

ORDER SHEET.
**IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD.**

Cr. Misc: Appln: No.S-110 of 2019.

DATE	ORDER WITH SIGNATURE OF JUDGE
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For orders on office objection.

For hearing of main case.

Date of hearing: 29.03.2019.

Date of decision:29.03.2019.

Mr. Asif Gul Bhatti, Advocate for the applicant.

Mr. Shahzado Saleem Nahiyoon, D.P.G for the State.

Ms. Rehana Siddiqui, Advocate for respondents No.3 to 4.

ORDER.

KHADIM HUSSAIN TUNIO,J:- Through captioned criminal miscellaneous application, applicant seeks custody of alleged detinue namely Zulqarnain Hyder aged about 4 years from respondent No.3 Zamin Ali.

2. Precisely, facts of the instant application are that applicant has got married with respondent No.3, who has not properly maintained the applicant and two minors children namely Zulqarnain Hyder aged about 4 years son and daughter Urooj Fatima aged about two years. The respondent No.3 is psycho temperament and having suspicious nature and habit of taking wine, always used to cause maltreatment to applicant and her minor children. The applicant is household lady and save her matrimonial relations intact, but had endured all cruelties of respondent No.3 and his family members. It is alleged that on 17.10.2018 during odd hours of night, respondent No.3 started maltreatment, who was intoxicant condition for his cruel lust and got injured and after snatching alleged detinue Zulqarnain Hyder, ousted her from his house alongwith minor daughter Urooj Fatima aged about two years without bag and baggage, since then respondent No.3 is not allowing her to meet with her son and even she tried to take many efforts for meeting and reconciliation, but could not succeed. It is further alleged that respondent No.3 pronounced three times divorce on 18.01.2019, through divorce deed, which was received through post. It is further alleged that respondent No.3 usually used to come to his house after many days and odd hours in intoxicant condition and did not give time to the applicant and his minor children. It is further alleged that alleged detinue has not been admitted in any school as yet by the respondent

No.3 being careless person and having friendship with other women. It is also alleged that applicant had filed application u/s 491, Cr.P.C before learned Sessions Judge, Jamshoro, which was heard and decided by learned IInd. Additional Sessions Judge, Kotri, who handed over custody of minor Zulqarnain Hyder to respondent No.3 vide order dated 02.02.2019 and ignored while deciding the application u/s 491, Cr.P.C, wherein removal of custody of minor son Zulqarnain Hyder from the lawful custody of the applicant, who refrain from making any observation in respect of rights of the parties to the custody of the minor, which could be decided by the Guardian Court; that custody of the minor Zulqarnain Hyder with the respondents NO.3,4 and 5 is improper and illegal, therefore, she prayed for custody of the minor.

3. On notice issued to the respondents and concerned SHO was directed to recover and produce the alleged detinue before this Court alongwith respondents.

4. Learned counsel for the applicant has mainly contended that applicant is entitled to the custody of the minor son Zulqarnain Hyder aged about four years, who is in improper custody of his father; that applicant has right of Hizanat, therefore, she prays for grant of application.

5. Respondents No.3 to 5 have filed their objections to the application u/s 491, Cr.P.C wherein respondent No.3 submitted that applicant is not guardian of the minor Zulqarnain Hyder; that custody of the minor Zulqarnain Hyder with the respondent No.3 is lawful; that respondent No.3 is lawful guardian of the minor being his real father; that applicant has filed application and managed, concocted story based on false and fabricated averments by concealing the real facts; that applicant has left the house of respondent No.3 alongwith his minor daughter and did not turn up; that applicant has pressurized the respondent No.3 to divorce her when he did not fulfill her wishes and divorced on 21.01.2019; that applicant has issued threats to the respondent No.3, therefore, he has filed application u/s 22-A &B, Cr.P.C. for providing protection, which was disposed off; that applicant is not entitled for the custody of said minor and instant application may be dismissed.

6. Be that as it may, the custody of minor was removed forcibly by the respondent No.3 Zamin Ali alongwith respondents No.4 and 5 from the applicant, who is real mother of the minor Zulqarnain Hyder. In such circumstances, relief can be granted under section 491, Cr.P.C. I am of the humble opinion that in the cases pertaining to the custody of a child, the courts

are not supposed to go into the technicalities of law and they should decide the case keeping in view the facts and circumstances of each case brought before it for the decision mainly taking into consideration the welfare of the minor child. Although ordinarily an application 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 children are fully protected in a suitable manner, the courts could also pass appropriate orders in exercise of its inherent jurisdiction. In case of MUHAMMAD NASEER HUMAYOON v. Mst. SYEDA UMMATUL KHABIR (1987 SCMR 174), this Court has changed the custody in exercise of the jurisdiction under section 491, Cr.P.C and against the said order petition for leave to appeal was filed before Hon`ble apex Court, but leave was declined keeping in view the fact that the parties have parted their ways and the minors are of a tender age. Following the observation from the reported judgment, I am of the considered view and in the interest of justice as well as for the welfare of the minor, the applicant being mother is entitled to retain his custody.

7. In view of above, I am of the humble opinion that applicant has made out a case for custody of minor boy Zulqarnain Hyder, who is aged about four years. In this respect, reliance can be placed on case laws reported as 1987 P.Cr.L.J.1318, 1991 P.Cr.L.J.758, 1997 P.Cr.L.J. 581 and 2000 P.Cr.L.J. 1685, therefore, respondent No.3 can be said to be having custody of minor in an illegal way, but also in the way he has snatched the custody of minor from the applicant would be called as improper custody. Awarding of custody under section 491, Cr.P.C. is always subject to regulation of custody by the guardian Court, I feel it proper to order that custody of minor namely Zulqarnain Hyder be handed over to the applicant by respondent No.3 subject to its regulation by guardian Court, for that purpose respondent No.3 being father of the minor is at liberty to seek his remedy before the Court of law. The applicant was directed to furnish her solvent surety in the sum of Rs.500,000/-(Rupees five lacs) and PR bond in the like amount, to the satisfaction of Additional Registrar of this Court. The applicant/mother of the said minor will be responsible for his life, health and safety. She was further directed to allow the respondent No.3 Zamin Ali (father) to meet with his minor son namely Zulqarnain Hyder on every Saturday from 11.00 am to 1.00 pm (two hours) in the Court of Ist. Civil Judge & Judicial Magistrate, Kotri in the presence of applicant and respondent No.3. She was also directed not to remove the child from the present address without prior permission of this Court. Further, parties were directed to approach the

Guardian Court for regularization of the custody of minor Zulqarnain Hyder, if they desire so. Consequently, instant application was disposed of in the above terms and these are the reasons for the same.

JUDGE.

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