

JUDGMENT

MOHSIN AKHTAR KAYANI, J.---Through this writ petition, the petitioner has assailed the order dated 04.03.2019, passed by the learned Family Judge (East), Islamabad, whereby interim maintenance allowance in favour of minor to the tune of Rs.50,000/- per month has been fixed.

2. Brief facts referred in the instant writ petition are that Dr. Aqueel Waris/petitioner and Dr. Maryam Khan/respondent No.2 married on 07.12.2012 and they were blessed with minor son namely Ibrahim Aqueel Waris/respondent No.1 on 01.01.2014. However, the marriage was dissolved vide judgment and decree 20.02.2018, passed by learned Family Judge (East), Islamabad. Respondent No.1 is currently in custody of Respondent No.2, who has filed suit for recovery of maintenance allowance to the tune of Rs.55,500/- against the petitioner on account of diverse expenses of the minor i.e. school and tuition fee, stationary, uniform, travelling, sports and extra curriculum activities, food, health, medical care, etc. Respondent No.2 contends that the petitioner has not paid a single penny as a maintenance despite the fact that petitioner is qualified physician/doctor, who is settled in Ireland serving as Surgical Tutor in the Royal College of Surgeon, Ireland (RCSI) and he is also serving as Registrar in RCSI having monthly salary of €500 (Euros), which is approximately equivalent to PKR.680,000/-. The petitioner contested the suit by filing his written statement with the stance that his monthly salary is €2496.92 and after deduction of €941.02, his net salary is €1555.90, which is approximately equal to PKR.211,480/-, whereas he is paying €1,000 as house rent, while in the rest of the amount, he has to maintain his family and parents. In this context, the petitioner has tendered in evidence his salary slip of Feidhmeannacht na Seirbhíse Sláinte, Health Service Executive along with his bank account statement in the learned Trial Court. However, the learned Family Judge (East), Islamabad vide impugned order dated 04.03.2019 has passed interlocutory order of interim maintenance to the tune of Rs.50,000/- per month in favour of respondent No.1/minor son against the petitioner/father. Hence, the instant writ petition.

3. Learned counsel for petitioner contends that the learned Family Judge while considering the pleadings of the parties has fixed the interim maintenance on higher side and as such, the order for interim maintenance allowance of the minor is unlawful and has been passed in violation of settled principle of laws; that the Family Court has to consider financial status of father while passing order of interim maintenance; that such kind of harsh order will not only deprive the father / petitioner from contesting the suit on merits, but it also creates a ground for technical knockout, which itself is violation of Articles 4, 9, and 10-A of the Constitution of the Islamic Republic of Pakistan, 1973 as it amounts to negation of principles of fair trial.

4. Conversely, learned counsel for respondents contends that it is the duty of the petitioner being father to maintain the minor and provide all the requisites of life including shelter, food, clothing and protection to the minor, which is lacking in this case and petitioner being father is not providing all these necessities of life, rather he is not interested to pay the interim maintenance, which otherwise proves that petitioner is not interested in the welfare of minor; that the order impugned before this Court is of interlocutory nature and the same could not be assailed in constitutional jurisdiction.

5. Arguments heard, record perused.

6. The perusal of record reveals that the petitioner being father of minor namely Ibrahim Aqueel Waris/respondent No.1 is aggrieved with the order dated 04.03.2019, passed by the learned Family Judge (East), Islamabad, whereby interim maintenance allowance in favour of minor has been fixed @ Rs.50,000/- per month. The petitioner being father contends that his monthly salary being a doctor in Ireland is €2496.92, while he is taking net salary is €1555.90 after deduction of €941.20, and out of his net salary he is paying €1000 as rent and as such, in the remaining amount of €555.90, he has to maintain his parents and sister at home, therefore, the interim maintenance allowance fixed by the learned Family Court is on higher side and order impugned is harsh in nature.

7. While considering the above background, this Court has to deal with question that what are the principles to fix the interim maintenance by the learned Family Judge? While going through the question framed above, it is necessary to firstly consider the primary source of law being Muslim citizens of Pakistan i.e. the Holy Quran, wherein the subject has been dealt in details, particular in Surah Baqarah and Surah Talaq. The specific verses of the said Surahs have been respectively reproduced as under:

8. I have also gone through the different sayings of the Holy Prophet (PBUH) with respect to issue in hand and for ready reference, one of the sayings of the Holy Prophet (PBUH) is reproduced as under:

"It was narrated that 'Aa'ishah said: "Hind bint 'Utbah, the wife of Abu Sufyaan, entered upon the Messenger of Allaah (peace and blessings of Allaah be upon him) and said, 'O Messenger of Allaah, Abu Sufyaan is a stingy man who does not spend enough on me and my children, except for what I take from his wealth without his knowledge. Is there any sin on me for doing that?' The Messenger of Allaah (peace and blessings of Allaah be upon him) said, 'Take from his wealth on a reasonable basis, only what is sufficient for you and your children.'" (Narrated by al-Bukhaari, 5049; Muslim, 1714)."

9. Besides the above referred guidelines, I have also gone through the judgment of the Lahore High Court reported as PLD 2016 Lahore 73 (Ali Adnan Dar v. Judge Family Court), wherein it has been held that:

Father was under legal as well as moral obligation to maintain and support his minor daughter as per injunction of Islam.

It has further been observed in the abovementioned case law that:

The family court while passing the interim maintenance was required to give the bear minimum to the minor.

Similarly, it has also been held in the same judgment that:

Interim maintenance was sufficient to meet day to day expense of minor.

10. Likewise, in another judgment reported as 2011 MLD 1105 Lahore (Amir Mehmood Hussain v. Niha Amir Syed), it has been held that:

The interim maintenance has been fixed only after tentative assessment status of the petitioner and expense being incurred on the education and ther necessities.

11. In addition to above, in case reported as 2015 YLR 2364 (Tahir Ayub Khan v. Miss Alia Anwar), it has been held that:

Family Courts have no unfettled or unbridled powers to fix the interim maintenance at its discretion as they are required to adopt a pragmatic, rational and judicial approach, broadly keeping in mind the social status of the parties, the earnings of the petitioner/father, his capacity to pay and requirement of the minor.

12. Besides the above referred judgments on the question of maintainability, the Division Bench of this Court in reported case 2018 CLC 506 Islamabad (Minhaaj Saqib v. Najum ul Saqib and others) has also settled the question of maintainability of writ petition against interim order, wherein it has been held that High Court could not interfere with interim order of lower court for reducing maintenance allowance of minors.

13. I have also gone through the judgment rendered by the Hon'ble Lahore High Court reported as PLD 2016 Lahore 73 (Ali Adnan Dar v. Judge Family Court, and others), wherein it has been held that if the father found that the interim maintenance was excessive or order suffers from any illegality, irregularity or is arbitrary, fanciful, and void ab initio without jurisdiction or same had attained the status of final order, then constitutional petition is maintainable. Similarly, certain guidelines have been set in supra judgment regarding fixation of interim maintenance of minor, which plays a key role while passing such order. For ready reference, the same are reproduced as under:

I. Maintenance allowance is indispensable right of the mother and children, so the order for grant of maintenance allowance must be passed at a "convenient stage" of the proceedings.

II. Although section 17-A of the ibid Act empowers Family Court to pass an order for grant of interim maintenance allowance at any stage of the proceedings, in the normality of the circumstances, it must be passed after hearing "both of the parties" unless the attitude and conduct of the defendant/father is evasive.

III. The order for grant of interim maintenance is made on the basis of tentative assessment of the material available on file and keeping in view the social status of the parties. Further, both the above, material available and social status, should be mentioned in the order for the grant of interim maintenance. Further the quantum of interim maintenance should be "bare minimum" to meet the day to day needs of the recipient in the narrow context.

IV. Although the family laws have been enacted to promote, protect and advance the rights of women and children yet at the interim stage, the version of the respondent/defendant be given a sympathetic or somewhat preferable consideration because, non-payment of interim maintenance allowance will cut throat of his invaluable right i.e. "right to defence" and in consequential effects, children/women would be the losing and deprived parties.

V. Further, if the case is not decided within the statutory period as given in Section 12-A of the West Pakistan Family Courts Act, 1964 either party may apply to the High Court for appropriate direction. However, the order for grant of interim maintenance shall hold the field unless reviewed by High Court under section 12-A or Family Court itself reviews it at any stage as observed below.

VI. Family Court, according to section 12-A" of the West Pakistan Family Courts Act, 1964, is under legislative direction to decide the case within six months. Although this provision is directive as no penalty/consequences are mentioned for non-compliance and in this regard reference is made to (2001 SCMR 1001). But in case the matter is not decided within six months and the delay is due to the plaintiff party, then Family Court either on its own motion or on the application of the defendant/father review its earlier order for grant of interim maintenance allowance."

14. While considering the principles laid down in the Holy Quran, Sun'ah as well as in the aforesaid judgments of superior Courts of the country, this Court is of the view that the

Almighty Allah has already settled the principles in Surah Tal'aq and Surah Bakarah in unequivocal terms by using the word " " i.e. "capacity" and this concept has been followed by the superior Courts. Accordingly, this Court comes to the conclusion that any order in which the financial capacity of the father vis-a-vis his own expenses has not been considered properly by the Judge Family Court, the order of interim maintenance would be considered unjust, perverse, harsh, excessive and fanciful, which will further create an imbalance qua the rights of father, who will suffer due to socio-economic factors as he would not be in a position to comply with the terms of interlocutory order in terms of section 17-A of the Family Courts Act, 1964, where no appeal has been provided and in such a manner, he has been deprived of his constitutional guarantees of equal protection of law in terms of Article 4 of the Constitution of the Islamic Republic of Pakistan, 1973, whereby the State has given its assurance for such guarantee.

15. Similarly, on the other hand, such harsh order of higher maintenance in favour of minor would amount to creating financial problems for a father, especially when he would not be able to comply with the terms of the interlocutory order, his right to contest the suit on merit would close and he would be knocked out by the Judge Family Court on failing to pay interim maintenance and accordingly his suit will be decided forthwith, which, in some cases, is violation of right to fair trial and due process in terms of Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973.

16. While considering the above discussion, interlocutory orders of the Judge Family Court could not be assailed in constitutional jurisdiction, even though in some of cases they are harsh, but the determination of adequacy or inadequacy of the quantum of maintenance would certainly require factual evidence or inquiry which cannot be made in the proceedings under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 as held in 2018 CLC Note 43 (Shameneh Haider and others v. Haider Ali Khan), 2011 MLD 1105 Lahore (Amir Mehmood Hussain v. Niha Amir Syed), 2015 YLR 2364 (Tahir Ayub Khan v. Miss Alia Anwar), PLD 2012 Lahore 420 (Ibrar Hussain v. Mehvish Rana and others), and PLD 2013 Lahore 64 (Muhammad Shahbaz Khalid v. Judge Family Court, Lahore). Although, the underlining legal principles to consider this legal aspect is the intention of the legislature, who has specifically prohibited filing of appeal against interim order, allowing constitutional petition would tantamount to defeating and diverting intent of the legislature. Even otherwise, there is no bar under the law to challenge the void ab initio orders, which are without jurisdiction. Learned counsel for respondents has also explained the principle of interlocutory order while relying upon judgment reported as 1999 SCMR 1447 (Mohtarma Benazir Bhutto v. The State), wherein it has been held that orders at interlocutory stages should not be brought to higher courts to obtain pragmatic orders as it intends to harm the advancement of fair trial, curtailing remedies available under the law, and even reducing the right of appeal.

17. The epitome of entire discussion gives a complete insight that father should not be punished by way of interim maintenance allowance order so that he would not be able to pay the maintenance and resulted into consequences provided in Section 17-A of the Family Courts Act, 1964, therefore, it is the imperative duty of the Family Court to adopt a pragmatic approach and fix the interim maintenance on the following principles:

- i. Financial status of father shall be kept in view, which should be based upon salary slips, bank statements, income tax record, and business income reflected on record or through any other documentary proof placed by either side in the Court.
- ii. Interim maintenance should be fixed not on hard and fast principles, rather based upon a tentative view.
- iii. Maintenance should not be fixed on a higher side, which may result into technical knockout of the father so that he could not able to pay the interim maintenance, therefore, his option should also be considered for payment of interim maintenance, which he agrees to pay before the Family Court.
- iv. In cases, where father has not explained his monthly income or his financial status in the pleadings, rather concealed his income, the Family Court can rely upon the facts narrated in plaint or on the basis of attached documents vis-a-vis the needs of minor and the verbal stance given by father without reference to his written statement will not be considered justified, hence the Family Court shall exercise discretion to fix the interim maintenance while applying the above principles.

- v. In cases, where determination of adequacy or inadequacy of quantum of maintenance requires factual inquiry and evidence in trial, the maintenance should be fixed after consultation with the father and mother as well as keeping in view the day-to-day requirements of minor.
- vi. The needs of minor should be considered on the basis of social stratification of family in which minor has been brought up.
- vii. The financial status of father could also be considered on the basis of facts narrated in pleadings of the parties, which includes the living standard and previous matrimonial life of the parties in which the mother/wife has been provided with particular kind of living, housing facilities, transportation, gifts, immovable properties of husband and the lifestyle in which husband/father was living prior to separation or divorce or before the institution of suit for maintenance.
- viii. In cases, where father being civil servant or employee of any organization, department or company has not appended his salary slips or bank statements, the Family Court shall ask for an undertaking or affidavit regarding his salary and thereafter shall fix the interim maintenance, however after the trial of the case, if the court comes to the conclusion that at the time of fixation of interim maintenance allowance the father/husband has stated a fact beyond his pleadings or undertaking, which is found to be false, such father be burdened with heavy costs and action of perjury may also be initiated against him.
- ix. The Family Court may also call the employer of father, HR department, admin department, bank managers, land revenue department, tax record, and banking details as well as salary details of the father directly from the relevant offices while deciding the question of interim maintenance for a prima facie view to fix the allowance in favour of minor so that no inadequacy is attributed while fixing the maintenance allowance.

18. While applying the above principles in present scenario, when the petitioner/father has taken the plea that since he is left with €555 in his hand after deduction of tax and payment of other expenses, he could not pay the interim maintenance of Rs.50,000/- per month to the minor/respondent No.1, which prima facie seems to be on higher side at this stage, but this Court, in constitutional jurisdiction, is not able to determine this factual aspect of adequacy or inadequacy of the interim maintenance allowance on the basis of principles laid down by the superior Courts, where such order could not be assailed in constitutional jurisdiction. However, in order to avoid any conflict, the Judge Family Court is directed to decide the pending maintenance suit within the period of one month while recording the evidence on day to day basis so that the father/petitioner could only be burdened with the interim maintenance of Rs.50,000/- for a month, which would be subsequently merged into the final judgment or in case it may be decreased or otherwise on the basis of evidence.

19. In view of above, the instant writ petition is hereby **DISMISSED** with the direction to the Judge Family Court seized with the matter to conclude the suit within 30 working days.

Petition dismissed.