

ORDERSHEET
HIGH COURT OF SINDH, KARACHI
 Cr. Misc. Application No. 120 of 2016

Date	Order with signature of the Judge
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PETITIONER : Shanza Ali through Mr. Asad Ali Zaidi,
Advocate

RESPONDENT NO.1 : AamirShujaat through Ms. Naeema
Aziz Advocate

RESPONDENTS NOS. 2
AND 3 : Mr. Zafar Ahmed Khan, Additional
Prosecutor General and Mr. Anwar
Subhani, State Counsel

DATE OF HEARING : 28.07.2016

DATE OF JUDGMENT : 28.07.2016

JUDGMENT

Muhammad Humayon Khan, J: This petition was originally filed under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 but it was converted into Criminal Misc. Application under Section 491 Cr. P.C. after hearing the petition on 28.07.2016.

2. The relevant and material facts of the case as pleaded in the petition are that the petitioner got married to the respondent No.1 on 18.10.2013 but marriage did not survive long and ultimately divorce was pronounced by the respondent No.1 to the petitioner on 17.05.2014. Out of the wedlock, a daughter was born on 01.09.2014 namely Fatima who is presently aged about one year and ten months (suckling baby). The shock and trauma of divorce for petitioner

resulted in series deterioration of her health, who suffered from depression and lost interest in life. In these circumstances, the petitioner's parents contacted the respondent No.1 and delivered custody of the said minor Fatima to the respondent No.1, who took the minor Fatima from hospital and got the critically ill petitioner to sign certain documents relating to custody of the said minor Fatima. When the petitioner recovered, she asked the respondent No.1 to return custody of the minor Fatima to the petitioner but the respondent No.1 refused and therefore the petitioner filed this petition.

3. The respondent No.1 filed objections; wherein, he denied the case of the petitioner and pleaded that the petitioner has already filed G & W Application No.789 of 2016 before the learned XX Family Judge, Karachi-East, which is pending. It is further pleaded that the petitioner gave the custody of the minor Fatima before the witnesses and she has also signed the documents for handing over the custody in favour of respondent No.1, therefore, this petition is not maintainable in law.

4. I have heard the learned counsel for the parties and perused the material available on the record and the written arguments filed by learned counsel for the petitioner.

5. The learned counsel for the petitioner contended that mere pendency of the G & W Application before the Guardian Judge is no ground to dismiss this petition as the jurisdiction under Section 491 Cr.P.C. is concurrent with the jurisdiction of a Guardian Judge and

both such jurisdictions for being entirely different would not destroy/exclude the other. He further contended that the agreement regarding custody of minor between the parents is not a valid agreement enforceable at law as the welfare of minor is of paramount importance and the conduct of parents is a secondary consideration. He further contended that the petitioner being the real mother has the right of "Hizanat" as the minor daughter is below the age of two years and needs constant love, care and affection of petitioner being the real mother. In support of his contentions, the learned counsel for the petitioner has relied upon the following case-laws:-

- i) Mst. Saima Bibi Vs. Raheel Butt and 3 others (2014 MLD (Lahore) 38);
- ii) Mst. Abida Vs. S.H.O., Ratodero Police Station (District Larkana) and 3 others (2014 YLR (Sindh) 705);
- iii) Mst. Reema Vs. S.H.O., Police Station Darri, Larkana and 4 others (PLD 2014 Sindh 598);
- iv) Shaukat Masih Vs. Mst. Farhat Parkash and others (2015 SCMR 731);
- v) Saima Noreen Vs. The State and others (2015 MLD (Lahore) 833);
- vi) Karam Khatoon Vs. Senior Superintendent of Police, District Khairpur and 8 others (2016 MLD (Sindh) 29);

6. The learned counsel for the respondent No. 1 contended that this petition is not maintainable in law as the petitioner has already filed G & W Application No. 789 of 2016 before the learned Family Judge which is pending and therefore the petitioner cannot avail two

remedies at a time. She further contended that the petitioner herself has handed over the custody of the minor Fatima to the Respondent No.1 by executing agreement and therefore the petitioner has lost her right to claim custody. However, the learned counsel for the respondent No.1 has not cited any case-law in support of her arguments.

7. The learned Additional Prosecutor General and State Counsel supported the arguments of the petitioner.

8. After taking into consideration the entire material available on the record and the arguments advanced by the parties, I came to the conclusion that the following two points are involved in this petition which have to be decided:-

- i) Whether this Court can entertain an application under Section 491 Cr.P.C. during the pendency of G & W application before the learned Family Judge?
- ii) Whether an agreement between parties regarding custody and guardianship of minor being contrary to Muslim Law is enforceable in law? If so, whether the mother of minor after executing such agreement has lost the right of "Hizanat"?

9. So far as the first point for determination is concerned, 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 release of the persons kept under illegal and improper custody. In the matters pertaining to custody of minor of tender age, this Court is empowered to issue directions under Section 491 Cr. P.C. and can pass an order regarding temporary 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 as has been held in the following case-laws:-

- i) Mst. Zarmeen Vs. Dr. Omer Mohayuddin Sheikh and others (2013 MLD (Lahore) 1640);
- ii) Mst. Saima Bibi Vs. Raheel Butt and 3 others (2014 MLD (Lahore) 38);
- iii) Mst. Abida Vs. S.H.O., Ratodero Police Station (District Larkana) and 3 others (2014 YLR (Sindh) 705);
- iv) Mst. Reema Vs. S.H.O., Police Station Darri, Larkana and 4 others (PLD 2014 Sindh 598);
- v) Saima Noreen Vs. The State and others (2015 MLD (Lahore) 833);
- vi) Karam Khatoon Vs. Senior Superintendent of Police, District Khairpur and 8 others (2016 MLD (Sindh) 29).

10. In view of the above settled principle of law, I hold that this application under Section 491 Cr.P.C. is maintainable and this Court is empowered to pass appropriate orders to ensure that the rights conferred upon the minor child are fully protected in a suitable manner in the exercise of its inherent jurisdiction more particularly

when the minors are of tender age as in this case the minor baby is below the age of two years.

11. Now the second point for determination is in two folds namely (1) whether an agreement between parties regarding custody and guardianship of minor being contrary to Muslim Law is enforceable in law? and (2) whether the mother of minor after executing such agreement has lost the right of “Hizanat”? According to the Muslim Law, mother has the preferential right to “Hizanat” (temporary custody of the minor) till the minor attains the age of seven in the case of male and the age of puberty in the case of a female. It is an established principle of law that an agreement with regard to the custody and guardianship of minors is not a valid agreement and cannot be enforced and has no binding force in the eyes of law as has been held in the following case-laws:

- i) Mst. Tahera Begum Vs. Saleem Ahmed Siddiqui (PLD 1970 Karachi 619);
- ii) Afshan Naureen Vs. Nadeem Abbas Shah (1997 MLD (Lahore) 197);
- iii) Mst. Razia Rehman Vs. Station House Officer and others (PLD 2006 Supreme Court 533);
- iv) Dr. Fauzia Haneef Vs. Dr. Raashid Javaid and 2 others (PLD 2010 Lahore 206);
- v) Mst. Abida Vs. S.H.O., Ratodero Police Station (District Larkana) and 3 others (2014 YLR (Sindh) 705);
- vi) Saima Noreen Vs. The State and others (2015 MLD (Lahore) 833).

12. In view of the settled principle of law laid down in the above-noted case laws, I hold that the agreement dated 01.09.2014

between the petitioner and the respondent No.1 regarding custody of minor Fatima being in derogation of Muslim Law is null and void and hence cannot be enforced under any circumstances, consequently, the petitioner being the real mother of the minor Fatima has right of "Hizanat".

13. There is another important aspect of the matter which I noticed that the stamp paper for the said agreement was purchased on 29.08.2014 and it was typed on computer. This fact establishes without any doubt that the respondent No.1 has already managed to take away the custody of the minor Fatima immediately after the delivery from the petitioner in hospital. This agreement, on the face of it, appears unconscionable as the petitioner was in the hospital and accordingly there is a rebuttable presumption that the said agreement was entered into by coercion and undue influence. No effective rebuttal is forthcoming to show as to why the petitioner would voluntarily part with her minor daughter immediately after birth. My this considered view is fully supported by the case of Mst. Shehnaz Bibi Vs. Muhammad Akram and others (1995 P.Cr.L.J. (Lahore) 307).

14. There is yet another case of ShaukatMasih Vs. Mst. Farhat Parkash and others (2015 SCMR 731) wherein, the Hon'ble Supreme Court of Pakistan has cancelled the guardianship certificate and direct the learned Guardian Judge to consider application submitted before him regarding custody of the relevant minor as a pending application and then to decide the matter afresh after attending to all

the jurisdictional, legal and factual issues and during the interregnum the custody of the minor shall remain with her mother.

15. I also took judicial notice of the fact that minor baby Fatima is below two years of age and accordingly it is her fundamental right of being fed from the breast of her mother for at least two years in view of the settled principle of Muslim Law that minor who comes out of womb of the mother has a fundamental right of being fed from the breast of his/her mother and no person can deprive minor of this supreme and fundamental right. Thus, the said agreement dated 01.09.2014 is ab-initio illegal, null and void having no legal effect whatsoever.

16. Admittedly, baby Fatima is below two years of age and certainly would need constant care of mother and it is a universal truth that there cannot be any substitute for a mother and that the lap of mother is God's own cradle for a child and hence the custody of minor Fatima with the respondent No.1 is improper if not illegal.

17. Above are the reasons for the short order dated 28.07.2016, whereby, I have converted this petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 into Criminal Misc. Application under Section 491 Cr. P.C. and allowed with the following directions:-

“(1) that the interim custody of Baby Fatima aged about one year and ten months (suckling baby), shall remain with the Petitioner being the real mother, who shall furnish P.R. Bond of Rs. 50,000/- within three days from the date of this order that she shall keep the minor in proper health and care and also bring the minor every Saturday at 12:00 noon before the Nazir of this Court either herself or through any person of her blood relation nominated by her, to hand over to the Respondent No.1 (father of minor) through Nazir of this Court;

- (2) that the Respondent No.1 should return the custody on Monday at 12:00 noon to the petitioner in the presence of Nazir of this Court and in a similar way, the Respondent No.1 shall also furnish P.R. Bond of Rs.50,000/- within three days from the date of this order that he should not take the custody of the minor forcefully from the petitioner;
- (3) this order shall be implemented after furnishing P.R. Bond by both the petitioners and respondent No.1 and the first meeting will commence on 06.08.2016 (Saturday);
- (4) if the petitioner and respondent No.1 intend to change the day and time, they are at liberty to move joint application for such change;
- (5) that both the petitioner and respondent No.1 should stickily comply with this order.”

This short order may be read as part and parcel of this Judgment.

J U D G E