

**ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI**

Criminal Misc. Application No.457 of 2023

Date

Order with signature of Judge

1. For order on office objection at 'A'
2. For hearing of main case

24.7.2023

Mr. Ghulam Umar advocate for the applicant
Ms. Rubina Qadir, DPG alongwith Muhammad Aslam DSP Sachal
Karachi and Muhammad Nawaz, Additional SHO PS Sachal Karachi

Through this Criminal Miscellaneous Application, the applicant has impugned the order dated 10.7.2023 passed by learned V-Additional Sessions Judge Malir Karachi in Habeas Corpus Petition (HCP) No.103 of 2023, whereby learned trial Court dismissed the application of the applicant for removal/deletion of his name as the party from the aforesaid HCP.

2. Learned counsel for the applicant has contended that the impugned order is not maintainable under the law and the same is liable to be set aside; that Mst Asma Abdullah/respondent No.1 was married to Abdullah Solangi/ respondent No.2 and from the said wedlock they have two children namely master Dawood Abdullah and master Ibrahim Abdullah; that after the marriage some disputes arose between them, in this regard, elders of both family members tried their level best to convince the spouses for passing their matrimonial relationship in a happy environment but all their sincere efforts remained fruitless. It is further contended that thereafter respondent No.1 without any reason and justification left her matrimonial house alongwith minors/children, due to which applicant's brother took the custody of his minor children from respondent No.1; due to the above reason the respondent No.1 filed HCP No.103/2023 before the learned V-Additional Sessions Judge Malir Karachi wherein she made the applicant as party to the proceedings just to put pressure upon her husband, though the applicant has no any concerned with the dispute between them but in good faith applicant and his family members tried to reconcile the matter between the parties but on the contrary the respondent No.1 with ulterior motives arrayed him as party in the above proceedings, which is apathy on her part ; that in order to remove the name from the above HCP, the applicant moved an application before the learned trial Court but the said application was dismissed without cogent reasons as

such the impugned order is not sustainable under the law and liable to be set aside. It is further contended that the applicant has no role to play in the proceedings, therefore his name may be ordered to be removed from the said proceedings i.e. HCP No.103/2023, due to which the applicant has been suffering from the mental torture and unable to pay attention to his job and daily routine affairs without committing any offense; that the applicant is a law-abiding and peace-loving citizen of Pakistan, who has never committed any offense nor took the law in his hands but respondent No.1 without any cogent reason made him a party for ulterior motives. He added that respondents No.1 and 2 got married and the applicant has nothing to do with their family matter as such he was/is not a necessary party in the proceedings, because the relief sought in the HCP was in respect of the custody of minors who are with their natural guardian/father, therefore, it was unnecessary to array him as a respondent. He emphasized that harassment, in all forms and manifestations, affects and violates the dignity of a person as guaranteed under the Constitution of Pakistan, 1973. He lastly prayed for setting aside the impugned order dated 10.7.2023 to the extent of deletion of his name from the proceedings and prayed that respondents No.3 and 4 may be restrained not to harass and disturb the applicant as well as his family at the behest of respondent No.1.

3. Learned DPG is present along with Muhammad Aslam DSP Sachal Karachi and Muhammad Nawaz, Additional SHO PS Sachal Karachi, and submitted that the police tried to contact respondent No.2 on his cell numbers but all three cell numbers were off due to which he could not be produced before this Court.

4. I have heard the learned counsel for the parties and with their assistance examined the documents on record and the order of the Subordinate Court.

5. In the present case, respondents No.1 and 2 are husband and wife and natural guardians of minors. Respondent No.1 preferred Habeas Corpus Petition 103/2023 before the learned V-Additional Sessions Judge Malir Karachi wherein she made the applicant a party to the proceedings, which was/is pending for the safe recovery of minors, who are in the custody of the father. Admittedly, the minors would require constant care; indeed, their mother/respondent No.1 has developed an emotional attachment with the minor children and the issue of the welfare of the minors is yet to be decided by the learned Guardian and Wards Court if pending adjudication before the competent Court.

6. It is well settled now that proceedings under section 491, Cr.P.C. is 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.

7. It is also 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 because of the age, sex, and religion. Welfare includes his 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.

8. Since the issue involved in the present proceedings is limited as to whether the applicant has any role in removing the custody of minors from the mother, if yes then he is a necessary party in the proceedings if not his name is liable to be removed from the array of respondents. The trial Court has observed in the impugned order that minors have not yet been recovered and no plausible explanation has been put forward by the present applicant as to why his name should be deleted. In such circumstances, when the issue of recovery of minors is still under adjudication before the trial Court, I am of the tentative view that the purpose of filing this petition could be served if the minors are produced before the concerned Court and handed over to the respondent-mother till the custody issue is decided by the competent Court of law. In such a situation, the applicant being a brother of respondent No.2 shall endeavor for the safe recovery of the minors by utilizing his all means to assist the executing agency positively, however, the applicant shall not be harassed by the police, however, the cooperation of the applicant with the police is much needed, for that the concerned Court is at liberty to take all steps for the safe recovery of the minors.

9. Primarily, two provisions of law namely Section 491 Cr.P.C and Section 25 of the Guardians and Wards Act deal with two different situations. There is no overlap between the two provisions as both are meant to cater to different situations, the first to cater to an emergent situation, while the latter to give more long-term decisions regarding questions relating to guardianship of minors keeping in view all factors including their best interest and welfare. In principle, in the cases concerning the custody of a child, this Court will not go into the

intricacies/technicalities of the matter and confine to the extent of the production of the children/minors who are now in the custody of the father. The law however is clear that for mere pendency of a guardianship application or availability of such jurisdiction would not ipso facto debar jurisdiction of habeas corpus yet it would not control the absolute and exclusive jurisdiction of guardian Court in such like matter but could only be availed under certain criterion/situation as discussed supra.

10. It is alleged that respondent No.1 was forcibly thrown out from her marital home by respondent No.2 and that the minors were forcibly detained by respondent No.2, to the exclusion of the mother, and that the same attracted the provisions of Section 491 Cr. P.C. and the trial Court is ceased of the matter to deal with the subject issue and interference at this stage is not called for, for the reason that issue of their welfare is involved.

11. Before parting with this order, it is also observed that the impugned order passed by the learned 1st Additional Session Judge seems to be an elaborate, speaking one, and it does not warrant the interference of this Court as no prejudice has been caused to the applicant to assist the trial Court for safe recovery of the minors.

12. Since the minors are residing with their father as reported by the learned counsel for the applicant and they are yet to be produced before the concerned Court in compliance with the directions issued from time to time, therefore, in my view this Court has limited jurisdiction to entertain the instant application, and the same is hereby disposed of in the above terms.

JUDGE