

JUDGMENT SHEET
ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT

W.P. No.4025/2021

Mst. Rozina & 02 others

vs.

Muhammad Zubair Paracha & 03 others

Petitioners by: Mr. Ali Nawaz Kharral and Malik Qamar Abbas,
Advocates.

Respondent No.1 by: Rao Abdul Rahim and Ch. Shahid Mehmood,
Advocates.

Date of Hearing: 16.12.2021.

MOHSIN AKHTAR KAYANI, J: Through this writ petition, the petitioners have called in question order of the learned Additional District Judge (West), Islamabad, dated 08.10.2021, whereby appeal filed by the petitioners against order of the learned Executing Court (West), Islamabad, dated 12.07.2021, has been dismissed.

2. Succinctly, Mst. Rozina (petitioner No.1) and Muhammad Zubair Paracha (respondent No.1) were married and from the said wedlock two children namely Rehan Paracha (10 years) and Irfa (07 years) were born, as such, after divorce, both minors started living with their mother (petitioner No.1) in Mansehra, whereafter the father (respondent No.1) allegedly snatched the minors from the mother and obtained guardian certificate from learned Senior Civil Judge, Rawalpindi vide order dated 21.10.2017. Both the parents remained locked in diverse litigation, including criminal and civil, in order to get the custody of minors, as such, the learned Executing Court vide order dated 12.07.2021 removed the mother as guardian of the minors (petitioners No.2 & 3), against which the mother preferred an appeal, which was dismissed vide impugned order dated 08.10.2021. Hence, instant writ petition.

3. Learned counsel for petitioner contends that the learned Executing Court acted beyond his jurisdiction in directing petitioner No.1 to hand over the custody of minors to the father, who is otherwise the judgment-debtor despite the fact he neither filed any guardianship petition for custody of the minors nor prayed for handing over the custody of minors in his favour; that both the Courts below have failed to note that respondent No.1 has not paid any sum of money as maintenance, therefore, such conduct disentitles him for the custody of minors as welfare of the minors is of paramount consideration; that both the Courts below have not appreciated each and every fact of the case in its true perspective, rather passed the impugned orders in haste.

4. Conversely, learned counsel for respondent No.1 opposing the instant writ petition stressed that petitioner No.1 has been playing hide and seek with the Hon'ble Courts causing tremendous loss to the State's machinery; that petitioner No.1 is blowing hot and cold in the same breath as she has been changing her stance before the Courts and causing frustration to Hon'ble Courts and respondent No.1 for locking them in unwarranted litigation; that petitioner No.1 has been given sufficient number of opportunities to improve her conduct before the Court, but her conduct clearly manifested defiance of the Court's order constraining the learned Executing Court to pass the impugned order, which is well within the four corners of law.

5. Arguments heard, record perused.

6. Perusal of record reveals that petitioner No.1 Rozina alongwith her two minors have assailed the orders of learned Guardian Court, dated 12.07.2021 and judgment dated 08.10.2021, passed by learned Additional District Judge (West), Islamabad, whereby order of the Guardian Judge has been maintained in which petitioner's status as of being guardian has been removed in terms of Section 39(e) of the Guardian & Wards Act, 1890, who was also directed to handover the custody of minors to father Muhammad Zubair Paracha. The minute scanning of

record reflects that the initial impugned order was passed by learned Guardian Judge when petitioner/mother has refused to implement the visitation schedule settled in the final judgment of Guardian Court vide judgment & decree dated 27.07.2018 and up-held by the first Appellate Court, whereby it was declared that custody of two minors shall remain with the mother and she would comply with the visitation schedule.

7. I have confronted the petitioner who is present before the court as to why she has not complied with the orders of court, whereby she states that she has apprehension that respondent might remove the minors as he has done in the previous proceedings as a result of the same petitioner/mother was without the minor for two long years when Hon'ble Bench-I of this Court in W.P No.1859/2019, got executed the orders and minors were recovered from the possession of respondent. I have gone through that record, whereby it is admitted position that minors remained in illegal custody of father after passing of the judgment & decree infavour of petitioner/mother but this aspect does not entitle the petitioner to refuse the order of Guardian Court as it is not the mandate of law rather it is the Guardian Court, who has to get implemented the orders in letter & sprit and petitioner should have to trust upon the Guardian Court at the first instance.

8. Now going to the requirements of Section 39(e) of the Guardian & Wards Act, 1890, it is admitted position of law that Guardian Court on the basis of application filed by any person interested, or on its own motion, remove a guardian appointed or declared by the Court, on certain conditionality including but not limited to "for contumacious disregard of any provision of this Act or of any order of the Court". Both the parties have been confronted regarding any specific order of Guardian Court whereby petitioner/mother has separately been declared as Guardian through judgment of the court, both the parties have conceded that no specific order has been passed in this regard rather

petitioner/mother has initially filed the application for custody of minors, which was allowed vide judgment & decree dated 27.07.2018 in the following manner:-

In view of my findings hereinabove, the instant guardian and custody petition is hereby accepted. The respondent is directed to hand over the permanent custody of minors namely Rehan Paracha and Ifra Paracha to the petitioner/mother within the period of fifteen days. Applying this principal following visitation schedule is fixed:-

- a. The respondent/father shall have the right to meet the minors on every Saturday & Sunday and the minors will be handed over to the respondent for the period of two days from Saturday morning till Sunday evening. It will be the responsibility of the respondent to pick the minors from the house of the petitioner on the Saturday morning 10:00 a.m. to 7:00 p.m. and drop them back at the house of the petitioner in the Sunday evening.*
- b. In addition to weekly visitation schedule, respondent/father has also been allowed visitation rights on specific events to the effect that respondent/father shall have the right to meet with the minors on second day of Eid-ul-Fitar and Eid-ul-Azha, from morning to evening at the house of respondent/father, subject to furnishing surety bond of Rs.5,00,000/- for safe return of minors.*
- c. Moreover, during visitation, the respondent/father shall not remove the minor beyond territorial limits of Islamabad. Petitioner/mother shall be bound to intimate the court regarding any change in her address; otherwise it shall be deemed as an act contrary to the welfare of the minor.*

9. The above referred operative part of judgment clearly establishes that petitioner/mother was not appointed as Guardian for custody of minors, who are now in custody of petitioner/mother, therefore, there is no question left for the executing court to exercise its powers U/S 39(e) of the Guardian and Wards Act, 1890, even otherwise, the petitioner is natural guardian and such status could not be recalled in any circumstances. Learned courts below have wrongly appreciated the legal position due to defiance of courts' orders by the petitioner/mother though there are other remedies available to the executing

court for implementation of its orders in terms of Section 43 Chapter IV of the Guardian and Wards Act, 1890, which deals with “orders for regulating conduct of proceedings of guardians, and enforcement of those orders”, whereby specific powers have been extended to the Guardian Judge to exercise its authority in the same manner as an injunction granted under Orders XXXIX Rules 1 & 2 as well as Sub-rule (3) of Rule 2 of the Civil Procedure Code. Similarly, Section 45 also provides the penalty for defiance of Guardian court’s order, if a person having custody of minor fail to produce him or cause him to be produced, could be sent to civil prison until he undertakes to produce the minors or cause him to be produced or compelled to his return or to delivering the statement or some other functions, therefore, the court is fully equipped to issue warrants of arrest to detain such person who has committed disobedience by sending him to civil prison. By virtue of above discussion, this court is convinced that the impugned orders of both the courts below are not sustainable in the eyes of law and same are set-aside, instant petition is allowed.

10. At this stage, petitioner/mother undertakes to comply with the judgment & decree dated 27.07.2018 including the visitation order in letter & spirit, which has attained finality upto this court. However, in case the petitioner/mother refuses to comply with the terms of visitation order or respondent/father as the case may be, the Guardian Court/Execution Court can resort to initiation of action against the delinquent party for disobedience of the court’s order in terms of Sections 43, 44 & 45 of the Guardian and Wards Act, 1890.

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open court on _____

JUDGE

Zahid.