IN THE HIGH COURT OF SINDH AT KARACHI

Cr. Rev. Application No.108 of 2015

Date	Order with Signature of Judge

Before : **Mr. Justice Fahim Ahmed Siddiqui**

Mst. Noor Jehan ……..……..Applicant

Versus

Muhammad Khan Khoso & another…… Respondents

Date of Hearing : 17.10.2017

Applicant Mst. Noor Jehan through Mr. Mirza Sarfaraz Ahmed, advocate.

Respondent No.1 Muhammad Khan Khoso through Mr. Naseer Hussain Jaffri, advocate.

The State through Mr. Muntazir Mehdi, the Assistant Prosecutor General, Sindh.

O R D E R

FAHIM AHMED SIDDIQUI, J: By invoking the revisional jurisdiction under Section 435 Cr.P.C. read with Section 439 Cr.P.C., the Applicant has assailed the order dated 26.12.2014, passed by the learned Sessions Judge Karachi South in Cr. Misc. Application No. 1850 of 2014 being an application under Section 491 Cr.P.C., whereby the said application was dismissed.

2. It is the case of the Applicant that she is the grand maternal mother of the detenue Baby Zaina KHoso, aged about four years, who was residing with her since her birth. It is submitted by the Applicant that her daughter namely Sana Khoso was married to Respondent No.1 Muhammad Khan Khoso and out of the said wedlock a minor/detune Baby Zaina was born on 01.12.2010. However, due to mal-treatment,

misbehaviour and the objectionable character of the Respondent No.1, Sana Khoso was compelled to file a family suit bearing No. 718 of 2014 against the Respondent No.1 for dissolution of marriage by way of Khula, which was ultimately granted on 25.10.2014 and the detenue Baby Zaina Khoso, was residing with her mother Sana Khoso. It is submitted that on 06.11.2014, Sana Khoso met an accident and later expired, whereafter the custody of the minor Baby Zaina was with the Applicant. It also came to know that the Respondent No.1 has secretly performed his third marriage with the friend of Sana Khoso in her life time and presently he is residing with her. The Respondent No.1, who being the father of detenue, with consensus of both the families, was allowed to meet the detenue on every Saturday. On 13.12.2014, the Respondent No.1 had requested the Applicant to allow him to take Baby Zaina to meet his parents at their house and after permission, he took the minor from the house of the Applicant and then did not fulfill his commitment and had not returned the custody of the minor to the Applicant and refused to return the custody of the minor as per schedule, which was settled in between the parties, in presence of the elders of the family. The Applicant tried to contact the Respondent No.1, through phone, but neither he received the calls of the Applicant nor returned the custody of the minor to the Applicant and has left the detenue minor at the mercy of his third wife, who is not looking after to the detenue. It is claimed by the Applicant that minor Baby Zaina was being maintained by her properly with full love, affection and her education is being suffered due to non-attendance of the classes and the custody of the minor has been removed by the Respondent No.1 by illegal means and by improper way and he was not so authorized to retain the custody of minor, therefore she filed an application under Section 491 Cr.P.C., as mentioned above, for restoration of the custody of minor Baby Zaina by exercising the powers as envisaged in Section 491 CrPC.

3. The learned counsel for the applicant submits that the applicant being the maternal grandmother has preferential right of custody of minor after the death of the mother of minor. According to him, the respondent (father of the minor) is not a proper person for custody of minor as during the lifetime of the mother of minor, his behavior and attitude towards her as well as minor remained questionable and that was the reason that the mother of the minor has obtained a decree of the relation of her marriage. He submits that the learned Sessions Judge in the impugned order could not appreciate the legal position properly. According to him, Muhammedan Law is very much clear regarding this point and he refers Section 353 of Muhammedan Law and submits that as per the said provision, the custody of a minor girl will remain with the applicant being her grandmother. He further submits that the custody of the minor was already with the Applicant and the respondent tactfully and decisively take in the custody of the minor on the pretext of meeting with his parents, assess the custody of minor should be restored to the Applicant. According to him, the Respondent has already married with another woman during the lifetime of the deceased mother of minor and stepmother shall not be a proper matron for the minor. In the end, he emphasizes for production of minor in the Court. He took reliance from **Bashir Ahmed v. Mst Aziz Begum and another (1973 SCMR 1), Major Zafar Iqbal v. Mst Rehmat Jan and another (1994 SCMR 339), Mst. Kaneez Fatima v. Shaukat Hussain and others (1998 MLD 1996), Nadeem Iabal v. Muhammad Kabir Khan and 2 others (2011 YLR 348)** and **Mst Naseem Bibi v. SHO PS Qutubpur, District Multan and 3 others (2011 MLD 1814)**.

4. The learned counsel for the Respondent, while supporting the impugned order, submits that the said order is proper and there is no need to interfere with the same. According to him, the present Applicant has filed application under Section 491 CrPC before the learned Sessions Judge with ulterior motives, as huge property of the deceased is involved

in the minor baby is entitled for the same being the legal heir of the deceased. He also questions the 'decree of dissolution of marriage' by submitting that the name and address of the Respondent was wrongly shown in the family sued for getting decree of dissolution of marriage behind the back of the Respondent. He submits that the said family suit was filed even without the consent of deceased wife of the Respondent and there was a clear-cut fraud played by the Applicant and other family members. He submits that there was a dispute between the deceased and her brothers regarding the inherited property and for the same reason, one of the brothers of the deceased hatched a plot to murder the deceased for which she lodged a FIR against her brothers. He further submits that the deceased remained with the Respondent till her death, which is clear from the relevant record pertaining to her death. According to him, the Applicant and other family members of the deceased had already usurped valuable properties of the deceased and by getting the custody of minor, they intend to usurp the remaining properties of the deceased.

5. Mr. Muntazir Mehdi, the learned Assistant Prosecutor General, Sindh submits that in the instant matter, there is no interest of stat is involved. However, he supports the impugned order and submits that the parties may approach the proper forum for resolving the issue of custody of minor.

6. In rebuttal, the learned counsel for the Applicant submits that it is very much clear from the record that the deceased herself has approached to the Family Court for resolution of her marriage. He submits that the said case which was lauded by the deceased had already been disposed of during the phase of investigation. He also labelled counter allegations on the respondent for keeping an evil eye on the properties of the deceased.

7. The instant Criminal Revision is actually continuity of a petition of habeas corpus filed before the learned Sessions Judge, Karachi South, which was dismissed through the impugned order. The writ of habeas corpus is one of the most ancient writs known to the common law of England. It is a writ of immemorial antiquity and the first thread of its origin are, woven deeply within the "seamless web of history" and it is now untraceable among countless incidents that constitute the total historical pattern. The writ of habeas corpus is essentially a procedural writ, which deals with the machinery of justice, not the substantial law. The object of the writ is to secure release of a person who is illegally restrained of his liberty. The writ is, no doubt, a command addressed to a person, who is alleged to have another person unlawfully in his custody, requiring him to bring the body of such person before the court. However, the production of the body of the person detained is directed with an implied order that the circumstances of his detention may also be inquired into, so that it will be ascertain that the alleged unlawful detention or restrained is actually in existence.

8. However, the case of issuance of writ of habeas corpus requires a different consideration in respect of minors under the allegation of illegal detention or restrained by one of the spouses. It is the settled law that the cases of custody of minors should be decided on the one and the sole ground of ‘paramount consideration’ of welfare of minors. It is the reason that even if the custody or detention is not illegal but in cases of ‘suckling babies’ and those minors who are ‘fully dependent’ on their mothers due to their tender ages; the courts may issue directions in favor of mother, and such directions are always of ‘interim in nature’ and the same may not debar the Family Court to look into the matter and decide the same on merits. In the present case, the situation is a little bit different as the controversy if not in between the spouses but after the death of the mother, the maternal grandmother is demanding custody of minor from the

real father under Section 491 CrPC. The caselaw relied by the learned counsel for the petitioner pertains to the controversy in respect of custody of minor initiated before the Family Courts, which ultimately decided by the higher forums. From the caselaw cited by the learned counsel for the petitioner, it fortifies that the proper forum to decide the matter pertaining to custody of minors is the Family Court, as the question of the welfare of minor is factual controversy, which requires evidence. The honorable Supreme Court has laid down a guideline regarding handling the matter of custody of minors under Section 491 CrPC in the case reported as **Mst. Nadia Perveen v. Mst. Almas Noreen and others (PLD 2012 SC 785)**, wherein it held as:

> *"Jurisdiction of a High Court under section 491, CrPC for recovery of minors, is to be exercised, sparingly and such exercise may be undertaken only in exceptional and extraordinary cases of real urgency keeping in view that even a Guardian Judge has the requisite powers of recovery of minors and regulating their interim custody."*

9. I am of the view that in the present case, there are no exceptional and extraordinary circumstances available, which attract real urgency for exercising the jurisdiction under Section 491 CrPC. Consequently, the instant criminal revision is dismissed.

J U D G E