

**ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI**

Constitutional Petition No.S-409/2014

DATE ORDER WITH SIGNATURE(S) OF JUDGE(S)

- 1.For order on CMA No.1823/2014 (Exemption)
- 2.For katcha peshi

28.5.2014

Mr. Aftab Ahmed Satti, for petitioner

The petitioner has invoked the jurisdiction of this Court under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 for production of her two children in Court and their custody to her.

Briefly stated the facts of the case are that the petitioner from her marriage with the Respondent No.1 since 22.4.2004 gave birth to three children. The petitioner claims that on account of some family dispute, the respondent No.1 started maltreating the petitioner and in the last week of November, 2013, the respondent No.1 left the petitioner at her parents' house with allegations that she is a women of bad character. After hectic efforts of the parents of the petitioner as well as her relatives, the matter could not be reconciled. Learned counsel says that on 07.12.2013, respondent No.1 with the help of respondents No.2 to 6, illegally, forcibly snatched the minor children from the custody of petitioner. The petitioner's parents tried to obtain custody of minors from the respondent No.1, but he strictly refused to return them. It is alleged in paragraph-10 of the petition that the minor children are in the custody of respondents No.1 to 6 at Peshawar and there is imminent danger to their lives. Therefore, she is seeking recovery of her children from the custody of Respondent No.1.

The learned counsel for the petitioner 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 in number of cases 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.

I have heard the learned counsel, examine the Court file and have observed the following facts: -

1. The petitioner was the wife of respondent No.1 for almost 10 years as she was married to him on 24.4.2004 and she has been divorced on 17.1.2014. Nikahnama and divorce deed are available on record.
2. The petitioner has already approached the Court of learned District & Sessions Judge, East, Karachi under section 491, Cr.P.C. through Criminal Miscellaneous Application No.22/2014 for the same relief and it is still pending.
3. The age of children is 09 years and 07 years, therefore, the petitioner cannot claim her right of *Hizanat* for the custody of the children, who are admittedly in the custody of their father as natural guardian of the children.
4. The Custody of children with their father cannot be treated as under illegal custody as he is responsible for their upbringing as a natural guardian.
5. The circumstances narrated by the respondent No.1 in the divorce deed compelling him to divorce the petitioner, belies the story of petitioner.
6. The contents of the petition are perfect draft of the case to be filed by the petitioner under Guardian & Wards Act to claim the custody or visiting rights of the children.
7. Merely lodging of complaint to the SHO concerned against the husband for having the custody of children does not mean that any extra ordinary circumstances have arisen for invoking the constitutional jurisdiction.

In view of the above facts and circumstances, no case is made out for invoking the jurisdiction of this Court for recovery / production of children in Court and claim custody without showing exceptional and extra ordinary circumstances of real urgency as held by the Honourable Supreme Court of Pakistan in **PLD 2012 SC 758** (*Mst. Nadia Perveen v. Mst. Almas Noreen and others*). The guidance in such like cases from the Honourable Supreme Court in this case is reproduced below: -

“It is has consistently been held by this Court in the cases of *Muhammad Javed Umrao v. Miss Uzma Vahid* (1988 SCMR 1891), *Nisar Muhammad and another v. Sultan Zari* (PLD 1997 SC 852), *Mst. Khalid Perveen v. Muhammad Sultan Mehmood and another* (PLD 2004 SC 1) and *Naziha Ghazali v. The State and another* (2001 SCMR 1782) that the matter of custody of minor children can be brought before a High Court under section 491, Cr.P.C. only if the children are of very tender ages they have quite recently been snatched away from lawful custody and there is a real urgency in the matter and also that in such a case the High Court may only regulate interim custody of the children leaving the matter of final custody to be determined by a Guardian Judge. In those cases this Court had repeatedly exphasized that in such matters the jurisdiction of a High Court under section 491, Cr.P.C. 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 minor children and regulating their interim custody.”

The petitioner has failed to make of a case for the recovery of minors from the lawful custody of their father. The petitioner has equally efficacious and alternate remedy under the Guardian & Wards Act, 1890. She may file Guardian & Wards case, if so advised, as even Guardian Judge has power of recovery of minors and regulating their interim custody.

The petition is dismissed as not maintainable with no orders as to cost.

JUDGE

