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JUDGMENT SHEET

LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Writ Petition No.244677/2018

Imtiaz Hussain **Versus** District Judge etc.

J U D G M E N T

Date of Hearing:	13.11.2023
Petitioner by:	Mr. Muhammad Adnan Chaudhry, Advocate. Ms. Zubaida Faryal, Advocate alongwith the petitioner and the minor Nalaain Abbas.
Respondent No.3 by:	Mr. Muhammad Ihsan Gondal, Advocate alongwith the respondent and the minor, Tooba Zahra.

Anwaar Hussain, J. The petitioner, who is real father of Tooba Zahra (“**the minor daughter**”), has called in question the legality and propriety of order dated 06.12.2017 passed by the Family Court, Bhakkar as also the judgment dated 26.09.2018 passed by the District Judge, Bhakkar. Through the former order, the guardian petition filed by the petitioner against respondent No.3 (“**the respondent**”) seeking custody of the minor daughter, was dismissed whereas through the latter judgment, the appeal preferred against the order of the Family Court met with the same fate. Admittedly, no visitation schedule was chalked out by the Courts below.

2. Learned counsel for the petitioner submits that findings of both the Courts below are against the law and facts of the case, *inter alia*, for the reason that the minor daughter is residing with the respondent who is her real mother, however, the respondent has contracted second marriage with a stranger, therefore, she has no right under the law to retain the custody of the minor daughter. Places reliance on cases

reported as Mst. Bakhat Bibi v. Bahadur Ali and others (2015 CLC 1260 Lahore) and Naghma Rani v. Additional District Judge, Gujrat and 3 others (2018 CLC 767 Lahore) in support of his contentions. Adds that the petitioner has not contracted second marriage and is also raising the minor son, namely, Nalaain Abbas, born from the marriage of the petitioner with the respondent. Further contends that at the time of dissolution of marriage, both the parties agreed that the minor son will remain with the father and the minor daughter will remain with the mother till she contracts second marriage and since the respondent has re-married, therefore, she is obligated to handover the custody of the minor daughter to the petitioner. Admittedly, another minor son of the parties who remained with the respondent has passed away during pendency of the proceedings.

3. Conversely, learned counsel for the respondent has supported the impugned decisions of the Courts below. Contends that the petitioner has initiated the guardian proceedings just to avoid the payment of maintenance allowance to the minor daughter, in respect of which decree passed by the Family Court is holding the field. Adds that the petitioner has not paid a single penny to the minor daughter, towards her maintenance allowance, which shows irresponsible attitude of the petitioner *qua* welfare of the said minor. Places reliance on cases reported as Shagufta Bano v. Musarrat Hanif etc. (1982 CLC 1821 Lahore), Mst. Hameed Mai v. Irshad Hussain (PLD 2002 SC 267) and Mst. Beena v. Raja Muhammad and others (PLD 2020 SC 508) in support of his contentions.

4. Arguments heard. Record perused.

5. Learned counsel for the petitioner has vehemently built up his entire case on the basis of the agreement which is alleged to have been violated on account of second marriage by the respondent. Argument

is misconceived inasmuch as the children cannot be treated as commodities and their welfare cannot be compromised by their parents by executing any agreement. Suffice to observe that such agreements are against public policy and hence, not enforceable under the law. This Court is of the view that placing a Sword of Damocles of losing the custody of the child upon remarriage on the respondent is not only illegal but also raises a logical question as why such a condition was not placed on the petitioner himself, disentitling him from keeping the custody of the minor son and seeking the custody of the minor daughter. In this regard, suffice to observe that it is well-settled principle of law that re-marriage of the mother is not a stand-alone ground for depriving her from keeping custody of her minor children. Case reported as Raja Muhammad Owais v. Nazia Jabeen and others (2022 SCMR 2123) is referred. In view of the judgment of Supreme Court in case of Raja Muhammad Owais supra, reliance placed upon the cases cited at bar by learned counsel for the petitioner is of no help to the petitioner, as also being distinguishable on account of facts.

6. Having observed so, it is imperative to mention that in order to gather the psychological and mental state of the minors on account of their separation from their parents as well as *inter se* separation, being the siblings, I have interviewed the minors in presence of their parents, in my Chambers, after hearing arguments of their respective counsel, in the open Court. The minor daughter whose custody is the bone of contention between the parties, at present, appears to be well-groomed and brought up by the respondent. Admittedly, the respondent has contracted second marriage and has a daughter from the second wedlock. The said daughter of the respondent was also present today who appears to have a conducive bonding with the minor daughter. As opposed to the minor son, the minor daughter of

the parties was more interactive and expressive while showing her playful interaction with her step sister. The respondent has also produced academic record of the minor daughter, in original, which has been examined in presence of the petitioner and returned while retaining copies thereof. The said record as also the bonding of the minor daughter with her step sister indicates that the minor daughter is living and being raised by the respondent in a conducive environment and second marriage of the respondent had no adverse effects on the minor daughter.

7. There is yet another angle from which this case can be examined inasmuch as during the course of arguments as also during Chambers' hearing of the parties and the minors, the petitioner did his best to conceal factum of his own second marriage by imparting incorrect instructions to his learned counsel, in open Court, as also by tutoring the minor son to lie about the petitioner's re-marriage and having a child from his second wedlock. Efforts to conceal his own second marriage in itself adversely reflects upon the conduct of the petitioner, which disentitles him from the custody of the minor daughter. Once the petitioner realized that he cannot hide the truth from the Court any more, the petitioner tendered apology and stated that due to the fear that he will be denied custody of the minor daughter, he lied before the Court(s). His conduct is unbecoming of a responsible parent as he tutored the minor son to lie, which act is deprecated and cannot be countenanced.

8. Moreover, it appears that the personal ego of the petitioner as also to avoid his obligation to maintain the minor daughter has pushed the petitioner to approach the Court by filing guardian petition inasmuch as there is no evidence available on record that he has ever paid any maintenance allowance to the minor daughter, pursuant to the decree of the Court passed on account of maintenance allowance.

Hence, the petitioner is not entitled to any relief *qua* custody of the minor daughter on this ground as well.

9. Perusal of record reveals that there is no visitation schedule chalked out by the Courts below to cater the need of developing a strong parental bonding of the minor daughter with her non-custodial parent, i.e., the petitioner and *vice versa* for the respondent to meet the minor son. Moreover, while exercising *parens patriae* jurisdiction, this Court is perturbed that the parties have treated their children as commodities/chattels while the custodial and non-custodial parents locked their horns to get the custody of the minor daughter before the Courts even at the cost of well-being and welfare of the minor daughter, the agreement executed by the petitioner and the respondent clearly evinces that they separated the minor siblings from each other as if it were only the mother and father respectively who had some rights of custody and/or control over their minor children and the minors have no rights to enjoy each other's company. In the instant case, the minor siblings, *inter se*, have been separated in the most inhumane manner. This Court feels that the right of minor siblings to develop bond of love and ownness among themselves by remaining united and grow up in the companionship has been ignored. While parents may submerge and get themselves subsumed in their lives respectively, it is the minor siblings who have suffered the most by lack of mutual interaction, in the most innocent manner, during the most innocent period of their lives, the playful memories whereof would have been indelibly etched into their past memories to be relished in future. This Court is of the opinion that the siblings are required to be united and brought up together by one parent giving him custody to avoid causing additional trauma of facing separation from a sibling, which is not possible in the instant case inasmuch as the respondent has not made any effort to get the custody of the minor

son. While both the parents separated the minor siblings as if the same were commodities and chattels, they never bothered about the toll it could have taken on the minor siblings on account of their *inter se* separation. At this juncture, this Court considers it obligatory to observe that the learned Judge of the Family Court, while deciding the guardian petition, must in addition to and/or apart from other factors, also evaluate the adverse effects of separating the siblings from each other.

10. Even though the respondent has neither made any effort to obtain custody of the minor son residing with the petitioner nor there is any visitation schedule for the minor siblings to meet each other, this Court cannot remain oblivious to the rights of the minor siblings to meet each other and/or remain united. Strong *inter se* bonding of the siblings and love is as important to the wellbeing and welfare of the minors as parental bonding of a non-custodial parent with his/her minor children. Therefore, any visitation schedule must gear towards the welfare of the minor siblings separated by their parents and this Court in exercise of its parental jurisdiction feels obligated to ensure that visitation schedule is chalked out for the meeting of the minor siblings with each other. This Court in reported judgment rendered in **Writ Petition No.17366/2021** titled “Shahid Wazeer v. Additional District Judge, etc.” (2022 LHC 7798) has already observed that only such visitation schedule can be considered conducive to the welfare of a minor, which includes an overnight stay of a minor with non-custodial parent. Therefore, the findings of the Appellate Court below are upheld to the extent of dismissal of appeal of the petitioner, however, following visitation schedule is chalked out:

- i. The minor daughter shall be handed over to the petitioner twice in a month on first and third Saturday of every month who shall pick the minor daughter at 5.00 p.m. from the house of the

respondent and drop her back at the same time on the next day, i.e. Sunday at the same time.

- ii. On 2nd day of each Eid i.e., Eid ul Fitar and Eid ul Azha at 10:00 a.m., the petitioner shall pick the minor daughter from the house of the respondent and will be responsible for her safe dropping at the house of respondent on the next day at 4:00 p.m.
- iii. In winter holidays, the minor daughter will spend first four holidays with the petitioner. The minor daughter shall be handed over on first day of winter vacations at 10:00 a.m. to the petitioner and he shall return her to the respondent in evening at 5:00 p.m. on the fourth day. The petitioner will be responsible for safe pick and drop of the minor daughter.
- iv. In summer vacations, the minor daughter shall spend first month of summer vacations with the petitioner. The petitioner shall pick the minor daughter at 10:00 a.m. on the second day of summer vacations and drop her on 30th day to the respondent's house at 11:00 a.m.
- v. On birthday of the minor daughter, she shall be handed over to the petitioner at 2:00 pm and he shall return the minor daughter to the respondent at 6:00 pm on the same day.

11. The petitioner is directed to submit third party local surety bond in the sum of Rs.500,000/- to the satisfaction of the Family Court concerned, prior to receiving the minor daughter from the respondent for the first overnight stay.

12. Before parting with, it would be appropriate to observe about the schedule of meeting of the respondent with the minor son who is in custody of the petitioner. The record depicts, as also admitted by the respondent herself, that she neither sought custody of the minor son nor made any effort to have a visitation schedule by approaching any forum including the Courts below, therefore, this Court restrains itself from chalking out any detailed visitation schedule in this regard. However, if so desired and advised, the respondent may approach the Family Court concerned, by filing an appropriate application seeking custody of the minor son and/or a visitation schedule enabling her to meet with the minor son. If done so, the Family Court concerned shall proceed with the matter, in accordance with law.

13. This writ petition is **disposed of** in above terms.

(ANWAAR HUSSAIN)
Judge

Approved for reporting.

Judge

Akram