

ORDER SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P. No. 723 of 2022

Faisal Mehmood

v.

Learned Addl. District Judge, etc.

S. No. of order/ proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	09.12.2022	Syed Wahaj ul Hassan Naqvi, Advocate for petitioner. Malik Nasir Abbas Awan, Advocate for respondent.

ARBAB MUHAMMAD TAHIR J: Through the instant writ petition, petitioner namely *Faisal Mehmood* (defendant in main suit) impugns Orders and Decrees dated 21.12.2021 and 12.01.2022, passed by the learned Judge Family Court and the learned Additional District Judge-I Islamabad respectively, whereby in suit for the recovery of maintenance allowance and gold ornaments filed by respondent 3 to 5 (plaintiffs in the main suit), the defence of the petitioner was closed in terms of Section 17-A of the Family Courts Act, 1964 (“**Act of 1964**”) and pursuant thereto, suit to the extent of minors (respondent 4 & 5) was decreed in terms that the said respondents were held entitled to recover Rs. 15,000/- per month each with effect from October, 2020 till their legal entitlement along with 10 percent annual increase, while appeal was *dismissed in limine*.

2. Tersely, on 26.03.2021 respondents 3 to 5 filed a suit for the recovery of maintenance allowance and gold ornaments against the petitioner. As per the averments of the said suit, the marriage between petitioner and the respondents No. 3 *Mst. Nazia Zardad* lasted for about 9 years and ultimately led to divorce in September, 2020. Out of the wedlock, respondents 4 and 5 namely *Hassan and Hasnain*, aged about 5 and 8 years respectively were born and now are studying in Nursery and Class-III. In response to notice, petitioner entered appearance. Pre-trial reconciliation proceedings could not succeed as reveals through order dated 03.11.2021, after framing necessary issues, the case was set for recording evidence while at the same time the petitioner was directed to pay interim

maintenance to the minors/respondents 4 & 5 @ of Rs. 5000/- per month each with effect from the date of that order, or else right of the petitioner would be closed. On the subsequent date 27.11.2021, on failure of the petitioner to appear, he was proceeded against ex-parte. However, ex-parte order was subsequently recalled, on the application of the petitioner subject to payment of Rs. 3000/- and the case was adjourned to 21.12.2021 for cross examination of respondent No. 3 and payment of entire outstanding interim maintenance and the cost imposed as well. On 21.12.2021, the learned Judge Family Court passed the following order:-

“Today suit was fixed for cross examination over plaintiff and complete payment of interim maintenance by defendant and cost, defendant did not appear in person for complete payment of interim maintenance only his proxy counsel present and requested time on the other hand counsel for plaintiffs resisted the request of proxy counsel for defendant and requested to decree the suit to the extent of maintenance of minors by applying section 17-A of Family Courts Act.

Perusal of record reveals that on 03.11.2021 interim maintenance of plaintiffs No. 2 & 3 was fixed @ Rs. 5,000/- per month each, later on defendant has not paid single penny of interim maintenance to the plaintiffs, later on defendant disappeared from suit proceedings and ex-parte proceedings were initiated against him on 27.11.2021, thereafter on 01.12.2021 defendant filed application for setting aside ex-parte proceedings against him which was accepted subject to cost and complete payment of interim maintenance by defendant on 04.12.2021 but he failed, moreover defendant did not appear in person today in the Court, it seems that he is enjoying the pain and agony suffered by plaintiff, as she sits in the Court whole day for the payment of interim maintenance and cross examination which defendant miserably failed to obey orders of the Court, plaintiff No. 1 has claimed the maintenance for minor plaintiffs No. 2 & 3 at the rate of Rs. 30,000/- per month each since October, 2020, hence by applying S. 17-A of Family Courts Act 1964 defense of defendant is closed, suit to the extent of maintenance of minor plaintiffs No. 2 & 3 is fixed at the rate of Rs. 15000/- per month each since October, 2020 till their legal entitlement along with 10% annual increase, each increment will effect from, December of each year, first increment will effect from December, 2022, to that extent decree sheet be prepared accordingly.

Case is adjourned to 19.01.2022 for cross examination over plaintiff by defendant.”

3. It is significant to note that as per the initial direction vide order dated 03.11.2021, the petitioner was directed to pay interim maintenance of the two minors @ Rs. 5000/- per month each with effect from that date i.e. 03.11.2021, however, subsequently through the order *ibid*, petitioner was directed to pay maintenance @ of Rs. 15000/- per month to each minor w.e.f. October, 2020 till their legal entitlement. By the said order, the defence of the petitioner was closed in terms of section 17-A of the Act of 1964 and the suit was decreed to the extent of maintenance allowance of the two minors. There is no mention about the claim and the financial status of the petitioner on the basis of which the respondents claimed maintenance allowance as prayed for while the version of the petitioner asserted through written-statement was also not taken into consideration. There was absolutely no observation with regard to financial status of the petitioner and the grounds made basis to claim the maintenance allowance @ of Rs. 30,000/- per month by the respondents

4. The petitioner assailed the order in appeal but it was dismissed in limine by the learned ADJ-I Islamabad East vide order dated 12.01.2022, hence instant writ petition.

5. Learned counsel argued that the quantum of maintenance determined and fixed does not commensurate with the financial status of petitioner, who is a class-IV employee with monthly salary of Rs. 24740/-, has to pay Rs. 2666-31 as monthly installment to the NBP for settling the loan and that out of the remaining salary, has also to maintain his ailing father besides other family members and to pay the house rent. According to the learned counsel, the petitioner has no other source of income, a member of a joint family while on the other hand, the minors are of tender age studying in Nursery and class-3; that the procedure envisaged in section 17-A & B of the West Pakistan Family Courts Act, 1964, was not followed and the suit was decreed as prayed for. Further argued that the impugned judgments and decrees, being against the law and facts are liable to be set aside. Learned counsel relied upon case law reported as 2018 MLD 785 & 2018 CLC 1761.

6. On the other hand, learned counsel for respondents argued that the petitioner is deliberately avoiding payment of maintenance, failed to pay the interim maintenance and left the minors unattended and that the rate of maintenance allowance determined and fixed in no way can be termed excessive and is at par with the needs of the two minors who are being imparted with education. Learned counsel in this respect placed on record the receipts of payment of school fee of the two minors.

7. Heard, record perused.

8. It is settled principle that the father is legally and morally bound to maintain his children wherever they are residing according to their needs and, of course, as per his financial capability. An interim order for maintenance is governed by Section 17-A of the Act of 1964 which reads as under:-

“17A. 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.”

9. As per Section 17A *ibid*, in case of failure of the defendant to pay interim maintenance, the Court may strike off the defence of the defendant and decree the suit. The provision is directory in nature. Reliance is placed upon case of **Khurram Shahzad v. Naseem Akhtar and others (2021 CLC 1300-Islamabad), Bashrat Ali v. ADJ Multan and others (2018 MLD 785-Lahore)**,

10. Under the principle, the Court before passing the decree has to examine the claim of the plaintiffs/respondents, the needs of the minor and the financial capacity of the petitioner to pay the maintenance allowance. Before reaching at any conclusion on the question of quantum of maintenance to be determined, it is obligatory for the Court to undertake the said exercise as the authority bestowed under the provision warrants due application of mind and judicial dispensation. Not only this but in order to undertake such exercise the Court may examine any person, make a local investigation and inspect any property or document. Reliance is placed upon

case of **Shahzad Hussain v. Judge Family Court and Others (2011 CLC 820-Lahore)**.

11. On examination of the record, it reveals that the claim of the respondents as reveals through paragraph No. 7 had been that “the defendant is serving a Government Job and also running his business of property and he is earning an amount of Rs. 2 lac so can easily pay the maintenance to the plaintiffs”. The petitioner, on the other hand, in paragraph 6 of the written statement had taken the stance that he is a poor man working as Naib Qasid in AGPR with monthly salary of Rs. 24740, out of which Rs. 2666 are deducted for repayment of loan and by the remaining salary, he has to pay utility bills and to maintain his family members including ailing father. The learned Judge Family Court before passing the decree has to examine the claim of the respondents, the needs of the minors and the financial capacity of the petitioner to pay the maintenance allowance. For doing the needful, it is mandatory for the Court to decide the issue with due application of mind in accordance with the principles of natural justice, fair play and equity and for the purpose it may also undertake local investigation and may summon and examine any person, as deemed appropriate. It is obvious that the said exercise was not undertaken by the learned trial Court and the learned appellate Court also omitted to consider this aspect of the matter. The proceedings of the Family Court, whether it be a Trial Court or an Executing Court, are governed by the principles of equity, justice and fair play as laid down by the Hon’ble Apex Court in case of “Haji Muhammad Nawaz v Samina Kanwal”(2017 SCMR 321).

12. On the other hand, the conduct demonstrated by the petitioner appears to be not aboveboard, as he has not paid any interim maintenance to his minor children at the rate determined by the learned Trial Court vide order dated 03.11.2021, therefore, in order to show his bonafide and commitment to maintain his children, he shall have to pay adequate maintenance to both the minors, or else cannot be held entitle to ask for equitable relief as who seeks equity must come with clean hands.

13. In view of above, impugned orders and decrees are set aside subject to payment of half of the entire outstanding interim maintenance by the petitioner pursuant to order dated 03.11.2021 at the rate so determined by that order, in case the petitioner fails to pay half of the entire outstanding interim maintenance, the instant writ petition shall be deemed to have been dismissed by upholding the impugned orders. In case the petitioner complies with the order, the learned Judge Family Court shall proceed with the case from the stage where it had been before passing of the order dated 21.12.2021, i.e. cross examination upon plaintiff. The petitioner shall also continue to pay monthly interim maintenance to the minors, pending decision of the main case, in terms of order dated 03.11.2021. The instant writ petition is **disposed of** accordingly.

14. Before parting with the order, it is necessary to mention that the parties are in contest in a suit under the Act of 1964 which warrants expeditious disposal as for the purpose, provisions of *Quanun-e-Shahadat Order 1984 (P.O. No.10 of 1984)* and the *Code of Civil Procedure* except Sections 10 and 11 have been excluded to achieve the legislative intent. A specific timeframe of **six months** has been provided for the decision of a case under the Act of 1964 in terms of Section 12(A) of the Act of 1964 while period of **four months** is stipulated under Section 14(A) of the Act of 1964 for decision of an appeal. The suit was filed in **March, 2021** and has not yet reached to final conclusion despite lapse of more than one and half year which under the law, had to be concluded within a period of six months. Therefore, the learned trial Court shall make every endeavor to conclude the proceedings of the trial at the earliest preferably within a period of two months from the receipt of this order. Copy of this order be sent to the learned trial Court for compliance.

(ARBAB MUHAMMAD TAHIR)
JUDGE