

ORDER SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Writ Petition No.3608 of 2013

Nosheen Agha etc

Versus

Addl.District Judge, Etc

Date of Hearing: - 23rd October, 2014
Petitioner By: - Hafiz Arafat Ahmad Chaudhary & Kashifa Niaz Advocates.
Respondents By: - Raja Rizwan Abbasi Advocate.

J U D G M E N T
MUHAMMAD ANWAR KHAN KASI, CJ:

Brief facts of the case are that petitioner No.1 and respondent No.2 were spouses pursuant to their marriage solemnized on 9.11.2010 according to muslim rites. Subsequently, out of the wedlock a child namely Shah Bano was born on 19.8.2011. In the meantime, differences rose between the parties as according to petitioner, respondent No.2/husband contracted second marriage whereafter she instituted suit for recovery of maintenance for herself and for minor daughter. Simultaneously, the respondent No.2 filed a suit for jactitation of marriage against petitioner No.1 which is pending adjudication. During the course of proceedings upon suit for maintenance filed by petitioner, learned Family Judge vide order dated 2.2.2012 fixed interim maintenance of Rs.15,000/- for the minor girl, but the respondent No.2 failed to pay the same despite direction. Consequently vide order dated 15.4.2013, learned Judge Family Court struck off the defense of respondent No.2 and decreed the suit in accordance with prayer whereby maintenance of Rs. 1,50,000/- per month was sought since August, 2011. The judgment debtor [respondent No.2 herein] moved appeal which culminated upon impugned Judgment dated 4.6.2013 whereby the quantum of maintenance fixed by learned Judge Family Court was reduced to the tune of Rs. 15,000/- per month with annual increase @ 15 % beginning from August, 2011 till her marriage or till the adverse decision of learned Civil Court regarding legitimacy of minor child. Aggrieved thereby, petitioner moved present Writ Petition with following prayer:-

“The impugned Judgment dated 4.6.2013 passed by the learned Addl.District Judge may graciously be set aside by upholding the order/decreed passed by the learned Family Judge, Islamabad.”

2. Learned counsel for petitioners submits that the impugned Judgment & Decree passed by learned Appellate Court is preposterous and devoid of sound reasonings as the conduct of respondent No.2 before learned Trial Court has been completely overlooked by the learned Appellate Court.

3. It is further submitted that the decree passed by learned Trial Court is in accordance with statutory provisions contained under Section 17-A of Family Court Act, 1964 as the suit can be decreed if defendant makes default in payment of interim maintenance. The reduction in quantum of maintenance by the learned Appellate Court

from Rs.1,50,000/- to Rs.15,000/- is summersault upon the rights of petitioner without authority of law or reasoning.

4. It is next submitted that respondent/husband kept prolonging the matter of paying the maintenance for one reason or the other and when vide order dated 2.2.2012, learned Family Court fixed the interim maintenance, he moved Review Application and an application for conducting DNA test disputing the paternity of child, but the said applications were dismissed vide order dated 1.2.2013 and the learned Trial Court passed an order by warning the respondent No.2 that if he failed to pay the interim maintenance, his right of defence will be considered closed, yet he failed to pay the same and instead moved Writ-Petition before this Court which was dismissed in limine vide order dated 20.2.2013 and I.C.A thereagainst also failed. The learned Trial Court after dismissal of I.C.A, once again ordered the respondent for payment of interim maintenance vide order dated 15.4.2013, but he did not pay any heed to it. Resultantly vide order dated 4.6.2013, his defence was closed and the suit was decreed as prayed for under Section 17-A Family Court Act, 1964.

5. Learned counsel further stated that learned Appellate Court transgressed its jurisdiction by giving relief to the respondent No.2/appellant which he had not sought as the appellant had merely prayed for setting aside of the order dated 15.4.2013, but learned ADJ traveled beyond the scope of prayer by reducing the quantum of decree to an extent of his own choice which runs counter to the law on subject, because a Court cannot award relief beyond the pleadings at appellate stage.

6. Learned counsel next averred that the impugned Judgment does not point out any evidentiary material on the basis of which it resorted to modify the Judgment passed by learned Trial Court. He pointed out that the respondent/husband is a cricketer of international level with abundant resources of earning through multinational/national companies and cricket clubs as well as advertisements and media appearances, thus he earns millions of rupees a month, hence the maintenance of Rs.1,50,000/- was very much in accordance with the status of respondent No.2, who did not pay a single penny on account of maintenance to minor girl.

7. It is lastly submitted that the respondent No.2 leveled highly unethical and immoral allegations against the petitioner No.1 despite having remained unsuccessful in DNA expedition. He did not contribute in upbringing of minor knowingly that petitioner is not an independent woman as her parents have died and she has limited sources to maintain the family. The learned counsel for petitioner has placed reliance on case laws titled as (i) "Messrs A.R.Builders (PVT) Ltd. vs. Faisal Cantonment Board etc" [PLD 2004 Karachi 492] wherein it is held that "This is an established law that the Courts would not travel outside the scope of suit to grant either final or interim relief of the nature, which has no nexus with the facts pleaded in the plaint and/or relief sought in the suit. The denial of facts in the written statement and pleading additional grounds in written statement would not authorize the Courts to enlarge the scope of suit, when plaintiff had not pleaded any such fact nor had sought relief of the nature. The Courts are bound in law to confine themselves to the reliefs sought and/or which flow from the facts pleading in the suit, (ii) "

Mst.Jannat Bibi. Vs. Sher Muhammad etc” [1988 SCMR 1696] wherein it is held that “ Party is not permitted to deviate from his or her pleadings, nor can the Court set up a different plea for a party and decide the suit on that basis, much less at the appellate stage,--- (iii) “ Noor Muhammad and another. Vs. Muhammad Ishaq and another “[2000 MLD 251] wherein it is held that “Party was not permitted to deviate from his pleadings nor could the Court set up a different plea for a party and decide the suit on the basis muchless at appellate stage, --- (iv) “Khawaja Jameel Ahmad. Vs. Judge, Family Court, Multan and two others” [2007 YLR 1401], wherein it is held that “ Default in payment of maintenance by petitioner. Interim maintenance allowance of Rs. 1000/- fixed by Family Court, was upheld by Appellate Court. Applications by petitioner for recalling order fixing amount of dower had been dismissed by Appellate Court, validity ----- Held, Family Court was fully justified in closing petitioner’s right of defence under Section 17-A of West Pakistan Family Courts Act, 1964, when petitioner defaulted in payment of interim maintenance”---(v) “ Arif Sana Bajwa. Vs. Additional District Judge (Mushtaq Ahmed Tarar), Lahore and four others” wherein it is held that “ Family Court was not denuded of its power under the provisions of West Pakistan Family Courts Act, 1964, to pass interim order for maintenance. Both under statutory law and Islamic Law, the father was obliged to provide maintenance to his child. Order of Family Court directing the father was obliged to pay maintenance to his minor children during the pendency of the suit was just and according to the situation demanded. Father was given opportunity to deposit part of maintenance allowance which had become due against him as token of goodwill but he had refused to deposit any amount. Conduct of the father throughout the proceedings of the matter also did not entitle him to any discretionary relief.--- No illegality or irregularity had been committed by Appellate Court while passing the Judgment against the father----- High Court, in exercise of Constitutional jurisdiction declined to interfere with the Judgment and decree passed by the Courts below----- Constitutional petition was dismissed in circumstances and (vi) “Syed Zubair Shah. Vs. Mst.Shahnaz Anwar and two others” [2010 MLD 726] wherein it is held that “ Section 17-A of West Pakistan Family Court Act, 1964 empowered the Family Court to pass interim order for maintenance during the pendency of suit for maintenance and in case of default by the defendant, the Court could strike off the defence of the defendant and could also decree the suit--- . In the present case, on account non-payment of interim maintenance, order passed by the Family Court on the application filed by the plaintiff Under Section 17-A of West Pakistan Family Courts Act, 1964 was strictly in accordance with law and did not call for interference by any Court. When the order of Family Court was not complied with, the defence of the defendant was rightly struck off and the suit of the plaintiff was rightly decreed.”

8. On the other hand, learned counsel for respondent No.2 refuted the above arguments by submitting that real intent of petitioner No.1 is to extort money from him on the pretext of maintaining minor girl. He alleged that the petitioner No.1 belongs to show business field and is a model by profession who revealed her original ways soon after getting married as she used to mix up with wealthy people and became pregnant when he

was abroad on a cricketing tour to New Zealand and he immediately denounced parentage whereafter divorced her on 17.4.2011 in presence of witnesses.

9. Learned counsel next submits that respondent moved transfer application to the learned District Judge which was pending at the time when Judgment & decree dated 15.4.2013 was passed and said order was brought into the knowledge of learned Trial Court, but still it proceeded to pass the decree by striking off his defence.

10. Learned counsel lastly submits that the impugned appellate order has been passed correctly as the quantum of maintenance was fixed by learned Trial Court itself vide order dated 2.2.2012 as interim maintenance while taking into account the same earning resources at that time. He clarified that respondent is earning an amount of Rs. 72,945/- being member of ZTBL cricket team, therefore, the quantum of maintenance decreed by learned Trial Court is way above the total monthly earnings of respondent No.2. Learned counsel for respondent No.2 has placed reliance on case laws titled as “Lieutenant Iffat Kazmi etc. vs. Shuja Akbar Shah etc” [PLD 2005 SC 395], “Javed Ahmad alias Javed Iqbal. Vs. Addl.District Judge Lahore and others” [2013 YLR 1362], “M.Saleem Ahmad. Vs. Mst.Sabira Begum etc” [2001 YLR 2329], “Iftikhar Nazir Ahmad Khan etc. vs. Ghulam Kibria and others” [PLD 1968 Lahore 587], “Manzoor Hussain .vs. Zahoor Ahmad etc “ [1992 SCMR 1191], “Bashir and others. Vs. Ilam Din and others” [PLD 1988 SC 8], “Shah Jahan and others. Vs. Syed Amjad Ali, Hawaldar and others.” [2000 SCMR 88], “Tariq Mehmood. Vs. Collector, District Gujranwala and two others” [1991 CLC 793], “Faiz Ahmad and twenty three etc. vs. Ahmad Khan and seven others” [PLD 2013 Lahore 234], “Abdul Waheed through legal heirs and others. Vs. Mst.Mumtaz Gulshan and two others” [2013 YLR 239], “The Province of East Pakistan. Vs. Muhammad Hussain Mia” [PLD 1965 SC 1], “Syed Imtiaz Hussain .vs. Muhammad Salim etc. “ [2004 MLD 1548]. “Muhammad Salim. Vs. Lahore Development Authority etc” [1993 MLD 2312], “Syeda Sameera Akhlaq and another. Vs. Judge Family Court, Lahore” [2011 MLD 964], “Awal Ameer. Vs. Additional District Judge and others.” [2013 MLD 1342], “Shah Nawaz and another. Vs. Nawab Khan” [PLD 1976 SC 767], & “Shafqat Abbas. Vs. Zabia Shafqat” [2003 YLR 2364].

11. Heard & record perused.

12. Before evaluating facts and circumstances of the present case it would be pertinent to note that if defendant defaults in making payment of interim maintenance, Section 17-A of Family Court Act, 1964 provides two separate penal consequences; one striking off the right of defense while the second outcome may be to decree the suit. From the joint reading of Sections 17-A and 17-B of Act supra it is clear that by having used the word ‘may’ the legislature did not intend to make passing of decree mandatory rather it has been left upon the discretion of learned Trial Court to consider facts and circumstances of each case. For ready reference Section 17-A is reproduced;-

“Section 17-A. Interim order for maintenance..- At any stage of proceedings in a suit for maintenance , the Family Court may pass an interim order for maintenance, whereunder the payment shall be made by the fourteenth of each month, failing which the

Court may strike-off the defence of the defendant and decree the suit. ”

13. Insertion of Section 17-B further explains the circumference as well as the mode of exercising the authority in the shape of making reasonable inquiry of the matter in question before decreeing the suit, due to default. For ready reference, Section 17-B is reproduced hereunder;-

“ **Power of the Court to issue Commission.** Subject to such conditions and limitations as may be prescribed, the Court may issue a Commission to.-

- (a) Examine any person,
- (b) Make a local investigation, and
- (c) Inspect any property or document. “

14. Reverting to the instant case, it is evident from record of proceedings before the learned Trial Court that vide order dated 2.2.2012, interim maintenance to the tune of Rs. 15,000/- was ordered to be paid by respondent No.2/defendant, but on the next date of hearing i.e 8.3.2012 defendant moved application for permission to conduct DNA test of minor, which remained pending till order dated 1.2.2013, therefore, it was dismissed and case was again adjourned for payment of interim maintenance, but it remained unpaid and on next date i.e 20.2.2013 once again case was adjourned for 2.3.2013 when defendant moved application for further time to pay interim maintenance, which was allowed and the case was adjourned for 4.3.2013. In the meantime, defendant/respondent No.2 assailed order dated 2.2.2012 through Writ Petition No. 653/2013 which was dismissed in limine and I.C.A was also dismissed. On 4.3.2013, case before learned Trial Court was adjourned, but despite dismissal of said Writ Petition and I.C.A thereagainst defendant did not pay the interim maintenance, resultantly vide order dated 15.4.2013, his right of defense was struck off and the suit was decreed as prayed for. This position verifies the fact that there has been a clear default on the part of defendant/husband in payment of interim maintenance and it cannot be said that learned Trial Court wrongly invoked the provision of Section 17-A I of Family Court Act, 1964.

15. However, the learned Trial Court as well as the learned Appellate Court while decreeing the suit did not refer to any material on the basis of which quantum of maintenance was adjudged. This error floating on the surface amounts to negation of the requirement contained in Section 17-B of Family Court Act, 1964, because both the Courts on one hand failed to inquire into the financial position of defendant/husband and also did not take into account the justification in the context of normal needs of minor girl in custody of her mother.

16. Moreover, mandate of second penal consequence provided under Section 17-A embraces the expression of ‘decree’ which though has not been defined in Family Court Act, 1964, yet according to settled law a decree invariably refers to judicial determination of a matter in controversy and such determination cannot be done without application of

mind in accordance with evidence and law on the subject, therefore, impugned Judgments mechanically upholding prayer of a suit cannot be called a decree. Guidance is sought from case of “Hyderabad Development Authority through M.D vs. Abdul Majeed etc” [PLD 2002 SC 84] and “ Messers UBL. Vs. Messers Silver Oil Mills Ltd. [2003 SCMR 116].

17. In consideration of the peculiar circumstances of case as well as the huge amount of maintenance demanded by the minor through her next friend, it was incumbent upon the learned Trial Court to have sought evidence of plaintiff-petitioner in proof of justification concerning the quantum of maintenance and financial position of defendant-respondent No.2, similarly reduction in quantum of maintenance by the learned Appellate Court without dilating upon the above factors is also unwarranted.

18. In sequel of above discussion, the present petition is disposed-of in the manner that impugned Appellate Judgment dated 4.6.2013 is set aside and the Judgment & decree passed by learned Trial Court is restored to the extent of striking of defense of respondent No.2 while to the remaining extent, the case is remanded to the learned Trial Court to decide the quantum of maintenance after taking evidence of petitioner viz-a-viz financial status of respondent No.2. The suit shall be decided within a period of one month. The parties are left to bear their own costs.

(CHIEF JUSTICE)

Announced in Open Court, on this 2nd day of December, 2014.

Approved for Reporting.

(CHIEF JUSTICE)

S. Akhtar