IN THE HIGH COURT OF SINDH AT KARACHI

C.P. NO.S-2057/2017

Petitioner	:	Jahan Ara, through Mr. Hussain Bukhsh Saryo, advocate.
Respondents	:	Province of Sindh and others, Respondent No.4 through Mr. Wajid Ali Khaskheli, advocate.
Date of hearing	:	26.04.2018.
Date of announcement	:	02.05.2018.

JUDGMENT

Salahuddin Panhwar, J: Through instant petition, petitioner has invoked constitutional jurisdiction of this Court under habeas corpus petition wherein seeking custody of master Farhan and Baby Mehwish aged 5 years and 3 years respectively.

2. Record reflects that petitioner, mother of minors, contracted marriage with respondent No.4; from that wedlock there are four issues; two minors aged about 6 months and another one and a half years are residing with the petitioner whereas two minors (alleged detenues) are under the custody of respondent No.4 (father).

3. Documents placed on record by learned counsel for respondent shows that the petitioner preferred suit for maintenance claiming therein that she was compelled from her house and divorced hence she is entitled for maintenance of one minor, at that time she was pregnant.

4. While relying upon PLD 2010 Karachi 119, 2013 P Cr.LJ 1503, SBLR 2015 Sindh 207, SBLR 2013 Sindh 510, PLD 1997 SC 852, 1998 SCMR 289, 2009 PCrLJ 118 and 1994 PCrLJ 2570, learned counsel for petitioner contends that under section 491 Cr.P.C. issue of forcibly removal is not material and this Court has to examine whether right of *hazanat* lies in favour of petitioner; he further contends that admittedly minors are under seven years hence right of *hazanat* is in favour of petitioner therefore this Court has no option except to hand over the custody of minors to the mother however respondent may approach to the Guardian and Wards Court.

5. Whereas learned counsel for respondent No.4 while relying on PLD 2012 SC 758, 2001 SCMR 1782, 2013 YLR 583 and 2008 MLD 751, contends that scope of section 491 Cr.P.C. with regard to *habeas corpus* is applicable in matters of forcibly dispossession or illegal detention whereas alleged improper custody by the father is to be decided by the Guardian and Wards Court as well petitioner left the house of respondent No.4 at her own choice and since one year she is residing with her parents alongwith two kids; both kids are school going and in District Tando Qaisar, Taluka Hyderabad, whereas petitioner is residing in Karachi therefore at this juncture removal of custody would not be in the welfare of the minors as their education would be disturbed and this issue may be left open for Guardian and Wards Court to decide interim/permanent custody. Besides, he has placed birth certificate showing therein that minors' ages as 7 years and 5 years respectively.

6. Heard the parties and perused the record.

7. I am not inclined to proposition, so raised by the learned counsel for the petitioner, that "**right of *hizanat* shall control the jurisdiction under *habeas corups*".** I have gone through the case laws, relied by learned counsel for the petitioner but same also do not support the said proposition. The law *however* is clear that for mere pendency of a *guardianship* application or availability of such jurisdiction would not *ipso facto* debar jurisdiction of *habeas corups* yet it would not control the absolute and exclusive jurisdiction of *guardian* Court in such like matter but could only be availed under certain *criterion* / situation.

8. In the case of Mst. Ghulam Fatima vs. the State (1998 SCMR 289), relied by petitioner, it is contended that pendency of the guardianship matter before a Family Court would not affect the proceedings pending under section 491 of Cr.P.C. Relevant portion of such dictum which says that:-

> "At the outset it may be mentioned here that pendency of the guardianship matter before a Family Court would not affect the proceedings pending under section 491 of Cr.P.C. Such question arose in the case of Muhammad Javed Umrao v. Mst. Uzma Vahid (1988 SCMR 1891) where a learned Bench of this Court observed as below:-
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> > "It is true that facts of individual cases may be such where the cover of proceedings of one sort is taken for advancing the cause of other. In such cases it has to be ascertained, as to, what is the substance of the proceedings and thereafter the proceedings are to be diverted to the appropriate channel be it of section 491 Code of Criminal Procedure or one under Guardians and Wards Act."
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> In said case the mother of children approached Family Court for custody of her minor children, **but when she suspected that the minors were being shifted outside the jurisdiction of the Court**, she moved the High Court under section 491 of Cr.P.C. There is another view

> expressed in the case of Mst. Aisha Bibi v. Nazir and others (1981 SCMR 301), where it was observed that where the dispute between the parties is essentially regarding custody of the girl and **no question of any forcible detention was raised, such was essentially a matter for Guardian Judge** to resolve and **no justification is made out in such a case for issuing a direction in the nature of writ of habeas corpus**. In the case of Mst. Zenia v. Ahmed Jawad Sarwar (PLD 1994 Lah. 577) a learned Single Judge took view that the provisions of section 491 of Cr.P.C. are more appropriate, efficacious and speedy. In the case of Muhammad Javed Umrao (1988 SCMR 1891) a learned Bench of this Court held that the two matters, one dealt with under section 491 of Cr.P.C. and the other under Guardians and Wards Act were entirely different and there is no question of the one excluding the other, the one overlapping the other or the one destroying the other. In light of the case-law, the High Court was not right in dismissing the Criminal Miscellaneous Application No. 10 of 1994."

9. On similar analogy honourable apex Court has decide the case of Nisar Muhammad and another vs. Sultan Zari (PLD 1997 SC 852) wherein it is contended that *"The custody of the male child of such a tender age as 2 years and 8 months perhaps could have been provisionally given to the petitioner-mother in the case of Mst. Shaheen (PLD 194 Peshawar 143).* Further it was held that *"The only question was whether the detention of the child by the father was illegal at the time when the application was made. If it was so, then the other considerations apart, which had to be determined by the Guardian Judge in the proper proceedings, the custody could have been provisionally given to the petitioner therein leaving all other matters to the Guardian Judge for determination."*

10. Whereas in the case of Mst. Nadia Parveen vs. Mst. Almas Naureen (PLD 2012 SC 758) it is contended that matter of custody of minor children can be brought before the 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**. 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.

The above case laws help me in concluding that though every case would have its own *peculiar* facts however this would never change the following *criterion* which would be required to be examined by the court while exercising jurisdiction under *habeas corpus* in such like matter i.e:-

i) such jurisdiction never controls the absolute jurisdiction of *Guardian Court* which is proper forum for determining the welfare of the minor; (meaning that any order under such *habeas corpus* jurisdiction would have no bearing on merits of guardian proceedings)

ii) only a temporary *arrangement* could be made which too shall be subject to :

a) where the minor is of **very tender age;**

(though term **very tender age** is not defined however it has got nothing to do with *hizanat* else honourable Apex Court would have used *hizanat* in place of **very tender age)**

b) minor **quite recently** been snatched away from lawful custody; (since *legally* custody of child with mother or father is not ***illegal*** yet if a party to take advantage in *Guardian Court* removes minor from lawful custody same with help of *habeas corpus* jurisdiction be brought as it was earlier);

I would add that *quite recent* removal would also be applicable even if same is under a *deception* by exploiting jurisdiction of *guardian Court* , as was held in the case of *Ahmed Sami & 2 others v. Saadia Ahmed & another* (1996 SCMR 271) as:

"It is true that a Guardian Court is the final arbitrator to adjudicate upon the question of custody of child but this does not mean that in

> exceptional cases when a person who is holding the custody of a minor lawfully and has been deprived of the custody of minor has no remedy to regain the custody pending adjudication by the Guardian Court. In exceptional cases where the High Court finds that **the interest and welfare of minor demanded that the minor be committed immediately to the custody of the person who was lawfully holding the custody of minor before he was deprived of the custody, the Court can pass appropriate order under section 491, Cr.P.C. directing restoration of the custody of minor to that person as an interim measure pending final decision by the Guardian Court**."

c) there is a **real urgency in the matter;** (this is of ***prime*** consideration as it has direct *nexus* with welfare of minor even in temporary arrangement;

d) there is apprehension that minor would be shifted out of country to diverge the proceeding under Guardianship and deprive the custody of petitioner.

11. The above *criterion* is well within guidance, provided by earlier case laws on the subject as well the *very* recent view of honourable Apex Court in case of *Mirjam Aberras Lehdeaho v. SHO, PS Chung, Lahore & Ors* (2018 SCMR 427) where, after discussing earlier views, it has been concluded in response to proposition:

> "Whether the petition before the High Court under section 491 read with section 561-A, Cr.P.C. was not maintainable"

as:

> 22. **The Guardian Court is the final Arbiter for adjudicating the question of custody of children**. However, where a parent **holding custody** of a minor lawfully has been **deprived of such custody**, such parent cannot be deprived of a remedy **to regain the custody while the matter is subjudice before a Guardian Court**. Therefore, **in exceptional cases** (like the instant case), where the High Court finds that **the best interest and welfare of the minor** demand that his/her custody be **immediately restored to the person who was lawfully holding such custody before being deprived of the same**, the Court is not denuded of jurisdiction to pass appropriate orders under section 491, Cr.P.C. directing that custody be restored to that person as an interim measure

> pending final decision of the Guardian Court. While the tender age of the minor is always a material consideration but **it is not the only consideration to be kept in mind by the High Court**. Other factors like best interest and welfare of the minor, the procedural hurdles and lethargy of the system, delays in finalization of such matters, the handicaps that the mother suffers owing to her gender and financial position, and above all **the urgency to take appropriate measures to minimize the trauma, emotional stress and educational loss of the minor** are equally important and also need to be kept in mind while **granting or refusing an order to restore interim custody by the High Court**. The two provisions of law namely section 491, Cr.P.C. and section 25 of the Guardians and Wards Act deal with two different situations. As such, the question of ouster of jurisdiction of the High Court on account of provisions of sections 12 or 25 of the Guardians and Wards Act or pendency of proceedings under the said provisions does not arise. There is no overlap between the two provisions as both are meant to cater for different situations, **the first to cater for an emergent situation**, while the **latter to give more long term decisions regarding questions relating to guardianship of minors keeping in view all factors including their best interest and welfare**.
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> 23. We are not persuaded by the argument of the learned counsel for Respondent No.2 that the remedy under section 491, Cr.P.C. is barred in view of the availability of an alternative remedy by way of approaching a Guardian Court of competent jurisdiction. This Court as well as the High Court in exercise of their powers under section 491, Cr.P.C. have to exercise parental jurisdiction and are not precluded in all circumstances from giving due consideration to the welfare of the minors and to ensure that **no harm or damage comes to them physically or emotionally by reason of breakdown of the family tie between the parents**. …

12. Reverting to merits of the case, what *prima facie* appears from the record is that about a year back, the present petitioner (*mother)* earlier had filed a suit for *maintenance* of minor who was with her but had not moved to any *lawful* forum for custody of present *minors* (alleged detenues) who were / are with respondent. This *prima facie* means that at time of entering into legal fight with respondent she was neither having a complaint of ***recent removal*** of present minors (*alleged detenues)* nor had felt any **urgency** though they (*alleged detenues)* were with respondent at such time.

However, after about two months, she (petitioner) filed instant petition but without detailing those *exceptional* circumstances which could justify invoking of *habeas corpus* which *legally* is not a substitute to a proper *guardianship application* but an exception available in *exceptional* situation only which *too* for temporary arrangement. In absence of those *developed* exceptional circumstances, the resort to *habeas corpus* jurisdiction legally cannot be exercised, particularly when the petitioner has also filed petition before Family Court under section 7 of Guardian and Wards Act 1890, in March 2018. Thus, *prima facie* it is not a case, involving question of **recent removal of minor from lawful custody** as well no great **urgency** is shown to be existing which could justify removal of minors from *otherwise* lawful custody of their father (respondent). Further, the minors (alleged detenues) are admittedly not *suckling* child (**very tender age)** but are *school going* children and there has not been any allegation of apprehension of any *harm / legal injury* to minors if they stay / remain with respondent (*father)* during the course the parties get question of **'welfare of minors'** determined by proper *guardian Court* where she (*petitioner)* has approached. The present petitioner also has not alleged that there is apprehension of removal of *minors* from custody of respondent (father) with an *object* to defeat the *jurisdiction* of guardian Court where such matter is pending rather the present petition was *solely* based on the count of ***hizanat*** which, as already discussed, is not sole criterion for jurisdiction under *habeas corpus.* As well petitioner has not apprehended that father will shift the custody of minors out of the country thereby attempting to close all *rooms* upon her custody through *legal* fight. On the other hand, the continuous custody of the minors (alleged detenues) with respondent (father) *least* from time of divorce to

present petitioner (more than a year) is not disputed, which *too* without an allegation of a harm to welfare of minors (alleged detenues), are circumstances justifying with-holding of exercise under *habeas corpus* particularly when same would surely affect the minors towards their *education* as well *emotion* if they (alleged detenues) are parted from *atmosphere / circumstances* which do include their *friends; school; teachers* etc.

13. In view of above, I do not find any substance in instant petition which is accordingly dismissed, leaving the parties to contest their case before Guardian Court which shall decide the matter *expeditiously* as per law, preferably within three months.

14. While parting, I would say that since the status of the petitioner as *mother* of the minors (alleged detenues) is not a matter of dispute hence she *legally* cannot be denied the right of *visitation* therefore, as an interim arrangement petitioner would be allowed to meet both minors (alleged detenues) on fortnightly basis in the premises decided by family Court. The respondent, being father, shall bear expenses of such *meeting*. Needless to mention that direction of visitation are subject to further order passed by Family Court.

IK **J U D G E**