

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR**Cr. Misc. App. No. S – 331 of 2024***(Mst. Bibi Farzana vs. The State & others)***Hearing of case**

1. For orders on office objections at Flag-A
2. For hearing of MA No.2770/2024 (Rule Nisi)
3. For hearing of main case

01.08.2024

Mr. Muhammad Ameen Abbasi, Advocate along with applicant and Mst. Bibi Zairan alias Wafa.

Respondent No.6 Mukhtiar Ali, present in person.

Mr. Ghulzar Ahmed Malano, Assistant Prosecutor General along with Inspector Muhammad Siddique, SHO, Police Station Bakhri (respondent No.3) and ASI Abdul Razzaque Ghangro of Police Station Mohbat Dero.

ORDER

ADNAN-UL-KARIM MEMON, J. – Through this Criminal Miscellaneous Application under Section 561-A Cr. P.C, the applicant Mst. Bibi Farzana has assailed the legality of the order dated 30.05.2024 passed by the learned Sessions Judge, Naushahro Feroze in Cr. Misc. Application No.287/2024 (Re: Mst. Bibi Farzana vs. SSP Naushahro Feroze and others), whereby the application under Section 491 Cr. P.C. for recovery of detinue Mst. Bibi Zairan alias Wafa (daughter of the applicant) and master Oman Ali, aged about 04 years, master Soman Ali, aged about 03 years and baby Anzara, aged about 02 years has been declined on the premise that the custody of the minors is with the father namely Mukhtiar Ali and no more in illegal detention.

2. This Court vide order dated 29.07.2024 directed the SHO concerned to produce the daughter of the applicant and her minor children before this Court.

3. Learned counsel for the applicant has submitted that custody of the minors has been handed over to the mother Mst. Bibi Zairan who is real mother of minors present along with the applicant. He has further submitted that the mother Mst. Bibi Zairan cannot be deprived of custody of the minors as the father of the minors is cruel and causing bodily harm to his wife Mst. Zairan and his children, as such he may be dealt with iron hand. The private respondent present in Court submitted that he is not cruel towards his wife and children however he admitted that due to financial constraints he could not allow her wife to meet with her mother / applicant. Prima facie, this is hardly a ground to keep the wife in such a condition by not allowing her to meet with her parents, which is illegal action on the part of private respondents and cannot be appreciated at all. Therefore, he is required to furnish personal bond with the Additional Registrar of this Court to the effect that he will not cause any bodily harm to his wife and his children at

any circumstances, and if he carries out his illegal wishes to be fulfilled, the same shall be dealt with in accordance with law by SHO concerned with prompt action.

4. On the question of the maintainability of this Criminal Miscellaneous Application the applicant has submitted that this Court can exercise powers under Section 561-A Cr. P.C and the custody of minors cannot be denied to the mother till the minors attain the age of puberty and the minors still not reached the said ages, however, at this stage, the father of the minors, who is present in Court agrees for applying the Guardian & Wards Court for proper custody of minors by maintaining them.

5. Since this matter has been taken up, as the welfare of the minors is required to be seen and to ascertain whether they are in illegal detention or otherwise, as this Court can enforce the fundamental right of the mother to have custody of her minor sons and daughter.

6. Today, the police officials have brought the custody of minors along with daughter of the applicant, however, their custody has been initially restricted by the private respondent, on the plea that he is the natural guardian of minors and is residing with them peacefully. Further, this Court has no jurisdiction to entertain the present Criminal Miscellaneous Application in the terms that minors are no more in illegal custody. He prayed for a direction to the grandmother of the minors to move the trial Court for custody of minors if she intends to do so. However, at this stage I reminded him that the custody of the minors can be handed over to the mother Mst. Bibi Zairan. He agrees that the custody of minors may be handed over to the mother subject to the condition that he may be allowed to meet with his children as and when required, and he also agrees that he will maintain her wife as well as her children regularly without fail. This proposal seems to be reasonable and acceded to.

7. It is well settled 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 minor because the 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 claiming the custody of the minor before the Guardian and Wards Court.

8. It is a well-settled law that the 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.

9. I am of the view that the purpose of filing this Criminal Miscellaneous Application is served as the minors have been produced before this Court and are no more in illegal detention and the mother Mst. Zairan has received temporary custody of the minors till the issue of permanent custody of minors is decided by the Guardian & Wards Court as the respondent-father has agreed to move the concerned Guardian & Wards Court.

10. I am satisfied with the assertion of the parties to the extent that the minors are not in illegal detention so far as their custody is concerned, it is for the Family/Guardian Judge to regular the custody of the minors in terms of the law laid down by the Supreme Court in the case of Mst. Beena Muhammad v Raja Muhammad (PLD 2020 SC 508).

11. In view of the position, the father of the minors is directed to approach the learned Guardian & Wards Court for regular custody of the minors in terms of the law laid down by the Supreme Court in the case of Mst. Beena as discussed supra, and in the meantime, the respondent-father shall maintain the minors as well as her wife by paying Rs.5,000/- each per month to the mother regularly till the custody issue is decided, and if the trial Court calls on the parties to produce the minors the mother will abide by the directions. On the aforesaid proposition, I am fortified by the decision rendered by the Supreme Court of Pakistan in the case of Humayun Hassan v. Arslan Humayun and another, (PLD 2013 SC 557).

12. In the light of the facts and circumstances mentioned above more particularly in terms of judgment rendered by the Supreme Court in the case of Mst. Beena as discussed supra, the instant Criminal Miscellaneous Application has served its purpose which is hereby disposed of along with the pending application(s) if any, with direction to the learned Guardian & Wards Court to decide the issue of custody of the minors within two weeks positively after hearing the parties, if the lis is filed. In the intervening period, the private respondent-father is directed to execute the bond in the sum of Rs.1000000/- before the additional registrar of this court to the effect that he will not cause any bodily harm to the mother or minors as well as minor, and if he is found to be indulged in such cruelty, the SHO shall take prompt action against the private respondent-father of the minors.

Application stands disposed of in the above terms.

J U D G E