JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD

W.P. NO. 1357 OF 2025

AROOJ ABDAL

VS

LEARNED ADDITIONAL DISTRICT AND SESSIONS JUDGE, ISLAMABAD-EAST, ETC.

Petitioner by	**:**	**Malik Haroon Hameed, Advocate along with the Petitioner.**
Respondents by	**:**	**Respondent No.2 in person with minors.** **Mr. Zubair Shah, Advocate for the Respondent No. 3.** **Raja Zamir ud Din Ahmed, AAG.** **Mr. Yasir Mehmood, State Counsel.** **Mr. M. Saleem A.S.I.**
Assisted by	**:**	**Ms. Amna Khawaja Daniyal, Law Clerk.**
Date of hearing	**:**	**18.04.2025**

MUHAMMAD AZAM KHAN, J.

1. Through the instant Writ Petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter referred to as the **"Constitution"**), the Petitioner [Arooj Abdal] has impugned the Order dated 08.04.2025 passed by learned Additional Sessions Judge-East, Islamabad. It is also prayed that custody of minors, namely Farwa Nabeel, aged about 10 years, and Hamza Nabeel, aged about 05 years, be handed over to the Petitioner.

2. The brief facts of the case as per the Memo of Petition are that the Petitioner filed a Petition of Habeas Corpus under Section 491, Code of Criminal Procedure, 1898 **("Cr.P.C.")** before the learned Sessions Judge-East, Islamabad, for the recovery of minors namely Farwa Nabeel and Hamza Nabeel, alleging their illegal custody with the Respondent No. 3/Abdullah Jan. Notice was issued to the Bailiff of the Court through concerned S.H.O to produce the alleged detenues. The Bailiff submitted his report and produced the minors before the Court. The learned Additional Sessions Judge-East, Islamabad dismissed the

Petition filed by the Petitioner vide the Impugned Order. Being aggrieved of the Impugned Order, the Petitioner has filed the instant Writ Petition.

3. The learned counsel for the Petitioner argued that the Impugned Order is a non-speaking order and the learned Additional Sessions Judge did not apply his judicial mind while passing the Impugned Order; that the learned Additional Sessions Judge vide the Impugned Order erroneously stated that the Petitioner herself left the detenues/minors after the divorce; that this narration is factually incorrect as the minors were with the Petitioner at her residence on 05.04.2024, when the Respondents Nos. 2 & 3 came and took the minors away without her consent; that Respondent No. 3 is not in a position to take personal care of the minors on day-to-day basis as he is employed with the Danish Refugee Council (DRC) and posted abroad in Sudan for several years; and that the Petitioner being real mother of minor girl can take extra care of her in appropriate manner and there is no substitute of a real mother for the minors. Lastly, the learned counsel prayed for acceptance of the instant Petition and handing over the custody of the minors to the Petitioner.

4. The learned counsel for the Respondent No.3 argued that the minors are not in illegal custody as Respondent No. 3 is their real grandfather; and that the learned Additional Sessions Judge has passed a well-reasoned order which does not call for any interference. Lastly, the learned counsel prayed for the dismissal of the instant petition.

5. I have heard the learned counsel for the parties and perused the record with their able assistance.

6. The minors, namely, Farwa Nabeel and Hamza Nabeel, were present in this Court along with Respondent No. 3. It is pertinent to mention here that the minors seemed sensible and possessed sufficient mental capacity to comprehend and draw reasonable inferences in relation to the matter at hand. As the welfare of the minors is of paramount consideration before the Courts, the statements of the minors were taken in order to give weightage to their wishes. The daughter categorically expressed her wish to live with both parents, while the son wanted to remain with the mother. It is a universal truth that there cannot be any substitute for a mother and that the lap of the mother is God's own natural

cradle for a child. Thus, it will be in the welfare of the siblings to stay together in the custody of the mother for the time being.

7. Moreover, the availability of another remedy at law, such as the remedy under the Guardians and Wards Act, 1890 for obtaining custody of the minors, is not a valid ground for refusing an application for habeas corpus. This Court is vested with the power to exercise its parental jurisdiction under Section 491, Cr. P.C. to restore the interim custody of the minor to someone better entitled to have his/her custody. Reliance is placed upon the Judgment of the august Supreme Court of Pakistan titled *"Nisar Muhammad and another Vs. Sultan Zari"* reported as **(PLD 1997 Supreme Court 852),** the relevant portion of which is reproduced hereunder: -

> "*Again another principle to be adhered to in this matter is that the availability of another remedy at law, such as the remedy under the Guardians and Wards Act for obtaining custody of a minor child is not a valid ground for refusing an application for habeas corpus by the parent or guardian of the minor who is entitled to have his or her custody, where the minor is being illegally detained by another person.*"

8. The provisions of Section 491, Cr.P.C. provide efficacious and speedy relief for the release of the persons kept under illegal and improper custody. In the matters pertaining to the custody of minors of tender age, this Court is empowered to issue directions under Section 491, Cr.P.C. and can pass an order regarding custody without prejudice to the rights of the parties for final determination of the dispute pertaining to the custody of minors by the Guardians and Wards Court. Reliance in this regard is placed upon *"Dr. Mahreen Baloch Vs. Province of Sindh through Secretary Home Department, Karachi and 3 others"* **(2022 YLR 1602)**, the relevant portion of which is reproduced hereunder: -

> *"It is now well-settled principle of law that the jurisdiction of Courts under the Guardians and Wards Act, 1890, in respect of the custody of minors and for recovery/production of minors under Section 491, Cr.P.C. are entirely different and there is no question of one excluding the other, overlapping the other or destroying the other in as much as there is no repugnancy between the said two provisions. The provisions of Section 491, Cr.P.C. provide efficacious and speedy relief for the release of the persons kept under illegal and improper custody. In the matters pertaining to custody of minors of tender age, this Court is empowered to issue directions under Section 491, Cr.P.C. and can pass an order regarding custody without prejudice to the right of the parties for final determination of the dispute pertaining to the custody of*

minors by the Guardians and Wards Court. This view is fully supported by the case-law reported in (i) 2013 MLD (Lahore) 1640, (ii) 2014 MLD (Lahore) 38, (iii) 2014 YLR (Sindh) 705, (iv) PLD 2014 Sindh 598, (v) 2015 MLD (Lahore) 833, (vi) 2016 MLD (Sindh) 29 and (vii) 2017 MLD (Sindh) 427."

9. The Petitioner, furthermore, is *prima facie* entitled to the custody (*hizanat*) of her minor children, particularly where the male child is under the age of 7 years and the female child has not yet attained puberty. Given that the son, in the instant case, is 5 years old and the daughter is 10 years of age, the Petitioner is entitled to retain custody of both minors for the limited purpose of proceedings under Section 491, Cr.P.C. The final determination of permanent custody, however, falls exclusively within the jurisdiction of the Guardian Court, which the parties are at liberty to approach if they so wish. In a case of *Nisar Muhammad (supra)*, the Court further held that: -

"In the judgment of Mst. Rizwana Bokhari's case (supra), Muhammad Munir Khan. J. (as his Lordship then was) had rightly laid down the law which we are inclined to approve that on examination of the various provisions of Muslim Law, the Criminal Procedure Code, particularly its section 491, Cr.P.C. and sections 361 and 363 of the P.P.C. indicate that mother is entitled to 'hizanat' of her male child below the age of 7 years, failing that the mother's relations under Muslim Personal Law are entitled to the custody of the minor. Since the two male minors in this case are admittedly below 7 years in age and the three females have not yet attained puberty all the three being less than 8 years, the respondent is, therefore, prima facie entitled to 'hizanat' of all the 5 for the limited purpose of section 491, Cr.P.C. at the moment and the rights of the petitioners to the custody of the aforesaid minors has not accrued so far. In these circumstances, the custody of the aforesaid minors with the petitioners was, therefore, rightly declared illegal or at least improper by the learned Chief Justice of the Peshawar High Court. The learned Chief Justice was also justified to have expressed more than once that ultimate determination of entitlement of the custody shall of course lie with the Guardian Judge to whom the parties were directed to approach, if they so desired."

10. Upon perusal of the Impugned Order passed by the learned Additional Sessions Judge, it becomes ostensible that the learned Judicial Officer failed to use his judicious mind in reaching a reasonable conclusion. Mother leaving the custody of the detenues voluntarily does not constitute a valid ground to disentitle her from seeking the lawful recovery of the minors from the improper custody of the father, especially when the minors, in the instant case, were with the Petitioner at her residence on 05.04.2024. Reliance is placed upon *"Zubaida Shehzadi Vs. Muhammad Aslam and another"* **(2007 MLD 512),** the pertinent excerpt of which is given as under: -

> *"The petitioner was allegedly expelled by the respondent from his house. Even if it is assumed that she had left the house of her husband it would not make any difference. One thing is certain that she felt compelled to leave the house of her husband alone and in this way both the minor daughters stood deprived of the custody of their mother on June 6, 2006. It would be in the interest of the minors that they should be placed again in the custody of their mother without further loss of time…. In the circumstances of the case, both the minor girls who have admittedly not attained puberty are ordered to be given in the interim custody of the petitioner. The learned Judge Family Judge/Guardian Judge shall finally decide the question of custody of the minors strictly in accordance with law without being influenced by the instant order of this Court."*

In the present matter, the custody of the minors with Respondent No. 3 is, at the very least, improper if not outrightly unlawful. Accordingly, the custody of the minors shall remain joint between the Petitioner and the Respondent, with both parties entitled to visitation rights. The terms of visitation shall be mutually agreed upon, keeping in view the best interests and welfare of the children, ensuring that their education remains unaffected, until a final decision is rendered by the competent court under the Guardian and Wards Act. Furthermore, until a decision is rendered by the Court of competent jurisdiction, Respondent No. 2 shall not transfer the custody of the minors outside Pakistan without prior permission of this Court.

11. The instant Writ Petition is **disposed of** in the above terms while placing further reliance in this regard on judgment of august Supreme Court of Pakistan passed in *"Mirjam Aberras Lehdeaho Vs. SHO, Police Station Chung, Lahore and Others"* **(2018 SCMR 427)** and *"Mst. Nazia Perveen Vs. Station House Officer and Others"* **(2019 YLR 2244).**

(MUHAMMAD AZAM KHAN)
JUDGE

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