

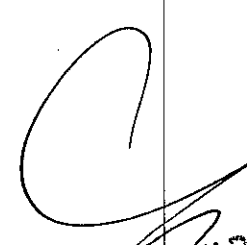
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IN THE COURT OF ADDITIONAL SESSIONS JUDGE ORAKZAI, AT BABAR MELA

Cr. Miscellaneous Application No.6/4 Of 2023

Sambano Bibi vs SHO PS Daboori etc.

Serial No of order or proceedings	Date of Order Proceedings	Order or other Proceedings with Signature of Judge or Magistrate and that of parties or counsel where necessary
1	2	3
Order	26/04/2023	<p>Petitioner Mst: Sambano Bibi along with her father and Counsel Sana Ullah Khan Advocate present. Respondent No.2 Ameen Badshah also present in person. Minors Mughawis aged about 07 years and Mst Arifa aged about 06 years are before the Court in custody of father (respondent) and Mst Ajwa aged about 01 year is before the Court in custody of mother (petitioner).</p> <p>2. The petitioner submitted application u/s 491 of the Code of Criminal Procedure, 1898; wherein, it is contended that she had been divorced by respondent No.2 and now residing with her parents. The minors were retained by the respondent who cannot take care of the minors and that all of the minors are of tender age and retaining such children from the mother is a cruel act of the respondent. The petitioner submitted in her application that all the minors may be recovered being in illegal and improper custody and may be handed over to the petitioner being real mother.</p> <p>3. The contention of the petitioner was considered genuine; therefore, the bailiff was directed to visit the house of respondent and produce the minors named above before the Court. On production of all the minors, parties agreed on amicable settlement of the issue; however, Mst Ajwa being suckling baby of one year was handed over then and there to the petitioner vide Order No. 5 dated 01/04/2023. The proceedings have been adjourned but the parties failed get the issue resolved out of the Court. The remaining two minors (one boy and one girl) opted to live with father (respondent) and are not willing to reside with their mother (petitioner); both orally examined in the Court.</p> <p>4. The real forum to determine the question of custody of the minor is the Guardian Court established under the Guardian and Wards Act, 1890. Section 491 of the Code of Criminal Procedure, 1898 is meant as a stop gap arrangement being tentative in nature.</p> <p>Mst Ajwa is aged about one year and is obviously falling within</p>


SAYED FAZA WADOOD
Addl: District & Sessions Judge
Orakzai at Hangu

the definition of suckling baby. It has been settled in Judgement reported as 2005 YLR 883 that interest of suckling baby would be best served if she is handed over to mother as the life, health or upbringing of minor is involved. Therefore, by attracting jurisdiction under section 491 (1A) of the Code of Criminal Procedure, 1898, Mst Ajwa being suckling baby is removed from the custody of father (respondent) and handed over to mother (petitioner) without prejudice to the rights of the parties to have the matter finally adjudicated upon by the Guardian Judge.

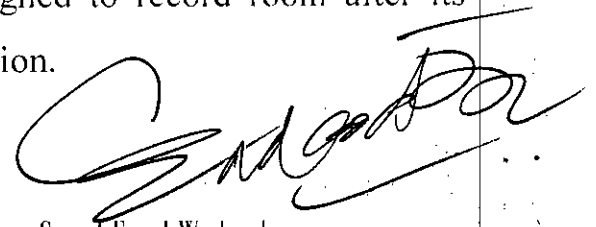
5. The rest of minors have been examined in the Court with special reference to their preferences as they have reached to the brink of level of expressing their opinion. They opted to live with their father and openly refused to go to their mother. Though preference of minor is not a sole gadget for deciding custody for the reason of possibility of brain wash or fear of harassment but when such preference is continuously expressed by the minors as was noted during the proceedings of present case, then such opinion cannot be ignored lightly. It has been settled in case reported as 2012 MLD 255 that minor when reached the brink of level of expressing his opinion, the same could not be disregarded. Similarly, welfare of a minor is always a paramount consideration which needed an inquiry based on facts and after providing chance to both the parties to produce their evidence and is the domain of Guardian Judge to settle it down. The case of such minors is beyond the ambit of freedom and liberty and interference of this Court under the cover of habeas corpus is neither necessary nor warranted; however, parties are at liberty to approach the proper forum if so desired.

6. In view of the above discussion the petition in hand is disposed of accordingly.

7. File of this Court be consigned to record room after its necessary completion and compilation.

Announced in open Court

26-04-2023



Sayed Fazal Wadood,
AD&SJ, Orakzai at Baber Mela