

ORDER SHEET
IN THE HIGH COURT OF SINDH BENCH AT SUKKUR
Cr. Misc. Application No.S-223 of 2019

Date	Order with signature of Judge
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1. For orders on office objection at flag 'A'
2. For hearing of main case

Mr. Mehboob Ali Sahito, Advocate along with applicant
Respondent No.3 present in person
Mr. Khalil Ahmed Maitlo, DPG

Date of hearing: 25.03.2019
Date of order: 25.03.2019

ORDER

ZAFAR AHMED RAJPUT, J:- Through instant Criminal Misc. Application, under section 491 of Cr.P.C, the applicant has prayed for the recovery of her minor children namely (1) Parveen aged about 01 year, (2) Moshin aged about 02 years, (3) Waqas aged about 03 years, (4) Alisha aged about 05 years, (5) Faeeda aged about 06 years and (6) Waqar aged about 09 years, from the custody of respondent No.3, her husband, and handing over their custody to her being their mother.

2. Briefly stated facts of the case are that Mst. Zubaida (applicant) was married with Parvaiz (respondent No.3) about 15 years back and from the said wedlock the aforementioned six children were born. It is alleged that about some time ago there were some disputes between the spouses over petty domestic matters due to which respondent No.3 drove out the applicant from his house along with minor children. However, about 15 days back the respondents No.3 and 4 illegally and unlawfully entered into the house of the applicant's parents and forcibly took away the minors by snatching their custody from the applicant.

3. Today on the direction of this Court, the respondent No.2 (SHO Police Station Kotri) has produced the children before this court.

4. As regard the scope of Section 491, Cr.P.C, it is now well-settled that in the cases pertaining to the custody of a child, the Courts are not supposed to go into the technicalities of the law and they should decide the case keeping in view the facts and circumstances of each case placed before it for decision mainly taking into consideration welfare of the child. 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 which have been conferred upon the child are fully protected in a suitable manner, the Court could also pass appropriate order in exercise of its inherited jurisdiction. Reliance in this regard may be placed in the case of Mst. Khalida Parveen v. Muhammad Sultan Mahmood & another, reported as **PLD 2004 SC 1**.

5. In the instant case it is an admitted position that the applicant is the mother and respondent No.3 is the father of the minors, who are aged of 01, 02, 03, 05, 06 and 09 years respectively. According to Muslim Law, mother is entitled to the custody (Hizanat) of her male child until he completes the age of seven years and of her female child until she has attained puberty or she (mother) otherwise loses the right of custody for some other reasons as enumerated in paragraphs 352 and 354 of D.F. Mulla's Principles of Muhammadan Law. Right of Hizanat can be enforced against the father or any other person. Father no doubt is the natural guardian of the minor but he cannot hold and detain the custody of minor child under seven years of age forcibly and against the wishes of the mother, who in law is entitled to the custody of the minor, or without obtaining proper orders for the custody of the minor from the Court of competent jurisdiction. It is not the case of respondent No.3 that he has obtained any such order. He is evidently holding the custody of the minors against the wishes of the applicant, in the circumstances his custody, prima facie, appears to be illegal. Reliance in this regard may be placed in the case of Safya Bibi v. Ghulam Hussain Shah (**PLD 1970 Azad**

J&K 13), wherein father had taken away the minor children from their mother, who because of the ages of the minors was in law entitled to their custody. It was held *“where a person is legally entitled to the custody of a child, the detention of the child by any other is illegal”*. In the case of Mst. Tayyaba Khan Vs. Syeda Begum and another (**PLD 1994 Karachi 204**) so also in the cases of Hussan Begum v. 1st Additional District & Sessions Judge, Karachi West and 3 others (**2013 P.Cr.L.J. 1503**) and Mst. Shazia Bano v. Government of Sindh through Secretary, Home Department, Karachi and 6 others (**2014 YLR 152**), it has been held that the mother being legally entitled to the custody of her minor son till the age of seven years, the custody of the minor with father having been demanded by the mother could not be considered as legal. In the said cases custody of the minors, who were present in Court with their fathers, were directed to be handed over to their mother immediately, with direction that the parties can agitate the question of custody before the Family/Guardian Court. Thus, relying on the ratio of the above judgments, I, hold that in the instant case the custody of minors namely (1) Parveen, (2) Moshin, (3) Waqas, (4) Alisha and (5) Fareeda, with respondent No.3 is illegal and improper.

6. For the foregoing facts and reasons, this Criminal Misc. Application is allowed and as a result whereof the respondent No.3 is directed to hand over the custody of the minors namely Parveen, Moshin, Waqas, Alisha and Fareeda to the applicant. The respondent No.3 shall retain the custody of minor No.6 namely Waqar who is admittedly 09 years old. However, the respondent No.3 as well as the applicant shall be at liberty to approach the Family/Guardian Court for the redressal of their grievances, if any. The Guardian Judge shall deal with the matter independently, if proceedings are instituted before him, in accordance with law without being influenced in any manner from the observations made hereinabove.

JUDGE

