JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P. No. 3771 of 2022
Sajid Khan and another
Versus
Mst. Ibtesam Shahid and 03 others.

Petitioners by	:	Mr. G.M. Chaudhry, Advocate.
Respondents by	:	Mr. Saad Ahmed Rajpoot, Advocate
Dates of Hearing	:	22.08.2023.

ARBAB MUHAMMAD TAHIR, J. Listed writ petition as well as W.P. No. 4096 of 2022 titled *Mst. Ibtesam Shahid v. Sajid Khan* and W.P. No. 2006 of 2023 titled *Sajid Khan, etc v. Mst. Ibtesam Shahid* entail common subject matter besides the parties, therefore, being decided through the signal judgment.

2. Tersely, the petitioner namely *Sajjid Khan* and the respondent *Mst. Ibtesam Shahid* had been in marital bond for about 12 years (05.01.2007 to 03.04.2019). The couple was blessed with a daughter namely *Mst. Samiya Sajid* (**"the minor"**) on 27.06.2008, now aged about 15 years. Due to strained relations, respondent along with the minor filed *suit for dissolution of marriage on the basis of Khula, recovery of past and future maintenance and recovery of dower amount*. The petitioner, on the other hand, filed petition in terms of *Section 7, 17 and 25 of the Guardian and Wards Act, 1890* for the custody of the minor. During pendency of the suit and the petition, the marriage of the parties stood dissolved on the basis of *Khula* in terms of *Section 10 (4) of the Family Court Act, 1964* on 03.04.2019. The learned Judge Family Court Islamabad (West) after recording evidence, pro and contra, heard the parties and decided both the suit and the petition, through consolidated Judgment and Decree dated 31.05.2022 whereby the respondent was held not entitled to maintenance while maintenance for the minor was fixed at Rs. 20,000/- per month with 10% annual increase from the date of institution of the suit till her legal entitlement. The claim of the petitioner for the custody of the minor was dismissed. It is important to note that the learned Judge Family Court also chalked out a

visitation schedule for meeting of the petitioner with the minor daughter in paragraph No. 25 of the judgment in following terms:-

> "i. On 1st and 3rd Saturday of each month defendant shall get the temporary custody of the minor from the house of plaintiff No. 1 at 10:00 a.m. and he shall return the minor daughter to the plaintiff No. 1 on the same day at 06:00 p.m. at her house.
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> ii. On second Sunday of each month defendant shall take the temporary custody of the minor from the house of plaintiff No. 1 at 10:00 a.m. and he shall return the minor daughter on the same day at the house of plaintiff No. 1 at 6:00 p.m.
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> iii. On birthday of defendant or minor plaintiff No. 1 shall hand over the custody of the minor daughter to the defendant at 04:00 p.m. from her house and defendant shall return the custody of the minor at the house of the plaintiff No. 1 at 07:00 p.m. on the same day.
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> iv. On Eid-ul-Fitar defendant shall get the custody of the minor from house of plaintiff No. 1 on Chand Raat at 07:00 p.m. and he shall return the custody of the minor daughter at her house on same night at 10:00 p.m.
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> v. On second day of Eid-ul-Fitar, defendant shall take the custody of the minor daughter from the house of plaintiff No. 1 at 10:00 a.m. and he shall return the custody of the minor daughter on the same day at 06:00 p.m. to the petitioner at her house.
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> vi. On Eid-ul-Azha defendant shall get the custody of the minor daughter from the house of plaintiff No.1 of 10:00 p.m. and he sha;; return the custody of the minor daughter on the same day at 06:00 p.m. to the plaintiff No.1 at her house.
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> vii On 10th of Moharram defendant shall get the custody of the minor daughter from the house of plaintiff No. 1 and he shall return the custody of the minor at the house of plaintiff No. 1 on the same day at 08:00 p.m.
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> viii. During summer and winter vacations defendant shall have his meeting with the minor daughter during 1st half of vacation on each consecutive day from 10:00 am to 06:00 p.m. for this he shall get the custody of the minor from the

house of plaintiff No. 1 at 10:00 a.m. and he shall return the custody of the minor on the same day at 06:00 p.m. at the house of the plaintiff No. 1."

3. The petitioner preferred an appeal against the judgment and decree *ibid* which was partially accepted vide Judgment and Decree dated 17.09.2022 passed by the learned ADJ Islamabad-West whereby the visitation schedule of the minor was modified in following terms:-

"i. The custody of the minor shall be handed over to the appellant on 2nd and 4th Saturday of every calendar month at 05:00 pm and appellant shall return the custody of the minor to the respondent on 2nd and 4th Sunday at 03:00 pm.

ii. On the occasion of Eid-ul-Fitar, the appellant/father shall be entitled for custody of the minor on 2nd day of Eid-ul-Fitar at 06:00 pm. and appellant shall return the custody of the minor to the respondent on the 3rd day of Eid-ul-Fiter at 05:00 p.m.

iii. On the occasion of Eid-ul-Azha, the appellant/father shall be entitled for custody of the minor on 2nd day of Eid-ul-Azha from 05:00 pm and appellant shall return the custody of the minor to the respondent on the 3rd day of Eid-ul-Azha.

iv. On the occasion of birth day of the minor, the appellant/father shall be entitled for custody of the minor from 05:00 pm and appellant shall return the custody of the minor to the respondent on the next day of birthday of the minor at 05:00 pm.

v. During summer vacations, the appellant will be entitled to have custody of alternative weeks for one month (1st and 3rd week)

vi. During the winter vacations, he will be entitled to meet with his minor child for 03 days."

4. The significant distinction between the two schedules, one framed by the learned trial Court and the second by the learned Appellant Court, is to the effect that through the latter schedule, the petitioner was allowed to retain overnight custody of the minor while through the former, the petitioner was only allowed to meet and keep

the minor at day time and he had to return her on the same day to the respondent. There are, however, concurrent findings on the issue of custody of the minor and her maintenance allowance.

5. Through *W.P. No. 3771 of 2022* the petitioner impugns concurrent judgments and decrees dated 31.05.2022 and 17.09.2022 passed by the learned Judge Family Court and learned ADJ West, Islamabad respectively, pressed for to have custody of the minor and to modify the quantum of maintenance, *inter-alia*, being not in consonance with his financial capacity. The petitioner, in addition, also prays for anearly decision of two pending applications.

6. The respondent, on the other hand, through *W.P. No. 4096 of 2022,* only questioned the judgment-in-appeal to the extent of modification of the visitation schedule.

7. The petitioner also filed another petition i.e. *W.P. No. 2006 of 2023* against the order dated 12.06.2023, passed by the learned Judge Family Court Islamabad-West whereby on his application for compliance of the schedule of meeting framed by the learned Appellate Court, it was observed in the concluding paragraph No. 4 that:-

> "In appellate court judgment dated 17.09.2022 wherein, visitation schedule is fixed and schedule in para no. 12(v) regarding summer vacation, the appellant has been declared entitled to have custody of the minor alternative weeks for one month (1st and 3rd week). Hence respondents are directed to make sure compliance of para No. 12(v). If the respondents failed to do so, the applicant can take help from the Nazrat Branch and bailiff. The applicant is directed to make sure submitting remaining maintenance allowance. File be consigned to record room after its due completion."

8. Hence, these matters for which due audience has been given to the learned counsel for the parties and have also gone through the record, made available on files with their able assistance. The learned counsel for the petitioner placed reliance upon case law reported as

2018 SCMR 1991, while learned counsel for the respondent refers 2022 CLC 762 Lahore and 2020 YLR 401 Lahore.

9. At the inception, it is necessary to mention that the constitutional jurisdiction in terms of Article 199 of the constitution vested in this Court cannot be invoked as a substitute for a revision or an appeal. This means that the High Court in constitutional jurisdiction cannot re-appraise the evidence and decide the case on its facts. Interference is on limited grounds as an exception and not the rule. Reliance is placed upon the recent pronouncement of the Hon'ble Apex Court vide Judgment dated 17.07.2023 in ***C.P. No. 1418/2023 titled M. Hammad Hassan v. Mst. Isma Bukhari and two others***. It was held that:-

> "6. The objective of Article 199 of the Constitution is to foster justice, protect rights and correct any wrongs, for which, it empowers the High Court to rectify wrongful or excessive exercise of jurisdiction by lower courts and address procedural illegality or irregularity that may have prejudiced a case. However, it is emphasized that the High Court, in its capacity under Article 199, lacks the jurisdiction to re-examine or reconsider the facts of a case already decided by lower courts. Its role is limited to correcting jurisdictional errors and procedural improprieties, ensuring the proper administration of justice. In the present case, the Petitioner pursued his case through the family court and its appeal in the district court and then also invoked the High Court's constitutional jurisdiction to reargue his case amounting to a wrongful exercise of jurisdiction whereby the High Court upheld the factual findings of appellate court after making its own assessments on the same. Allowing a re-argument of the case constituted to arguing a second appeal which should not have been entertained regardless of the outcome of the case."

10. Under the principle *ibid* this Court under Article 199 lacks the jurisdiction to re-examine or re-consider the facts of a case already decided by lower courts and its role is restricted to correct jurisdictional errors and procedural improprieties, ensuring the proper administration of justice. According to the ratio allowing re-

arguments of the case constitute to arguing a second appeal which should not have been entertained regardless of outcome of the case. The interference is only permitted in case there is an exception.

11. In the present case, as divulges from the record besides the submissions advanced by the learned counsel for the parties at-bar, the petitioner and the respondent have since parted their ways through a decree of *Khula*, leaving no hope for re-union. There are concurrent judgments of the two learned Courts on the issue of custody of the minor and the award of maintenance to her. Both the learned courts have given due consideration to the evidence on record besides the financial capability of the petitioner to maintain the minor who is aged about 15 years and is also being imparted with education. The petitioner made no contest to the decree given in favour of the respondent regarding the custody of the minor and only questioned the visitation schedule as reveals through paragraph 12 of the judgment in appeal. The learned Appellate Court had also considered the financial status of the petitioner and thereafter came to the conclusion that the quantum of maintenance fixed and determined by the learned trial Court is justified. Under the principle, this Court cannot interfere in the concurrent finding of the two learned Courts and cannot reassess and reevaluate the evidence in this regard.

12. However, the findings of the two learned Courts on the issue of visitation schedule of the minor are at variance primarily to the effect that the learned trial Court only allowed the petitioner to meet and remain with her at day time while the appellate Court also allowed the petitioner to have custody of the minor for overnight stay. This aspect, in the estimation of this Court, falls within an "*exception*", warranting exercise of jurisdiction in terms of article 199 of the constitution not only on account of having findings at variance but also for the reason that the issue pertains to visitation rights of a minor girl aged about 15 years and in order to appreciate the welfare and betterment of the minor girl of such an age, intelligence preference is also to be kept in mind.

13. The learned appellate Court framed the schedule after interviewing the minor and what had stated by the latter was

incorporated in paragraph No. 12 in terms that *"What did happened in the past be remained there. I want to meet my father but the prolong visitation hours should not fixed for her."*The statement of the minor explicitly reveals that she expressed desire to have meeting with her father/petitioner but with exception that prolong meeting hours should not be fixed. This statement of the minor if seen in conjunction with her statement got recorded before the learned Judge Family Court on 08.06.2023, leads to observe that the schedule framed by the learned Judge Family Court was justified as the minor daughter aged about 15 years, student of 9th class had specifically asserted that she does not want to remain with the petitioner overnight.

14. It is pertinent to mention that the purpose of the law on the subject is to secure welfare of the minor in all eventualities that includes due consideration of '*wish*' of the minor particularly when he/she can make a reasonable preference on account of his/her age. Such an intelligent preference of the minor shall be given due weight in order to assess his/her welfare as any direction adverse to the desire, so made, may cause injury to his/her welfare. For achieving the purpose, it is mandatory for the parents to create such an atmosphere that may contribute in building character of the minor instead to throw him/her in mental anguish. The Hon'ble Apex Court in the case of *"Mst. Madiha Younus v. Imran Ahmad* (**2018 SCMR 1991**) held that "*both the parents appears to be sensible and conscious of their social responsibility shall not do any act that may prejudice their mind towards the other parents*."

15. By taking guidance from the law on the subject and the attending circumstances of the case, it is observed that despite separation, both the sides must coordinate for the purpose of better upbringing of the minor daughter keeping in view her own interest, welfare and preferences and must show willingness to make changes to the visitation schedule as per mutual understanding/convenience keeping in view the welfare of the minor, instead to knock the doors of the courts on such a trivial matter again and again which can easily be resolved/settled with caution and peace. In the light of aforesaid, the schedule framed by the learned Appellate Court is, therefore, not legally sustainable.

16. In view of above, *Writ Petition No. 3771 of 2022* is **dismissed** while *W.P. No. 4096/2022* is **allowed**, consequently impugned judgment in appeal dated 17.09.2022 to the extent of visitation schedule contained in paragraph No. 12 is set aside and pursuant thereto the schedule of the meeting framed by the learned trial Court vide judgment dated 31.05.2022 contained in paragraph No. 25 is restored. *W.P. No. 2006/2023*, filed by the petitioner assailing order of the Judge Family Court whereby the respondent was directed to comply with the visitation schedule as directed by the learned Appellate Court is **disposed of** as having become infructuous. Both the parents appear to be sensible and conscious of their social responsibility, therefore, it is expected that they shall not do any act that may prejudice the mind of the minor towards the other parent.

(ARBAB MUHAMMAD TAHIR)
JUDGE

Announced in Open Court on _____08, 2023

JUDGE

A.R.Ansari