

HIGH COURT OF SINDH, CIRCUIT COURT,
HYDERABAD

C.P No.S-114 of 2023

[Mst. Aroba versus Province of Sindh & Ors]

DATE	ORDER WITH SIGNATURE OF JUDGE
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12.05.2023

Mr. Masood Illahi Sahito advocate a/w petitioner

Mr. Muhammad Sabir Hussain, advocate for respondent No.10

Mr. Ayaz Ali Rajper AAG a/w DSP Agha Abdul Majeed, Inspector
Muhammad Ali and SIP Mirza Khan

Respondents No.7 and 9 present in person

In pursuance of directions issued on the last date of hearing, police officials present had produced the alleged detainee. They submit that they were not in knowledge of the directions issued by this Court prior to issuance of NBWs; therefore, they prayed for recalling of NBWs. In view of the explanation offered NBWs issued against police officials are recalled.

2. Mr. Masood Illahi Sahito petitioner's counsel submits that the petitioner solemnized freewill marriage with one Muhammad Raheel Parvez on 14.04.2020, upon which parents of the petitioner were not happy; that on 13.12.2020 petitioner gave birth to alleged detainee, however, due to tensed environment in the house, she handed over custody of minor baby/alleged detainee to respondent No.7; that after passage of time, petitioner approached the respondent No.7 for return of minor baby/ alleged detainee, however, she flatly refused; therefore, the petitioner moved an application under Section 22-A & B Cr.P.C before learned District & Sessions Judge Hyderabad, where though the private respondents asserted that the custody of minor was handed over to them by the petitioner himself and that they had adopted the baby girl, as such application filed by the petitioner was dismissed; that thereafter petitioner moved another application under Section 491 Cr.P.C before the District & Sessions Judge Hyderabad, but the same was also dismissed. Learned counsel submits that it is an admitted position that the petitioner had given birth to the baby, as such she has the right to keep her custody. He

prayed that this petition may be allowed and respondents may be directed to hand over the custody of minor baby to the petitioner.

3. On the other hand, private respondent No.7 present in person submits that, the petitioner had contracted free will marriage, and after some time her husband left her and shifted to unknown place; therefore, the petitioner was intending to abort the baby, however, they approached the petitioner and shown their wish that they are ready to adopt the baby; that thereafter, with the consent of petitioner, they borne all the expenses incurred on the birth of baby/ alleged detainee and they adopted her. They prayed for dismissal of this petition.

4. I have heard counsel for the parties and perused the record with their assistance.

5. It is now settled that in exercise of jurisdiction under Section 491 Cr.P.C, the welfare of child is the primary and predominant consideration. It is also settled by now that jurisdiction of a court under Section 491, Cr.P.C is not to be confused with the jurisdiction vested in Guardian Court under the Guardians & Wards Act, 1890 and consequently it is not for the court while exercising jurisdiction under Section 491 Cr.P.C to determine the entitlement of parent to retain the custody of minor on permanent basis. Section 491 Cr.P.C and the provisions of Guardians & Wards Act 1890 are neither mutually exclusive nor overlap or destroy one another. Thus to the extent of question of permanent custody of a minor, the matter falls within the domain of Guardian Court pursuant to the provisions of Guardians & Wards Act, 1890. And the remedy available under Section 491, Cr.P.C is not a remedy available for declaring or determining the question of custody of minor on permanent basis. However, the courts are obliged to exercise their jurisdiction under Section 491 Cr.P.C in a proper case where the question of treatment of a minor in accordance with law comes before the court, pending determination of custody by the Guardian Court. In principle, the exercise of jurisdiction under Section 491 Cr.P.C., the court should not to go into the technicalities of law and should decide the matter before it mainly in view of the welfare of child and also "ensure that the rights conferred upon the child are fully protected in a suitable manner.

6. In the instant case, the parties have informed that the petitioner had contracted free will marriage, and after some time her husband left her and shifted to unknown place, therefore, the petitioner was intending to abort the

baby, however, respondent No.7 approached her and shown wish that they are ready to adopt the baby; that thereafter, with the consent of petitioner, they borne all the expenses incurred on the birth of baby/alleged detainee and they adopted her. Respondent No.7 further informed that the husband of petitioner never turned up before any forum to claim the custody of baby, which proves malafide of the petitioner. Learned Counsel for Respondent No.10 has submitted that the Guardian Court has not yet taken cognizance, therefore the purpose of filing this petition is over; and judicial propriety demands that the parties may approach the Guardian Court which is the final Arbitrator for adjudicating the question of custody of minor.

7. If this is the stance of the parties, let at the first instance the petitioner approach the Guardian and Wards Court for custody of minor baby Jannat aged about 22 months who is now in custody of respondents 7 & 10. It is expected that the Guardian Court will decide the question of custody of minor baby within a period of sixty days, just on approaching the petitioner in accordance with law, without being influenced by the observations of this Court in the instant case. Further, in order to ensure that the petitioner has parenting time with the minor baby, however, that is subject to determination by the Guardian Court, and in the meanwhile the petitioner shall have right to see the minor baby. The respondents are bound to appear before the Guardian Court along with minor, if the petitioner appears before the Guardian Court for the custody. However, it is made clear that the private respondents shall not remove the custody of minor outside the jurisdiction of Guardian Court. Any violation of the terms shall expose the concerned for contempt proceedings under Article 204 of the constitution.

8. This petition stands disposed off in the above terms.

JUDGE