

# IN THE HIGH COURT OF SINDH AT KARACHI

Constitutional Petition No.S-991 of 2021

Mst. Fatima Zehra,  
petitioner through:

Ms. Shabana Ishaque alongwith Mr.  
Saathi M. Ishaque, advocates

Muhammad Sheroz,  
respondents No.1 through:

Mr. Raheel Samsam Ali Khan, advocate

**Date of hearing:**

**29.12.2021**

**Date of order:**

**07.1.2022**

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ORDER

**Adnan-ul-Karim Memon, J.** – Petitioner Mst. Fatima Zehra filed this petition with the following prayer: -

- a) *To suspend the order dated 16.12.2021 and pass an order to give the minor day time meeting on two days of weekend (Saturday & Sunday) along with bailiff from 12:00 PM to 08:00 PM, all of the Saturday and Sunday that comes during the winter vacations.*
- b) *To direct the respondent No.2 to not give custody of minor for whole winter vacations to respondent No.1 as the minor is very young and has not even come into her sense properly.*

2. Precisely, facts of the case per memo of the petition are that the petitioner and respondent No.1 were married on 11.7.2016, and out of the wedlock baby Dua Sheroz was born on 03.2.2018. On 13.10.2018, a program was arranged to celebrate the AQIQA of minor Dua and after completion of the program, the mother of respondent No.1 started blaming the petitioner that her parents are of different types, to which the petitioner was astonished by hearing such blame on her parents and thereafter the respondent No.1 ordered the petitioner to leave his house and also tried to snatch the baby from her. It is submitted that on 22.11.2018, respondent No.1 came along with his mother and detained the minor baby, he ensure that he will return the baby in a couple of days, but he did not return the baby. The petitioner thereafter a complaint in PS Super Highway, but respondent No.1 refused to hand over the custody of the minor, therefore, the petitioner filed Petition bearing No.247/2018 for custody of the minor, upon II-Additional District Judge directed the concerned police to recover the minor. The minor was recovered and was produced before the Court, whereafter the learned II-Additional District Judge directed respondent No.1 to hand over the custody of minor to her mother i.e. petitioner. Thereafter the respondent No.1 filed a Suit bearing No.2476/2018 for restitution of conjugal rights against the petitioner, the pre-trial was failed and Khula was granted to the petitioner on 14.12.2018. It is further submitted that respondent No.1 then filed a Criminal Misc. Application bearing No.1242/2018, which was dismissed. The petitioner filed a Suit for return of dowry articles and maintenance, upon which respondent No.1 returned all dowry articles and respondent No.2 passed the order on

25.3.2019 for interim maintenance in the sum of Rs.5000/- per month, thereafter on 11.9.2021, learned III-Civil and Family Judge passed judgment and decree with direction to pay maintenance of Rs.15,000/- per month to the minor baby Dua from October 2018 with an increment of 15% per annum. It is submitted that respondent No.1 failed to comply with the aforesaid judgment and filed Family Appeal No.63/2021. The petitioner had no alternative but to file an execution application against respondent No.1. After dismissing of Guardian & Ward application, respondent No.1 filed Guardian & Ward Appeal, which is pending. On 11.12.2021, respondent No.1 also filed an application under Section 12 of the Guardian & Ward Act for temporary custody of minors in winter vacations, which was allowed by respondent No.3. It is submitted that in the judgment dated 11.9.2021 it is nowhere mentioned that the father of the minor would be granted permission to keep the minor in his custody for the whole winter and summer vacation and it is also nowhere found that the father can keep the daughter in his custody overnight as the minor is aged about three years and nine months, that is why the said order dated 16.12.2021 is liable to be modified. That the petitioner has given consent that respondent No.1 should only be allowed to meet with daughter as per routine by Court through the bailiff during day time for a specified number of hours. That in the order dated 16.12.2021, respondent No.2 seems to be confused in paragraph (e) and mentioned that the minor would be handed over by the bailiff to the father on 21.12.2021 at noon and the bailiff would receive the minor on 30.12.2021 at 8:00 p.m., which shows that respondent No.2 granted full day and night meeting in the father's custody, which is not according to clause (a) and (b) of the order dated 16.12.2021.

3 On the other hand, respondent No.1's counsel submitted that respondent No.1 was married to the petitioner in Karachi on 11.07.2016, against the dower amount which has been paid. From the wedlock, the respondent gave birth to a daughter namely Baby Dua Sheroz, presently in the custody of the petitioner. It is submitted that on 03.10.2018, the petitioner happily went to her parent's house for the meeting, from there she along with the minor and her parents went to Lahore, without intimation to and permission of respondent No.1. Respondent No.1 came to know that his wife silently went to Lahore, therefore, respondent No.1, his mother, and uncle contacted her as respondent No.1 have love and affection for his daughter as well as wife, to bring them back, but when she came back and she handed over the custody of the minor to respondent No.1 on 24.11.2018 with the suggestion that she has no space for the minor as she/minor is the daughter of respondent No.1 and it is the responsibility of respondent No.1 to look after the minor and to keep her. That after handing over the custody of minor by the petitioner to respondent No.1, respondent No.1 took her to the minor at his house but the petitioner being in ill-advice of her family members filed a false and baseless *Roznamcha* before police

station by leveling false allegations upon respondent No.1 that he has forcibly taken the minor. That due to such harassment and issuance of threats by the petitioner and her family members to respondent No.1 and his family members, respondent No.1 has filed Petition under section 22-A & 22-B Cr.P.C. in the Court of District & Session Judge Central in Karachi vide Cr. Misc. Petition No.1242/2018, which was granted by the learned District Judge and passed order with a direction to the SHO to protect respondent No.1 and his family members. That since the beginning the respondent No.1 tried his level best to take back the petitioner as respondent No.1 had great love and affection with the petitioner but the petitioner remained on her obstinacy and used to tease, issue threats, and mentally torture respondent No.1, therefore, the respondent No.1 seeking no way out filed a Family Suit bearing No.2476/2018, for Restitution of Conjugal Rights and also filed Application for appointment of Guardian U/s. 7 & 10 of G & W Act. That the petitioner has counter prayed in the above-said suit and claimed *Khula* from respondent No.1 and during pre-trial proceedings the learned trial Court granted *Khula* to the petitioner whereby the marriage of the parties was dissolved. It is further the case of respondent No.1 that the petitioner was causing torture and harassment to respondent No.1 for taking illegal benefits she filed the petition U/s. 491 Cr.P.C. against respondent No.1, wherein she took the benefit of minor's age and got the custody of minor from respondent No.1 by misguiding and misleading the Hon'ble Court. That the petitioner proved herself to be an irresponsible and cruel wife, she was not of good character woman and involved in immoral relations with some other persons including her cousin Muhammad Taha and, therefore, she used to quarreled with respondent No.1 and remained in her illegal activities with that person. That the petitioner never fed mother milk to the minor daughter, as she should have feeded the minor for two years according to Holy Quran, but the petitioner said she cannot feed (mother feeding) her daughter because she does not want to destroy her future. The minor is and was never on mother feeding, which can be examined by the Nurse. It is further submitted that the petitioner is addicted to cigarette smoking as well as using some drugs. Respondent No.1 never cared about those things because he never wanted to ruin his wedded life and due to his daughter. It is further submitted that the petitioner always blackmailed respondent No.1 due to his daughter. There is no possibility of a bright future for the minor with the petitioner now. The behavior of the petitioner with the minor is not good, as the petitioner flatly stated to respondent No.1 that she would cause harm to the minor if respondent No.1 failed to fulfill her illegal desire. It is further submitted that the minor is of very tender age, as such she requires full care and attention but the petitioner is not able to provide the same to the minor, while respondent No.1 is entitled to keep the custody of the minor. The petitioner has lost the right of custody of the child as she has deprived respondent No.1 to see and meet the minor, in such circumstances.

4. I have heard learned counsel for the parties and perused the record.
5. I have gone through the order dated 16.12.2021 passed by the learned Civil & Family Judge-III Malir Karachi in Guardian & Wards Application No.265/2018, whereby the learned Family Judge passed the following order: -

*“Keeping in view the above facts, reasons, and circumstances, this application is allowed to the extent as mentioned below, in the interest of justice and for the growth & welfare of the minor accordingly. As Applicant is a real father of the minor, he is entitled to meet his child and enjoy winter vacations at his home. With regard to the apprehension of the removal of the ward same is taken into consideration. Reliance on PLD 2018 Balochistan 44.*

*Application is disposed of with the following terms and conditions.*

- a. Meeting time is allowed for ten days, from 12:00 pm to 08:00 pm daily from date 21<sup>st</sup> December 2021 to 30<sup>th</sup> December 2021,*
- b. Applicant is directed to receive the custody of minor at 12:00 pm from respondent's home and return/hand over the custody of minor to the respondent at 08:00 pm daily from date 21<sup>st</sup> December 2021 to 30<sup>th</sup> December 2021.*
- c. Applicant is directed to furnish solvent surety of Rs.30,00,000/= (Thirty lacs) for the purpose of this temporary and safe custody of minor baby Dua Sheroz.*
- d. Applicant is further directed to submit his original passport/CNIC before the Nazir of this court along with surety.*
- e. Head bailiff is appointed to appoint any bailiff to go along with the applicant to take the custody of the minor from the respondent's home on 21<sup>st</sup> December 2021 at 12:00 pm, and hand over the custody of minor to applicant. Bailiff is further directed to take the custody of minor from applicant on 30<sup>th</sup> December 2021 and return/hand over the same to the respondent at 08:00 pm, thereafter ensure safe return of the minor baby Dua to the respondent.*
- f. Bailiff is directed to ensure his presence during the handing over and taking over of custody of minor as mentioned in clause (e).*
- g. Bailiff is further directed to make report of handing over and taking over and to ensure smooth execution of this order.*
- h. During meetings SOPs be strictly followed as to control the spread of Covid-19.*
- i. Applicant is further cautioned that removal of ward from the jurisdiction will lead to criminal as well as civil proceeding under S.44 of the Guardian and Wards Act, 1890.”*

6. At this stage, I have been informed that the marriage between the parties has already been dissolved by way of Khulla vide order dated 14.12.2018 passed by Family Judge-I Karachi Central, in Family Suit No.2476/2018; and, respondent-father has contracted second marriage and he has also one daughter from his second wife. Per learned counsel for the petitioner, the respondent-father is not entitled so far as the aforesaid arrangement made by the learned Family Court is concerned as it would not be in the welfare of the minor to remain in the custody of her stepmother as the father remains out of home for his professional engagements, whereas the petitioner is a real mother. Learned counsel further pointed out that the learned Civil & Family Judge has already dismissed the Guardian & Wards Application No.265/2018 of the respondent-father vide order dated 11.9.2021. An excerpt of the order is reproduced as under: -

**“ISSUE NO.3:**

*17. As discussed Supra, applicant being real father of the minor cannot be completely deprived from the temporary custody/meeting with minor as such he is fully entitled to meet with the minor monthly as well as occasionally.*

*Henceforth, I opt to order that the instant application is hereby dismissed with no order as to cost. The minor shall remain in the custody, direct supervision and control of her mother as before.*

*Furthermore the order dated 25.03.2019 remained intact with little bit changes (having observed the concern, love and affection of applicant for her little daughter Dua). Applicant has a right to avail the meeting/temporary custody of minor on 2<sup>nd</sup> & 4<sup>th</sup> Saturday of every month from 10:00 a.m. to 01:00 p.m. at meeting hall situated in court premises subject to payment of conveyance charges of Rs.1500/- with increment of 20% per annum. Respondent is directed to hand over the peaceful custody of the minor Baby Dua Sheroz D/o Muhammad Sheroz as per order and provided schedule of court. Applicant and respondent are strictly directed not to remove the custody of minor from Karachi, without prior permission of Guardian Court.*

*Additionally, applicant may be allowed to avail temporary custody of said minor on her Birthdays, Eid occasions, and summer and winter vacations, by making a proper application in that respect. Hence, in above terms, the instant application is hereby dismissed accordingly with no order as to costs. Parties are directed to maintain peace and tranquility between them and follow the orders of this court without any hindrance.”*

7. Admittedly, the minor baby is aged about three years and nine months and would require constant care; indeed, the mother has developed an emotional attachment with the minor child and the issue of welfare of the minors has already been set at naught by the learned Guardian and Wards Court as discussed supra. It is well-settled law that paramount consideration while deciding the question of custody of the minor is the welfare of the minor irrespective of age, sex, and religion. Primarily, welfare includes his/her 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/her nearness of kin to the minor, and the preference of the minor if he or she is intelligent enough to make it. On the aforesaid proposition, I am fortified by the decision rendered by the Honorable Supreme Court of Pakistan in the case of *Humayun Hassan v. Arslan Humayun and another*, **PLD 2013 SC 557**.

8. In principle, in the cases, concerning the custody of a child, the learned Family Court is not required to go into the intricacies/technicalities of the matter and confine its findings to the extent of the welfare of the child/minor, which is a paramount consideration. Since the arrangement, so made, as discussed supra, is prima-facie harsh for the minor as far as her traveling is concerned, the learned Family Court ought to have taken appropriate measures in this regard in the light of findings of the learned Family Court while deciding the custody of the minor. It appears that the traveling of the minor from her mother's house to the house of the respondent-father from time to time and from hand to hand could not be suitable for the health and betterment of the minor.

9. Primarily, the reasoning assigned by the learned Family Court is not in accord with settled principles for governing the temporary or permanent custody of minor, for the reason that the minor baby Dua is only aged about three years and nine months, who could not be taken away from the mother, and the traveling of minor daily as mentioned above is harmful to her health, therefore, the arrangement made by learned Family Court is modified, leaving the respondent- father to visit the minor twice in a month in the Court of learned III-Civil & Family Judge Malir Karachi from 09:00 a.m. to 12 noon. The learned Civil & Family Judge shall fix any two days in a month for the meeting of father-respondent No.1 with the minor baby Dua, and in the meanwhile, petitioner-mother shall not take away the custody of minor out of the jurisdiction of the learned Guardian and Wards Court without intimation to the concerned Court. However, the respondent-father shall have visitation rights i.e. Birthdays, Eid occasions, and summer and winter vacations and arrangements shall be made by the learned Family Court upon filing appropriate application by the respondent-father and the learned Family Court would be at liberty to pass appropriate order on such application concerning the date, time and place of meeting of minor with respondent-father, however, that arrangement is subject to the observation made by this Court as discussed in the preceding paragraph and also subject to payment of maintenance of the minor, which has already been done by the learned Family Court.

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

JUDGE