

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Constitution Petition No. S-2329 of 2017

Date	Order with Signature of the Judge
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Hearing of case.

For hearing of main case.

Heard on **16th April, 2018.**

Decided on: 29.05.2018.

Mr. Muhammad Qasim Niazi, Advocate for petitioner.
Mr. Saghir Abbasi, A.P.G/Advocate for respondents No.1&2.
M/s. Sajjad Gul Khatri & Mohammad Nazim, Advocates for respondent No. 3.

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KAUSAR SULTANA HUSSAIN, J.:- The petition has been filed against the order dated 17.10.2017 passed by the learned IXth Additional District & Sessions Judge South, Karachi, whereby Habeas Corpus Petition No. 1482 of 2017 filed by the petitioner Mst. Shelly Nathaniel Daughter of Nathaniel C. Lal for production of alleged detinue/minors namely, Berenice Treeza (17.4.2015), 2) Benedict Leander Sohan (17.4.2005), 3) Louis Phillip Sohan (26.8.2006), and 4) Mathew Alex Sohan (02.01.2008) by the father of minors namely John Valentine Sohan has been dismissed.

2. Necessary facts for disposal of this Constitution Petition are that, during wedlock the respondent No. 3 (husband of petitioner) many time quarreled and entered into clashes with the petitioner and used abusive and filthy language as well as he badly maltreated the petitioner without any cogent reasons, in this regard the petitioner registered her complaint in the police station. However, finally on 03.10.2017, the respondent No. 3 forced her to leave his house in wearing clothes after beating her mercilessly and forcibly snatched the children from her. Per petitioner all the children are under age while Baby Berenice Traeeza is a suckling baby and now physical and mental health of the children is in bad condition therefore, the petitioner being real mother of them claims that she is in

a better position to look after them. She pointed out that the respondent No. 3 is habitual intoxicant person and many times he tried to force minors to drink wine. She prayed that the impugned order dated 17.10.2017 may be set aside being illegal and contrary with the settled principle of law and children may be handed over to her.

3. The respondent No. 3 has submitted his objections to the present petition and denied therein the contains of the petition. He requested for dismissal of the petition.

4. The learned counsel for the petitioner argued that the learned trial Judge, while passing impugned order dated 17.10.2017 did not consider the facts alleged in her Habeas Corpus Petition No. 1482 of 2017 / and ages of minors, hence the order passed may be set aside and for the welfare of the children their custody may be handed over to her.

5. On the other hand, the learned counsel for respondent No. 3 has opposed the petition and argued that the present petition is not maintainable under the law as alternate remedy to claim the custody of minors is available in Guardian & Wards Act, 1890, as such the present petition is liable to be dismissed with special costs. He further objected in his reply that being father, the respondent No. 3 is natural guardian of the children as such he is responsible for up brining of his children and providing all the necessities of life to them. He states that the petitioner on 30.9.2013 herself left his house and inspite of his efforts to stop her, the petitioner did not give any attention to him and children. Per respondent No. 3 his daughter Berenice Traeeza is not a suckling baby as she is two years and eight months old. Per respondent No. 3/father all the children are residing with him with their own will and wish. The learned counsel for the respondent No. 3/father supported the impugned order passed by the learned IXth Additional Sessions Judge South, Karachi passed on 17.10.2017 and according to him the petitioner has failed to show exceptional and extra ordinary circumstances

warranting urgency. He relied upon the judgment reported in MLD 2014 (Sindh) 1333 (Mst. Rabia Noor V/s Shahzad Shah).

6. After hearing arguments of both the sides and perusal of record, I am of the view that relationship of wife and husband between the petitioner and respondent No. 3 is still intact. This Court while proceeding with the matter called the parties and their all four children in chamber, while hearing both the parties with their children this Court observed that the petitioner is willing to join the respondent No. 3 apparently for the betterment and welfare of the children but the respondent No. 3 was reluctant to keep her again in his house as wife, for which he shown reason that until and unless he regain his trust upon the petitioner he cannot allow her to join him. During short conversation with the children, it was observed by this Court that the respondent No. 3 is creating negativity and hatred in their minds against their mother/petitioner, such act of the respondent No. 3 would be very harmful in shaping positive personality of children, they may develop behavioral problems, loosing self-esteem and self-confidence. So much as they can start hating with every women they saw in the shape of mother. Devastating effect of such psychological condition could be life-long. Separation between a married couple is neither new phenomena nor an abnormal act or stigma, however, it is always advisable that while parting ways, special emphases be laid on the betterment and welfare of children, either or both parties could be at fault, however children born out of such wedlock are innocent and not to be punished by maligning their minds against any of their parents, they be told about positive side of other parent rather propagating negativity and consequent maligning their minds.

7. In the instant matter minors are of tender ages, therefore, keeping in view their ages, I have to follow the dictum laid down by the superior Courts that High Court is empowered to issue directions in the nature of habeas corpus under Section 491 Cr.P.C, if the custody of the minor was improperly disturbed. Section 491 Cr.P.C. provides a more efficacious, speedy and appropriate remedy in the

case of illegal or improper custody of the minor and the High Court can pass an order regarding the temporary custody without prejudice to the right of the parties for final determination of the dispute pertaining to the custody of the minors by the Guardians and Wards Court. No doubt that the custody of the minors with the respondent No. 3/father, if not illegal is at least improper. The petitioner being mother of the minors can better dispense and bestow, love and affection to the minors being of tender ages. In the reported case of Mst. Khalida Perveen V/s Muhammad Sultan Mehmood and another (PLD 2004 Supreme Court 1) the Hon'ble apex Court ruled that "*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 conferred upon the child are fully protected in a suitable manner, Court can also pass appropriate orders in exercise of its inherent jurisdiction.*"

8. Upshot of above discussion and keeping in view the circumstances of the case, I am of the view that the custody of the minors with the respondent No. 3/father if not illegal, is at least improper. The minors need constant love, care and affection of the mother. The respondent No. 3/father being earning person has to remain out from his house in day time, so he cannot look after the minors properly. Besides this if supposedly other female relatives of the respondent No. 3/father are looking after the minors yet they are not substitute to the real mother. In this tender age, the minors, especially minor girl in all probability can be brought up properly by the real mother and her custody with anyone except the real mother is improper, therefore, by accepting the locus standi preferred in this Constitution Petition, the impugned order dated 17.10.2017 passed by the learned IXth Additional District & Sessions Judge South, Karachi, in Habeas Corpus Petition No. 1482 of 2017 is set aside. The respondent No. 3/father is directed to hand over the custody of the minors to the petitioner/mother. However, the respondent No. 3/father may approach to the Guardian Court for claiming custody of the minors, if so desire/advised and the learned Guardian Judge, for custody of the minors

shall decide the matter on its own merits, without being influenced by the observations of this Court. Case law relied upon by the learned counsel for the respondent No. 3/father are distinguishable from the circumstances of present case hence cannot be considered.

9. With this observations and directions, the instant Constitution Petition stands disposed of as allowed.

J U D G E

Faheem Memon/PA