

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

CP NO.S-2116/2018

Date	Order with signature of Judge
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17.10.2018

Mr. Altaf Hussain advocate alongwith petitioner Mst. Beenish & Urooj sister of petitioner.

Mr. Qadir Hussain Khan, Advocate for respondent No.2 alongwith Ayesha Younus, Adnan Khan, Basalat A. Khan.

Aashique Hussain Kalhoro and Muhammad Rehman, Deputy Directors, Social Welfare Department alongwith Abdul Khalique Qureshi.

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Salahuddin Panhwar, J: Precisely relevant facts of this petition are that petitioner approached the District and Sessions Judge under section 491 Cr.P.C. with regard to custody of minor Ayesha. According to petitioner, she contracted marriage without consent of parents, her husband was living in UAE, she joined him and after conceiving they decided delivery in Pakistan as they were not in a position to bear the cost there hence she returned back, after seizure baby Ayesha was born on 07.09.2018. Since her family was not happy therefore her sister on the second day of delivery removed the custody from hospital to Sarim Burney Welfare Trust, thereafter petitioner approached District and Sessions Judge for custody which case was entrusted to 2nd Additional District Judge Karachi South (Ghulam Mustafa Laghari) who, after hearing, dismissed application by order dated 19.02.2018 with findings that :-

5. I have considered the arguments of learned advocates for the respective parties and also have gone through the material available on record. It is admitted fact that the minor is kept at the shelter home of Sarim Burney Welfare Trust. Applicant did not hand over the custody of minor baby Aisha to Sarim Burney Welfare Trust. Baby Aisha handed over to the Sarim Salam Burney Welfare Trust by one lady as per arguments of learned counsel for applicant that the said lady is sister of applicant. The father of baby Aisha is not

come in the court nor filed any affidavit in favour of applicant. **It seems that the dispute of the parentage is involved over the minor baby Aisha.** Proceeding U/s 491 Cr.P.C. are not available for declaring any person as guardian or for determining all the questions relating to the custody of minor because the final decision of regular custody was to be decided in the proceedings initiated by, the parties claiming the custody of the minor before the Guardian court.

6. In view of the above circumstances, I am of the humble view that **the custody of the minor with the respondent No.2 cannot be considered as illegal.** However, the applicant is at liberty to knock the door of Guardian/Family Court for deciding the parentage of the minor if so desires.”

Hence petitioner approached this court while exercising concurrent jurisdiction. It would be conducive to refer relevant portion of direction of this Court on 15.10.2018:-

“3. Since petitioner being mother is claiming custody of minor of a tender suckling age, she has been deprived from custody since 7th September 2018; she approached the trial Court where her request was declined and now she is before this Court. No doubt custody cannot be denied to the mother; the Trust is claiming that they are not in a position to identify the minor. Accordingly petitioner shall approach the Trust with counsel and identity her daughter; on her identification minor shall be produced before this Court.

4. Besides, officers of Women Development Department and any officer from the Social Welfare Department shall visit M/s. Sarim Burney Welfare Trust International and submit report with regard to inmates, as well respondent No.2 shall submit complete record of inmates along-with parentage and the Trust including the mechanisms. At this juncture judicial propriety demands that learned District and Sessions Judge Karachi South shall depute any Magistrate to visit respondent No.2’s trust and submit report in the light of this order.”

2. Pursuant to that learned Magistrate visited Sarim Burney Welfare Trust, relevant portion of that report is that :-

“Respected Sir, the undersigned received the order dated 15-10-2018 passed by the Honourable High Court of Sindh in CP No. S-2116 of 2018 on 16-10-2018 for compliance through the Honourable District & Sessions

Judge Karachi-South where-after the undersigned visited the head office of Sarim Burney welfare Trust International (hereinafter referred to as SBWTI) situated in Wassiamall Building, near Dow Medical College, M.A Jinnah Road, Karachi and reached at the said office at 01:30 PM.

Respected Sir, after apprising the Chairman SBWTI Mr. Sarim Burney about the visit of undersigned in compliance of above said order dated 15-10-2018, the undersigned was informed by the Chairman SBWTI that on 07-09-2018 one Mst. Urooj Liaquat Ali and Anjum Parvez S/o. Parvez Akhtar lodged/ shifted one new born baby girl to SBWTI after submitting one Statement/ Bayan-e-Halfi to the effect that the said baby girl had born to her sister namely Mst. Beenish D/o. Liaquat Ali on the same day i.e. 07-09-2018 at about 05:00 PM and since the said baby girl having no legal father, her custody is being handed over to SBWTI for her better upbringing with no concern with the said baby girl by Mst. Beenish or anyone else and the SBWTI will have all rights to either provide the said baby girl best upbringing or to handover the custody of said minor to anyone. (Copy of the Statement/ Bayan-e-Halfi is annexed herewith at R-1 for kind perusal of the Honourable Court).

Respected Sir, the Chariman SBWTI further informed the undersigned that at the time of receiving baby girl from Mst. Urooj and Anjum Parvez the SBWTI had taken photograph of Mst. Urooj as well as of baby girl who was given name by SBWTI as Palwasha. The SBWTI also have the CCTV Camera recording which was handed over to the undersigned in USB. (Photograph of Mst. Urooj and baby girl, copy of CNIC of Anjum Parvez, and relevant CCTV Camera recording in USB is annexed herewith at R-2 to R-5 for kind perusal of the Honourable Court).

Respected Sir, The undersigned was further informed that on 15-10-2018 at about 02:00 PM the petitioner party along with their learned Counsel approached for identification purpose in compliance of order passed by the Honourable High Court but they left the office of SBWTI at about 04:00 PM without identifying the baby girl by stating that they cannot wait anymore. The reason for keeping them on wait is stated to be the brining baby girl from shelter home of SBWTI situated at Hyderi, North Nazimabad, Karachi which consumed more than expected time of transportation due to traffic jam on M. A Jinnah Road. In this regard the conversation between the staff of SBWTI and petitioner party through text message/SMS is also provided to the undersigned in printed form. (Copy of the conversation through text

message/SMS is annexed herewith at R-6 for kind perusal of the Honourable Court).

Respected Sir, The undersigned was further informed that at the time of shifting the baby girl at SBWTI, the petitioner Mst. Beenish, was not on record and since there was a baby girl in existence and Mst. Urooj and Anjum Parvez were ready to leave her at SBWTI, the SBWTI had no issues with parentage of the baby girl, however as a precautionary measure, the SBWTI had duly informed the general public through its Facebook page (www.facebook.com/sarimburneyofficial) and Youtube channel which has a considerable viewership of general public.

Respected Sir, with regard to internees, the undersigned was informed that presently around 100 persons including, children (male/female) and 08 males are available at SBWTI. All the females and children are kept at shelter home situated at Hyderi, North Nazimabad. Two old age male inmates are also residing at shelter home, however other male inmates are kept at head office of SBWTI. The handy available informal list of inmates has also been provided to the undersigned. (List of the inmates provided to the undersigned is annexed herewith at R-7 for kind perusal of the Honourable Court.”

3. Besides representative of Sarim Burney Welfare Trust has submitted trust deed alongwith details of shelter homes, tax receipts and details of inmates. At this juncture Deputy Director, Social Welfare Department submits his report which is that :-

Under the directives of Honorable High Court of Sindh in CP. NO. S-2116/2018, the undersigned paid visit of Shelter Home running in Sarim Burney Welfare Trust International, in Hyderi, North Nazimabad behind Saima Parimall and met with Mrs. Alia Sarim vice Chairperson / Incharge of the Shelter home and Mr. Basalat Ali Khan (Welfare Officer) / Lawyer of welfare trust. According to them Sarim Burney Welfare Trust registered under Trust Act, bearing the registration No. 237, dated 10-7-2012. At the time of visit 88 homeless women and children/ inmates were available there of different ages, (3) three children under two years including baby Aisha also them. During visit the undersigned observed that the shelter home providing good services/ facilities for the inmates like clothing, feeding, recreational activities, informal education and religious education with the support of different philanthropists. The undersigned also felt that all inmates were quite satisfied regarding

the basic necessities providing to them by the shelter home, regarding baby Ashia a caretaker female was also available for her care.”

4. Further, focal person of Child Protection Authority is present and contends that building for destitute children is under construction for last 5/6 years and same is near completion, it is contended that social welfare department has signed MoU with Sarim Burney Trust to provide shelter to women.

5. Typical facts, so surfaced during hearing of instant petition, resulted into bringing number of *unfortunate* facts onto light which, I am unable to ignore. I will attend each *separately*.

No one can deny to the fact that protection and rehabilitation of every single un-owned or destitute *child* is the **ultimate** responsibility of the State which it (**State**) cannot avoid even on mere plea of working of some NGOs with help of philanthropists. The roles of **NGOs** can never be a substitute to that of **responsibility** of the State but may, at the most, could be of **help / assistance** which, *too*, shall always require a supervisory *eye* because the **State** is never supposed to compromise on **protection, life** and **rehabilitation** of such children. Entry of a single child into such like institutions of an **NGO** must be supervised till the **child** either reaches to **safe-hands** or is made capable of leading an honourable **life**. Such aspect I, *painfully*, admit to be ‘**missing**’ which allows raising of number of questions on working and *even* existence of such *government institutions / authorities*.

6. Worth to add here that Sindh Child Act was promulgated in 1955 which not only demands taking of a **destitute** child into custody by the State but with concept of reformatory institution.

Such *vital* Act *however* seems to have served no purpose at all but seems to have gotten rust and dust thereon. The Act, I would again insist, is never meant for its presentation or to talk about in **seminars** on **issues** but demands purposeful enforcement thereof. The *grief* continues when I have to admit that since 1955 no mechanism is provided. Even Child Protection Authority is established about 2/3 years back but again only on papers because State is not visible in the field.

7. At this juncture, a reference to Section 10 of Sindh Child Protection Authority Act, 2011, being relevant, is made hereunder which reads as:-

10. (1) For the purposes of this Act, the Authority shall have powers-

- (a) to coordinate and monitor the child protection related issues at the provincial and district level;
- (b) to ensure the rights of the children in need of special protection measures;
- (c) to support and establish institutional mechanisms for the child protection issues;
- (d) to make necessary efforts **to enhance and strengthen the existing services of different children welfare institutions;**
- (e) to set minimum standards for **social, rehabilitative, re-integrative and reformatory institution and services and ensure their implementation;**
- (f) to **supervise in the light of minimum standards, the functions of all such institutions established by government or private sector for the special protection measures of the children;**
- (g) to set minimum standards for all other institutions relating to the children **(like educational institutions, orphanages, shelter homes, remand homes, certified school, youthful offender work places, child parks and hospitals etc) and ensure their implementation;**
- (h) to review laws, propose amendments in the relevant law, wherever necessary, so as **to bring those in conformity with the relevant international instruments ratified by Pakistan and to propose new laws;**
- (i) to recommend development of a Policy and Plan of Action for the children;
- (j) to **monitor and report on the violation of the national and provincial laws and international instruments and take**

suitable remedial measures for the protection of the child;

- (k) to set up child protection management information system and prepare annual reports;
- (l) to mobilize financial resources for programmes relating to special protection of children through provincial, national and international agencies;
- (m) to **promote and undertake systematic investigation and research on child protection issues;**
- (n) to **initiate through relevant authorities, prosecution of the offenders when children are victim of the offence;**
- (o) to establish and manage the Fund;
- (p) to do such acts as are ancillary and incidental to the above functions;
- (q) **to investigate or cause investigation, on its own or upon a complaint, into any matter having bearing on the interest of the children; and**
- (r) any other functions, which may be assigned to it by Government.

8. The *functions*, so appearing from above section of the Act, *prima facie* reaffirms the fact that all the government, private or other institutions, including NGOs, have been brought under direct supervision / control of the Authority and that a ***minimum*** standard for ***social, rehabilitative, re- integrative*** is required to be assured by all such *institutions* which, too, under direct supervision of *Authority* with a sense of assurance that any departure / violation shall expose *guilty* to lawful action. The above also burdens the *Authority* not only to promote and undertake ***systematic investigation*** but to ensure initiation of prosecution of the offenders through relevant authorities, when the victims of the offences are ***children***. We, unfortunately, have been experiencing an *abnormal* increase in offences relating to ***children*** but the ***victims*** and ***parents*** of such ***victims*** have never been heard of any help / assistance by ***Authority***. This, I admit *painfully*. Representatives of Social Welfare Department are unable to satisfy this court as well assist this court

whether they have provided any shelter home/reformatory institutions.

9. Taking a *pause* here, I would add that it is also claimed that since 25 years this Trust (respondent No.2) is in existence but representative of that trust is unable to point out that any minor nestled in their Trust has received good education and has qualified even upto bachelor decree. This again is the *failure* of Authority of all the laws, enacted on such *subject*.

It, *however*, claimed that in case of orphanage kids usually many families approach them and they hand over the custody after adaptation through Courts. Without making any comments onto the *sincerity* of the Trust, I would say that when a *trust / institution* claims to be working for **protection, welfare & rehabilitation** of children then it must ensure such objectives. Even in cases of *giving* custody of **orphanage** to families there must be some *mechanism* to know about **welfare** of such child but without troubling the *families*.

10. Resuming again, the Representatives of Social Welfare Department, present, are unable to satisfy this court as well assist this court whether they have provided any shelter home or they have done any *concrete* things so as to achieve the object of the Act by assuring requirement of Section 10 *supra*. Under these circumstances, Social Welfare department and DG Child Protection Authority shall submit record of last two years with regard to efforts taken for the destitute children or the recovered children; adopted and thereafter are under the control of any *darul aman*. Such report shall also include as to what steps were / are being taken so as to

achieve objectives of Section 10(m), (n) and (q) of the Act in particular. They shall also ensure proper publication by all *means* of its objectives and availability of all *kinds* of help, as permissible by Act. Further they shall also physical *visit* to all such *institutions* and shall ensure that such *institutions* are having **minimum standards**. Reformatory /hostel centers shall be established on every division to ensure that in case minors are destitute concerned police with the approval of magistrate as provided under the Child Protection Act shall nestle them in those centers. Needless to add that per Section 11 of the Act all the **Executive authorities** have been placed under *mandatory* obligation to assist the Authority in performance of its functions. Any departure shall not only be violation of such section but may also expose them to legal consequences. Compliance report shall be submitted through A.R. of this Court, on quarterly basis. Learned MIT shall ensure compliance of this order in its letter and spirit.

11. Now, reverting to merits of the case. Today, the minor is produced, parentage is not disputed. I have examined the order passed by learned ADJ and I am shocked that how and in what manner an Additional Sessions Judge declined custody to mother on the plea that parentage is involved and petitioner's sister has not filed affidavit in her favour. It needs not be insisted that provision of Section 491 Cr.PC can well be invoked in matters of custody of *minor children* even where question of **illegal** confinement is not involved. The provision itself shows that it can well be exercised even if the custody is not **illegal** but is **improper**. The facts, *prima facie*, involved custody of a child of *days* therefore, learned lower court judge was supposed to take a little more efforts and was never

supposed to fall prey of *technicalities*. Though, remedy under section 491 Cr.PC is *summary* in nature yet it (*summary nature*), no where, restrains one to make an *inquiry* particularly when it may advances the cause of justice and is *otherwise* not restrained. Reference may well be made to the case of Zohra Bibi v. Sultan Mahmood (2018 SCMR 762) where at Rel. P-766, it is observed as:-

“... Whenever it is possible to grant relief under the law, then technicalities in the ways of administration of justice should be avoided to the possible extent by remaining within the domain of law.

12. It is a matter of record that a little effort by this Court resulted into making it clear that :

- i)) According to the Trust at the time of receiving possession photograph of baby and that of petitioner's sister was captured as well CCTV footage are proof.
- ii)) Statement of *depositor* did disclose the name of the present petitioner, as ***mother***,
- ii)) Learned Magistrate in his report about the trust has opined that there is no issue of parentage and without dispute they have handed over the custody to the petitioner (mother).
- iv)) Custody of suckling baby Ayesha is handed over to mother (petitioner).

13. The courts are required to adjudicate the issue. Learned judge was competent to call any person so as to make a *prima facie* enquiry about status of mother *least* entitlement of petitioner for custody or otherwise but he (*Mr. Ghulam Mustafa Laghari, Additional District & Sessions Judge*) rather went on in saying that “***It seems that the dispute of the parentage is involved over the minor baby Aisha***” though this issue was not there. All, including Courts, must avoid bringing *legitimacy* of a child into dispute

except such **issue** is raised for its determination. The manner in which the learned lower court judge has dealt with the matter, *prima facie*, resulted in keeping the petitioner (**real mother**) deprived *least* away from her child for **days**, despite of fact that parentage was not disputed. I would add that *lap* of the mother has been considered as *lap* of GOD. In this case mother from the day one was deprived by the family members, thereafter when she approached the Additional District Court on 15.09.2018 since then she has been deprived on technicalities by the respondents. Since the Authority (Sindh Child Protection Act, 2011) seems to have kept its *significance* into dark else petitioner could have been rescued in *hours* without forcing her to keep wondering at doors of the Courts.

14. Without going any further, I would painfully, conclude that all learned Magistrates and District Judges in cases of section 491 Cr.P.C. or where minor children are recovered, shall ensure *least* an inquiry so as to examine fitness / claim of petitioners and if none is there then child shall be ensured to be nestled at proper place. They shall not dispose of matters in mechanical manners if the situation is *alike* the one, surfaced during hearing of the instant petition, **but are believed to go a little further to help and achieve object of justice.**

15. In terms of above, instant petition is disposed of. Office shall communicate this order to all concerned for compliance and information.

J U D G E

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