JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Writ Petition No. 3820 of 2022

Ms. Hina Tariq
Versus
Learned ADJ-West, etc.

=====

Petitioner By	:	Malik Haroon Hameed & Waleed Saifullah, Advocates
Respondents By	:	Mr. M. Akram Khurram, Advocate
State By	:	Mian Zain Qureshi, State Counsel. Raza Mohammad, S.I.
Date of Hearing	:	01.11.2022

ARBAB MUHAMMAD TAHIR, J: Through the instant writ petition under Article 199 of the Constitution read with section 491 Cr.P.C., petitioner namely *Ms. Hina Tariq* ('**petitioner**') impugns order dated 04.10.2022 passed by the learned Addl. Sessions Judge, Islamabad (west) whereby her petition in terms of Section 491 Cr.P.C seeking recovery of minor namely Eman Shah, aged about 8 years, ('**minor**') was dismissed. In-addition, she sought recovery of the minor from the custody of her ex-husband namely Shaibzada *Shah Saud* ('**respondent No. 2**').

2. Tersely, the minor Eman Shah, aged about 8 years, is offspring of petitioner and respondent No. 2, who have since separated their ways. The learned court of first instance while deciding the petition under section 491 Cr.P.C filed by the petitioner observed as under:-

> "First of all, the scope of section 491 Cr.P.C is to be kept in view. As per Para No. 7 of the petition***, the petitioner herself admits that she has not only remarried but the alleged detenue child has been in custody of respondent No. 1 in lieu of an agreement***. Further, she stated that ***she has also filed a guardian petition to obtain the custody of said child***. In this preview, instant petition and the request being made by the petitioner is not covered by Section 491 C.r.P.C which has obviously been legislated to deal with an emergent situation and recent forcibly change of custody Moreover, the custody of father Isi neither improper nor illegal and the instant matter

> is exclusively entertain able by the learned Guardia Court. Hence the petition stands dismissed File be consigned to record room after its due completion and compilation".
> **(Emphasis Supplied)**

3. The admitted facts of the case are that the petitioner has since contracted second marriage which is intact, that the minor aged about 8 years is in custody of respondent No. 2/real father and that the petitioner, in order to have custody of the minor has already filed a petition under the Guardian and Wards Act before the Court of competent jurisdiction.

4. The petition is being pressed, *inter-alia*, on the grounds that there was no agreement between the parties regarding custody of the minor, as observed by the learned Court of first instance; that the minor is not being imparted education in the institution as agreed between the parties, that she is also not being produced for meeting with the petitioner before the learned Guardian Judge, she is not being properly look after, the minor is a sick child and requires constant care and checkup and that depending upon her gender, the welfare of the minor lies in custody of the petitioner. Learned counsel relied upon case law reported as ***PLD 2004 SC 1.***

5. On the other hand, learned counsel for respondent No. 2 repelled the above submissions by contending that according to petitioner's own stance the minor is residing in Mardan KPK., therefore, as the corpus does not reside within the jurisdiction of this Court, the petition is not maintainable. In this respect placed reliance upon case law reported as ***PLD 2012 SC 758, 2020 PCr.LJ 1307, 2013 PCr.LJ 1055 & 2022 YLR 1125.*** On merits, learned counsel asserted that the welfare of the minor lies in custody of the respondent No.2, who is her real father; that there arises no question of shifting interim custody of the minor as the same was handed over to the respondent No.2 by mutual consent and that proper course for the petitioner is to approach the appropriate forum, available to her under the law.

6. Heard the learned counsel for the petitioner, petitioner-in-person, learned counsel for the respondent No.2 and the minor as well, produced by her father.

7. At the inception, it is deemed necessary to mention that in all eventualities in the matters relating to custody of the minor, the '**fundamental factor is the best interest of the child and not that of the parents**." The Hon'ble Apex Court in the recent **Judgment dated 05.10.2022,** in the case of "*Raja Muhammad Owais v. Mst. Nazia Jabeen and others*" (**Civil Petition No. 240 of 2021**), on the aspect of welfare of the minor, has graciously observed that:-

> "8. The United Nations Convention on the Rights of the Child, 1989 (UNCRC) is an international treaty which sets out the rights of children, be it economic, social, health or family. The UNCRC was ratified by Pakistan in 1990 with reservations that it will adopt the Convention, subject to the requirements of the Islamic Law. However, in 1997, the ratification became absolute as the reservation was withdrawn. The UNCRC recognizes that the child should grow up in an environment of love, happiness and understanding. Article 3 provides that in all actions concerning children whether by courts of law or public, or private welfare institution amongst others, the best interest of the child shall be a primary consideration. Article 7 provides that every child has right to be cared for by their parents and Article 9 requires that in the event of separation between the parents, the child should be in contact with both parents unless either one can cause any harm. Article 12 provides that a child capable of forming his or her own view should be able to express it and it should be given due weightage. This Article suggests that child's preferences can be a guiding factor in custody cases, hence, encouraging their participation and opinion in custody matters. This is essential because custody is about the care and comfort of the child and the right of the child to a family. Custody matters are always sensitive and require a great deal of care as the court has to weigh in all factors in order to determine where the welfare of the minor lies. In cases of remarriage, circumstances change, hence, while looking at the welfare of the child, the entire living arrangement and environment has to be reassessed in the context of the welfare of the child. Fundamental to this decision is the best interest of the child and not that of the parents. Hence, a second marriage of the mother cannot become a stand-alone reason to disqualify her right to custody."

8. As graciously observed by the Hon'ble apex Court, custody matters are always sensitive and require a great deal of care as the court has to weigh all factors in order to determine where the welfare of the minor lies. In cases of remarriage, circumstances change, hence, while looking at the welfare of the child, the entire living arrangement and environment has to

be reassessed in the context of the welfare of the child. Fundamental to this decision is the best interest of the child and not that of the parents.

9. It is settled principle that the matters governing custody of minors exclusively falls within the domain of **'Guardian Court'** being final Arbiter within the meaning and scope of Section 25 of Guardians & Wards Act, 1890. However, where there appears an *exception* to normal situation, the child is not left to suffer consequences of procedural hurdles at the cost of his/her welfare rather one, deprived of lawful custody, has been provided a way to invoke jurisdiction in terms of Section 491 Cr.P.C as interim measure till the Guardian Court, competent to try and adjudicate upon the matter, decides the question of custody.

10. Under the principle, if any of the parents intend to seek declaration as guardian of minor(s) coupled with right to retain their custody; he or she has to approach the Guardian Court**.** The jurisdiction in terms of Section 491 Cr PC is meant to invoke in exceptional cases i.e. *where children are of very tender ages, recently been snatched away from lawful custody* and*there is a real urgency because of likely of any harm or prejudice to the welfare of minor*. Reliance is placed upon case of ***Mst. Nadia Perveen V. Mst. Almas Noreen and others*** (PLD 2012 S.C 758). On the aspect, the Hon'ble apex Court in the case of ***Mirjam Aberras Lehdeaho v. SHO*** (2018 SCMR 427) graciously held that:-

> "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 resorted 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 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. "

11. In the case in hand, the minor is not a suckling baby. It is also not the case of the petitioner that she has recently been snatched away from her lawful custody and there is also no apprehension of any harm or prejudice to the welfare of minor who, otherwise, expressed her willing to remain in custody of her father. Hence, it can safely be held that in the attending circumstances, there exists no exception circumstance warranting exercise of jurisdiction in terms of Section 491 Cr. PC.

12. In view of above, the impugned order in the backdrop of facts and circumstances of the instant case, is well reasoned, in accordance with law and does not call for any interference. Consequently, the instant writ petition is **dismissed**. However, the petitioner if so desires may avail remedy before appropriate forum.

(ARBAB MUHAMMAD TAHIR)
JUDGE

Announced in an open Court on _____11.2022

JUDGE

//Kamran//