

ORDER SHEET
IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR.
Criminal Misc. Application No.S-122 of 2024.

(Mst. Rizwana Vs. The State & others)

DATE	ORDER WITH SIGNATURE OF HON'BLE JUDGE
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Hearing of case.

1. For Orders on MA No. 1233/2024
2. For hearing of main case.

Date of hearing and order 29-04-2024.

Mr. Shahzado Dreho, advocate for the Applicant.
Mr. Achar Khan Gabole, advocate for private respondents
Ms. Shabana Naheed Mughal, Assistant Prosecutor General.

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ORDER.

Adnan-ul-Karim Memon J:- The applicant Mst. Rizwana has filed the application u/s 491 Cr. P.C for direction to respondents Nos. 2 to 8 to produce her minor son Master Anees Ahmed aged about 04 years, who is in custody of his father namely Raja Awais respondent No.8. Today in compliance with the order dated 22-04-2024 Master Anees Ahmed has been produced by SHO PS Airport.

Learned counsel for the applicant has submitted that Master Anees Ahmed is not in safe custody and is suffering badly without care. He further submitted that Master Anees Ahmed is aged about four years and would require constant care; indeed, the applicant mother has developed an emotional attachment with the minor child and the issue of the welfare of the minor was heard by Civil Judge/ Guardian Judge Sukkur in Guardian and Wards Application No. 71/2020 (Re. Raja Awais Ahmed Vs. Mst. Rizwana) and the same was withdrawn vide order dated 28-05-2021; however the applicant filed Family Suit No. 440/2020 (Re. Mst.

Rizwana Vs. Raja Awais Ahmed) for maintenance of the applicant and her minor, which was dismissed as withdrawn with permission to file fresh vide order dated 28-05-2021. Learned counsel for the applicant further submitted that the applicant has filed Family Suit No. 62/2023 (Re. Mst. Rizwana Vs. Raja Awais) before Family Judge Lakhi Ghulam Shah, Shikarpur and on the contrary respondent No. 8 has filed Guardian and Wards Application No.17/2024 (Re. Raja Awais Vs. Mst. Rizwana) before the Court of Civil Judge/Guardian Judge Ghotki and both the family matters are pending. Learned counsel further submitted that both the parties have litigated on the issue of custody of the minor and other ancillary issues and this Court can direct respondent No. 8 to hand over the custody of the minor to the applicant mother leaving the parties to approach the Family Court for permanent custody of the minor. He prayed for allowing the instant Crl. Misc. Application.

On the contrary, learned counsel for the private respondent No. 8 has filed an objection against the instant application u/s 491 Cr. P.C. by referring to various clauses of objections arguing that the minor is living a happy life with his father and the applicant had left the residential house of the respondent No. 8 and after a couple of months she has approached this Court. He further submitted that it is not a case, involving the question of removal of a minor from the lawful custody and this Court lacks jurisdiction to entertain application u/s 491 Cr.P.C. He however admitted that the marriage between the parties is still intact. He prayed for dismissal of the instant Crl. Misc. Application.

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

It is well-settled law that the paramount consideration while deciding the question of custody of the minor is the welfare of the minor irrespective of age, sex, and religion. Primarily, welfare includes his moral, spiritual, and material well-being. While considering what is the welfare of the minor, the Court shall have regard to the age, sex, religion of the minor, the character and capacity of the guardian, nearness of kin to the minor, and the preference of the minor if he/she is intelligent enough to make it. On the aforesaid proposition, I am fortified by the decision rendered by the Honorable Supreme Court of Pakistan in the case of Humayun Hassan v. Arslan Humayun and another, **PLD 2013 SC 557**. In view of the above, the purpose of filling this CrI. Misc. Application has been served as the minor has been produced in Court as it is settled law that the father is the natural guardian while the mother is entitled to the custody (hizanat) of a male child till the age of seven years under the Hanfi law while in the case of a female till she attains puberty. This right continues notwithstanding a divorce or separation. The Supreme Court has held that as a natural guardian, it is the obligation of the father to maintain the child even if the custody is with the mother. The inability of the mother to financially support the child is not a determinate ground to deprive her of custody because in such an eventuality the father's obligation regarding maintenance is not extinguished. It is further held that the rule that the father is a natural guardian and, therefore, entitled to the custody of the child nor that the mother loses the right of hizanat after the minor has attained the prescribed age or puberty, as the case may be, is not absolute, but rather subject to exceptions. The decision regarding custody of a child is governed by the fundamental principle, the paramount and overarching consideration is the welfare of the child i.e. to ascertain the course which is in the latter's best interest. The crucial

criterion is, therefore, the best interest and welfare of a child while determining the question of custody. The rights or aspirations of the parents or some other person are subservient to this principle and each case of custody must be decided based on ascertaining a course which is in the 'best interest of the child'. The factors or variables that may be taken into consideration while determining the question of custody of a child are not exhaustive but they would depend on the facts and circumstances of each case. The guiding principle is to ensure that the determination of custody promotes the rights of the child as well as the latter's wellbeing. The overriding consideration must be to protect the child from any physical, mental, or emotional injury, neglect, or negligent treatment. The mother's disability, illiteracy, or financial status are not the sole determinant factors. The second marriage contracted by the mother also cannot become a stand-alone reason to disqualify her from obtaining custody of the child. The question of custody involves taking into consideration the factors that are relevant to the upbringing, nursing, and fostering of the child. It essentially extends to the emotional, personal, and physical well-being of a child. The sole object is to ensure that the overall growth and development of the child is guaranteed.

In principle, in the cases, concerning the custody of a child, the learned Family Court is not required to go into the intricacies/technicalities of the matter and confine its findings to the extent of the welfare of the child/minor, which is a paramount consideration. When all factums were confronted coupled with the legal position of the case that the issue of illegal detention is no more in the field as the minor has been produced in Court. After all seeing this both the parties stated that litigation regarding custody of the minor is pending

before Family Judge Lakhi Ghulam Shah, Shikarpur and Civil Judge/Guardian and Wards Court Ghotki and further state that both the matters may be heard and decided by one Family Judge/Guardian Ward Court at Sukkur. The request seems to be reasonable and acceded to; consequently, the learned Sessions Judges of District Ghotki and Shikarpur are directed to transfer both cases to Family Judge/Guardian Court Sukkur for the decision on the issue of custody of minor Master Aness Ahmed within 15 days positively. Intimation notice shall also be given to the parties for such arrangements; however, in the intervening period applicant mother shall have visitation right to meet with her son Master Anees Ahmed as and when she wants, and respondent No. 8 shall not create any bottleneck in the intervening period and shall maintain the minor properly as well as applicant mother if the marriage is still intact under the law.

In view of the above terms, the instant Crl. Misc. Application stand disposed of together with listed application.

JUDGE

