

Form No: HCJD/C-121.
JUDGEMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

WRIT PETITION NO. 2429 OF 2021

Brig. Adnan Danish Khan

Vs

Mehwish Javed, etc.

PETITIONER BY: Sardar Asad Ullah Khan, Advocate.

RESPONDENTS BY: Mr. Muhammad Masood Khan, Advocate.

DATE OF HEARING: 29.09.2021.

=====

BABAR SATTAR, J.- Through this petition, the judgment and decree passed by the learned Judge Family Court dated 16.12.2019 and the judgment and decree passed by the learned appellate court dated 13.04.2021 have been impugned.

2. Learned counsel for the petitioner stated that the petitioner and respondent No.1 were divorced in 2018. That they have three children, who are in the custody of respondent No.1 and the petitioner had visitation rights. He contended that the salary slip of the petitioner reflected that the cash-in-hand received by the petitioner per month was an amount of Rs.151,629/-. That through the judgments and decrees impugned the petitioner had been directed to pay maintenance in the amount of Rs.20,000/- per month per child with 10% annual increase and has been directed to also pay to the school of respondents No. 2 to 4 any annual charges imposed by the school.

3. Learned counsel for the petitioner submitted that while awarding maintenance neither the learned Family Court nor the learned appellate court took into account the means of the petitioner. He submitted that the petitioner was an Army Officer and belonged to salaried class and the maintenance fixed in the impugned judgments is disproportionate to his means. He relied on **Tauqeer Ahmad Qureshi Vs Additional District Judge, Lahore (PLD 2009 SC 760)** for the proposition that the Family Court is under an obligation to take into account the financial condition and the status of the father while granting maintenance. He further contended that there was no provision of law pursuant to which the learned Family Court and the learned appellate court could direct the petitioner to provide accommodation for minor children who were in the custody of his former wife. And that the petitioner was an Army Officer and his children were entitled to study in an Army Public School, which charged lesser fee than the school in which they were presently enrolled, and by moving the children to Army Public School the quantum of maintenance expense would be reduced.

4. Learned counsel for the respondents submitted that where the Family Court had given findings of fact which were also upheld by the learned appellate court, the scope of interference by a high court in its writ jurisdiction was very limited and that the High Court could only exercise its constitutional jurisdiction if it found that the impugned judgment suffered from any jurisdictional defect. He further submitted that the petitioner had made inaccurate disclosure of facts before the learned Family Court and it was respondent No.1 who had produced the latest pay slip of the petitioner which reflected his salary as Rs.200,000/- per month. He submitted that

the quantum of maintenance fixed by the learned Family Court and upheld by the appellate court did not suffer from any infirmity. On Court query regarding the legal basis for issuance of direction to provide the respondents with accommodation in addition to provision of the maintenance, the learned counsel for the respondents submitted that respondents No. 2 to 4 were settled with respondent No.1 and did not press for provision of accommodation as part of the relief granted by the learned Family Court and the learned appellate court. He, however, submitted that the maintenance granted by the learned Family Court was reasonable in view of salary of the petitioner and there was no misreading or non-reading of evidence. That the petitioner had himself enrolled his children in the school in which they were presently studying and it was only after the petitioner and respondent no.1 were divorced that the petitioner demanded the children be pulled out from the present school and be enrolled in an Army Public School which charged lesser fee. He further submitted that respondent No.1 had produced forty five exhibits before the learned Family Court to document the expenses incurred by respondent No.1 in maintaining respondents No. 2 to 4 and it was in view of the evidence produced before the learned Family Court that the quantum of maintenance was determined. He relied on **Amjad Khan Vs. Muhammad Irshad (2020 SCMR 2155)**, **Shah Jahan and others Vs. Syed Amjad Ali (2000 SCMR 88)**, **Abdul Wali Khan Vs. Muhammad Saleh (1998 SCMR 760)**, **Muhammad Akbar Vs. Addl. District Judge and others (2019 CLC Note 32 Lahore)**, **Muhammad Farique Vs. Kaneezan Bibi (2018 MLD 1988)**, **Fazalur Rehman Vs. Mst. Shazia Bibi (2015 CLC 116)**, **Faisal Hanif Vs. Baby Mahnoor**

(2002 CLC 1754), Muhammad Aslam Vs. District Judge and others (2002 CLC 1768), Syed Hamid Shah Vs. Mst. Sahiba and others (2005 YLR 2393), Shahid Raza Vs. Dr. Fauzia Shaheen (2004 MLD 1325), Tayyab Khan Vs. Nadia Khan (2000 CLC 558), Muhammad Rafi Vs. Atta Ullah Kausar (1993 CLC 1364) and Usman Khan Vs. Mst. Shehla Gul (2002 CLC 910).

5. The law on the scope of High Court's jurisdiction in family matters is well settled. The august Supreme Court in **Shah Jahan and others Vs. Syed Amjad Ali and others (2000 SCMR 88)** held the following:

"...To assess evidence or to determine the amount of maintenance, was the function of the Family Court which has been vested with exclusive jurisdiction to decide such matters. Evidently, neither there appears to be any misreading of evidence nor any material piece of evidence appears to have been overlooked by the Family Court while determining the amount of maintenance awarded to the appellants. It is pertinent to point out that, when the High Court exercises Constitutional Jurisdiction, its powers are not analogous to those of an Appellate Court. Therefore, although it can strike down an order passed by a subordinate Court or a Tribunal as without lawful authority and of no legal effect but it cannot substitute its own judgment for that of the subordinate Court or Tribunal."

6. In **Amjad Khan Vs Muhammad Irshad (2020 SCMR 2155)** It was held that:

"...that it is by now a settled principle of law that the High Courts must not exercise their constitutional jurisdiction in order to interfere with the discretion exercised by lower courts unless the same suffers from jurisdictional, factual or legal errors. In other words, such interference would be justified in cases where the impugned order has been passed without jurisdiction or is based on misreading or non-reading of

evidence, or is not in accordance with the law. If none of these errors is present, the High Courts must not exercise their constitutional jurisdiction to interfere with the findings of lower courts merely because it reached a different conclusion as to the controversy than the latter. In this regard, reference can be made to a collective reading of Mst. Mobin Fatima v. Muhammad Yamin (PLD 2006 SC 214) and Nadira Shahzad v. Mubashir Ahmad (1995 SCMR 1419)."

7. It is settled law that the quality and adequacy of evidence adduced and the quantum of maintenance determined on the basis of such evidence falls within the exclusive domain of the family court, and in its constitutional jurisdiction the High Court cannot sit in appeal over the quantum of maintenance determined by the family Court upon re-appraisal of evidence, or second guess the quantum determined by the Family Court unless the judgment of the Family Court suffers from a jurisdictional defect, or a legal defect due to misapplication of law, or a factual defect due to misreading or non reading of evidence.

8. In the instant case, the learned Family Court and the learned appellate court have determined the quantum of maintenance awarded on the basis of the latest pay slip of the petitioner. The learned counsel for the petitioner has failed to point out any misreading or non-reading of evidence by the Family Court. The learned Family did record an expectation that the petitioner ought to provide accommodation to respondents No. 2 to 4, who were in the custody of respondent No.1. This expectation was converted into a direction by the learned appellate court. Such expectation and direction requiring the petitioner to provide accommodation to respondents No. 2 to 4 in addition to provision of maintenance has no basis in law and to this extent the impugned

judgments and decrees suffer from legal errors and are liable to be set aside. The maintenance awarded, on the other hand, could not be interfered with as the award of maintenance and direction to pay any annual charges imposed by the school in relation to the education of respondents No. 2 to 4 are in accordance with law.

9. Divorce is understandably an acrimonious affair. But bitterness emanating from breakup of a marriage must not be used as a lens to view the parental relationship between a father and his children. A father is the natural guardian of his children and the maintenance that he is liable to pay is for the upkeep of his own children and not that of his former spouse. Thus, it is in the interest of the relationship between the father and his children to approach the issue of maintenance with the generosity of heart that defines the bond between a father and his children. This is all the more important in face of breakup of the marriage which then deprives the children of the constant love and affection of both parents simultaneously. The needs of maintenance change over time as the children grow older and it is in the best interest of the children at the receiving end of a broken home that their evolving maintenance needs are discussed between the parents and resolved in a civil and amicable manner.

10. In view of the above, the instant petition is **partly allowed**. The part of the judgments and decrees impugned before this Court that relate to the direction issued to the petitioner to provide accommodation to respondents No. 2, 3 and 4, (which has also not been pressed by the learned counsel for respondent No.1), is set aside for being not supported by law. The impugned

judgments and decrees to the extent of grant of maintenance, quantum of maintenance and direction to the petitioner to pay annual charges directly to the school, in which respondents No. 2, 3 and 4 are studying, suffer from no infirmity and to such extent this petition is dismissed.

(BABAR SATTAR)
JUDGE

Saeed.