

ORDER SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Cr. Misc. A. No.S-330 of 2016.

DATE	ORDER WITH SIGNATURE OF JUDGE
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07.11.2016.

Syed Ghulam Hyder Shah, Advocate for applicant, alongwith the applicant.

Mr. Shahzado Saleem Nahyoon, Assistant Prosecutor General alongwith SIP Sohail Sarwar on behalf of SSP Hyderabad and SIP Saleem on behalf of SHO PS A-Section Latifabad, Hyderabad.

Mr. Nazeer Ahmed Bhatti, Advocate alongwith respondent No.3 as well detenues / minors Muhammad Saram and Muhammad Sheez.

Mr. Ayaz Hussain Tunio, Advocate for intervener.

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Learned counsel for applicant files counter affidavit, taken on record, copy whereof provided to other side.

2. Through instant criminal miscellaneous application, applicant (mother) seeks custody of minors Muhammad Saram and Muhammad Sheez, who are admittedly of tender age. Such plea is denied by respondent No.3 on the ground that earlier application of applicant, filed under section 491 Cr.P.C before District & Sessions Judge, Hyderabad, was disposed of with direction to the parties that they shall approach Guardian and Wards Court. Meantime, Muhammad Sadiq (husband of applicant) filed suit for restitution of conjugal rights as well applicant filed suit for dissolution of marriage; applicant has no source of income and she is residing with her mother in a rented house, hence this application is not maintainable.

3. Contention raised by learned counsel for respondent No.3 as well father that since earlier application under section 491 Cr.P.C. was declined and two suits (restitution of conjugal right and dissolution of marriage) have been filed by the respective parties, therefore, this is not a proper stage to hand over the custody of minors to applicant. He relied upon *Nadia Perveen v. Almas Noreen* (P L D 2012 Supreme Court 758).

4. I am conscious of the legal position that Courts, while exercising jurisdiction under section 491 Cr.P.C, are to examine the illegal or improper custody *only* and cannot go beyond that while ordering one to be released from *unlawful* custody. The custody of a child with father or mother *normally* cannot be said to be *unlawful* however in series of decisions, *now* have attended scope of **stare decisis**, the discretion of Section 491 Cr.PC in such like matters has been encouraged but only to regulate *interim* custody of the child, therefore, the provision of Section 491 Cr.PC can well be insisted particularly by a *mother* in matters of children of *tender* age. Filing of suits between husband and wife (mother & father of child) *even* shall not necessarily debar the Courts from exercising the jurisdiction under section 491 Cr.PC if situation *otherwise* so demands. Even in the case of Nadia Parveen, referred by learned counsel for respondent, the exercise of jurisdiction under section 491 Cr.PC is not restricted.

5. Further, it is by *now* a well settled proposition that under section 491 Cr.P.C. mother can be rescued if dispute is between the father and mother and minors are of tendered age. Here, situation is similar, thus as an interim arrangement, custody of the minors is handover to the applicant (mother) and father shall pay Rs.20,000/- per month for the maintenance of the minors which *however* subject to final determination by proper Family Court looking to the financial position of the father and needs of minors; till such time the father shall continue paying such amount. With regard to permanent custody or any disqualification of mother, the father is at liberty to approach concerned Guardian and Wards Court; however, Guardian and Wards Court shall decide the matter of custody of minors.

6. While parting, I feel it necessary to add that *normally* the matters, involving appearance of ladies (women) and children, are frequently listed on daily basis; which, involving *so called* honour and prestige, hence may result into any *untoward* situation, therefore, DIG Hyderabad is hereby directed to depute at least three (03) lady police constables in every Court room under supervision of one lady Inspector so as to have sense of protection for such

ladies (women) and to handle any *untoward* situation properly. Such arrangement shall be supervised by one lady inspector.

Disposed of.

JUDGE

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