, the petitioner was pregnant. After divorce the petitioner had to file a suit for recovery of her dower amount, return of dowry articles and maintenance of her Iddat period bearing Suit No. 1801 of 2015, which was decreed in favour of the petitioner, as the respondent No. 1 did not peruse the said suit. Subsequently, the respondent No. 1 has filed Criminal Miscellaneous Application under Section

491 Cr.P.C and prayed that the custody of minor be handed over to him. After receiving notice of that application through S.H.O. of Police Station Iqbal Market for her appearance before the learned VIIIth Additional Sessions Judge Karachi-West alongwith minor. Per petitioner, when she alongwith minor and her sister reached within the premises of the Court, Court Moharrar of Police Station Iqbal Market tried to snatch the minor from her sister and also used filthy language against her and forcibly taken them to the Court. She further mentioned in her petition that the Court in absence of her counsel handed over the custody of minor to the respondent No. 1 although at that time the minor was about two years old and suckling Baby. While perusing the order of learned VIIIth Additional Sessions Judge, Karachi-West, it is clear that the petitioner/respondent No. 1 was not provided any opportunity to reply the petition of the respondent/applicant, even on her first appearance before the Court in absence of her counsel the minor was handed over to the applicant/respondent No. 1, on the ground that she has confirmed that she had contracted second marriage. The learned trial Court did not bother that minor is suckling Baby, who cannot be treated like things. Petitioner present before this Court stated that she did not contract second marriage and she also did not confirm the claim of the respondent No. 1 before the learned VIIIth Additional Sessions Judge Karachi-West that she had contracted second marriage. Since the petitioner has denied the claim of the respondent No. 1 in respect of her second marriage before this Court, while the respondent No. 1 is adamant on his claim and the trial Court had handed over the custody of the minor to respondent No. 1/applicant on the sole ground of petitioner's remarriage. Besides the minor is a son and in case of Mst. Tayyaba Khan *Versus* Syeda Begum and another (P L D 1994 Karachi 204) it has been held that "*the mother being legally entitled to the custody of her minor son, till the age of 7 years, the custody of the minor with father having been demanded by the mother had not be considered as legal.*"

6. In view of the above circumstances, this petition is allowed, the father/respondent No. 1 is directed to hand over the custody of the minor Sarim aged about 30 months immediately to the petitioner/mother, who is directed not to move minor from the territorial limits of this Court.

7. For ultimate determinate of the entitlement of custody shall lie with learned Guardian and Ward Judge to whom the parties are directed to approach, if they so desire. The case laws produced by the learned counsel for the petitioner are quite applicable in the circumstances of this petition, while the case laws produced by the learned counsel for the respondent No. 1 have been related with those minors, who had been in custody of their grandparents with the consent of their parents, but later on they claimed. Order accordingly.

J U D G E