

**Judgment Sheet**  
**IN THE LAHORE HIGH COURT**  
**BAHAWALPUR BENCH, BAHAWALPUR**  
**JUDICIAL DEPARTMENT**

Crl. Revision No.54/2022  
(Majeed Ahmad vs. Additional Sessions Judge, etc.)

**JUDGMENT**

Date of hearing: 14.02.2022

Petitioner by: Mian Muhammad Khubaib Mahand, Advocate.

State by: Jam Abdul Malik, Assistant Advocate General.

Respondent No.3 by: Mr. Muhammad Arshad Rajput, Advocate.

Research Assistance Dr. Muhammad Mumtaz, Research  
Officer/Civil Judge,

**ALI ZIA BAJWA, J:-** Originally the petitioner invoked jurisdiction of this Court through filing a constitutional petition, which was treated as such and fixed before the Bench. During the course of hearing, it was observed that impugned order was passed by learned Additional Sessions Judge, Ahmedpur East ('ASJ') on judicial side. Learned Counsel for the Petitioner requested to convert the instant writ petition into revision petition as this court has inherent power to convert one type of proceedings into another type. No fetters or bar can be placed on the High Court to convert and treat one type of proceedings into another type<sup>1</sup>, provided, it

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<sup>1</sup> COMMISSIONER OF INCOME TAX (LEGAL) RTO, ABBOTTABAD Vs. Messrs ED-ZUBLIN AG GERMANY and another (2020 SCMR 500)

has jurisdiction over the matter brought before it. Reliance can be placed on Muhammad Akram<sup>2</sup> wherein it was observed as infra:

*“The Courts are sanctuaries of justice, and in exercise of authority to do ex debito justitiae, that is to say remedy a wrong and to suppress a mischief to which a litigant is entitled. No fetters or bar could be placed on the High Court and or this court to convert and treat one type of proceeding into another type into another and proceed to decide the matter either itself provided it has jurisdiction over the lis before it in exercise of another jurisdiction vested in the very court or may remit the lis to the competent authority/forum or court for decision on merits.”*

Thus, by seeking guidance from the aforementioned authoritative judgment of august Supreme Court of Pakistan, vide separate order of even date the writ petition is converted into revision petition.

2. The instant revision petition has been directed against the order dated 29.01.2022 (*‘impugned order’*) passed by learned ASJ through which SHO, Police Station Saddar Ahmedpur East/respondent No.2 (*‘SHO’*) was directed to record statement of respondent No.3 under Section 154 Code of Criminal Procedure, 1898 (*‘Cr.P.C.’*) and redress her grievance.

3. Shaista Bibi respondent No. 3 filed an application under Section 491 Cr.P.C. against her husband i.e. the petitioner, his mother Mst. Mukhtar Mai, his brothers Muhammad Naveed and Muhammad Tanveer for the recovery of her minor daughter Farzana aged 10 months before the Court of Additional Sessions Judge on 25-01-2022. Despite efforts made by the police, minor Farzana could not be recovered till 29-01-2022. Learned Additional Sessions Judge, Ahmedpur East passed the impugned order whereby Station House Officer police station Saddar Ahmedpur East was directed to proceed

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<sup>2</sup> Muhammad Akram vs. DCO Rahim Yar Khan – 2017 SCMR 56

against the petitioner under Section 154 Cr.P.C. on the application of respondent No. 3.

4. Learned counsel for the petitioner submits that father being natural and lawful guardian cannot be termed as kidnapper of his own child, hence prays that order of learned ASJ with regard to direction to SHO to register a criminal case against the petitioner may kindly be set-aside being illegal and unlawful. It has been admitted by both the parties that subsequent to passing of impugned order, minor Farzana was handed over to her mother i.e. respondent No.3.

5. Learned AAG supports the version advanced by learned counsel for the petitioner.

6. On the other hand, learned counsel appearing on behalf of respondent No.3 vehemently opposes the contentions raised by learned counsel for the petitioner and supports the impugned order.

7. Heard, record perused.

8. Perusal of the record available on file transpires that learned ASJ, vide impugned order, has issued a direction to the SHO to record the statement of respondent No.3 and register a criminal case against the petitioner. The stance of respondent No.3 is that petitioner kidnapped her minor daughter. Admittedly, petitioner is real father of minor Mst. Farzana Bibi and in Muslim Law, as in almost every other legal system, the father is the natural guardian of the person and property of his minor child. The mother and other female relatives of the minor, however, have been given certain rights of custody known as *hizanat*. According to the standard text-books, under the *Hanfi* Law, the father is not entitled to the custody of a male child until he attains the age of seven years, and of a female child until puberty. During the period the child remains in the custody of the

mother or other female relatives, the father is exclusively responsible to provide appropriate maintenance. In other words, father remains in constructive and legal custody of the child even though physical or actual custody rests with the mother or other female relatives.<sup>3</sup> In number of cases<sup>4</sup>, august Supreme Court of Pakistan treated father as natural guardian of his minor child. This Islamic principle was long ago judicially accepted in our region by Privy Council in its one of the most celebrated judgments in *Imambandi*<sup>5</sup>, which had been followed subsequently in chain of judgments, in the following words:

*“16. It is perfectly clear that under the Mahomedan law the mother is entitled only to the custody of the person of her minor child up to a certain age according to the sex of the child. But she is not the natural guardian ; the father alone, or, if he be dead, his executor (under the Sunni law) is the legal guardian...”*

Though section 361 of Pakistan Penal Code, 1860 (‘PPC’) deals with kidnapping from lawful guardianship, however, the exception appended to section 361 PPC reveals that term “lawful guardian” in this section includes any person lawfully, entrusted with the care or custody of such minor or other person. Before proceedings further, it would be advantageous to have a bird eye view of section 361 PPC which is reproduced below:

**“361. Kidnapping from lawful guardianship.** *Whoever takes or entices any minor under fourteen years of age if a male, or under sixteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.*

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<sup>3</sup> MUHAMMAD SADIQ Vs. (Mrs.) SADIQ SAFOORA, (PLD 1963 (W. P.) Lahore 534)

<sup>4</sup> MIRJAM ABERRAS LEHDEAHO Vs. SHO, POLICE STATION CHUNG, LAHORE and others, (2018 SCMR 427), KHAN MUHAMMAD Vs. Mst. SURAYYA BIBI and others, (2008 SCMR 480), MEHMOOD AKHTAR Vs. DISTRICT JUDGE, ATTOCK and 2 others, (2004 SCMR 1839), ALLAH DITTA and others vs. Mian MUHAMMAD AKRAM and others (2003 SCMR 1199) and SHER BAZ KHAN and others vs. Mst. MALKANI SAHIBZADI TIWANA and others (PLD 2003 Supreme Court 849).

<sup>5</sup> Imambandi vs Sheikh Haji Mutsaddi, [(1918) 20 BOMLR 1022]

**Explanation.** *The words —lawful guardian in this section include any person lawfully entrusted with the care or custody of such minor or other person.*

**Exception.** *This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.* (emphasis supplied)

9. Bare perusal of *supra* Section reveals that a person is said to kidnap a minor (*under fourteen years of age in case of male and under sixteen years of age in case of female*) or person of unsound mind, when he takes away such minor or person of unsound mind from the lawful guardianship without the consent of such guardian. The explanation shows that the term “lawful guardian” includes any person lawfully entrusted with the care or custody of such minor or other person. There is, however, an exception to this section that it does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose. The offence of kidnapping is punishable under section 363 PPC but the father being the legal guardian of the minor child under Muhammadan Law cannot, in any case, be said to take or entice away his own minor child and as reiterated above, although the mother has the right of *hizanat* but the fact remains that the guardianship vests in the father. It was observed in *Mehnaz*<sup>6</sup> as under:

*‘The father is also the legal guardian of his minor children. The legal guardian has in law constructive custody of his minor children and, therefore, if a father removes his child from the custody of his wife, he cannot be tried or convicted on the charge of kid-napping. For the sake of arguments, if it is believed that the respondent took away his minor son from the custody of his ex-wife, even then, he was not liable to face trial on the charge of kidnapping being the natural and legal guardian of the alleged abductee.’*

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<sup>6</sup> Mst. Mehnaz vs. Judicial Magistrate 1<sup>st</sup> Class – 2008 YLR 1669

10. In the same way, the father has constructive custody of his minor child, even though he/she be in the *hizanat* of his/her mother.<sup>7</sup> Perusal of section 361 PPC transpires that exception provided under that act even relieves a person from criminal liability if he or she believes himself/herself to be the mother/father of an illegitimate child or who in good faith believes/considers himself or herself entitled to lawful custody of such minor. In *Muhammad Ashraf*<sup>8</sup>, this principle was very well elaborated by this Court in following words: -

*“6. The cumulative effect of reading of main section alongwith the exception is that firstly kidnapper should take the child out of the custody of the lawful guardian in order to constitute an offence of kidnapping but if a person takes the child, may be, from the custody of the mother believing himself to be the father or in good faith believes himself to be entitled to the lawful custody then the offence of kidnapping is not committed unless removal is committed for immoral or unlawful purpose, be it at the hands of even a guardian.*

*7. Father of a child is always a natural guardian alongwith the mother. He can never be ascribed or attributed the offence of kidnapping of his own child. The exception appended to section 361, P.P.C. even goes to the extent of relieving a person from any criminal liability if he in good faith believes to be father of an illegitimate child, or, who, in good faith believes to be entitled to the lawful custody of such child...”*

11. The term ‘lawful guardian’ in section 361 PPC has been used in a wider sense including any person lawfully entrusted with the care or custody of the minor. The principle of dual guardianship of the minor is by itself not repugnant to Islamic Law or law of the land. Under this conception the guardianship of the father does not cease while the minor is in the custody of mother. Again, there is nothing in law to prevent the mother to agitate her right of *hizanat* when the minor is with the father. The father, being lawful guardian, taking away his own child from the custody of mother cannot be saddled with criminal liability and charged for an offence of kidnapping as

<sup>7</sup> AHMAD NAWAZ and 3 Others vs. The STATE (PLD 1968 Lahore 97)

<sup>8</sup> MUHAMMAD ASHRAF vs. S.H.O. and others, (2001 P.Cr.LJ 31)

defined under Section 361 of Pakistan Penal Code. Father and mother cannot prosecute each other on the charge of kidnapping of their own minor children.<sup>9</sup> This Court affirms the view that the police authorities have no jurisdiction to interfere with a matter purely of family nature, especially, relating to the custody of minors between their parents.<sup>10</sup> As learned counsel for the petitioner has apprised this Court that matter of custody of minor Farzana is *sub-judice* between petitioner and respondent No.3 before Guardian Court and custody of the minor has already been handed over to mother by the petitioner in pursuance of process issued by the learned ASJ till the decision of Guardian petition, hence, in circumstances though non-compliance of order of the court qua the production of minor may have its own legal consequences but learned ASJ was not justified to direct the SHO to record the version of respondent No.3 and register a criminal case against the petitioner (father of minor).

12. In view of what has been discussed above, instant Revision Petition is **ALLOWED** and the impugned order dated 29.01.2022 passed by learned ASJ, to the extent of direction to SHO to record the statement of respondent No.3/Mst. Shaista Bibi under section 154 Cr.P.C. is **SET ASIDE**.

(ALI ZIA BAJWA)  
JUDGE

Approved for Reporting

JUDGE

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<sup>9</sup> KAUSAR PARVEEN Vs. THE STATE (PLD 2008 Lahore 533), Muhammad Shoaib vs. Hudda and two others – 2005 YLR 1060 LHR, Suleman and others vs. THE State – 1984 Pcr.L.J. 1988 and Bashir Ahmed vs. The State – 1971 Pcr.L.J. 252

<sup>10</sup> Mst. SAMINA KHATTAK and others v. SHO, POLICE STATION KOHSAR and others, (2019 PCr.LJ 909)