

## ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

C P No.D-307 of 2012

Present:

Mr. Justice Syed Hasan Azher Rizvi  
Mr. Justice Salahuddin Panhwar

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Order with signature of Judge

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1. For hearing of MiscNo.11548 of 2012
2. For katcha peshi

24.07.2012

Mr. Syed Mahmood Alam Rizvi, Advocate for the petitioner.  
Mr. Sheikh Liaquat Hussain, Advocate for respondents Nos. 8 to 10.  
Mr. Muhammad Qasim, Standing Counsel for the State.

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**SALAHUDDIN PANHWER, J. petitioner has invoked writ jurisdiction of this court under article 199 of constitution of Islamic republic of Pakistan 1973, for recovery of his son (Detenue).**

**2. Succinctly, facts set out in pleading are that** Petitioner Abid Ali Khan had married with Mst. Hareem Jibran in the year 1996. Out of this wedlock two kids namely Fahad Ali Khan and Haeed Ali Khan were borne in the year 1997 and 2002, respectively. On account of family disputes respondent No.6 (mother) left the house of petitioner and continued to live with her parents at Lahore but custody of minors remained with the petitioner. Respondent No.6 (mother of minors) filed Criminal Miscellaneous Application No. 32 of 2004 under section 491 Cr P C, before District & Sessions Judge Karachi, for the recovery of minor kids; administratively same was assigned to 1<sup>st</sup> Additional Sessions Judge , such petition was dismissed; subsequently due to intervention of family members compromise was effected between the parties, they started again their matrimonial life together but due to differences, marriage tie came to an end on 26.10.2008. The minors remained with petitioner. On 17.06.2011 petitioner approached CPLC, with complaint that since yesterday his minor son is missing, also petitioner approached principal Wendy School, where minor Fahad Ali khan was studying, Principal disclosed that respondent No. 6 (mother) and her mother

respondent No. 10, were in touch with minor Fahad for quite some time and that a call had been received in school just after start of school hours on 16.09.2011, on this information, petitioner lodged report against respondents 6 to 9, which was converted into FIR No. 361 of 2011 at Police Station Khayaban-e-Itehad. During investigation it was surfaced that custody of minor Fahad Ali Khan had been illegally and fraudulently shifted from Pakistan to Dubai with a fake name as Hasoor Jibrani instead of Fahad Ali Khan by concealing correct and real identification; after investigation report under section 173 Cr P C was submitted before the Court of Magistrate. While taking cognizance Magistrate VI, Karachi south observed that “prosecution at liberty to register the case of preparation of forged documents and under immigration Act, before the competent forum”. Concerned police approached FIA for report of travel history, petitioner also approached F I A for legal action as minor Fahad Ali Khan was shifted on fake passport and respondents also managed to conceal basic facts and had fabricated the evidence to obtain bogus Form “B” from NADRA, and shifted minor from Pakistan fraudulently.

3. Learned counsel for the petitioner has, inter alia, contended that abduction and removal of Fahad Ali Khan, minor son of the petitioner, is a case of human smuggling and trafficking as minor Fahad Ali Khan has been removed from Pakistan to Dubai (UAE) on the basis of fake and bogus documents; the offence is non-cognizable. Respondent No. 2 is required to lodge FIR in view of the peculiar circumstances and the admitted documentary evidence, enquiry will delay the matter, any sort of further delay in registration of the FIR against the respondents Nos. 6 to 9, under relevant law, may result in destroying the evidence, it is a case where the basic fundamental rights under the Constitution of 1973 has been denied to the Petitioner; it is the respondent No. 2 only who, being Federal Investigation Agency, has power and authority to move through Interpol for the purpose of recovery of minor son of the petitioner namely Fahad Ali Khan

(Detenue) by issuing red and yellow warrants accordingly. He has relied upon SUO MOTO CASE FOR RECOVERY OF MINOR KIDS OF MST TAHIRA JABEEN (2010 SCMR 1804).

4. Conversely, learned counsel for the respondent has argued that minor Fahad Ali Khan is aged about 15 years hence FIR lodged under sections 363/34 PPC is illegal as no FIR can be registered if minor is more than 14 years; that petitioner has not approached Family Court by filing Guardianship application therefore petition is not maintainable; it is alleged that fake passport and other document were prepared at Lahore hence FIA has transferred investigation to Punjab as such this Court has got no jurisdiction; criminal case is pending in Magistrate Court for adjudication; FIA is investigating the case.

5. Heard Mr. Syed Mahmood Alam Rizvi, learned counsel for the petitioner, Mr. Sheikh Liaquat Hussain, learned counsel for respondents Nos. 8 to 10 and Mr. Muhammad Qasim, learned Standing Counsel for the State. Perused record.

6. Before discussing the merits of this case, it will be very relevant and proper to examine the precedents, which are the primary source of law. Accordingly, we have examined many decision to see the ratio and obiter that under what circumstances High court has exercised Writ jurisdiction of Habeas corpus under section 491 Cr P C or under Article 199 of Constitution of Islamic Republic of Pakistan 1973, in matters regarding disputes of the custody of minors between mother and father. In case of Mst Rehana vs Arshad Khan & others reported in 1991 MLD 1395, it is held that “admittedly baby Najam ul Sahar is aged about five months old now, her custody with respondent (father) appears to be improper, if not illegal, there cannot be any substitute for a mother. In case of Khalida Begum vs Muhammed Altaf, reported in 1983 CLC 698, it is held that “the mother’s lap is God’s own cradle’ child in the circumstances of a given case should remain with mother; in case of Muhammed Javed Akhtar vs Huma Naz reported in 2000 SCMR 1891, it is held that children were of tender age and the

custody was handed over to mother, in case of Mst Khalida Perveen vs Muhammed Sultan Mehmood, reported in PLD 2004 SC 1, it is held that, in our opinion in the cases pertaining to the custody of a child, the courts are not supposed to go into the technicalities of the law and they should decide the case in view of the facts and circumstances of each case placed before it, mainly taking into consideration welfare of the child, although ordinarily a petition under section 491 Cr P C is not found to be competent when there is no element of illegal custody by the father of his own child, but in the welfare of the child, custody was handed over to mother, same view is taken by Hon'ble Supreme Court in case of Muhammed Naseer Humayoon vs Mst Syeda Ummatul Kabir reported in 1987 SCMR 174, and in case of Ahmed Sami vs Sadia Ahmed reported in 1996 SCMR 268, similarly same view in cases, Awal Mryam vs Gul Jan reported in 1991 P Cr L J 717, Natasha Rasheed vs Rashid Zar, reported in PLD 2010 KAR 119, Mst Zenia vs Ahmed Sarwar, reported in PLD 1994 LAH 577, Zubaida Shehzad vs Muhammed Aslam reported in 2007 MLD 512, Gazala Parveen vs Muhammed Yaseen reported in 2012 P Cr L J 657, Mst Nusrat Parveen vs Abdul Gafoor reported in 2011 YLR 1495, Attique Rehman vs Mst Sadia reported in PLD 2009 LAH 344, in case of Mst Raffiat Tariq vs DPO Sanghar reported in 2009 P Cr L J 118, Mah Rukh Bajwa vs Aftab Alam, reported in 2008 MLD 751. That after reading of the above case laws, in search of ratio, has brought us to the view that Hon'ble Supreme Court of Pakistan and High Courts have exercised the writ jurisdiction in exceptional cases, only in favour of mother, keeping in view the tender age of minors. Admittedly, alleged abductee (minor) is aged about 15 years, who is alleged to have been forcibly taken away by his mother (respondent No.6), but the perusal of the para No.2(k) of the petition it is manifest that Principal Wendy School disclosed to the petitioner that “respondent No. 6 (mother) and her mother respondent No. 10 were in touch with minor Fahad Ali Khan for quite sometimes and that a call had been received in

School just after start of School on 16.09.2011". under these circumstances shifting custody of minor by mother or abduction is one of factual controversy and requires evidence so we refrain ourselves in diving into detail of such aspects, as this is not permissible in writ jurisdiction, especially, when on same allegations criminal case is pending for adjudication.

The suo moto case of minor kids of Mst Tahira Jabeen, relied by counsel is distinguishable to the facts of the case in hand. In that case Hon'ble Supreme Court, exercised suo moto jurisdiction to save the minors of 2 and 4 years of tender ages, in that matter mother had filed application before Guardian Court, Lahore and during pendency of such guardianship petition the minors were removed and shifted to DUBAI by father, therefore, custody was handed over to mother but the facts of the instant case are entirely different. In subject matter the minor is aged about 15 years, no proceedings before Guardian Court are pending; accordingly, the petitioner has failed to make out the case of Habeas corpus writ petition within the parameters laid down by Hon'ble Supreme Court and question of paramount consideration of welfare of minor will be decided by family court.

7. Regarding contention of petitioner counsel that custody was allowed by Sessions Court, we have examined order of Sessions Judge, passed on 23<sup>rd</sup> February 2004, custody was allowed to be continued by father and application of mother was dismissed, it will be just and proper to re-produce relevant portion of order,

“Thus this petition is dismissed and the custody of both minor detenues shall remain with respondent No.1(petitioner) with the observation that parties are at liberty to approach a Guardian judge at Karachi for redressal of their grievance, if any. The Guardian Judge shall deal with the matter independently, if proceedings are instituted before him, in accordance with law without being influenced, in any manner, for the observation made herein above”.

It is pertinent to mention here that said order was passed on 23rd February 2004, after this order parties reconciled their matter on 27th February 2004, again started their matrimonial life hence, aforesaid order, has no legal value under the law as it has lost its legal sanctity being past transaction, even otherwise, it cannot operate as res-judicata, as decided by Hon'ble Supreme Court in case of Mst Razia Rehman vs Station House Officer reported in PLD 2006 SC 533, wherein it is held, “earlier decision in Habeas Corpus petition could never be permitted to operate as res-judicata with respect to any such subsequent petition”.

8. Regarding the contention of petitioner counsel that FIA Authorities be directed to lodge FIR and issue red warrant through Interpol, learned Standing Counsel has contended that inquiry is in progress in subject matter, offence pertains to the jurisdiction of Lahore, Punjab, therefore, inquiry has been transferred to Federal Investigating Agency Punjab, and after completing inquiry FIR can be registered, in that regard it will be suffice to say that any interference in investigation at this stage will not be proper and just, however, in case if petitioner feels any malafide on the part of investigation agency, petitioner is at liberty to avail the remedy according to law.

09. As discussed above petition is not maintainable under the law.

10. We have dismissed the petition alongwith the listed application by our short order dated 24.07.2012 and these are the detailed reasons for the same.

**Judge**

**Judge**