

JUDGMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD. **JUDICIAL DEPARTMENT.**

W.P. No. 3308/2019.

Prince Salman Ali Khan, etc.

Versus

Mst. Hina Durrani, etc.

Petitioners by: Mr. Habib Ahmed Bhatti, Advocate.

Respondent No.1 by: Mr. Adnan Iqbal, Advocate.

Date of Decision: 17.02.2020.

MOHSIN AKHTAR KAYANI, J: Through this Writ Petition, the petitioners have assailed the order dated 16.07.2019, passed by learned Additional District Judge (West), Islamabad, whereby appeal filed by petitioner has been dismissed.

2. Brief facts referred in the instant case are that respondent Hina Durrani married to petitioner No.1 and during subsistence of their marriage petitioners No.2 & 3 were born. Petitioner No.2 is approximately 13-1/2 years of age whereas petitioner No.3 is 10-1/2 years of age and parties are litigating against each other, however, in the previous round of proceedings in W.P No.3355/2017 titled **Mst. Hina Durrani Vs. Prince Salman Ali Khan, etc.** filed for recovery of minors, during the proceedings of said petition a compromise was effected between the parties vide agreement dated 12.10.2017 referred as Mark 'A' and parties were bound to comply with the terms of compromise agreement and order dated 12.10.2017 was passed. The agreement contain the details of terms of visitation, however, custody remained with father/petitioner No.1. The respondent mother again filed criminal original No.386/2018, which was disposed of vide order dated 22.11.2018, whereby respondent was directed to approach the Guardian Court for redressal of her grievance for enforcement of

visitation schedule if so advised. Respondent has filed application before the learned Family/Guardian Court for enforcement/implementation of terms of agreement dated 12.10.2017, which was contested by petitioner No.1 and learned Guardian Court has adjudicated upon the matter vide order dated 29.05.2019, feeling aggrieved with the said order petitioner has filed appeal before the learned Additional District Judge (West), Islamabad, which was decided vide judgment dated 16.07.2019 with the observation that learned Guardian Court has to adjudicate upon the matter accordingly. Hence, this writ petition.

3. Learned counsel for the petitioner contends that learned Appellate Court as well as learned trial Court without hearing the case on merit by determining the question of welfare of minors is not empowered to adjudicate upon the question on the basis of compromise dated 10.12.2017 as facts recorded in the compromise as well as in order of this Court have been changed and respondent No.1 has entered into second marriage with a stranger and it is not possible for petitioner No.1 to send her real daughter to respondent No.1 for the purpose of visitation in the house of stranger and this question requires proper adjudication; that the Executing Court as well as Appellate Court have not considered the legal question despite the fact that minors are not willing to visit respondent/mother under the changed circumstances and they have refused to visit, even they have recorded their statements in this regard.

4. Conversely, learned counsel for respondent No.1 contends that whether respondent No.1 has entered into second marriage or not but it is right of real mother to visit the minors as per compromise agreement and learned Guardian Court shall comply with the said terms accordingly without any objection; that learned Guardian Judge is supposed to hand over the custody of minors by all means and if petitioner No.1 considers that it is not in the welfare of the minors, he may approach the Guardian Court and can get changed the terms of compromise settled in the agreement if a decree would be passed in his favour.

5. Arguments heard, record perused.

6. Perusal of record reveals that respondent No.1 filed an application before the Executing Court for implementation of decision of this Court dated 10.12.2017, passed on the basis of compromise in W.P No.3355/2017. Learned Executing Court passed the order accordingly on 29.05.2019 for the implementation of visitation schedule but petitioner No.1 father of the minors has challenged the same in appeal, which was dismissed by the Appellate Court. The main ground raised by petitioner No.1 before the learned Executing Court is the change of circumstances which require due appreciation whereby respondent No.1 has entered into second marriage with a stranger and in these circumstances minors are not comfortable for visitation in company of a stranger.

7. I have gone through the record, whereby respondent No.1 mother has filed a petition before this Court through W.P No.3355/2017 for recovery and production of the minors which were removed by petitioner No.1 father. In compliance of order of this Court petitioner No.1 put appearance and submitted a settlement/compromise deed dated 12.10.2017 to regulate the visitation of minors, this Court on the joint statement of both the parties disposed of the writ petition vide order dated 12.10.2017, whereby parties were directed to comply with the terms of compromise agreement, however, respondent No.1 again approached this Court through Crl. Original No.386/2018 for non-compliance of visitation schedule which was disposed of vide order dated 22.11.2018, whereby respondent No.1 approached the learned Guardian Court for implementation of order of this Court as a result whereof learned Guardian Court passed the order dated 29.05.2019 in the following manner:-

Under the law embodied in Guardian and Wards Act the focus point always is welfare of minors. While keeping in view the facts and circumstances portrayed hereinabove I consider the visitation of minors with the petitioner in their welfare as well, therefore, the parties are directed to strictly adhere to the terms of compromise reached between them on 12.10.2017 which has been reproduced in para No. 10 of this

order. The learned counsel also requested that since tomorrow is birthday of minor Aamaya Aatiqah Khan therefore the respondent may also be directed to handover minor to the petitioner between 07:30 p.m. till 08:30 p.m. The learned counsel for respondent did not object over this request rather conceded and committed that his client would handover minor for one hour during 07:30 p.m. to 08:30 p.m. to the petitioner, hence respondent is directed to handover custody of minor daughter to the petitioner from 07:30 p.m. to 08:30 p.m. on 30.05.2019.

The learned counsel for petitioner further requested that since summer vacations are due shortly therefore the respondent may be directed to handover custody of the minors to petitioner during first spell of the summer vacations. However, learned counsel for respondent stated that the respondent would like to retain custody of minors during first spell because he has already chalked out a plan for recreation. On request of learned counsel for respondent, he is allowed to retain the custody during first spell of summer vacations but he shall be bound to handover custody of minors to the petitioner during second spell of summer vacations without fail.

However, the Appellate Court has maintained the above mentioned order mainly on the ground that petitioner No.1 has assailed the order of this Court dated 12.10.2017, passed in W. P No.3355/2017 in ICA No.529/2018, whereby it has specifically been held that **"respondent's remarriage does not render the said agreement a dead letter"**.

8. Keeping in view the above position and the findings of the Courts below there is nothing left in favour of petitioner who is delaying the matter of visitation on one pretext or the other, therefore, question of second marriage does not come in way of visitation as respondent mother is not seeking the custody rather she is seeking only enforcement of visitation schedule agreed by petitioner No.1 himself in the compromise agreement. However, if petitioner No.1 thinks that second marriage of respondent No.1 is against the welfare of minor he may approach the learned Guardian Court to prove contrary view and get judgment in his favour, whereby viries of compromise agreement should be challenged by the judgment of Guardian Court, however, till then compromise

deed is considered to be final and no exception could be taken in this regard. The second important question raised in this case is as to whether minors could be compelled for visitation schedule as both the minors are 13-1/2 & 10-1/2 years of age and can fully understand the nature of dispute of their parents and as such Executing Court is not in position to handover minors by compelling them through orders for visitation to their mother, therefore, it is appropriate that terms of agreement should be enforced in letter & spirit by calling the minors on each and every occasion as per agreed terms before the Guardian Court and statements of minors should be recorded on each and every visitation schedule as to whether minors intend to visit their mother/respondent No.1 or not, such statement could only be recorded when both the parties (father & mother of minors) are present before the Court so that compromise agreement could be implemented in a proper manner, however, if the minors will record their stance for not visiting their mother they should not be compelled by the Guardian Court. In such situation respondent No.1/mother be given ample opportunity to sit with the minors separately in the visitation room for at-least two (02) hours and if she will be able to convince the minors for visitation, they be allowed to proceed with the visitation schedule accordingly.

9. For what has been discussed, instant writ petition stands disposed of in above terms.

(MOHSIN AKHTAR KAYANI)
JUDGE

Zahid