

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Crl. Misc. Application No. S-398 of 2023

Date	Order with signature of Judge
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1. For orders on O/objection at flag-A.
2. For hearing of main case.

Date of hearing: **25.09.2023**

Mr. Illahi Bux Jamali, Advocate for the Applicant.

M/s Ahmed Bux Mirasi and Akhtiar Ahmed Heesbani,
Advocates for respondents.

Syed Sardar Ali Shah, Additional Prosecutor General.

ORDER

KHADIM HUSSAIN SOOMRO, J; Through instant Crl. Miscellaneous Application: the applicant, Irshad Ali Channa, is seeking directions for the production of minor detinue, Ali Raza, before this Court and requests that the custody of the minor be handed over to him, as he claims to be the father of the minor and husband of the deceased, Mst Azra.

2. The essential facts required for the proper disposal of the instant Crl. Miscellaneous application is that the applicant claims that he contracted marriage with Mst. Azra, the daughter of Pathan Khan Channa, on 01.03.2019, with the consent of her parents, and they resided in a harmonious environment. The applicant dropped his wife, along with minor detinue Ali Raza, to her parent's house for a meeting/visiting purpose and returned back. However, respondents No.4 and 5 made a request to the applicant that his wife would be returned after a period of eight days. During the interaction, responders No.4 and 5 showed reluctance to return the applicant's wife, Mst Azra, to him and confined her within the wall of the house. Consequently, the applicant filed Crl. Misc. Application No.356 of 2023 under Section 491 Cr. P.C, for the safe recovery of Mst. Azra, and his son Ali Raza, the alleged detinue aged about two years. When the private respondents came to know

about the above cited Misc. Application, filed by the applicant for recovery of his wife [Mst. Azra], she was murdered on 30.05.2023 under the blame of 'Karo Kari' [hour killing], such FIR being Crime No.02/2023, was lodged by SHO on behalf of State u/s 302, 311 PPC at Police Station, Mehmood Channa. After that, respondent No.6 Imran Ali asserts his status as the husband of Mst. Azra seeks custody of the alleged detinue being a father. Consequently, there is a dispute regarding the parentage of a child between the applicant, Irshad Ali Channa, and respondent No.6, Imran Ali Channa.

The parties were served with notices. On the day of 11.08.2023, both parties presented themselves before the court. However, temporary custody of the minor was granted to Mst. Pathani, the biological maternal grandmother of the child. This interim order was contingent upon the execution of a PR bond amounting to one million to the satisfaction of the Additional Registrar of this Court.

3. Learned Counsel for the applicant, *inter alia*, contended that the applicant contracted free will marriage with deceased Mst. Azra and from said wedlock alleged detinue was born; therefore, he, being a father, is entitled to get his custody from respondent No.6; that alleged detinue has been deprived of education and other basic necessities of life; that the life of the detinue is endangered; that the applicant being a father is natural guardian of the minor, and he has no need to seek a declaration to this effect. The Counsel emphasized that the applicant is entitled to the restoration of the custody of his son. In support of his contentions he places reliance upon the cases of *Nasira Raza v. Additional District Judge, Jhelum and another (2018 SCMR 590)*,

4. Learned Counsel for respondents No.5 and 6 contended that respondent No.6 was married to Mst. Azra and he is the natural guardian of the minor; that the applicant has managed the false documents, such as Nikhnama and Free Will Affidavit, on the basis

of which he falsely claims to be the husband of the deceased Mst Azra, and the father of the minor; that the scope of provisions of Section 491, Cr.P.C, is very much limited, and in the best interest and welfare of the minor, he records his no objection, if the custody of the minor would remain with the maternal grandmother Mst pathani, as ordered by this court.

5. Learned Additional Prosecutor General submitted the Court, the scope of Section 491 of the Criminal Procedure Code, would primarily handle the matter on a temporary basis. The final decision on the custody of the child would be determined by the Guardian Judge, whose order would ultimately regulate the custody of the child. In support of his contentions, he places reliance upon the cases of *Parveen Bibi v. SHO Police Station Sadar Mian Channu district Khanewal and another (2011 P.Cr.LJ 1835)*, *Mst. Ayesha Siddiqua v. Station House Officer and 2 others and Ali Ahmed v. Muhammad Yakoob Almani, Deputy Superintendent of Police, Qasimabad, Hyderabad and 5 others (PLD 1999 Karachi 134)*.

6. Heard arguments of learned Counsel for the parties and perused the record meticulously.

7. The matter in hand is of a unique feature. The parentage of the minor is disputed between applicant Irshad Ali Channa and respondent No.6 Imran Ali Channa; both claim to be the father of the minor as well as the husband of the deceased Mst. Azra who has been reportedly murdered. The SHO PS Mehmood Channa filed a statement dated 10-07-2023, wherein he stated that Mst. Azra was murdered on 30-05-2023, and such FIR Crime No. 02/2023 u/s 302 PPC was registered at Police Station Mehmood Channa by ASI Muhammad Yaseen on behalf of the State. Both above individuals adversely claim to be the husband of deceased Mst. Azra and they have a plethora of documents to establish their relationship with the minor. The genuineness of these documents, as submitted by both parties, can only be decided after leading evidence, and the same cannot be done in the present proceedings. This court has already passed an order dated 11.08.2023 whereby interim custody of the minor was granted to Mst. Pathani, the

biological maternal grandmother of the child. It is important to note here that the above interim order is provisional in nature and will be subject to final adjudication by the Guardian Judge, whose subsequent orders will ultimately govern the permanent custody of the child.

8. It is well-established law the issue of custody of minor children can be presented to a High Court under section 491, Cr.P.C. only if the children are very young, recently taken away from lawful custody, and if there is a genuine urgency in the matter. Furthermore, in such cases, the High Court is authorized to only regulate interim custody of the children, while the final custody determination is entrusted to a Guardian Judge. The jurisdiction of a High Court under section 491 of the Criminal Procedure Code (Cr.P.C.) is to be exercised sparingly and in exceptional and extraordinary cases of genuine urgency. The powers to regulate the custody of the minor permanently lie with a Guardian Judge. The reliance can be placed on the case 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).

9. In the instant case, the custody of the minor was produced before this Court; however, the regular custody of Master Ali Raza is to be decided by the Guardian and Wards Court. The parties may approach Guardian and Wards Court if they are so advised. However, the interim custody of minor Ali Raza has already been granted to Mst. Pathani, in terms of the order dated 11.08.2023, remains intact till the final decision of the Guardian and Ward's application.

CrI. Misc. Application stands disposed of in the above terms.

JUDGE

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