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Judgment Sheet

IN THE LAHORE HIGH COURT, LAHORE

JUDICIAL DEPARTMENT

Writ Petition No.81201 of 2022

Mst. Sadaf Rasheed. Versus **Senior Civil Judge, etc.**

J U D G M E N T

Date of Hearing	25.01.2023.
For the Petitioner	Mr. Zahoor Nasir Tagga, Advocate.
For Respondent No.2	Mr. A.D. Shahid, Advocate.

Raheel Kamran J:- The petitioner has assailed the order dated 06.02.2021 passed by the learned Senior Civil Judge (Family Division), Khanewal whereby application of the petitioner for setting aside ex-parte judgment and decree dated 12.10.2019 was dismissed.

2. Learned counsel for the petitioner contends that the impugned order has been passed erroneously in disregard of the fact that respondent No.2-Ghulam Abbas filed a petition for custody of minor on 23.10.2017 before the learned Guardian Court at Shorkot disclosing address of the petitioner as Tehsil Shorkot District Jhang and on account of non-prosecution, the same was consigned to record with permission to seek revival thereof, as manifest from the order dated 08.05.2018. He adds that another application, concealing the earlier one, was filed before the Guardian Court at Khanewal on 03.10.2018 while showing the petitioner to be resident of District Khanewal. He maintains that second application on the same subject was not maintainable. He emphasizes that in any event the *ex-parte* judgment and decree obtained by respondent No.2 was result of fraud, misrepresentation and concealment of facts and the petitioner had no knowledge of proceedings as summons were never personally served

upon her, therefore, the same was liable to be set aside. He further contends that in his application for the execution of decree, respondent No.2 has once again mentioned address of the petitioner to be resident of Shorkot. Claims that after abandoning the child at the age of four months, respondent No.2 took little interest in the welfare of the minor and never paid a single rupee towards the same until he moved an application for custody of the minor when she attained the age of six years.

3. Conversely, learned counsel for respondent No.2 supports the impugned order for reasons stated therein. He maintains that previously filed application for custody of minor was dismissed for non-prosecution, therefore, there was no bar against institution of fresh one by the said respondent. He adds that the petitioner got married with one Hassan Iqbal on 04.08.2018 whereafter she moved to reside with in-laws in Khanewal, therefore, in the second application for custody of minor address of the petitioner was stated to be one mentioned on Marriage Registration Certificate of the petitioner. He further contends that in the application for execution of the decree, passed by the Guardian Court, Khanewal address of the petitioner was specified to be that of Shorkot for the reason that she entered into third marriage with one Abdur Rauf on 03.02.2019 who has been residing in village Haveli Bahadur Shah Sharqi, Tehsil Shorkot and her residential address was changed once again. He emphasized that the *ex-parte* judgment and decree dated 12.10.2019 was passed in accordance with law after service of the process, therefore, application of the petitioner for setting aside the same has been rightly rejected.

4. Arguments heard. Record perused.

5. The matter in hand relates to custody of the minor namely Tahira Mai, the decision whereupon, as far as practicable, must be made on merit on the basis of her welfare being paramount consideration in law. Reliance in this regard is placed on judgment of the Apex Court in the cases of Sardar Hussain and others v. Mst. Parveen Umer and others

(PLD 2004 SC 357), Mst. Razia Bibi v. Riaz Ahmad and another (2004 SCMR 821) and Mirajam Aberras Lehdeaho v. SHO, Police Station Chung, Lahore and others (2018 SCMR 427). In the absence of proper service and adequate opportunity of hearing granted to both sides, any determination of welfare of the minor cannot be termed as lawful and satisfying the requirement of fundamental right to fair trial as guaranteed under Article 10A of the Constitution of Islamic Republic of Pakistan, 1973. Reliance in this regard is placed on judgment of this Court in the case of Yaqoob Ali through LRs and others v. Muhammad Ayub and others (PLD 2021 Lahore 678).

6. When it was claimed that the petitioner was not personally served nor she had any knowledge of the proceedings qua custody of the minor at Khanewal, the primary controversy for the Court in the petitioner's application for setting aside the *ex-parte* decree dated 12.10.2019 was whether the judgment debtor was served in accordance with law before such decree was passed against her. Without framing issues and recording evidence, the Court below has decided the factual controversy qua residential address of the petitioner while relying on photocopy of the petitioner's alleged second marriage in Khanewal district, produced by the counsel for respondent No.2. The Court below has also presumed petitioner's knowledge of proceedings and service of summons on the basis that notice alongwith registered envelope AD were sent on her Khanewal address and that notice was also published in the newspaper daily "Dunya", Multan.

7. Undeniably, neither the process server was produced as a witness in the instant case to establish personal service of summons under Section 8 of the Family Courts Act, 1964 upon the petitioner in accordance with law nor any reference to his report to the said effect has been made in the impugned order as well as the judgment and decree sought to be reviewed. Furthermore, in the absence of any acknowledgment due available on record, service of the notice has been presumed by the Court below merely on the basis of postal receipt

available on record. Without establishing on record that the petitioner could not be served personally, reliance on publication of the notice could not be considered safe to presume service of the petitioner, particularly when respondent No.2 himself alleged in his petition for custody that she was an illiterate villager. Reliance in this regard is placed on judgments in the cases of Ahmed Khan v. Haji Muhammad Qassim and others (2002 SCMR 664), Mehr Din through Legal Heirs v. Azizan and another (1994 SCMR 1110), Pehalwan Khan v. Mrs. Najma Mujtaba (1986 CLC 1735) and Muhammad Asghar and others v. Qamar Din (PLD 2005 Lahore 240).

8. For the foregoing reasons, the titled petition is **allowed**, the impugned order dated 06.02.2021 passed by the Senior Civil Judge (Family Division), Khanewal is set aside and application of the petitioner for setting aside the *ex-parte* judgment and decree dated 12.10.2019 is allowed and resultantly application of respondent No.2 under Section 25 of the Guardian and Wards Act, 1890 for custody of the minor Tahira Mai shall be deemed to be pending for decision afresh in accordance with law. Additionally, in exercise of powers conferred by Section 25A of the Family Courts Act, 1964 the aforementioned proceedings are hereby ordered to be transferred to the Family Court, Tehsil Shorkot District Jhang from the Court of Senior Civil Judge (Family Division), District Khanewal.

(RAHEEL KAMRAN)
JUDGE

Asim Shahzad