JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Criminal Revision No.105 of 2022
Mst. Mishal Masood
Versus
Muhammad Munib and others

Date of Hearing:	05.12.2022
Petitioner by:	Mr. Muhammad Mushtaq Khaki, Advocate along with the petitioner.
Respondents by:	M/s Muhammad Sadiq Khan and Muhammad Saif ullah, Advocates for respondents No.1 to 3. Respondents No.1 to 3 and minor (Ibrahim Munib) in person. Mr. Zameer-ul-Hassan, A.S.I., Police Station Ramna, Islamabad.

MIANGUL HASSAN AURANGZEB, J:- Through the instant criminal revision petition the petitioner, Mst. Mishal Masood, assails the order dated 26.11.2022 passed by the Court of the learned Additional Sessions Judge, Islamabad-West dismissing her petition under Section 491 of the Code of Criminal Procedure, 1898 (**"Cr.P.C."**) seeking the recovery of her ten-month old baby, Ibrahim Munib, from the custody of her former husband. The primary ground on which the said petition was dismissed was that the minor had been living with the private respondents (who were his father and paternal grandfather and grandmother) for a long duration which had made the status of the petitioner that of a stranger to the minor.

2. The petitioner and respondent No.1 (Muhammad Munib) got married on 13.02.2021. The couple were blessed with a son / detenue on 14.01.2022. Soon thereafter the matrimonial relationship of the couple went sour. Three months after the birth of the minor, the couple parted. Respondent No.1 has pronounced divorce on the petitioner and the divorce certificate was issued on 14.09.2022.

3. The petitioner asserts that in the month of April 2022, the minor was snatched from her and she was thrown out of the

UNCERTIFIED COPY

house. Since then she has been living with her mother and brother.

4. The case of the private respondents is that the petitioner voluntarily abandoned the minor who is being taken care of by his father and grandmother; and that the welfare of the minor will best be served if his custody is not taken away from the private respondents.

5. It was not until 24.11.2022 that the petitioner filed the petition under Section 491 Cr.P.C. before the Court of the learned Additional Sessions Judge, Islamabad seeking the recovery of her minor son. This petition has been dismissed vide the impugned order. The factum as to the presence of the minor with the private respondents for months has prevailed over the learned Court below in holding that the petitioner had become a stranger to the minor and has no acquaintance with him. I cannot subscribe to this view since presently the minor is just ten months old. The minor is a suckling baby and needs to be taken care of by his mother. Therefore, vide short order dated 05.12.2022, I allowed the instant criminal revision petition and set-aside the impugned order dated 26.11.2022 with the direction for the custody of the baby to be handed over to the petitioner. In holding so, I am fortified by the law laid down in the following cases:-

(i) In the case of Mst. Fehmida Vs. Sajjad Ashraf (2016 YLR 2119), the petitioner had sought recovery of her one and a half year old son from the custody of her estranged husband. For this purpose, a petition under Section 491 Cr.P.C. had been filed *albeit* with a 'considerable delay.' The said petition was allowed by the Hon'ble Lahore High Court. Paragraph 8 of the said judgment is reproduced herein below:-

> *"8. There is no denial that the minor is aged about 1-1/2 year and before the arising of differences, the spouses were living together. However, the petitioner was expelled thereafter while keeping the minor son with him. The minor son is a suckling baby and requires protection and care for twenty four hours a day and nobody else other than real mother can look after him in such a tender age. There is no cavil that jurisdiction under section 491, Cr.P.C. is to be exercised with great caution and restraint. However, that*

UNCERTIFIED COPY

> ***cannot operate as an absolute bar on exercise of such jurisdiction in a case where minor is of tender age and he has been snatched recently from lawful custody and there is real urgency in the matter keeping in view the welfare of the minor. As the provisions of Section 491, Cr.P.C. provides efficacious and speedy relief for protecting the right of any person who, under the circumstances, has been kept under illegal or improper custody. The minor who is admittedly aged about 1-1/2 year and is a suckling baby, requires constant love, care and affection of the mother and there can be no substitute of the real mother in such an eventuality. The arrangement under section 491, Cr.P.C. are temporarily in nature, which are to be dealt with by way of parental jurisdiction. However, the question of custody can finally be decided by the concerned Guardian Judge appointed under the Guardian and Wards Act, 1890.***

(ii) In the case of Mirjam Aberras Lehdeaho Vs. SHO Police Station Chung, Lahore (2018 SCMR 427), it was held *inter alia* that the tender age of the minor was always a material consideration but not the only consideration to be kept in mind by the High Court while deciding a petition under Section 491 Cr.P.C. The other factors to be taken into consideration were the best interest and welfare of the minor and the urgency to take appropriate measures to minimize the trauma, emotional stress and educational loss of the minor.

(iii) In the case of Hania Usman Vs. Federation of Pakistan (2019 CLC Note 64), the Division Bench of this Court allowed a petition under Section 491 Cr.P.C. filed by the mother for the recovery of the custody of her four-year old son from his father. The petition in the said case was filed six months after the date on which the mother had been deprived of her minor son's custody.

(iv) In the case of Kiran Bibi Vs. Junaid Ahmed (2017 YLR Note 279), the Hon'ble High Court of Sindh allowed the petition under Section 491 Cr.P.C. filed by the mother for the recovery of the custody of her thirteen-month old child from his father. The petition in the said case was filed more than four months after the mother had been deprived of her child's custody.

(v) In the case of Hina Jillani Vs. Sohail Butt (PLD 1995 Lahore 151), the Hon'ble Lahore High Court allowed a petition seeking the issuance of the writ of *habeas corpus* filed at the instance of the mother of a one-year old baby girl seeking the recovery of the

UNCERTIFIED COPY

custody from her father. The petition in the said case was filed five months after the mother of the minor had proceeded abroad.

6. Learned counsel for the petitioner in justification of the delay in filing of the petition submitted that negotiations had been conducted between the relatives of the petitioner and respondent No.1 so that the minor's custody could be handed over to the petitioner. In the case of Razia Rehman Vs. Station House Officer (PLD 2006 S.C. 533), the mother of two minor children had filed a writ of *habeas corpus* seeking the recovery of the children from their father. The petition was withdrawn due to negations aimed at an amicable settlement. Since the estranged couple could not come to a settlement, the mother filed a second petition six months after the first petition had been filed. The subsequent petition was allowed and the custody of the minor children was directed to be handed over to the mother. In the case at hand, I am of the view that the petitioner has given adequate justification for the delay in filing the petition under Section 491 Cr.P.C. before the learned Court below.

7. These are the reasons for the short order dated 05.12.2022 whereby the instant petition was allowed and the impugned order dated 26.11.2022 was set-aside. Consequently, the custody of the minor was handed over to the petitioner in the Court. These reasons are being issued on 29.12.2022.

8. Respondent No.1 shall be at liberty to approach the learned Guardian Judge, Islamabad, for the minor's custody under the provisions of the Guardian and Wards Act, 1890.

(MIANGUL HASSAN AURANGZEB)
JUDGE

Ahtesham*

UNCERTIFIED COPY