

**ORDER SHEET**  
**THE HIGH COURT OF SINDH, KARACHI**  
**C.P No. S-792 of 2022**

Dated: Order with signature of Judge(s)

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1. For Orders on Office Objection  
4. For hearing of Main Case

Date of Hearing : 4 May 2023, 24 May 2023, and 26 May 2023.

Petitioner : Mst. Fatima through Mr. Ayatullah Khawaja, Advocate

Respondent No.1 : Nemo

Respondent No. 2 : Nemo

Respondent No. 3 : Nemo

Respondent No. 4 : Nemo

Respondent No. 5 : Muneeb through Mr. Javaid Ahmed Chhatari, Advocate along with Mr. Tasleem Ahmed Rajput, Ms. Farah and Ms. Saima

Respondent No. 6 : Station House Officer PS. Jamshed Quarters, Karachi through Ms. Amna Ansari, Additional Prosecutor General

Respondent No. 7: : Nemo

**ORDER**

**MOHAMMAD ABDUR RAHMAN, J.** This Petition has been maintained by the Petitioner under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 impugning an order dated 31 August 2022 passed by the IVth District Judge Karachi East in Habeus Corpus Petition No. 300 of 2022 dismissing that Petition.

2. The Petitioner and the Respondent No. 5 were married at Karachi on 28 February 2020 against a dower of Rs, 100,000 (Rupees One Hundred Thousand) and were purportedly residing in Hyderabad. From their wedlock one daughter Minor M was born on 15 November 2020. The marriage was not successful and which led to the Petitioner leaving or being

forced to leave the matrimonial home. The dispute as to the manner in which the Petitioner left is to my mind not material for deciding this Petition. Suffice to say that the Minor M at the relevant time was aged about 2 years and found herself to be in the custody of the Respondent No. 5 and who had maintained a Guardian and Ward Application No. 250 of 2022 before the Family Court Hyderabad to maintain his custody of the Minor M.

3. The Petitioner being aggrieved, maintained Habeus Corpus Petition No. 300 of 2020 before the court of the IVth Additional District Judge Karachi (East) alleging that the Minor M was aged about 1 year seven months at the time stated that the Minor M was within the jurisdiction of the District Court (East) and sought the custody of the Minor M. The IVth Additional District Judge Karachi (East) after carrying out an inquiry came to the conclusion that the Minor M was residing in Hyderabad and outside the jurisdiction of the District Court (East) and dismissed the Petition on 31 August 2022.

4. The Petitioner thereafter maintained this Petition before this Court impugning the order dated 31 August 2022 passed by the District Judge Karachi East in Habeus Corpus Petition No. 300 of 2022 and pleaded that this Court in its Constitutional Jurisdiction should direct that the custody of the Minor M should be handed over to her.

5. By an order dated 28 December 2022 directions were given to the SSP Hyderabad to ensure that the Minor M was brought before this Court on 29 December 2022 and on which date the custody of the Minor M had been handed over to the Petitioner with an observation that the question of the jurisdiction of this Court sitting at its principal seat to exercise jurisdiction over the Minor M at Hyderabad would be determined subsequently.

6. Mr. Ayatullah Kahawaja addressed arguments on behalf of the Petitioner and stated that after the orders dated 28 December 2022 and 29 December 2022 the Petition has served its purpose and was liable to be disposed of in terms of the above-mentioned orders. He stated that the Minor M had pursuant to orders passed by IVth Additional District Judge Karachi (East) been present in District East on 19 July 2022 and was brought to PS Jamshed Quarters and was thereafter forcibly removed from the jurisdiction of this Court. He submitted that the forcible removal of the Minor M from the jurisdiction of this Court should have necessitated the IVth Additional District Judge Karachi (East) to have taken requisite action to bring the Minor M into the jurisdiction of that Court. He contended that there was a clear illegality in the manner in which the IVth Additional District Judge Karachi (East) conducted Habeas Corpus Petition No. 300 of 2022 and therefore this Court in its jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 had ample powers to call for and hand over the custody of the Minor M to the Petitioner which had happened. He therefore prayed that this petition be disposed of in terms of the existing orders passed by this court. On 28 December 2022 and 22 December 2022. He relied on the decision reported as **Mirjam Aerras Lehdeaho vs. SHO Polict Station Chung, Lahore**,<sup>1</sup> **Natasha Rashid vs. Rashid Zar**,<sup>2</sup> **Mst. Basri Irshad vs, Tauqir Hayat**,<sup>3</sup> **Ms. Shahzia Akbar Ghazali vs. Khurram Mehboob**,<sup>4</sup> **Mst. Khalida Perveen vs. Muhammad Sultan Mahmood**,<sup>5</sup> **Mst. Saima Bibi vs. Raheel Butt**,<sup>6</sup> **Ghulam Fatima vs. The State**<sup>7</sup> to advance the proposition that a Court in its jurisdiction under Article 491 of the Code of

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<sup>1</sup> 2018 SCMR 427

<sup>2</sup> PLD 2010 Khi 119

<sup>3</sup> 2021 YLR 1267

<sup>4</sup> 2021 YLR 1267

<sup>5</sup> PLD 2004 SC 1

<sup>6</sup> 2014 MLD 38

<sup>7</sup> 1998 SCMR 289

Criminal Procedure, 1898 can exercise its jurisdiction to hand over the custody of a minor in exceptional circumstances.

7. Mr. Javaid Ahmed Chhatari addressing arguments on behalf the Respondent No. 5 has contended that the Petitioner had abandoned the Minor M and left the matrimonial home. He stated that the jurisdiction of this Court cannot extend to the city of Hyderabad and which was clearly a void order. He stressed that such an action would be in violation of the High Court of Sindh Benches Rules 1987 as the permission of the Chief Justice of the High Court of Sindh had not been obtained in accordance with Rule 7 thereof and contended that in the circumstances the orders dated 28 December 2022 and 29 December 2022 were clearly outside of the jurisdiction of this Court and should be recalled and the custody of the Minor M should be returned to the Respondent No. 5. *He relied* on the decisions reported as **Mst. Rabia Versus Station House Officer, Police Station Waleed, Larakana**<sup>8</sup>, to state that as the Minor had not been illegally removed from the lawful custody of a person no question arose to invoke Section 491 of the Code of Criminal Procedure, 1898. He next relied on the decision reported as **Ramdass vs. Bernadat**<sup>9</sup> to state that where a court had wrongfully assumed jurisdiction the entire proceedings conducted on the basis thereof were to be deemed void. He finally relied on the decision reported as **Humayun Hassan vs. Arslan Humayun**<sup>10</sup> to state that the father was the natural guardian of a minor and therefore it could not be said that the Minor was not in the lawful custody the Respondent No. 5.

8. I have heard the Counsel for the Petitioner and the Counsel for the Respondent and have perused the record. It seems that from the record the Minor M was in Karachi on 19 July 2022 as was confirmed by the Station House Officer P.S. Jamshed Quarters and on which date there was an

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<sup>8</sup> 2022 YLR 1125

<sup>9</sup> PLD 1998 Khi 42

<sup>10</sup> PLD 2013 SCMR 557

attempt made as between the families of the Petitioner and the Respondent No. 5 to reconcile and it seems that despite this fact being on the record, the IVth District Judge Karachi East in Habeus Corpus Petition No. 300 of 2022 has declined to exercise jurisdiction. To my mind once the Minor M was within the jurisdiction of the court on 19 July 2022 it cannot be said that the IVth District Judge Karachi East in Habeus Corpus Petition No. 300 of 2022 lacked jurisdiction. In the decision reported as **Ms. Shahzia Akbar Ghazali vs. Khurram Mehboob**<sup>11</sup> the Supreme Court of Pakistan while considering an appeal from an application maintained under Section 491 of the Code of Criminal Procedure, 1898 before the High Court of Islamabad and which court had refused to exercise jurisdiction where the Minor was taken outside the jurisdiction of that Court to Karachi held that:

“ ... 5. *Having heard the learned Counsel for the parties we find that the minor was forcibly taken away from the lawful custody of his mother within the territorial limits of Islamabad. The minor was thereafter moved to Lahore and later to Karachi in order to evade the process of law. This Minor is about one year old and obviously needs his mother to survive. No reason whatsoever has been alleged or pleaded that may furnish any justification to deny custody to the real mother and hand him over to Respondent No. 1. **Prima facie Petitioner has a right to have custody of the suckling baby. Such right is recognized by the law.** We are also convinced that there are material and overwhelming factors pointing towards the welfare of the minor being best served and protected if the custody the minor is handed over to the petitioner. We are of the opinion that Islamabad High Court erred in law in refusing to exercise jurisdiction despite the fact that the custody of the child was forcibly taken away from the petitioner while both were residing within the territorial jurisdiction of the Islamabad High Court.*

While I note that there is a dispute as to whether or not the Minor was residing in Karachi or not from the report of 19 July 2022 as is confirmed by the Station House Officer P.S. Jamshed Quarters the Minor M was well within the jurisdiction of the District Judge Karachi East and as soon as such a fact was brought within the knowledge of the IVth Additional District Judge Karachi (East) orders, keeping in mind the age of the Minor M, should have been passed to restrain her movement from the jurisdiction of that Court. As such custody was removed from the jurisdiction of that Court, the the IVth Additional District Judge Karachi (East) as per the decision of the Supreme Court of Pakistan could not have abdicated its jurisdiction.

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<sup>11</sup> 2019 SCMR 116

Nevertheless, as after the order dated 28 December 2022 passed by this Court, the Minor M is now well within the jurisdiction of this Court and which decision has not been challenged by the Respondent No. 5 at any forum I am of the opinion that the Order dated 28 December 2022 and 29 December 2022 were hence in these highly exceptional circumstances properly passed.

9. In the decision reported as **Mirjam Aerras Lehdeaho vs. SHO Polict Station Chung, Lahore**<sup>12</sup> the Supreme Court of Pakistan has examined the jurisdiction of a Court under Section 491 of the Code of Criminal Procedure, 1898 and has held that:

" ... 17. This Court has on various occasions examined the question of exercise of jurisdiction by the High Court where the matter involves custody of minors while the matter is sub judice before the Guardian Court. In *Ahmed Sami and 2 others v. Saadia Ahmed and another* (1996 SCMR 268) at page 271, it was held that:

*"It is true that a Guardian Court is the final arbitrator to adjudicate upon the question of custody of child but this does not mean that in exceptional cases when a person who is holding the custody of a minor lawfully and has been deprived of the custody of minor has no remedy to regain the custody pending adjudication by the Guardian Court. In exceptional cases where the High Court finds that the interest and welfare of minor demanded that the minor be committed immediately to the custody of the person who was lawfully holding the custody of minor before he was deprived of the custody, the Court can pass appropriate order under section 491, Cr.P.C. directing restoration of the custody of minor to that person as an interim measure pending final decision by the Guardian Court."*

18. In *Shaukat Masih v. Mst. Farhat Parkash and others* (2015 SCMR 731), we held at page 734 that:

*"We have been informed that so far respondent No. 1 has not filed any appeal against the relevant order passed by the learned Guardian Judge nor any application has so far been filed before the learned Guardian Judge seeking recall of the ex parte order and reconsideration of the matter on its merits. Be that as it may we find that through the impugned order passed by the High Court a minor girl has been given in the custody of her real mother and even if there are some questions regarding proper exercise of jurisdiction by the High Court in the matter still we would not like the little girl to be made a ball of ping pong and shuttle her custody during the legal battles being fought by those interested in her custody. Faced with this unfortunate situation we have decided to invoke this Court's jurisdiction under Article 187(1) of the Constitution of the Islamic Republic of Pakistan, 1973 which allows this Court to issue such directions, orders or decrees as may be necessary for doing complete justice in any case or matter pending before it. Invoking the said jurisdiction of this Court we set aside the order passed by the learned Guardian Judge, Shahkot, District*

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<sup>12</sup> 2019 SCMR 427

*Nankana Sahib on 24-7-2014 and cancel the Guardianship Certificate of the said date and direct the learned Guardian Judge to consider the application submitted before him by the present petitioner regarding custody of the relevant minor as a pending application, to hear all the parties concerned, including the mother of the minor, and then to decide the matter of custody of the above mentioned minor afresh after attending to all the jurisdictional, legal and factual issues relevant to the controversy raised by the parties. During the interregnum the custody of the minor shall remain with her mother and the learned Guardian Judge shall attend to the request, if any made regarding visitation rights."*

19. In *Muhammad Khalil-ur-Rehman v. Mst. Shabana Rahman and another* (PLD 1995 SC 633), this Court held on pages 638 and 639 that:

*"In view of the above observation, it is quite clear that in appropriate cases the Court under section 491, Cr.P.C. if it reaches the conclusion that a minor has been illegally removed from the custody of a person who was holding his custody lawfully, the Court is empowered under section 491, Cr.P.C. notwithstanding the provisions of Guardians and Wards Act to pass appropriate orders. We are, therefore, of the view that the jurisdiction of the Criminal Court is not barred under section 491, Cr.P.C. to pass appropriate order with regard to custody of a minor who has been illegally removed from the custody of person, on account of the provisions of Guardians and Wards Act. ... As earlier pointed out, the two provisions, namely section 491, Cr.P.C. and section 25 of the Guardians and Wards Act deal with two different situations and as such the question of ouster of jurisdiction of criminal Court under section 491, Cr.P.C. on account of provisions of section 25 or 12 of Guardians and Wards Act did not arise at all. There is no overlapping between the provision of section 491, Cr.P.C. and section 25 of the Guardians and Wards Act."*

20. In the case of *Mst. Nadia Perveen v. Mst. Almas Noreen and others* (PLD 2012 SC 758) we held at page 760 that:

*"It has consistently been held by this Court in the cases of Muhammad Javed Umrao v. Miss Uzma Vahid (1988 SCMR 1891); Nisar Muhammad and another v. Sultan Zari (PLD 1997 SC 852), Mst. Khalida Perveen v. Muhammad Sultan Mehmood and another (PLD 2004 SC 1) and Naziha Ghazali v. The State and another (2001 SCMR 1782) that the matter of custody of minor children can be brought before a High Court under section 491, Cr.P.C. only if the children are of very tender ages they have quite recently been snatched away from lawful custody and there is a real urgency in the matter and also that in such a case the High Court may only regulate interim custody of the children leaving the matter of final custody to be determined by a Guardian Judge.*

*In those cases this Court had repeatedly emphasized that in such matters the jurisdiction of a High Court under section 491, Cr.P.C. is to be exceptional and extraordinary case of real urgency keeping in view that even a Guardian Judge has the requisite powers of recovery of minor children and regulating their interim custody."*

21. Findings to the same effect have been recorded in *Abdul Rehman Khakwani v. Abdul Majid Khakwani and 2 others* (1997 SCMR 1480) and *Mst. Khalida Parveen v. Muhammad Sultan Mehmood and another* (PLD 2004 SC 1).

22. The Guardian Court is the final Arbiter for adjudicating the question of custody of children. However, where a parent holding custody of a minor lawfully has been deprived of such custody, such parent cannot be deprived of a remedy to regain the custody while the matter is sub judice before a Guardian Court. Therefore, in exceptional cases (like the instant case), where the High Court finds that the best interest and welfare of the

*minor demand that his/her custody be immediately restored to the person who was lawfully holding such custody before being deprived of the same, the Court is not denuded of jurisdiction to pass appropriate orders under section 491, Cr.P.C. directing that custody be restored to that person as an interim measure pending final decision of the Guardian Court. While the tender age of the minor is always a material consideration but it is not the only consideration to be kept in mind by the High Court. Other factors like best interest and welfare of the minor, the procedural hurdles and lethargy of the system, delays in finalization of such matters, the handicaps that the mother suffers owing to her gender and financial position, and above all the urgency to take appropriate measures to minimize the trauma, emotional stress and educational loss of the minor are equally important and also need to be kept in mind while granting or refusing an order to restore interim custody by the High Court. The two provisions of law namely section 491, Cr.P.C. and section 25 of the Guardians and Wards Act deal with two different situations. As such, the question of ouster of jurisdiction of the High Court on account of provisions of sections 12 or 25 of the Guardians and Wards Act or pendency of proceedings under the said provisions does not arise. There is no overlap between the two provisions as both are meant to cater for different situations, the first to cater for an emergent situation, while the latter to give more long term decisions regarding questions relating to guardianship of minors keeping in view all factors including their best interest and welfare.*

*23. We are not persuaded by the argument of the learned counsel for Respondent No.2 that the remedy under section 491, Cr.P.C. is barred in view of the availability of an alternative remedy by way of approaching a Guardian Court of competent jurisdiction. This Court as well as the High Court in exercise of their powers under section 491, Cr.P.C. have to exercise parental jurisdiction and are not precluded in all circumstances from giving due consideration to the welfare of the minors and to ensure that no harm or damage comes to them physically or emotionally by reason of breakdown of the family tie between the parents..."*

10. The Supreme Court of Pakistan has clearly identified one of the exceptional circumstances for a court to invoke its jurisdiction under Section 491 of the Code of Criminal Procedure, 1898 would be to seek the custody of a minor who is of a tender age to be given to her mother, notwithstanding the fact that the jurisdiction of the Guardian Court is also available. In the present case, the Minor M is aged about 3 years and is clearly of an age which warrants that she remains in the custody of the Petitioner. I therefore am not inclined to vary the order dated 28 December 2022 and 29 December which I do believe have settled this *lis* and would maintain those orders.

8. For the foregoing reasons, the order dated 31 August 2022 passed by the IVth District Judge Karachi East in Habeus Corpus Petition No. 300 of 2022 dismissing that Petition was clearly not warranted. However, the



Orders dated 28 December 2022 and 29 December 2022 passed by this court in this Petition having not been challenged by the Respondent No. 5 at any forum have attained finality. This petition is therefore disposed of with no order as to costs in terms of the Orders dated 28 December 2022 and 29 December 2022 and with the direction that the custody of the Minor M will remain with the Petitioner until decided otherwise by a Family Court having the requisite jurisdiction over that *lis*. Needless to say, the observations that are made herein should not prejudice the outcome of any proceedings as between the parties regarding the custody the Minor M.

JUDGE

Karachi dated 25 August 2023.