

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Criminal Misc: Appln. No.S-466 of 2023

Applicant : Mst.Rukaiya Chandio W/o Abdul Rasheed
Through Mr. Masood Rasool Babar Memon,
Advocate.

Respondent No.6 : Mst.Shahnaz W/o Basheer Ahmed Chandio
Through Mr. Muhammad Hassan Chandio
Advocate.

Respondent No.8 : Allah Dino S/o Ghulam Sarwar
Through Mr. Sultan Ahmed Chandio,
Advocate.

The State : Through Mr. Nazar Muhammad Memon,
Additional P.G.

Date of hearing : 17.07.2023.
Date of decision : 17.07.2023.

ORDER

ARBAB ALI HAKRO, J.- Through this Habeas Corpus Application, the applicant seeks recovery of her minor son, Daniyal (aged about 02-years), who is in illegal and improper custody of respondents No.6 to 9.

2. A notice was sent to the respondents, resulting in respondent No.6, along with minor Daniyal, appeared in Court.

3. Learned counsel for the applicant contends that Mst.Rukaiya/applicant is the mother of the minor. Contends that on 03.07.2023 at about 1935 hours, private respondents came to the applicant's house; respondent No.8 took out a pistol and forcibly took away her minor son. Contends that the applicant could not be deprived of the right of Hazanat of the minor, who is a tender age and in the light of the principle laid down in the Holy Quran.

4. Conversely, learned counsel for respondent No.6 contends that the minor child was not snatched by respondent No.6; in fact,

she adopted the minor with the consent of the applicant and her husband, who is bedridden.

5. I have heard the learned counsel for the parties and perused the record.

6. It is irrefutable that the minor is approximately two years old and at a vulnerable stage of development, necessitating round-the-clock protection and care. Only the biological mother can adequately attend to his needs at this tender age. There is no cavil that jurisdiction under section 491, Cr.P.C. is to be exercised with great caution and restraint. However, that cannot operate as an absolute bar on the exercise of such jurisdiction in a case where the minor is of tender age and has been snatched recently from lawful custody, and there is real urgency in the matter keeping in view the child's welfare. As the provisions of Section 491, Cr.P.C. provides efficacious and speedy relief for protecting the right of any person who, under the circumstances, has been kept under illegal or improper custody. The minor, admittedly aged about 02 years and is a tender age, requires constant love, care and affection of the mother, and there can be no substitute of the natural mother in such an eventuality. However, the question of custody can finally be decided by the concerned Guardian Judge appointed under the Guardian and Wards Act 1890. In the case **(PLD 2012 Supreme Court 758)**, the Apex Court, while addressing the question concerning the exercise of jurisdiction by this Court under section 491, Cr.P.C. laid down the following principle: -

"It has consistently been held by this Court in the cases of Muhammad Javed Umrao v. Miss Uzma Vahid (1988 SCMR 1891), Nisar Muhammad and another v. Sultan Zari (PLD 1997 SC 852), Mst. Khalida Perveen v. Muhammad Sultan Mehmood and another (PLD 2004 SC 1) and Naziha Ghazali v. The State and another (2001 SCMR 1782) that the matter of custody of minor children can be brought before a High Court under section 491 Cr.P.C. only if the children are of very tender ages

they have quite recently been snatched away from lawful custody and there is a real urgency in the matter and also that in such a case the High Court may only regulate interim custody of the children leaving the matter of final custody to be determined by a Guardian Judge.”

7. It was held in a judgment reported in **1996 SCMR 268** that a High Court, while dealing with an application under section 491, Cr.P.C. The custody of a minor is with an improper person; it can pass appropriate order under section 491, Cr. P.C., directing restoration of the custody of the minor to an entitle person as an interim measures, leaving the parties to avail the remedy regarding custody of the minors decided by a Court of competent jurisdiction. In the said judgment, it was further observed that the custody of minors who were four and two years old had rightly been handed over to the mother, and reliance was also placed on an earlier judgment of the Apex Court reported in **PLD 1995 SC 633.**

8. I, therefore, hold that the minor is not under the legal custody of respondent No.6. Accordingly, the instant application is allowed, and interim custody of minor Daniyal is handed over to the applicant/mother. And applicant is directed to furnish a bond in the sum of Rs.50,000/- to the effect that she will keep the minor in proper condition and health care and not remove the minor from the jurisdiction of this Court.

9. However, the ultimate determination of the entitlement of custody shall lie with the Guardian and Wards Court, to whom the parties are directed to approach if they so desire.

JUDGE