

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, **ISLAMABAD**

WRIT PETITION NO.150 OF 2020

Lt. Col. (R) SHAHID HAMID

Vs.

Mrs. SALEHA HAYAT AND OTHERS

WRIT PETITION NO. 499 OF 2020

Mrs. SALEHA HAYAT AND OTHERS

Vs.

Lt. Col. (R) SHAHID HAMID AND OTHERS

Petitioner by : Syed Asghar Hussain Sabzwari, Advocate.
(Lt. Col. (R) Shahid Hamid)

Respondents by : Mr. Imran Shafique, Advocate.
Syed Nayyar Abbas Rizvi, Advocate.
Barrister Omer Azad Malik, Advocate.
(Mrs. Saleha Hayat and her children)

Date of hearing : 02.11.2020

LUBNA SALEEM PERVEZ, J. Through this judgment I intend to decide both the titled writ petitions as common questions of law and facts are involved.

2. Through their respective petitions, both the petitioners have assailed judgment and decree dated 07.12.2019, passed by the learned Additional District Judge, West-Islamabad, and judgment and decree dated 27.04.2019, passed by learned Judge Family Court, West-Islamabad.

3. Facts of the case are that Respondent No.1 / Mrs. Saleha Hayat, ex-wife of the Petitioner, after dissolution of marriage, filed suit for recovery of maintenance allowance of two minor sons before learned Judge Family Court, West-Islamabad, who, vide his judgment and decree dated 27.04.2019, fixed the maintenance allowance at the rate of Rs. 50,000/- per month per child from March, 2010, with annual increase of 10%, from March, 2011, till the age of majority. The judgment and decree was challenged through filing of appeals by both the parties before the Additional District Judge, West-Islamabad, who, vide consolidated judgment and decree dated 07.12.2019, modified the monthly maintenance from Rs. 50,000/- per

child, to Rs. 100,000/- with the entitlement to receive their past maintenance allowance for a period of six years with annual increase from filing of suit and held that increase will become due after one year of filing of the suit. Both the parties, since not satisfied with the judgment and decree of the Courts below, have filed the instant petitions.

4. Learned counsel for the Petitioner/father submitted that the courts below have committed material irregularities and illegalities while deciding the matter as the respondents is claiming maintenance after considerable delay without any plausible reason; that the maintenance claimed is unrealistic and extraordinary exorbitant as the wealth of petitioner/father cannot be made basis for maintenance; that the courts below have ignored the guiding/determining factors for fixing maintenance of the minors; that the trial court has illegally received and admitted inadmissible evidence without appreciating the fact that it did not pertain to period for which maintenance is claimed; that the trial Court has also ignored the fact that Respondent No. 1 has fraudulently transferred the amount of Rs. 35 million in 2010; that the petitioner's source of income is pension only as the business of the petitioner is also under litigation and non-functional since, 2010; that the courts below have acted beyond jurisdiction by granting 10% yearly increase with retrospective effect; that the courts below have ignored the important factors that the children of army officers (retired and serving) are entitled for admission in APS School on a special fee structure/concession and are also entitled for medical treatment in the armed forces hospitals and despite these facilities the Respondent No. 1 has on her own will admitted the children in the private educational institutions and has claimed the education and medical expenses of the private institutions/hospitals which is not only excessive but exaggerated.

5. On the other hand, learned counsel for the respondents/mother and minors assailed the judgment and decree dated 27.04.2019 & 07.12.2019, passed by the learned Judge, Family Court and learned appellate Court, respectively. He contended that the courts below have not appreciated the fact that father has the responsibility to maintain his children, who is in a position to bear the educational and other expenses of his minor sons according to their social status; that the break-up of monthly expenses of each children @ of Rs. 300,000/- per month was provided during trial proceedings but the learned Trial Court has ignored the

expenses incurred on the minors and unrealistically reduced the monthly expenses to Rs. 50,000/- per month and the learned Appellate Court though enhanced the monthly expense to Rs. 100,000/- per month per child but without appreciating that the father is capable of maintaining the children according to their social status and living style; that the approach of the father of the children (petitioner in W.P. No. 150/2020), is vindictive who has fraudulently taken refuge behind the plea of educating the children in APS as he can afford educational expenses in the best available institutions in the world; that both the courts below have categorically held that the father has sufficient resources to pay the reasonable amount of maintenance to the minors; that the learned Appellate Court has misconstrued and misapplied the provision of limitation act to confine the past maintenance upto six years in contravention of section 17A of the Family Court Act, 1964; that father of the minors is also maintaining son from his first marriage who is above the age of 28 years; that the courts below have misread the evidence Ex-P/2 (divorced deed) which is the admission of his luxurious life style. He, therefore, prayed that both the impugned judgments and decrees of the learned Trial as well as Appellate Courts may be modified and monthly maintenance may be enhanced to Rs. 300,000/- per child as claimed in the suit.

6. Arguments heard. Record perused.

7. Perusal of the record revealed that marriage between petitioner, Lt. Col. (R) Shahid Hamid (father) and respondent, Mst. Saleha Hayat (mother) was solemnized on 22.02.1999, and from the wedlock two sons namely Bakhtayar and Shahmeer were born on 12.07.2000 and 16.11.2001, respectively. The mother, after dissolution of marriage between the parties on 25.05.2010, by way of exercising her right of divorce filed suit for maintenance of the minors before Senior Civil Judge/Family Court, Islamabad on 28.04.2017, whereby, she claimed past and future monthly maintenance of the minors @ of Rs. 300,000/- per child with effect from 25.05.2010 (aggregating to Rs. 50,400,000/-) along with 18% mark-up till the realization and final adjudication of suit on the ground that the father of the minors is a man of means and in support produced his wealth statement filed with the FBR before trial Court and asserted that he can afford the amount claimed as maintenance for his sons. The suit was contested by the father of the minors by taking plea that his only source of income is pension and some

profits on account of savings certificates. Four issues were framed by the learned Trial Court on 18.11.2017, from the divergent pleadings of the parties, however, emphasized on issue No.2, being related to the actual and basic controversy between the parties i.e. quantum of maintenance of two minors.

8. The learned Trial Court on the basis of evidence produced by the parties during trial held that the father of the minors had good source of income as he is running a company and not solely dependent on his pension, and on that basis fixed the monthly maintenance @ of Rs. 50,000/- per child from March, 2010, till the age of attaining majority with the annual increase of 10% from March, 2010, and also allowed adjustment of the amount paid as maintenance @ Rs.5,000/- from January, 2015 to June, 2017, vide judgment and decree dated 27.04.2019, which was appealed against and the learned Additional District Judge, West-Islamabad, vide judgment and decree dated 07.12.2019, passed in appeal, enhanced monthly maintenance to Rs. 100,000/- but limited the post maintenance for a period of preceding six years within annual increase of 10% after one year from the filing of the suit.

9. The controversy between the parties to the instant petitions is the determination of quantum of the maintenance of the minor sons of the parties, who by now have attained the age of majority. The mother of the minors claimed monthly maintenance @ Rs. 300,000/- per child, break-up of which is that Rs. 70,000/- for educational expenses and Rs.230,000/- for medical, entertainment and other expenses, asserting sound financial status of the father of the minors, whereas, the father claim of having meager financial resources and dependent on the pension and profits on saving certificates.

10. There is no second opinion about the principle that the father being a natural guardian has moral, religious and legal obligation to take care of his children in every respect and bear maintenance and fulfill their needs. It is also the ultimate right of the children to be supported by the Father at least upto the age of majority i.e. 18 years. Para 369 of Muhammadan Law which defines 'maintenance' to include food, raiment and lodging, hence, definition is inclusive in nature, which as per rules of interpretation gives wider meaning to the definition, as such, it enlarges the scope of maintenance. In support reliance is placed on the judgment of

Hon'ble Supreme Court reported as *Humayun Hassan v. Arslan Humayun* (PLD 2013 SC 557) wherein para 369 of Muhammadan Law by D.F. Mullah has been explained in the following words:-

"In this context, according to section 369 of the Muhammadan Law by D.F. Mullah, maintenance means and includes food, raiment and lodging. However, it may be observed that from the very language of the above section, such definition is neither conclusive nor exhaustive, and in our view it undoubtedly has a wider connotation and should be given an extended meaning, for the purposes of meeting and catering for the present days social, physical, mental growth, upbringing and wellbeing of the minor, keeping in mind the status of the family, the norms of the society and his educational requirement, which has now attained utmost importance[1]; but obviously corresponding to and commensurating with the means and the capacity of the father to pay.."

11. Para 370 of Muhammadan Law provides guidance regarding maintenance of children and grandchildren, according to which it is obligatory on the father to maintain his sons till they attain the age of majority, however, a disabled son(s) due to any disease or infirmity is the responsibility of father despite attaining majority. The daughters' as per Muhammadan Law are maintained by the father till they are married. Para 370 of the Muhammadan Law is also reproduced below:-

"370. Maintenance of children and grandchildren.---(1) A father is bound to maintain his sons until they have attained the age of puberty. He is also bound to maintain his daughters until they are married. But he is not bound to maintain his adult sons unless they are disabled by infirmity or disease. The fact that the children are in the custody of their mother during their infancy (section 352) does not relieve the father from the obligation of maintaining them. But the father is not bound to maintain a child who is capable of being maintained out of his or her own property.

(2) If the father is poor, and is incapable of earning by his own labour, the mother, if she is in easy circumstances, is bound to maintain her children as the father would be.

(3) If the father is poor and infirm, and the mother also is poor, the obligation to maintain the children lies on the grandfather, provided he is in easy circumstances."

12. Perusal of the above provisions of Muhammadan Law reveals that though, it provides for the binding responsibility to support and maintain his minor children but no formula for fixing the amount of maintenance has been prescribed in the law. Thus, it strengthens the view that maintenance of minors is fixed according to the capacity and financial status as well as capacity of earning of the father and his other responsibilities of another marriage and children. Hence, no hard and fast rule has been laid down by the superior courts while deciding the amount of

maintenance of minors, rather the quantum of maintenance is determined on the basis of the needs and requirement of the minor(s) considered necessary to lead a life, as held in *Humayun Hasan*'s case supra by holding that '*meeting and catering for the present days social, physical, mental growth, upbringing and wellbeing of the minor, keeping in mind the status of the family, the norms of the society and his educational requirement*, at the same time by also taking into account the financial condition and social status of the father as held by the Hon'ble Supreme Court supra according to the means and capacity of the father'.

13. In the present case evidence revealed that the father of the minors is a well-educated person having professional experience in the field of aviation, is also running a business in the name and style of 'Pegasus Legacy', though, both the parties have filed suit against each other with regard to the said business. Perusal of the divorce deed (para 13, 14 & 15 of Ex-P/2), also shows the admission of the father that he has given a lavish luxurious living to his wife and son during subsistence of marriage, therefore, the contention of the father that he has no financial capacity to bear maintenance of his minor sons as per the social status they have been brought up, is not tenable. The evidence on record also discloses that the father of the minors is a man of means having business and properties in his name, which is one of the important factor in determining the quantum of maintenance as held in judgment of the Superior Courts. However, when the claim of maintenance per child is examined, it revealed that it is totally based on estimations, as she was claiming the amount of Rs. 300,000/- per child per month spent on the raising of her sons, whereas, she was under legal obligation to produce evidence of spending the amount on education, medical and entertainment etc., but only school fee receipts were produced during trial. Claim of maintenance on guess work and estimates cannot be considered rather the reasonable of cost of living should also be kept in mind and the same cannot be ignored. I am, therefore, of the opinion that the learned Additional District Judge, West-Islamabad, has rightly enhanced the monthly maintenance allowance per child @ Rs. 100,000/- with annual increase of 10% from the filing of the suit. As regards the question of limitation of past maintenance, allowed by the learned ADJ, for a period of six previous years, I am of the opinion that the issue has been decided in accordance with law and in support thereof the judgment of Hon'ble Supreme Court re: *Mst.*

Farah Naz v. Judge Family Court Sahiwal and others (PLD 2006 SC 457) can be referred wherein it has been held as under:--

"Claim for past maintenance would be governed by Art.120 of the Limitation Act, 1908, which prescribed period of six years in a suit for which no period was provided elsewhere in the Act, from the date when the right to sue had accrued. In computing period of limitation prescribed for any suit, by reason of Section 13 of Limitation Act, 1908, time during which defendant had been absent from Pakistan and from the territories beyond Pakistan under administration of the Central Government would be excluded. Even if period of limitation for such suit would be three years, in view of absence of husband from Pakistan, period of his absence from Pakistan would be excluded for reckoning the period of limitation. Suit filed by wife was not barred by limitation."

14. In view of the above, the judgment and decree dated 07.12.2019, passed by the learned Appellate Court, is upheld. Consequently both the titled petitions, being devoid of any merit, are **dismissed**.

(LUBNA SALEEM PERVEZ)
JUDGE

Announced in the open Court _____.

JUDGE