

Order Sheet
IN THE HIGH COURT OF SINDH KARACHI
Constitutional Petition No. S –837 of 2020

Muhammad Faraz Rehan

Versus

Station House Officer, PS Sir Syed (Central) Karachi and 03 others

Date of hearing & order : 04.01.2021

Mr. Muhammad Kamran Mirza, advocate for the petitioner.

Mr. Raja Ali Asghar, advocate for the respondents 2 & 3.

Ms. Naushaba Haque Solangi, AAG.

ORDER

ADNAN-UL-KARIM MEMON, J. The petition is filed by the petitioner to issue a writ of Habeas Corpus directing the respondent-police officials to produce his minor son namely Master Zohan Faraz aged about 02 years to enable him to take his custody.

2. According to the averments of the petition, his wife passed away on 09.05.2020 due to the coronavirus pandemic, and in the meanwhile respondents 2 and 3 took away the minor's custody. The petitioner came into contact with them for returning his custody, but they refused to return the custody of the minor to him.

3. Mr. Muhammad Kamran Mirza, learned counsel for the petitioner, has argued that he has got the right to live with his minor son and the grandmother has no right to the custody of his minor son under the Guardian and Wards Act, 1890. In support of his contention, he relied upon in the case of Nasir Raza v. Additional District Judge, Jehlum and another, **2018 SCMR 590** and argued that the father is a natural guardian of minor in comparison to maternal/paternal grandmother, therefore, he is entitled to the custody of his minor son.

4. Mr. Raja Ali Asghar, learned counsel for the respondents 2 & 3, has opposed this petition on the ground that in the custody matters the only Guardian and Wards Court has jurisdiction to regulate the custody of the minor; that the purpose of filing of this petition is achieved as the minor has been produced before this Court and now it is for the learned trial Court to decide in this regard. He asserted that the petitioner has failed to show that he was/is in such a position

to take care of his minor son with the same zeal and affection as that of a grandmother.

5. I have heard learned counsel for the parties, perused the material available on record and case law cited at the bar.

6. Record reflects that the petitioner is a real father and natural guardian of minor namely master Zohan Faraz. Petitioner preferred Habeas Corpus Petition No.239/2020 before the learned Additional Sessions Judge-VI Karachi Central, which was dismissed vide order dated 23.09.2020 with direction to approach the learned Guardian and Wards Court. Admittedly, the minor is a male child of 2 years old would require constant care on the premise that his mother has died; indeed, respondent No.3 is the maternal grandmother of the minor and she has developed an emotional attachment with the minor child and the issue of welfare of the minor is yet to be decided by the learned Guardian and Wards Court if approached by the parties. It is well settled now that proceedings under section 491, Cr.P.C. is not available for declaring any person as guardian or for determining all the questions relating to the custody of minor because the final decision of regular custody was to be decided in the proceedings initiated by, the parties claiming the custody of the minor before the Guardian court. It is well settled law that paramount consideration while deciding the question of custody of the minor is the welfare of the minor which has to be seen in view the age, sex, and religion. Welfare includes his moral, spiritual, and material wellbeing. While considering what is the welfare of the minor the court shall have regard to the age, sex, religion of the minor, the character and capacity of the proposed guardian, his nearness of kin to the minor, and the preference of the minor if he or she is intelligent enough to make it.

7. I am of the view that the purpose of filing this petition is served as the minor has been produced before this Court; and, prima-facie the minor is no more in illegal custody as discussed in the preceding paragraph. Primarily, in the cases, concerning the custody of a child, this Court is not required to go into the intricacies/technicalities of the matter in constitutional jurisdiction and should confine its findings to the extent of the welfare of the child/minor which is a paramount consideration and it is for the learned Guardian and Wards Court to take appropriate measures in this regard.

8. In view of the above, without touching the merits of the case, I am satisfied with the arrangement made by the learned Additional Sessions Judge-VI Karachi

Central vide order dated 23.09.2020 which is just fair and equitable and is not only in the interest of the minor but also reasonably protected the rights of both the parties by directing the petitioner to approach the learned Guardian and Wards Court.

9. The controversy as raised by the parties needs to be looked into by the learned Guardian and Wards Court concerned for the custody of the Master Zohan Faraz son of Muhammad Faraz Rehan aged about 02 years, if approached and the decision thereof shall be made within a reasonable time, keeping in view the welfare of minor strictly in accordance with law.

10. In the light of the facts and circumstances mentioned above the instant petition is disposed of along with the pending application(s), in the above terms.

J U D G E

Nadir*