JUDGMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD. JUDICIAL DEPARTMENT.

W.P. No. 4044/2018.

Arfa Nadeem and another

Versus

Subass Ahmed Chohan, etc.

Petitioners by: Rana Abdul Latif Khan, Advocate.

Respondent No.1 by: Ms. Shabana Murad Shah, Advocate.

Date of Decision: 14.02.2019.

MOHSIN AKHTAR KAYANI, J: Through this writ petition, the petitioners have assailed the judgment dated 02.03.2018, passed by learned Additional District Judge (West), Islamabad, whereby appeal filed by respondent No.1 was allowed against Guardian Court's order and matter was remanded to the trial Court.

2. Learned counsel for the petitioners contends that respondent No.1 filed a Guardian Petition under Guardians & Wards Act, 1890, which was dismissed by learned Guardian Court vide order dated 06.11.2017 while considering the background of earlier petition for custody in terms of Section 25 of Guardians & Wards Act, 1890 which was dismissed by the Guardian Court at Jhang and order was upheld up to the Appellate level and as such respondent No.1 has no right to re-agitate the matter before the Guardian Court at Islamabad; that learned Appellate Court without considering the fact and law has set aside the order and remanded the same while observing that petitioner No.1 Arfa Nadeem has contracted second marriage and under these change circumstances second guardian application is maintainable; that view taken by learned Appellate Court is contrary to law as petitioner No.1 has not entered into any such relationship

and as such the facts were verbally submitted before the Appellate Court without any basis and question of custody has already been settled; that petitioners are settled in United Kingdom, even before the filing of guardian application and as such Guardian Court, Islamabad has not territorial jurisdiction to entertain the matter under the law.

- 3. Conversely, learned counsel for respondent No.1 contends that petitioner No.2 Almas (daughter, aged about 5-1/2 years) is not allowed to remain in custody of petitioner No.1 as mother has entered into second marriage and this fact could be verified only through evidence and as such the welfare of minor could be adjudicated only after recording of evidence on this new cause of action; that Appellate Court has rightly remanded the matter while considering each and every aspect of the case and no prejudice has been caused to the petitioner.
- 4. Arguments heard, record perused.
- 5. Perusal of record reveals that petitioner No.1 and respondent No.1 were married to each other on 28.02.2009 at Jhang and after marriage they started living in London, during the subsistence of marriage, Almas/petitioner No.2 (daughter) was born on 15.01.2012 in U.K and later on dispute arose between the parties and different complaints have been filed with the London Police department and petitioner No.1 has filed a petition for separation. As per record, petitioner came to Pakistan and started living at Jhang when respondent No.1 has filed an application for custody of the minor daughter Almas, however, the said custody application was dismissed due to lack of evidence on the part of respondent No.1/father vide order dated 22.10.2015, as such no adjudication took place on merit. As such petitioner and minor are living in U.K and they only visit Pakistan in vacations.
- 6. Respondent No.1 filed a custody application in terms of Section 25 of the Guardians & Wards Act, 1890 for the custody of Almas/petitioner No.2 before

the Guardian Court at Islamabad on the basis of changed circumstances with the contention that petitioner No.1 has got decree for dissolution of marriage on the basis of khulla from the Court of Family Judge (West), Islamabad and petitioner No.1 has entered into second marriage whereas minor/petitioner No.2 has been left at the mercy of irrelevant person who is stranger (نامحرم) to the minor daughter and as such he is entitled for custody. The application was contested by the present petitioner before the trial Court at Islamabad, the same was dismissed vide judgment dated 06.11.2017, however, respondent No.1 feeling aggrieved with the said judgment filed the appeal which was allowed by learned Additional District Judge (West), Islamabad vide judgment & decree dated 02.03.2018 with the following observations:-

Appellant contended that at the time of filing of the first petition, the marriage of the parties was intact while at the time of filing the instant petition, the divorce was affected between the parties and the mother had contracted second marriage which is again a ground for reconsideration since it has change the complexion of the case. Therefore, keeping in view the welfare of the minor which is a paramount consideration, the same can be changed subsequently for good reason, therefore, even if the order of the Guardian Judge Jhang, is considered to be an order of competent jurisdiction passed after full deliberation it can be reviewed/changed due to some material change has taken place.

Therefore, keeping in view the aforesaid reasons, the appeal in hand is allowed and the impugned order dated 06.11.2017 is set aside and guardian petition of the appellant is restored in its original number. No order as to costs. Parties are directed to appear before the learned Guardian Court on 12.03.2018. Copy of this judgment be sent to the learned trial Court forthwith. File be consigned to record room after its due completion /compilation.

7. Learned counsel for the petitioner has been confronted regarding the settlement of issue on the basis of evidence or disputed allegations referred by respondent No.1 in his application U/S 25 of the Guardians & Wards Act, 1890, whereby petitioner's counsel contends that no evidence has been recorded and the allegations could only be justified after recording of evidence, however, at

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this stage learned counsel for the petitioner has raised question of territorial jurisdiction mainly on the ground that minor petitioner No.2 is residing in U.K and as such the Guardian Court, Islamabad lacks territorial jurisdiction.

- 8. I have gone through the entire record with the able assistance of both the counsel, however, from the perusal of record, it transpires that the question of ordinary place of residence of minor has not been determined from any record appended with this petition nor even the same has been reflected in any order of the Courts below. The grounds argued by the petitioner's side could only be resolved if the matter is adjudicated on merit while considering the question of territorial jurisdiction as well as law by the learned Guardian Court.
- 9. In view of above situation order of remand of case, passed by learned Additional District Judge (West), Islamabad is in accordance with law as all these issues raised by both the parties are based upon factual disputes which could only be resolved after recording of evidence, however, question of territorial jurisdiction is of prime importance which should be adjudicated at the first instance, therefore, instant writ petition is misconceived and the same is hereby dismissed.
- 10. Before parting with this judgment, learned Guardian Judge seized with the matter is directed to decide the fate of pending application within period of 04 months under intimation to this Court, however, Guardian Court shall decide the question of territorial jurisdiction on the basis of evidence at the first instance and if it has been proved that the minor is resident of Pakistan within territorial jurisdiction of this Court, only then the Guardian Court shall proceed further on merit for determination of welfare of minor.

(MOHSÍN AKHTAR KAYANI) JUDGE