

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
C.P. No.S-836 of 2019

DATE ORDER WITH SIGNATURE(S) OF JUDGE(S)

1. For orders on office objection No.1 & 28 as at 'A'.
2. For hearing of Main case.
3. For hearing of CMA No.3655/2019 (U/s. 151 CPC).

Sardar Muhammad Bux Mahar.....petitioner
Versus

Mst. Saman Muhammad Mahar and another.....Respondents

16.08.2019

Ms. Arjumand Khan, advocate holding brief for Ms. Ismat Mehdi, advocate for the petitioner.

Mr. Muhammad Imtiaz Khan, advocate a/w Respondent Mst. Saman Muhammad Mahar, Master Ghulam Muhammad Khan Mahar, and Baby Anaya Muhammad Mahar.

-.-.-.-

NAZAR AKBAR, J. The Petitioner through the instant petition has challenged the order dated **25.6.2019** passed by the VII-Additional Sessions Judge South, Karachi in Criminal Miscellaneous Application No.545/2019 whereby pending the said Cr. Misc. Application the learned Additional Sessions Judge has been pleased to direct the Petitioner to produce the minors/detenues before the Court on **29.6.2019** at **10:00 a.m** positively, failing which the coercive measures will be taken for production of the minors before the Court.

2. The background of this petition is that Respondent No.1/wife of the Petitioner through Criminal Miscellaneous Application under **Section 491** of the Cr.P.C being mother has prayed for recovery and production of detenues namely Master Ghulam Muhammad Khan Mahar and Baby Anaya Muhammad Mahar as according to her the said minors have been unlawfully detained by the Petitioner. The

Petitioner has contested the Cr. Misc. Application and he has also filed a Guardian and Ward Application No.939/2019 under **Section 5 and 7** of the Guardian and Ward Act, 1890 (hereinafter G&W Act) in the Court of Family Judge (South) Karachi against Respondent No.1/his wife seeking declaration that the welfare of the minors lies in the custody of the minors with the Petitioner. After hearing learned counsel for the parties at some length I have noticed that unfortunately both the parties have filed different applications before the Courts below for a judicial pronouncement about their right of custody of the minors but none of them has filed a proper applications under **Section 25** of the Guardian & Wards Act, 1890 for the said purpose. The parties are parents of two minors namely Master Ghulam Muhammad Khan Mahar and Baby Anaya Muhammad Mahar. The Respondent is mother and she is represented by Mr. Muhammad Imtiaz Khan, advocate, who instead of filing application under **Section 25** of the G&W Act for the custody of the children before the Guardian and Ward Court, has filed a misconceived application under **Section 491 Cr.P.C** before the Court of District Judge (South), Karachi. Same is the position of the Petitioner, father of the minors, his counsel, too, instead of filing an application under relevant provision of G&W Act for claiming exclusive right of custody of the minors/ wards, has filed an application under **Section 5 and 7** of the G&W Act. Unfortunately the book of Guardian & Wards Act, 1890 available in my chamber shows that **Section 5** of the said act has been omitted by **Ordinance, 27 of 1981**. And the provision of **Section 7** of G&W Act are generally invoked by strangers to the minor children for their appointment as guardian to look after the welfare of minors in the event of death of at least one of the natural guardians. **Section 7** is to be read with

Section 8 of the G&W Act, which provides that such an application can be made by “**the person desirous of being**” appointed as guardian of minor. Both the parents are natural guardians and, therefore, they do not require an order of the Court to support his/her right to act as guardian of the minors. The Court under **Section 7** of the G&W Act is not empowered to decide title of guardian about custody of the ward. The respective prayers of the Petitioner and Respondent in their applications before lower Courts reproduced below show that “custody of the minors” is the only issue between the two natural guardians.

Mother’s prayer in Cr. Misc. Application No.545 of 2019 under Section 491 Cr.P.C.	Father’s prayer in Application No.939 of 2019 under Section 5 & 7 of the G&W Act.
<p>a. The Respondent No.1 may be directed to recover and produce the Detenues (Minors) namely Master Ghulam Muhammad Khan Mahar and Baby Anaya Muhammad Mahar son and daughter of Sardar Muhammad Bukhsh Khan Mahar before this Hon’ble Court who are presently confined in House No.38/1, SGM Villa, Khayaban-e-Ameer Khusroo, Phase-VI, DHA, Karachi.</p> <p>b. Handover the custody of the Detenues namely Master Ghulam Muhammad Khan Mahar and Baby Anaya Muhammad Mahar son and daughter of Sardar Muhammad Bukhsh Khan Mahar to the Applicant who is their real mother.</p> <p>c. The respondent No.2 may be directed not to remove the custody of Detenues namely Master Ghulam Muhammad Khan Mahar and Baby Anaya Muhammad Mahar son and daughter of Sardar Muhammad Bukhsh Khan Mahar from the jurisdiction of this Hon’ble Court without permission.</p>	<p>i) Declare that the welfare of the minors/wards lies in their remaining in the custody of the applicant.</p> <p>ii) Declare that the custody of the minors/wards with the Applicant is lawful and the Applicant be permitted to remove the minors from the jurisdiction of this Hon’ble Court as and when so needed / required.</p> <p>iii) Grant any other and / or further relief which this Hon’ble Court deems fit and proper in the circumstances of the case.</p>

3. The perusal of prayers of the parents in their separate misconceived applications reflect that both have common object before them. The unfortunate object is to take exclusive custody of children to the exclusion of the other. It may not be unfortunate for either of the parents but at the end of the day, irrespective of who wins and who loses in Court, it would be unfortunate for the subject of controversy, i.e. the innocent children. In my humble view both the counsel were not pursuing the case of their respective client in accordance with the relevant law applicable in the facts and circumstances of the parties. It was simply a case of an application under **Section 25** of the G&W Act which reads as follows:-

25. Title of guardian to custody of ward. (1) *If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.*

(2) *For the purpose of arresting the ward, the Court may exercise the power conferred on a Magistrate of the first class by section 100 of the*¹⁵*[Code of Criminal Procedure, (1898 Act V of 1898)]*

(3) *The residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship.*

However, none of them has file an application in terms of **Section 25** of the G&W Act for determination of his/her title as guardian to claim custody of the wards as against the other keeping in view the welfare of the wards. Be that as it may, after detailed arguments, it is even conceded by both the learned counsel that they are contesting about custody of the children, and both claim that welfare of children lies in their custody being with them as opposed to the other side.

4. In view of the above facts and the nature of dispute between the parties, since both the parties seem to have chosen a defective forum for redressal of their grievances and/or claim against each other, this petition is disposed of alongwith pending application(s) in the following terms:-

- (i) The Cr. Misc. Petition No.545/2019 filed by the Respondent under **Section 491 Cr.P.C** pending in the Court of VII Additional Sessions Judge, South, Karachi is converted into an application under **Section 25** of the G&W Act. The Court of VII Additional Sessions Judge, South Karachi immediately send the record of Cr.M. A. No.545/2019 to the Court of Family Judge South, Karachi already seized of Guardian & Wards Application No.939/2019 filed by the petitioner.
- (ii) On receiving the record of Cr. Misc. Application No.545/2019, the office will assign it a fresh number to it as Guardian & Ward Application under **Section 25** of G&W Act by the Respondent as the applicant. If needed, an amended title and even its contents may be filed by the Respondent to her Cr.M.A No.545/2019 to conform it to the needs of such an application by looking at **Section 10** of the G&W Act.
- (iii) The counter affidavit filed by the Petitioner together with the contents of his application under **Section 5** and **7** of the G&W Act in the said Court shall be treated as a written reply to the said G&W application.
- (iv) To begin with and to avoid confusion, the office of Guardian and Ward Court should write in red ink on the

title of Cr. Misc. Application as application under **Section 25** of the G&W Act and also write in red ink on the counter affidavit jointly with the application No.939/2019 as “written reply” by the Respondent to the said G&W case.

- (v) If any amended application is filed by the counsel for the Respondent Mst. Saman Muhammad Mahar to her original Misc. Application on or before the first date of hearing in terms of above direction, the Petitioner, on receiving the amended application, if any, shall be allowed to file amended written statement within next 10 days.
- (vi) In view of above directions the G&W Ward case No.939/2019 shall be deemed to have become infructuous since the final order in the G&W case will cover his grievance too.
- (vii) Parties are directed to appear on **29.08.2019** before the Court where G&W Application No.939 of 2019 was pending till its merger into G&W case as written statement in terms of above orders.

5. However, before concluding I must observe that by now there was no order about regulating the custody of the minors/wards in any of the two proceedings, (Cr. Misc. Appln. No.545/2019 and G&W application No.939/2019). However, it is very gratifying that some senses are prevailing on the parties as the record shows that even during the proceedings of Cr. Misc: Application before the Court of VII Additional Sessions Judge (South), Karachi the two wards/minors

were already visiting the mother on regular basis. It is also borne from the record and from the fact that today the mother (Respondent No.1) has brought the children with her to the Court. I believe it was possible only by consent of the father of the minors though reportedly he is out of Pakistan. It is very good sign. Therefore, I am restraining myself from passing any comment on this aspect of the case. I expect and I also pray for a nice amicable settlement of the difference between the parents of the two wards/minors or at least the educated parents shall not settle their scores against each other at the cost of mental, physical and psychological growth of their minors/ wards. It goes without saying that under any circumstances there is no replacement of either of the parents for the minors.

6. In view of the above the instant petition is disposed of alongwith listed application(s) in the above terms and the trial Court is directed to ensure that case should be disposed of within six months from **29.8.2019**.

JUDGE

SM
Ayaz Gul