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ORDER SHEET
HIGH COURT OF SINDH, CIRCUIT COURT LARKANA

Cr. Misc. Application No.S-91of 2017

Date	Order with signature of Judge
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1. For orders on office objection & reply of Advocate as at "A".
2. For KatchaPeshi.

Mr. Muhammad Ali Napar, advocate along with applicant.

Mr. Zafar Ali Malghani, advocate along with respondent No.4 and minor Ghulam Dastagir.

Nemo for the State

Date of hearing: 05.06.2017

Date of order: 05.06.2017

ORDER

ZAFAR AHMED RAJPUT, J:- Through instant Criminal Misc. Application, under section 491 of Criminal Procedure Code, 1898 r/w section 561-A (ibid), the petitioner has prayed for the recovery of her minor son, namely, Ghulam Dastagir aged about 3 ½ years, from the custody of respondent No.3, her husband, and handing over his custody to her being his real mother.

2. Briefly stated facts of the case are that Mst. Farha Naz (petitioner) was married with Islamuddin (respondent No.4) on 25.01.2013 and from the said wedlock Ghulam Dastagir was born, who is now 3 ½ years old. It is allege that the petitioner and respondent No.4 remained together as wife and husband happily for sometime; thereafter, differences stirred up between them and the petitioner was driven out by the respondent No.4 from his house on 24.04.2017 after snatching the custody of the minor from her.

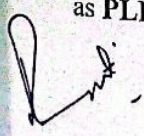
3. I have heard the learned counsel for the parties and perused the material available on record.

4. Learned counsel for the applicant has mainly contended that the minor is in illegal and unlawful custody of respondent No.4. He has also contended that under Muhammadan Law, the mother has right to have the custody of minor boy till the age of 7 years and in the instant case it is an admitted position that the age of the minor is 3 ½ years, as such, the applicant being mother is entitled for his custody.

5. Conversely, learned counsel for respondent No.4 has maintained that the application is only maintainable in the case when a person or minor illegally or improperly detained but in the instant case respondent No.4 has the custody of the minor being his father and natural guardian, which is neither illegal or improper nor it was snatched away by him but the applicant had herself left the minor at the house of respondent No.4 while leaving his house.

6. I have given my due consideration to the contentions raised by the learned counsel for the parties.

7. As regard the scope of Section 491, Cr.P.C., it is now well-settled that in the cases pertaining to the custody of a child, the Courts are not supposed to go into the technicalities of the law and they should decide the case keeping in view the facts and circumstances of each case placed before it for decision mainly taking into consideration welfare of the child. Although ordinarily a petition under Section 491, Cr.P.C. is not found to be competent when there is no element of illegal custody by the father of his own child but in the welfare of the child as well as to ensure that the rights which have been conferred upon the child are fully protected in a suitable manner, the Court could also pass appropriate order in exercise of its inherited jurisdiction. Reliance in this regard may be placed in the case of Mst. Khalida Perveen v. Muhammad Sultan Mehmood & another, reported as PLD 2004 SC 1.



8. In the instant case it is an admitted position that the applicant is the mother and respondent No.4 is the father of the minor, who is only 3 ½ years old. According to Muslim Law, mother is entitled to the custody (Hizanat) of her male child until he completes the age of seven years or she otherwise loses the right of custody for some other reasons as enumerated in paragraphs 352 and 354 of D.F. Mulla's Principles of Muhammadan Law. Right of Hizanat can be enforced against the father or any other person. Father no doubt is the natural guardian of the minor but he cannot hold and detain the custody of minor child under seven years of age forcibly and against the wishes of the mother, who in law is entitled to the custody of the minor, or without obtaining proper orders for the custody of the minor from the Court of competent jurisdiction. It is not the case of respondent No.1 that he has obtained any such order. He is evidently holding the custody of the minor against the wishes of the applicant, in the circumstances his custody, prima facie, appears to be illegal. Reliance in this regard may be placed in the case of Safya Bibi Vs. Ghulam Hussain Shah (PLD 1970 Azad J&K 13), wherein father had taken away the minor children from their mother, who because of the ages of the minors was in law entitled to their custody. It was held that "where a person is legally entitled to the custody of a child, the detention of the child by any other is illegal". In the case of Mst. Tayyaba Khan Vs. Syeda Begum and another (PLD 1994 Karachi 204) so also in the cases of Hussan Begum v. Ist Additional District & Sessions Judge, Karachi West and 3 others (2013 P.Cr.L.J. 1503) and Mst. Shazia Bano v. Government of Sindh through Secretary, Home Department, Karachi and 6 others (2014 YLR 152), it has been held that the mother being legally entitled to the custody of her minor son till the age of seven years, the custody of the minor with father having been demanded by the mother could not be considered as legal. In the said cases custody of the minors, who were present in Court with their fathers, were directed to be handed over to their mothers immediately, with direction that the parties can agitate the question of custody

before the Family/Guardian Court. Thus, relying on the ratio of the above judgments, I, hold that in the instant case the custody of minor Ghulam Dastagir, with respondent No.4 is illegal and improper.

9. For the foregoing facts and reasons, this Criminal Misc. Application is allowed and as a result whereof the respondent No.4 is directed to hand over the custody of minor Ghulam Dastagir to the applicant. However, the respondent No.4 shall be at liberty to approach the Family/Guardian Court for redressal of his grievances, if any. The Guardian Judge shall deal with the matter independently, if proceedings are instituted before him, in accordance with law without being influenced in any manner from the observations made hereinabove.



JUDGE