

HIGH COURT OF SINDH, AT KARACHI

CP No.S-745 of 2013

ORDER

Petitioners : Mst. Ghulzadi
Through Mr. Suhbat Ali Lund, Advocate.

Respondents : Government of Sindh and others
Mr. Sabir Hussain, State counsel.

DATE OF HEARING : 21.05.2014

NAZAR AKBAR, J. The petitioner is wife of Respondent No.4 and mother of four children. The marriage took place in Saeedi Mossani Village at Tehsil Mehar, District Dadu and the Respondent No.4 (husband) is still residing at District Jafferbad. The petitioner claims that due to torture by the Respondent No.4 and others she has left her husband and shifted to Karachi alongwith minor Ali Raza. The Respondent No.4 who is father of the children and still husband of the petitioner has forcibly taken away children back to his village, it is alleged in para 10 of the petition that on 15.6.2013 the Respondent No.4 alongwith others Respondents No.5 to 8 took away minor alongwith four Nokia mobiles on gunpoint. The brother of the petitioner tried to lodge FIR at Surjani Police Station but failed. Therefore, she is seeking recovery of her children from custody of the Respondent No.4 she has also sought protection of minors and her brother and sister who are living at Karachi.

I have heard the learned counsel for the petitioner, who claims that this petition is maintainable as habeas corpus under Section 491 Cr.P.C. He contends that the Hon'ble Supreme Court has held that High Court has jurisdiction to entertain such like petitions under Section 491 Cr.P.C. This cannot be disputed that such powers are available with the High Court but in every case while exercising such powers the Court is under judicial obligation to examine the

facts of the case before issuing direction to police for production of children. In the instant case, it is not a dispute that the petitioner is wedded wife of the Respondent No.4 and she has not even filed any case for dissolution of marriage. Out of four children said to have retained or abducted by the respondent, two are not of tender age. The petition was filed in 2013 and now Rashman is over 11 years of age and Rasheed is 9 years of age. The petitioner has not filed any certificate of birth to give exact date of the children. It is duty of the petitioner to live with the Respondent No.4, at least as long as marriage survives. She according to her own statement was living with Respondent No.4 for more than 12 years before coming to Karachi. In view of these facts the custody of children with father cannot be treated as illegal custody. The petitioner having left the husband on her own choice cannot deprive the father to have an access and even live with children. He is responsible for their upbringing. In the circumstances, since the petitioner has deserted her husband and the children are in custody of father, such custody of children cannot be treated as illegal custody. It is factual controversy that whether children were brought to Karachi by the petitioner with permission of Respondent No.4 (husband) or Respondent No.4 has forcibly taken away the children from Karachi. No case is made out for invoking the jurisdiction of High Court. The Petitioner may file Guardian & Wards proceeding if so advised, as even Guardian Judge has power of recovery of minors and regulating their interim custody.

Learned counsel for the petitioner has relied on **PLD 2012 S.C 758** Mst. Nadia Perveen ..Vs.. Mst. Almas Noreen and others. This judgment is in fact against the petitioner as it has been held in this case that;

“Jurisdiction of a High Court under section 491, Cr.P.C for recovery of minors, is to be exercised, sparingly and such exercise may be undertaken only in exceptional and extraordinary cases of real urgency keeping in view that even a Guardian Judge has the requisite powers of recovery of minors and regulating their interim custody.”

In the present case as no exceptional / extraordinary circumstances have been shown for exercising jurisdiction under Section 491 Cr.P.C. Consequently the petition is dismissed.

JUDGE

Karachi
Dated:27.5.2014

SM