

ORDER SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.431 of 2019
Shehnaz Akhter Zahoor Ahmed

Versus

The learned Additional District Judge-IV East-Islamabad and another

S. No. of order/ proceedings	Date of order/ proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	29.09.2020	Ms. Kashifa Niaz Awan, Advocate for the petitioner, Mr. Muhammad Aslam Chishti, Advocate for respondent No.2

Through the instant writ petition, the petitioner, Shehnaz Akhter Zahoor Ahmed, impugns the judgment dated 11.12.2018 passed by the Court of the learned Additional District Judge, Islamabad, whereby the appeal filed by respondent No.2 (Muhammad Aslam Chattha) against the judgment and decree dated 28.04.2018 passed by the Court of the learned Judge Family Court, Islamabad, was partially allowed and the said judgment and decree dated 28.04.2018 was modified to the extent that the petitioner was held entitled for maintenance from the date of the institution of the suit and not from June 2004. The learned Family Court had held that the petitioner was entitled to the payment of maintenance from June 2004.

2. The petitioner and respondent No.2 got married on 14.07.2002. On 11.05.2017, the petitioner filed a suit for recovery of maintenance before the learned Family Court at Islamabad. Vide judgment and decree dated 28.04.2018, the learned Family Court decreed the petitioner's suit and held that she was entitled to the payment of maintenance allowance at the rate of Rs.10,000/- per month from June 2004 till the subsistence of the marriage. Furthermore, it was held that the

maintenance allowance would be liable to an increase by 15% per annum.

3. Respondent No.2 preferred an appeal against the said judgment and decree passed by the learned Family Court. Vide judgment dated 11.12.2018, the said appeal was partially allowed and it was held that the petitioner would be entitled to maintenance with effect from the date of the institution of the suit. The said judgment has been assailed by the petitioner in the instant writ petition.

4. Learned counsel for the petitioner, after narrating the facts leading to the filing of the instant petition, submitted that the marriage between the petitioner and respondent No.2 had not been dissolved when the suit for maintenance was filed; that the sole ground on which the learned Appellate Court modified the well-reasoned judgment of the learned Family Court was that the petitioner and respondent No.2 had gone on a trip to Kaghan and Naran in August 2016 and that from time to time the petitioner had used respondent No.2's vehicle; that respondent No.2 was not absolved from his responsibility to pay maintenance to the petitioner even if it is assumed that the couple were happily living together; and that the learned Appellate Court erred by not appreciating that respondent No.2, in his cross-examination, had admitted that in the entire period, he had not paid for the petitioner's costs of living. Learned counsel for the petitioner prayed for the writ petition to be allowed in terms of the relief sought therein.

5. On the other hand, learned counsel for respondent No.2 submitted that for the issuance of a writ of *certiorari* there has to be a jurisdictional irregularity or a patent error in the

judgment; that it was not disputed that the learned Appellate Court had the jurisdiction to entertain an appeal against the judgment and decree passed by the learned Family Court; that respondent No.2 paid maintenance to the petitioner up to 01.04.2017 when the relations between the couple were cordial; that for the period beyond 01.04.2017, respondent No.2 is ready to pay maintenance to the petitioner; that during the execution proceedings, the petitioner had refused to accept maintenance for the period beyond 01.04.2017; and that since the contesting parties had gone on a trip to Kaghan and Naran in August 2016, this shows that their relations were convivial and that there was no dispute regarding the payment of maintenance by respondent No.2 to the petitioner. Learned counsel for respondent No.2 prayed for the writ petition to be dismissed.

6. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance.

7. The sole ground on which the learned Appellate Court modified the judgment and decree dated 28.04.2018 passed by the learned Judge Family Court was that the petitioner and respondent No.2 had gone on a trip to Kaghan and Naran in August 2016 and that respondent No.2's car had been in the use of the petitioner. The learned Appellate Court proceeded on the assumption that if the relations between a married couple are cordial, the claim for the payment of maintenance made by a wife cannot be allowed. This is not in consonance with the law. A husband is not relieved of his obligation to pay maintenance to his wife whether the relations between them are strained or not. It is only in cases where a wife willfully deserts her husband

or fails to perform her marital duties without any lawful excuse, she will lose the right to claim maintenance. The evidence on the record does not show such desertion on the part of the petitioner.

8. Respondent No.2 had appeared before the learned Family Court as DW.1 and in his cross-examination he had deposed *inter alia* as follows:-

"یہ درست ہے کہ سارے پیریڈ میں میں نے رہائش پر اٹھنے والے اخراجات کی بابت کسی قسم کی ادائیگی نہ کی ہے"

9. The said testimony appears to have escaped the attention of the learned Appellate Court while modifying the judgment and decree passed by the learned Family Court. In view of the said tacit admission by respondent No.2 that maintenance had not been paid to the petitioner, I am of the view that the impugned appellate judgment dated 11.12.2018 suffers from misreading and non-reading of evidence, which is enough to justify interference with the said judgment in the Constitutional jurisdiction of this Court.

10. In view of the above, the instant writ petition is allowed; the impugned appellate judgment dated 11.12.2018 is set-aside and the judgment and decree dated 28.04.2018 passed by the learned Judge Family Court is restored. There shall be no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

*Sultan**