

Order Sheet
IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD

Cr. Misc. Application No. S- 295 of 2020

Mst. Fouzia @ Waziran -----	VERSUS	Applicant
SSP District Jamshoro & others -----		Respondents

Mr. Imtiaz Ali Channa, Advocate for Applicant

Mr. Azizullah Buriro, Advocate for Respondents

Mr. Shahid Ahmed Shaikh, D.P.G. along with Inspector Ghulam Hyder
Panhwar SHO PS Khairpur Nathan Shah district Dadu.

Date of hearing	:	24.08.2020
Date of decision	:	28.08.2020

ORDER

ADNAN-UL-KARIM MEMON, J.- Through this Habeas Corpus Petition, applicant seeks recovery of her minor sons and daughter namely Sajjad Husain (aged about 7 years), Gada Hussain (aged about 11 years), Fida Hussain (aged about 9 years) and Baby Suhana (aged about 5 years) illegally detained by the respondent No.5. (Uncle of minors)

2. Today the children have produced before this Court. This Court in presence of applicant inquired from them if they were under “detention” or “supervision” of any person to which they obviously responded in the negative.

3. I asked learned counsel that minors are no more in illegal custody; but in the custody of their uncle and grandmother. He replied that the petitioner is real mother and natural guardian of above named minors therefore; she has every right to meet her children. I queried from him whether petitioner has filed any application before the Guardian and Wards Court for custody of the minors, he replied in negative. However, he asserted that the petitioner shall approach learned Guardian and Wards Court having jurisdiction for obtaining the custody of minors if an appropriate direction are given to the learned trial court for swift disposal of the custody case.

4. I have noticed that since the very purpose of filling this petition is over on the premise that the aforesaid minors have been produced in court, therefore under the law a parent can claim visitation right of minor children. It

is admitted fact that the minors are with their uncle and grandmother. It is well settled now that proceedings under section 491, Cr.P.C. are not available for declaring any person as guardian or for determining all the questions relating to the custody of minor because the final decision of regular custody is to be decided in the proceedings initiated by, the parties if any claiming the custody of the minor before the Guardian Court. It is well settled law that paramount consideration while deciding the question of custody of the minor is the welfare of the minor which has to be seen in view the age, sex and religion. The welfare includes his moral, spiritual and material wellbeing. While considering what is the welfare of the minors the court shall have regard to the age, sex, religion of the minor, the character and capacity of the proposed guardian, his nearness of kin to the minor and the preference of the minor, if he or she is intelligent enough to make it.

5. Record reflects that minors namely Sajjad Husain (aged about 7 years), Gada Hussain (aged about 11 years), Fida Hussain (aged about 9 years) and Baby Suhana (aged about 5 years) would definitely require constant care on the premise that their mother has been living separately under certain allegations, though their father has passed away.

6. Mr. Azizullah Buriro learned counsel for Respondent No.5 has raised the question of maintainability of the captioned Miscellaneous Application and vehemently defended the custody of minors with grandmother on the premise that the applicant is / was involved in the murder of her husband and father of minors. He submits that being grandmother of the children, Respondent No.5 (uncle) was the best person to take decisions regarding their welfare and upbringing. He further maintains that the matter may be referred to Guardian and Wards Court where an application can be moved by the applicant seeking custody of minors. Therefore, the question regarding custody and welfare of the minors should be left to be determined by the Court of competent jurisdiction after a fair trial and evidentiary hearing to enable the parties to put all requisite material before the Court. On the basis thereof, an informed decision can be made by the Guardian Court regarding welfare and custody of the minors. He has vehemently argued that in these circumstances, this Court can refuse to exercise jurisdiction under Section 491, Cr.PC observing that the questions of custody and welfare of the minors could more appropriately be determined by the Guardian & Wards Court.

7. I have heard learned counsel for the parties and gone through the record with their assistance.

8. Considering the peculiar facts and circumstances of this case, the questions arise which has a direct bearing on the outcome of these proceedings, whether the petition before this Court under Section 491 Cr.P.C is not maintainable or whether learned Guardian & Wards Court has jurisdiction to determine the custody issue of the minors?

9. In my view mother is a natural guardian, there is no bar in law that places any restriction on the natural guardian to approach a Court of competent jurisdiction to be declared as guardian of the person and property of the minors.

10. Record reflects that the applicant, who is the real mother of children bonafide believed that the children had been removed from her custody by exercise of deception and trickery, she could not be precluded from approaching this Court, which is not denuded of its jurisdiction under Section 491 Cr.P.C to provide relief to the applicant. This Court in exercise of powers under Section 491, Cr.P.C has to exercise parental jurisdiction and is not precluded in all circumstances from giving due consideration to the welfare of minors and to ensure that no harm or damage comes to them physically or emotionally by reason of breakdown of the family tie between the parents. I find that the instant Miscellaneous Application under Section 491 Cr.P.C is maintainable, for just recovery of minors from illegal custody of any person.

11. The Honorable Supreme Court on various occasions has examined the question of exercise of jurisdiction by the High Court where the matter involves custody of minors on the analogy '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'. On the aforesaid proposition, the Hon'ble Supreme Court of Pakistan in the case of "SHABANA NAZ versus MUHAMMAD SALEEM" (2014 SCMR 343), while taking the issue very elaborately outlined the factors disqualifying the mother and father from the custody of minor in the following words:

"8. It may be noted that in terms of section 7 of the Guardians and Wards Act, 1890 (the Act), the paramount consideration for the Court

in making the order of appointment of guardian of minor is that it should be satisfied that it is for the welfare of minor. Although it is an established law that father is a natural guardian of his minor child/children but indeed the Court has to be satisfied while appointing the father as a guardian that the welfare of minor lies in the fact that he be appointed as a guardian and the custody of minor be delivered accordingly. There are many factors, which may not entitle the father to the custody of minor and some of the factors could be, where the father is habitually involved in crimes or is a drug or alcohol addict, maltreats his child/children, does not have a capacity or means to maintain and provide for the healthy bringing up of his child/children or where the father deliberately omits and fails in meeting his obligation to maintain his child/children. The factors noted above are not exhaustive and they may also not be considered as conclusive for that each case has to be decided on its own merit in keeping with the only and only paramount consideration of welfare of minor.

11. Para 352 of the Muhammadan Law provides the mother is entitled to the custody (Hizanat) of her male child until he has completed the age of 7 years and of her female child until she has attained puberty and the right continues though she is divorced by the father of his child unless she marries a second husband in which case the custody belongs to the father.

12. Para 354 provides for disqualification of female from custody of the minor, which includes the mother and one of the instance laid down is that if she marries a person not related to the child within the prohibited degree e.g. a stranger but the right revives on the dissolution of marriage by death or divorce.

13. Thus, it is apparent from reading of the two paras of the Muhammadan Law that though the mother is entitled to the custody (Hizanat) of her minor child but such right discontinues when she takes second husband, who is not related to the child within the prohibited degree and is a stranger in which case the custody of minor child belongs to the father. It has been construed by the Courts in Pakistan that this may not be an absolute rule but it may be departed from, if there are exceptional circumstances to justify such departure and in making of such departure the only fact, which the Court has to see where the welfare of minor lies and there may be a situation where despite second marriage of the mother, the welfare of minor may still lie in her custody”

12. In view of the forgoing, the controversy as raised by the parties needs to be looked into by the learned Guardian and Wards Court by way of proper proceedings, if approached and the decision thereof shall be made within a reasonable time, keeping in view the welfare of minors strictly in accordance with the Guardians and Wards Act, 1890.

13. In view of the above facts and circumstances of the case, the instant miscellaneous application is disposed of with direction to the applicant to approach the concerned Guardian and Wards Court for obtaining the custody of minors strictly in accordance with law within a period of one week from the date of receipt of this order.

JUDGE