Form No.HCJD/C-121

# ORDER SHEET
# IN THE LAHORE HIGH COURT LAHORE
## JUDICIAL DEPARTMENT.

W.P. No.47080 of 2026

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| Naseem Bibi | **VERSUS** | Addl. Sessions Judge Sheikhupura and four others. |

| S. No. of order/ proceedings | Date of order/ Proceedings | Order with signatures of Judge, and that of parties of counsel, where necessary |
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| | 28.08.2026. | Mr. Shaban Ali Solgi Advocate for the petitioner.<br>Mr. Hassan Raza Dogar Advocate for respondents No.3 to 5.<br>Malik Umer Tahir, Assistant Advocate General with Raza S.H.O. |

Through this constitutional petition, Mst. Naseem Bibi has challenged the order dated 27.07.2026, passed by the learned Additional Sessions Judge, Sheikhupura, whereby her petition under Section 491, Cr.P.C. seeking recovery of her three minor children was dismissed. The petitioner is the real mother of the minors, namely, Amna Bibi, aged about 16 years, Eman Fatima, aged about 11 years, and Ali Hussain, aged about 9 years. Her case before the learned Court below was that the minors were in her custody and that, on 20.07.2026 at about 5:00 p.m., respondent No.3, Muhammad Afzal, forcibly took them away from her custody. Respondent No.3 appeared before the learned Court below and produced the minors. He maintained that the minors were living with him and further stated that he had already instituted proceedings before the competent Guardian Court.

2. The learned Additional Sessions Judge, however, dismissed the petition mainly on the ground that the minors were neither of tender age nor suckling babies and were in the custody

of their father. The relevant portion of the impugned order reads as follows:

> "Admittedly, the minors are not tender age and not suckling baby who are in custody of their father. Hence, their custody cannot be termed as illegal and improper".

Consequently, the petition under Section 491, Cr.P.C. was held to be not maintainable and the petitioner was left at liberty to approach the Guardian Court.

3. Learned counsel for the petitioner contends that the learned Court below failed to address the real grievance raised by the petitioner. He submits that the specific allegation was that the minors had been forcibly removed from the custody of their mother. According to him, the petition could not have been dismissed merely because the minors were not suckling babies.

4. Learned counsel for the respondents, on the other hand, submits that the question of permanent custody is to be determined by the competent Guardian Court and that respondent No.3 has already availed that remedy.

5. I have heard the learned counsel for the parties and examined the available record with their assistance.

6. Before examining the legality of the impugned order, it would be appropriate to reproduce the relevant provisions of law. Section 491(1)(a) and (b), Cr.P.C. provides:

> "491. Power to issue directions of the nature of a habeas corpus. (1) Any High Court may, whenever it thinks fit, direct— (a) that a person within the limits of its appellate criminal jurisdiction be brought up before the Court to be dealt with according to law; (b) that a person illegally or improperly detained in public or private custody within such limits be set at liberty." The provision, therefore, is not confined to cases of illegal custody alone. It also takes

> within its scope a person who is “improperly detained in public or private custody.”

7. Likewise, Section 17 of the Guardians and Wards Act, 1890, lays down the governing principle for matters concerning minors. The relevant part thereof reads:

> “17. Matters to be considered by the Court in appointing guardian.—(1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.
> (2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.
> (3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.”

Thus, even under the statutory scheme governing permanent custody, age is only one of the relevant considerations. It is not, by itself, determinative of the question of custody.

8. Section 25 of the Guardians and Wards Act, 1890, which deals with restoration of custody, also recognizes that the welfare of the minor remains material. The relevant provision reads:

> "25. Title of guardian to custody of ward.—(1) If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian."

There is a clear distinction between the summary jurisdiction exercised under Section 491, Cr.P.C. and the comprehensive jurisdiction exercised by the Guardian Court for determination of permanent custody.

9. The learned Additional Sessions Judge was, therefore, required to examine the petitioner's allegation in the context of Section 491, Cr.P.C., namely, whether the custody of the minors with respondent No.3 could be regarded as improper in the circumstances alleged by the petitioner. The matter could not be concluded merely by observing that the minors had crossed the stage of infancy.

10. The August Supreme Court, in Mst. Khalida Perveen v. Muhammad Sultan Mehmood and another (**PLD 2004 Supreme Court 1**), recognized that the ordinary rule regarding the custody of a child cannot be applied mechanically where the welfare and rights of the minor require the intervention of the Court. The principle flowing from the said judgment is that, while ordinarily a petition under Section 491, Cr.P.C. may not finally determine custody between competing parents, the Court can pass an appropriate order in the exercise of its parental and inherent jurisdiction to protect the welfare and rights of the minor.

11. The remedy under Section 491 CrPC is not barred in view of the availability of an alternative remedy by way of approaching a guardian court. In this regard, reference is made to the judgment reported as *Mirjam Aberras Lehdeaho versus SHO, Police Station Chung, Lahore and others* (**2018 SCMR 427**). Paragraph 17 of the above referred judgment reads as under:

> This Court on various occasions examined the question of exercise of jurisdiction by the High Court where the matter involves custody of minors while the

> matter is *sub judice* before the Guardian Court. In a case reported as *Ahmed Sami and 2 others v. Saadia Ahmed and another* (**1996 SCMR 268**) at page 271, it was held that:"It is true that a Guardian Court is the final arbitrator to adjudicate upon the question of custody of child but this does not mean that in exceptional cases when a person who is holding the custody of a minor lawfully and has been deprived of the custody of minor has no remedy to regain the custody pending adjudication by the Guardian Court. In exceptional cases where the High Court finds that the interest and welfare of minor demanded that the minor be committed immediately to the custody of the person who was lawfully holding the custody of minor before he was deprived of the custody, the Court can pass appropriate order under section 491, Cr.P.C. directing restoration of the custody of minor to that person as an interim measure pending final decision by the Guardian Court.

In another judgment reported as *Muhammad Khalil-ur-Rehman v. Mst. Shabana Rahman and another* (**PLD 1995 SC 633**), this Court held on pages 638 and 639 which reads as under:

> In view of the above observation, it is quite clear that in appropriate cases the Court under section 491, Cr.P.C. if it reaches the conclusion that a minor has been illegally removed from the custody of a person who was holding his custody lawfully, the Court is empowered under section 491, Cr.P.C. notwithstanding the provisions of Guardians and Wards Act to pass appropriate orders. We are, therefore, of the view that the jurisdiction of the Criminal Court is not barred under section 491, Cr.P.C. to pass appropriate order with regard to custody of a minor who has been illegally removed from the custody of person, on account of the provisions of Guardians and Wards Act. ... As earlier pointed out, the two provisions, namely section 491, Cr.P.C. and section 25 of the Guardians and Wards Act deal with two different situations and as such the question of ouster of jurisdiction of criminal Court under section 491, Cr.P.C. on account of provisions of section 25 or 12 of Guardians and Wards Act did not arise at all. There is no overlapping between the provision of section 491 Cr.P.C. and section 25 of the Guardians and Wards Act."

12. In Gull Arzoo v. Station House Officer BZ, District, Multan and others (**2015 YLR 1765**), this Court considered the scope of Section 491, Cr.P.C. in a custody matter. The Court observed:

> "This Court and the Court of Sessions Judge have concurrent jurisdiction under Section 491, Cr.P.C.; and, High Court while adjudicating upon the matters of custody of minor should deal with the same in its parental jurisdiction."

The Court further held that:

> "the paramount consideration for the Court would be the welfare of a minor."

The said case also recognizes that the pendency of proceedings before the Guardian Court does not, by itself, constitute a bar to consideration of a petition under Section 491, Cr.P.C. on its own merits.

13. In Hussan Begum v. 1st Additional District and Sessions Judge, Karachi (**2013 P.Cr.L.J. 1503**), the learned Sessions Judge had treated the custody of a minor with his father as not being illegal. The High Court examined the matter in the light of the jurisdiction available under Section 491, Cr.P.C. and the question of improper custody. The case, therefore, makes it clear that the mere fact that a minor is with his or her father does not dispense with the judicial examination required under Section 491, Cr.P.C.

14. Similarly, in Mst. Shelly Nathaniel v. IXth Additional District and Sessions Judge, South Karachi and others (**2019 P.Cr.L.J. 890**), the High Court set aside the order whereby the habeas corpus petition filed by the mother had been dismissed and directed restoration of custody, while leaving the father at liberty to approach the Guardian Court. The Court directed that the Guardian Court would decide the matter:

> "on its own merits, without being influenced by the observations of this Court."

The said authority illustrates that an order passed in summary proceedings relating to recovery of minors does not finally adjudicate upon the competing claims of the parents regarding permanent custody. The cumulative effect of the above principles is that the jurisdiction under Section 491, Cr.P.C. cannot be rejected through a rigid formula that such jurisdiction is available only where the child is a suckling baby.

15. Undoubtedly, the age of a child is relevant. The custody of a child of tender age may stand on a different footing from that of a child who has attained sufficient maturity to express an intelligent preference. Section 17(3) of the Guardians and Wards Act, 1890, itself recognizes that:

> "If the minor is old enough to form an intelligent preference, the Court may consider that preference."

However, the age of a minor cannot be treated as the sole and conclusive test for determining whether a petition under Section 491, Cr.P.C. deserves consideration.

16. In the present case, the petitioner specifically alleged that she was exercising actual custody of the minors and that respondent No.2 forcibly took them away from her on 20.07.2026. The petition was filed immediately thereafter. It is further borne out from the available record that the mother of respondent No.3, namely Mst. Sardaran Bibi, had earlier instituted a habeas corpus petition before this Court, bearing W.P. No.61738 of 2025, seeking recovery of the minor children from the custody of the present petitioner. The said petition, however, was subsequently dismissed as withdrawn. This circumstance assumes considerable significance, as it lends support to the stance of the petitioner that, prior to the alleged

occurrence, the minor children were residing with and remained in the custody of their mother. The very institution of the aforesaid habeas corpus petition by Mst. Sardaran Bibi for recovery of the minors from the petitioner prima facie indicates that the children were not residing in the custody of their father. Rather, this circumstance lends further support to the petitioner's version that the minors were allegedly taken away forcibly from the custody of their mother and that their custody was subsequently changed. Thus, at this stage, the available record does not prima facie support the assertion that the minor children were residing with or were recovered from the lawful custody of their father. Respondent No.3 subsequently appeared before the learned Court below and produced the minors. These circumstances required the learned Court to address the petitioner's allegation and examine the nature and circumstances of the removal of the minors from her custody. Instead, the petition was dismissed because the minors were not suckling babies. The learned Court below appears to have treated the custody of the minors with their father as sufficient to exclude the applicability of Section 491, Cr.P.C. Such an approach overlooks the distinction between the status of a person as a natural guardian and the question of actual physical custody of a minor.

17. The claim of either parent to permanent custody is not to be determined merely by reference to the relationship of the parties. The welfare of the minor remains the controlling consideration. This is precisely why a detailed inquiry regarding permanent custody is ordinarily undertaken by the competent Guardian Court. At the same time, the existence of the remedy before the Guardian Court does not justify refusing to examine an immediate allegation that the existing custody of minors has been forcibly disturbed. The summary jurisdiction may, in an

appropriate case, be exercised to regulate the immediate custody of minors without finally determining the question of guardianship.

18. The present proceedings are not intended to decide whether the petitioner or respondent No.3 has the superior right to permanent custody of the minors. That question involves a detailed inquiry into matters relating to their welfare, upbringing, education, living conditions and other relevant circumstances. The competent Guardian Court may also consider the wishes and preference of Amna Bibi, who is stated to be about sixteen years of age, provided that she is found capable of forming an intelligent preference. Likewise, the welfare and circumstances of Eman Fatima and Ali Hussain shall be independently assessed by the Guardian Court.

19. However, none of these matters could justify the dismissal of the petition on the sole ground that the minors were not suckling babies. The learned Additional Sessions Judge was required to consider the petitioner's immediate grievance separately from the ultimate determination of permanent custody. The impugned order does not reflect any proper examination of the circumstances in which the minors were allegedly removed from the petitioner's custody. The decisive reason assigned for dismissing the petition is their age and the fact that they were with their father. In my considered view, such reasoning cannot be sustained. The Court, while dealing with a matter concerning minors, cannot proceed on the assumption that custody with a particular parent is always proper merely because of that parent's legal relationship with the children. A child is not an object of proprietary entitlement between the parents. The Court is required to remain mindful of the welfare and best interests of the minors.

20. In the circumstances of the present case, particularly when the petitioner approached the Court immediately with the allegation that the minors had forcibly been taken from her custody, it would be appropriate to restore the position which existed before the alleged removal, leaving the ultimate determination of permanent custody to the competent Guardian Court. It is, however, clarified that restoration of custody through the present judgment shall not amount to a declaration that the petitioner has an absolute or permanent right to the custody of the minors. Nor shall it prejudice the claim of respondent No.3 before the competent Guardian Court.

21. For the foregoing reasons, this petition is allowed. The order dated 27.07.2026, passed by the learned Additional Sessions Judge, Sheikhupura, is hereby set aside. The custody of the minors, namely (i) Amna Bibi, aged about 16 years (ii) Eman Fatima, aged about 11 years and (iii) Ali Hussain, aged about 9 years, shall be restored to their mother, Mst. Naseem Bibi, forthwith.

22. It is clarified that the above arrangement is interim in nature and is intended only to address the immediate grievance arising from the alleged disruption of the custody which the petitioner claims to have been exercising. It shall not determine or prejudice the rights of either party regarding permanent custody and guardianship. The parties shall be at liberty to pursue their remedies before the competent Guardian Court. If proceedings are already pending, the learned Guardian Judge shall decide the same independently, strictly in accordance with law and on the basis of the evidence produced by the parties.

23. While determining the question of permanent custody, the learned Guardian Court shall keep the welfare and best interests of the minors as the governing consideration and shall

also consider, where legally appropriate, the preference of any minor capable of forming an intelligent preference.

24. Nothing observed herein shall be construed as an expression of opinion on the merits of the competing claims of the parties regarding permanent custody. Petition allowed in the above terms.

**(GHULAM SARWAR NIHUNG)**
**JUDGE**

**Approved for reporting.**

**JUDGE**

**Announced, dictated, prepared and signed on 28.08.2026.**

*Ihsan*