

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Criminal Miscellaneous Application No.582 of 2022

Date	Order with signature of Judge
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1. For hearing of main case.
2. For order on MA No.14414/2022
3. For order on MA No.79135/2023

07.12.2023

None present for the applicant
Mr. Rehman Ghani Khattak advocate for respondent
No.1 along with Muhammad Sohail and Minor Muhammad Hamza
Malik

Applicant Mst. Sana Noor Sohail has brought this lis against the order dated 29.09.2022 passed by the learned VIIIth Additional District & Sessions Judge Karachi East in HCP No. 434 of 2022 (re-Mst. Sana Noor Sohail v Muhammad Sohail and another) whereby application under Section 491 Cr. P.C filed by the Applicant for recovery of her Children from respondent No.1, was dismissed. An excerpt of the same is reproduced as under:-

“So keeping in view the mentioned circumstances and in the interest of justice, I found that the prayer of this application is not liable to be considered hence it is dismissed with the observation that the petitioner is at liberty to approach the proper forum i.e. guardian and wards Court to redressal the grievance. With all due respect to the case laws produced by the learned counsel for the petitioner, these do not touch the merits of the present case in the circumstances discussed above.

2. It is inter alia contended by the learned counsel for respondent No.1 that the custody of the minor Muhammad Hamza Malik is with respondent No.1 in terms of the order dated 8.11.2022 passed by this Court whereas the custody of minor Muhammad Uzair Malik with the applicant-mother in terms of order dated 8.11.2022 passed by this Court, which is required to be handed over to respondent-father and let the Guardian and ward Court decides the issue of regular custody of Minors. Learned counsel insists that the minor Muhammad Uzair Malik may be ordered to be produced by his mother to meet with his father. Lastly, he prayed for the dismissal of the instant Criminal Miscellaneous application being not maintainable.

3. It appears from the record that the applicant is not turning up for long, and has left Karachi for her Village Mandhar, Union Council Attar Sheesha, District and Tahsil Manshera KPK, as per the Police report, this

Court has made efforts to trace her out but all the time Police is clue less in such a situation, it seems that applicant has lost interest in the case.

4. The record reflects that the applicant is a real mother and natural guardian of a minor and has preferred this Criminal Miscellaneous Application for recovery of the minors, and this Court vide order dated 8.11.2022 handed over the custody of one minor Muhammad Uzair Malik to her in Court. Admittedly, the minor is require constant care; indeed, her mother has developed an emotional attachment with the minor child, and the issue of the welfare of the minor is yet to be decided by the learned Guardian and Wards Court for which the parties have to approach. 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 minors because the final decision of regular custody is to be decided in the proceedings initiated by the parties claiming the custody of the minors before the Guardian and Wards 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. Welfare includes his/her moral spiritual, and material well-being. While considering what is the welfare of the minor the court shall have regard to the age, sex, and religion of the minor, the character and capacity of the proposed guardian, his/her nearness of kin to the minor, and the preference of the minor if he or she is intelligent enough to make it.

5. I am of the view that the purpose of filing this Criminal Miscellaneous Application is served as both minors were produced before this Court and one minor was handed over to the applicant-mother.

6. I have noticed that under similar circumstances Supreme Court case of *Humayun Hassan v. Arslan Humayun and another*, (PLD 2013 SC 557) has decided the issue about the custody of the minors with the following dicta.

“16. During the hearing, the learned counsel for the father submitted that the right of the hizanat of the child vesting in the mother is nearly over. In response to our query, we were told that the judgments of the learned Family Judge and the learned Appellate Judge were not abided by, as the father retained the custody of the child. Therefore, we cannot accept such a preposterous contention because in doing so we will be rewarding those who take the law into their own hands and violate the decisions of courts vested with jurisdiction. Every judgment must be abided by unless it is suspended and/or set aside by a higher court. The father dragged out the proceedings and then unnecessarily invoked the constitutional jurisdiction of the High Court. There was no reason for the High Court to exercise its constitutional jurisdiction in terms of

Article 199 of the Constitution and to set aside perfectly well-reasoned and legal judgments. As regards the learned counsel for the father, contending that the child has an aversion to the mother, just goes to show that the father has filled the child's innocent mind with fear and/or dread, and demonstrates that he has not been fair to either the child or the mother. 17. Therefore, for the reasons mentioned above we have no hesitation in setting aside the impugned judgment of the High Court dated 16 September 2019. Consequently, respondent No. 1 is directed to hand over the physical custody of the minor, Muhammad Rayyan, to the petitioner within seven days from the date of this order, failing which the concerned police officer and the social welfare officer will ensure compliance; a copy of this order be sent to the learned Advocate-General, Khyber Pakhtunkhwa for onward transmission of this order to the concerned and to oversee compliance. In view of the important issues decided in this petition with regard to the custody of minors the Registrar of the Peshawar High Court is directed to provide copies of this order to all family/guardian judges and Judges of the Peshawar High Court. This petition is converted into an appeal and allowed in the above terms."

7. In the light of the facts and circumstances mentioned above, the Criminal Miscellaneous Application has served its purpose which is hereby disposed of along with the pending application(s) leaving the parties to approach the Guardian and Wards Court for regular custody of minors, which if filed shall be decided within one month and both the parties will produce the minors before the Guardian and Wards Court concerned without fail. SSP District and Tahsil Manshera KPK shall ensure the production of Minor Muhammad Uzair Malik before the trial Court if summons are issued to him by the trial Court for the decision of the custody case on merits.

JUDGE