2018 P Cr. L J 1328

[Islamabad]

Before Mohsin Akhtar Kayani, J

Mst. SAIMA BIBI---Petitioner

Versus

ADDITIONAL SESSIONS JUDGE (EAST), ISLAMABAD and 3 others---Respondents

Writ Petition No. 2057 of 2018, decided on 30th May, 2018.

(a) Pakistan Prisons Rules---

----Rr. 326 & 327---Woman prisoner could keep her child with her in prison till the age of six years.

Verse 233 of Sureh Baqarah and Sahee Muslim Sharif on Serial No.4432 fol.

(b) Islamic Law---

----Custody of minor---Suckling baby---Feeding the suckling baby is of great importance and sentence of woman prisoner could be postponed while the child was being fed by his/her mother---Child could not be deprived of such right if mother was available and willing to feed the child.

Verse 233 of Sureh Baqarah and Sahee Muslim Sharif on Serial No.4432 rel.

(c) Criminal Procedure Code (V of 1898)---

----S. 491---Habeas Corpus petition---Temporary custody of minor---Scope---Efficacious and speedy remedy---Scope---High Court was empowered to issue directions in the nature of habeas corpus if the custody of minor was illegally or improperly disturbed---Section 491, Cr.P.C. provided more efficacious, speedy and appropriate remedy in a case of illegal or improper custody of minor---High Court could pass order regarding the temporary custody without prejudice to the rights of the parties for final determination of the dispute pertaining to the custody of the minor by the Guardian Court.

Mst. Shahista Naz v. Muhammad Naeem Ahmed and another 2004 SCMR 990 rel.

(d) Criminal Procedure Code (V of 1898)---

----S. 491---Pakistan Prisons Rules, Rr.326, 327 & 328---Constitution of Pakistan, Art. 35---Habeas Corpus petition---Custody of minor (girl)---Suckling baby---Mother, confined in prison---Child to be allowed to remain with mother in prison---Scope---Duty of State---Principle of protection of family---Scope---Mother, confined in prison, filed petition for custody of her suckling baby---Legality---Woman prisoner could keep their

children with them in prison till they attain the age of six years---State had to provide the diet and clothing for the child in every manner in all situations---State was responsible to provide every basic need to the minor and the mother whether she was in judicial custody or otherwise---High Court allowed the mother to retain the minor with her.

Mudassar Rizwan, Ms. Saba Batool Mumtaz and Ms. Bushra Raja Chishti for Petitioner and Petitioner in person.

Raja Gul Nawaz for Respondent No.4 along with Mst. Javaria.

Jamshed Khan, Inspector/SHO and Muhammad Aslam, Inspector, Police Station Lohi Bher, Islamabad.

Sajid, S.-I., Azra, Lady Constable, Shoaib Khan, H.C. and Rab Nawaz Constable, Adyala Jail, Rawalpindi.

Date of hearing: 30th May, 2018.

JUDGMENT

MOHSIN AKHTAR KAYANI J.---Through the instant writ petition, petitioner has prayed for recovery of her minor daughter Umme Hani aged about 10 months, who is in illegal and improper custody of Nasir Raza/respondent No.4.

2. Brief facts referred in the instant case are that the petitioner/Mst. Saima Bibi is facing trial for allegation of murder of her husband in case FIR No. 63/18, dated 22.02.2018, under sections 302/365/34, Police Station Lohi Bher, Islamabad and is presently in judicial custody at Adyala Jail Rawalpindi, whereas her minor daughter namely Umme Hani aged about 10 months at that time was snatched by respondents Nos.2 and 3 (police officials) and handed over the same to the Nasir Raza/respondent No.4 (complainant of the case).

3. Notice was issued to the respondents side as well as to jail authorities to produce the petitioner before this Court, in compliance whereof, Nasir Raza/respondent No.4 appeared in person before this Court on 28.05.2018 and requested for some time to engage services of a counsel. The request was allowed along with the direction to produce the minor Umme Hani before this Court for today i.e. 30.05.2018.

4. Learned counsel for petitioner contends that Mst. Saima Bibi/petitioner is the real mother of Umme Hani and no one else can look after the minor better than the mother. He further contends that petitioner could not be deprived of the right of Hazanat of the minor, who is a suckling baby and in the light of principles laid down in the Holy Quran, the minor could only be retained by the mother. He further contends that Rule 326 of the Pakistan Prisons Code (Jail Manual) empowers the mother (Women Prisoners) to keep their children with them in prison till attaining the age of six years.

5. Conversely, learned counsel respondent No.4 and Mst. Javaria contend that petitioner/Mst. Saima Bibi is an accused in case FIR No.63/18, dated 22.02.2018, under sections 302/365/34, Police Station Lohi Bher, Islamabad. He further contends that petitioner has been arrayed as accused in the murder of her own husband namely Raja

Yasir Murtaza and she has confessed the crime while recording her statement under section 164, Cr.P.C. before learned Judicial Magistrate and Investigation Officer has finally submitted a report under section 173, Cr.P.C. against the petitioner, who is facing the trial of the said criminal case. He further contends that minor is in proper custody of Nasir Raza/respondent No.4, whereby respondent No.4 while appearing before this Court contends that minor Umme Hani is with Mst. Javaria Paternal Aunt of the minor, who is wife of Nasir Raza/respondent No.4. He further contends that environment of jail is not suitable for the minor and the learned Additional Sessions Judge (East), Islamabad has rightly dismissed the petition of the petitioner while considering the background of the case. Mst. Javaria is also present before the Court along with minor.

6. Arguments heard, record perused.

7. From the perusal of record, it has been observed that petitioner/Mst. Saima Bibi is facing trial in case FIR No. 63/18, dated 22.02.2018, under section 302/365/34, Police Station Lohi Bher, Islamabad against allegation of murder of her husband Raja Yasir Murtaza and she filed petition under section 491, Cr.P.C. before learned Additional Sessions Judge (East), Islamabad to recover her minor daughter Umme Hani aged about 10 months, born on 26th April, 2017 as provided in the birth registration certificate, issued by the Union Council (Tumair), Islamabad, the said minor was allegedly snatched by respondents Nos. 2 and 3 (police officials) and handed over the same to Nasir Raza/respondent No.4 at the time of investigation of the criminal case, although at present the minor Umme Hani is with the Mst. Javaria Paternal Aunt of the minor, who is wife of respondent No. 4.

8. On the direction of the Court, the minor/Umme Hani has been produced by Nasir Raza/respondent No.4 as well as by Mst. Javaria in Court today i.e. 30.05.2018, whereas petitioner/Mst. Saima Bibi was also produced by the jail authorities. It has further been observed that minor is suckling baby, who requires the special attention and care of the mother and it is settled proposition that there is no substitute of real mother, but in these peculiar circumstances, the respondents side has argued their case on the strength that present petitioner is murderer of the father of minor and as such she is not entitled for the custody of minor in any situation. Learned counsel for respondent No. 4 further contends that petitioner herself acknowledged the commission of murder of her husband while recording her statement under section 164, Cr.P.C. before learned Judicial Magistrate and is in league with the other co-accused in the said criminal case. He further contends that petitioner has disentitled her for the custody of minor and even both Nasir Raza and his wife Mst. Javaria has filed guardian petition titled "Raja Muhammad Nasir and others v. Public at Large and others" before learned Guardian Court, Islamabad. He further contends that learned Additional Sessions Judge (East), Islamabad while deciding the petition under section 491, Cr.P.C. has rightly observed the reasons and considering the welfare of the minor dismissed the petition which further confirms the custody of Mst. Javaria and Nasir Raza.

9. I have considered each and every aspect of the case and gone through the relevant rules dealing with the Women Prisoners and children under Pakistan Prison Code (Jail Manual), which are reproduced as under:-

Children to be allowed to remain with their mothers.

Rule 326

Women prisoners shall be allowed to keep their children with them in prison till they attain the age of three years.

Amendment for the Punjab, Sindh and NWFP Provinces:

Children with mothers

Rule 326

Women prisoners shall be allowed to keep their children with them in prison till they attain the age of "six " years.

Amendment for Sindh Province Only

In rule 326, for the words "three years" the words "six years" shall be substituted.

Cases in which a child cannot be kept in a prison

Rule 327

No woman prisoner shall be allowed to keep a child who is over the age of three years. On a child becoming disqualified for further retention or when a woman prisoner dies or is executed and leaves, a child, the Superintendent shall inform the [District Coordination Officer] of the place where the prisoner resided and the latter shall arrange for the proper care of the child. Should the relatives or friends of the prisoner be unable or unwilling to support the child, the [District Coordination Officer) shall arrange for the removal of the child to healthy nursery surroundings through the special societies managing such institutes. The child shall be returned to the mother on release provided she is ready and also capable to look after it.

(ii) If the child is a girl who has attained the age of puberty and the relatives are unable or unwilling to support and take care of the girl, the Sessions Judge of the District shall, with the help of any welfare society or individual, arrange for her marriage.

Diet and clothing for children

Rule 328

Children in prison shall be provided with such clothing as the Superintendent may prescribe in writing. The scale of the diet for children is prescribed in rules pertaining to dietary.

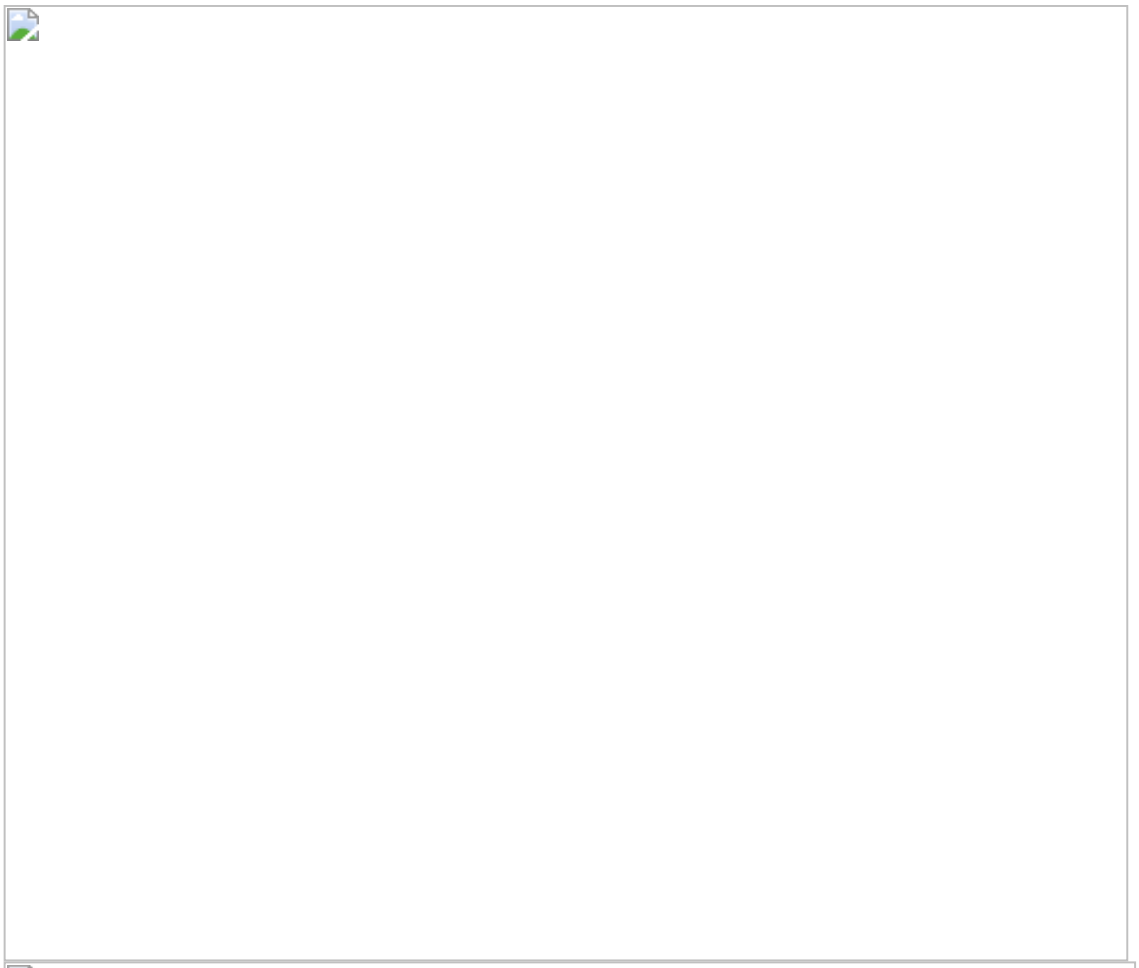
10. The above referred rules clearly permits the women prisoners to keep their children with them in prison till attaining the age of six years and as such the minor is presently 13 months old and is a suckling baby and requires special care of the real mother. Even

otherwise I am guided by the verse 233 of Sureh Baqarah, whereby translation of Quranic injunction has been provided which are reproduced as under:-





Similarly, another authoritative decision rendered by the Holy Prophet Muhammad (P.B.U.H) in his lifetime also provided me a deep insight of the proposition. The relevant Hadith recorded in Sahee Muslim Sharif on serial No. 4432 is as under:-





11. The above referred Islamic injunctions clearly reflect that feeding the suckling baby is of great importance and sentence can be postponed while the child is being feed by his/her mother and the child cannot be deprived of this right if his mother is available and willing to feed the child. Similarly the said authoritative directions of Quran have been explained in Hadiths of Muslim Sharif, in which Prophet Hazrat Muhammad (P.B.U.H) has suspended the sentence of rejam till the minor started eating by himself/herself.

12. The above referred position of Quran and Sunnah persuaded the lawmakers to protect the minor and the child as referred in Rules 326 to 328, in which State has to provide the diet and clothing for the children in every manner in all situations. Even otherwise the constitutional provisions of Article 35 of the Constitution of Islamic Republic of Pakistan, 1973, imposed obligation upon the State in the following manner:-

"The State shall protect the marriage, the family, the mother and the child."

13. In view of above constitutional provision, the State is responsible to provide every basic need to the minor and the mother, whether they are in judicial custody or otherwise.

14. I have gone through the impugned judgment of the learned Additional Sessions Judge (East), Islamabad, whereby application under section 491, Cr.P.C. filed by the petitioner has been dismissed on the basis of alleged involvement of the petitioner in case FIR No. 63/18, dated 22.02.2018, under sections 302/365/34, Police Station Lohi Bher, Islamabad while considering the statement under section 164, Cr.P.C. recorded by the petitioner before learned Judicial Magistrate, whereas in my humble view the fact of the statement recorded under section 164, Cr.P.C. as well as allegation of murder is yet to be proved by the learned Trial Court and as such the minor could not be given to any person, who is not in a prohibitory degree with reference to child (Umme Hani), especially when respondent No.4/ complainant of the said criminal case is the cousin of deceased having no relationship with the petitioner, however, at this stage respondent No.4 has taken the stance that minor is in custody of Mst. Javaria Paternal Aunt of the minor, but in my humble view the Mahommedan Law clearly carved out the situation, which deals with such kind of eventuality where mother is handicapped due to certain disabilities in such like situation or where natural guardian are absent or when none of them are qualified or willing to take the charge of minor, the custody of child devolves on the Court, who should place the infant in care of trustworthy person, however, in these circumstances, the order of preference provided under Personal Law in Hanafi School of thought (referred in Mahommedan Law compiled by Ameer Ali Syed Ch-V, the custody of children Al-Hizanat) is as under:-

> According to the Hanafis, the order runs thus (1) the mother. (2) the mother's mother how remote so ever; (3) then the father's mother how high so ever; (4) then the grandfather's mother how high so ever; (5) full sister; (6) uterine sister; (7) full sister's daughter; (8) uterine sister's daughter; (9) consanguine sister; (10) full maternal aunt; (11) uterine maternal aunt; (12) consanguine maternal aunt; (13) consanguine sister's daughter; (14) brother's daughter; (15) full paternal aunt; (16) uterine paternal aunt; (17) consanguine paternal aunt; (18) mother's maternal aunt of the full blood; (19) mother's uterine maternal aunt; (20) then the consanguine; (21) father's maternal aunt of the full blood; (22) uterine; (23) consanguine; (24) mother's paternal aunt of the full blood; (25) uterine; (26) consanguine; father's father's sisters. The general principle upon which the right is founded, is common to both the schools, viz., that "the custody of an infant belongs by right to the mother's relations, and those connected through her (that is, uterine relations) are preferred to those connected with the child on the father's side only (that is, the consanguine relations)."

> According to the Hanafis, if there be no female relations, or if none of them be legally qualified to exercise the right, it passes (a) to the father; (b) failing him, to the paternal grandfather; (c) to the lineal male ascendant to the third degree, or still higher; (d) to the full brother; (e) to the consanguine brother; (f) to the brother's son' (h) full paternal uncle; (i) to the half-paternal uncle on the father's side, and (j) to the son of the paternal uncle in the same order. Among these relations, also, the nearer always excludes the more remote.

15. It is trite law that in matter pertaining to custody of minors of tender age, the High Court is empowered to issue directions in the nature of habeas corpus under section 491, Cr.P.C., if the custody of the minor was illegally or improperly disturbed. Section 491, Cr.P.C. provides a more efficacious, speedy and appropriate remedy in a case of illegal or improper custody of minor and the High Court can pass an order regarding the temporary custody without prejudice to the rights of the parties for final determination of the dispute pertaining to the custody of the minor by the Guardians and Wards Court. Reliance is placed upon (2004 SCMR 990 titled "Mst. Shahista Naz v. Muhammad Naeem Ahmed and another").

16. While considering the above ratio, the respondents have filed the Guardian petition titled "Raja Muhammad Nasir and others v. Public At Large and others", which is presently pending before Guardian Court (East), Islamabad, the said petition was also filed before learned Guardian Court on 09.05.2018, but this Court shall not go into the disputed question of facts for determination of eligibility of guardianship in terms of Section 17 read with 7 of Guardians and Wards Act, 1890 as it will affect the either party's case before the Guardian Court. However, at this stage, paramount, importance and significance of right of suckling child has to be seen in the light of principle of welfare of minor under Quranic injunctions, Hadiths and the law.

17. There is no disqualification attached to the real mother at this stage except that she is facing the murder trial and as such no Court has yet decided the murder case nor question of welfare of minor, therefore, while considering the law on the subject and circumstances brought before the Court, I am of the considered view that petitioner is eligible person to take the custody of minor Umme Hani, who is presently with Mst. Javaria Paternal Aunt and respondent No. 4, although they have their own four children to feed, therefore, in these peculiar circumstances, I am fortified with the Quranic injunctions, Hadith and law on the subject and while exercising the powers under constitutional mandate provided under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 read with powers under section 491, Cr.P.C. to pass such directions to the respondents, who are holding the custody of Umme Hani in an improper way, even otherwise, Rule 328 of the Pakistan Prisons Code (Jail Manual) imposes the obligation to the State to provide the basic necessities to the minors in terms of mandate of Article 35 of the Constitution of Islamic Republic of Pakistan, 1973, therefore, the order passed by the learned Additional Sessions Judge (East), Islamabad, whereby application under section 491, Cr.P.C. filed by real mother/petitioner was dismissed is hereby set-aside and the petition under section 491, Cr.P.C. is allowed while exercising the extraordinary jurisdiction available to this Court to protect the interest of the minor at this stage. The Guardian Petition filed by the respondent No.4 and his wife is pending before learned Guardian Court, Islamabad, therefore, learned Guardian Judge seized with the matter is directed to decide the same within a period of two (02) months in

accordance with law and as such this Court is persuaded while considering the law as well as tender age of minor Umme Hani, who is suckling baby requires the mother feed as well as love and affection of mother, therefore, instant writ petition is allowed.

18. These are the reasons of short order dated 30.05.2018, which is reproduced as under:-

> "For the reasons to be recorded later on, the instant writ petition is allowed, order dated 14.05.2018, passed by learned Additional Sessions Judge (East), Islamabad is hereby set aside and minor Umme Hani aged about 12 months approximately (daughter) of the petitioner/Mst. Saima Bibi has been handed over to the petitioner and she is allowed to take the minor along with her to Central Jail Adayala Rawalpindi.
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> 2. In view of above, Superintendent Adayala Jail Rawalpindi is directed to register Umme Hani (minor) in the jail record as per law along with petitioner Mst. Saima Bibi (mother), who is under trial prisoner in case FIR No. 63/18, dated 22.02.2018, under section 302/365/34, P.S Lohi Bher, Islamabad and she is allowed to retain the custody of the minor Umme Hani with her.

(Copy Dasti)"

19. Office is directed to send the copy of this judgment to the Superintendent Adyala Jail Rawalpindi as well as to the Judge Guardian Court for necessary action.

SA/74/Isl. Order accordingly.

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