

ORDER SHEET
IN THE HIGH COURT OF SINDH CIRCUIT COURT
MIRPURKHAS

Crl. Misc App No.S-467 of 2024

(Vidhiya Vs. The Province of Sindh & others)

DATE ORDER WITH SIGNATURE OF JUDGE

Date of hearing & Order 06.08.2024

Mr. Muhammad Azhar Arain, Advocate for the applicant

Mr. Rao Faisal, Advocate for private respondents

Mr. Shahzad Saleem, A.P.G Sindh

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ORDER

Adnan-ul-Karim Memon, J. Through this Crl. Misc Application, the applicant sht. Vidhiya has assailed the legality of the Order dated 10-07-2024 passed by the learned Additional Sessions Judge-I, Umerkot in Haebus Corpus Petition No.637/2024, whereby her application for recovery of her minor children was disposed of with the following observations;

“4. Such position reflects that it is admitted between the parties that the applicant is biological mother of minors/alleged detainees. It also appears that minor Omsha is 02 year old baby of tender age and the applicant claims that she is a suckling baby. It is admitted that currently the baby Omsha is in custody of the respondent No.03, who is father. I also observe that the lap of mother is a heavenly place and she has an inherent right to keep her child close to her bosom; due to which, the welfare of this suckling baby apparently lies with her mother/applicant. Therefore, the applicant is entitled to the interim custody of the minor baby Omsha and she could not be deprived from the same until and unless decided otherwise by the Guardian Judge.

“5. However so far the rest of the minors/detainees are concerned, it appears that during proceedings today, when applicant was permitted to meet them, the children kept avoiding from meeting her and started crying loudly whenever she went near them, due to which it appears that if their custody is substituted/changed at this stage, it may be detrimental to the mental and physical health of the minors, which would be against their welfare.

“6. Therefore, the respondent No.03 is directed to handover the custody of the minor baby Omsh to the petitioner/mother. In compliance of the order, the respondent No.3 has delivered the custody of the minor baby Omsha to the petitioner and the petitioner acknowledged such receiving of custody by writing such statement, which is kept on record.

2. On the question of the maintainability of this Criminal Miscellaneous Application the learned counsel for 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, the learned counsel further argued that the applicant married Suresh Kumar and due to a quarrel between the spouses, the applicant was driven away from the house, compelling her to file the Heabus Corpus Petition before the learned Additional Sessions Judge-I, Umerkot for production of minors namely baby Nisha, baby Heer and master Charag and baby Omsha. Such petition was entertained and the respondent-father was directed to hand over the custody of minor baby Omsha to the applicant/mother, however, the rest of the custody of the children was not handed over to the applicant due to certain reasons as

discussed in the order, leaving her to file the captioned CrI. Misc Application for their production and custody.

3. In compliance with the Order dated 29-07-2024, the minors have been produced, however, they are reluctant to go with their mother. After realizing this situation, the applicant-mother has shown her eagerness to go with her husband so that she may meet with her children; however, the private respondent initially resisted on the ground that the applicant is an unwilling wife, and every time she makes hue and cry and leaves the house without any rhyme and reason.

4. This stance has been refuted by the applicant who is present in person along with her counsel, with the narration that the respondent-father is a differently-abled person i.e. dumb; however, she has managed to live with him due to the welfare of her children.

5. Since this matter has been taken up, 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 son and daughters. 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. I am of the view that the purpose of filing this CrI. Misc Application is served as the minors have been produced before this Court and their custody is with their father who is also the natural guardian of the minors. Primarily in the cases concerning custody of the child, the Court is not required to go into the intricacies/technicalities of the matter and should confine its findings to the extent of the welfare of the child/minor which is a paramount consideration. 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 cases of *Mst. Beena Muhammad v Raja Muhammad* (PLD 2020 SC 508) and *Humayun Hassan v. Arslan Humayun and another*, (PLD 2013 SC 557).

6. When confronted with this legal aspect of the case, the learned counsel for the parties agreed that they would endeavor to allow the parties to settle their differences without the intervention of this Court. The applicant also states that she is willing to go with her husband as the marriage is still intact. If this is the position of the case, I am of the view that the applicant is the real mother and natural guardian of minors baby Nisha, baby Heer, and master Charag and baby Omsha and now wants their custody through this CrI. Misc Application.

7. After arguing the matter at some length, both parties agreed to the disposal of this CrI. Misc Application in the terms that the applicant shall be allowed to go with her husband namely Suresh Kumar to live with him peacefully and Suresh Kumar will not create any bottlenecks during the intervening period and will live with her peacefully without any violence; and, he will allow the applicant to meet with her minor children

without resistance. In case of failure, the SHO concerned shall take prompt action under the law.

8. In the light of the facts and circumstances mentioned above, the instant Crl. Misc Application has served its purpose, which hereby stands disposed of in terms of the statement of the parties present in Court.

JUDGE

"Ali Sher"
