

ORDER SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

I.C.A.No.316 of 2017
Minhaaj Saqib, etc.
Versus
Najam-us-Saqib, etc.

S. No. of order / proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
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16.11.2017	Mr. Ijaz Janjua, Advocate for the appellants, Respondent No.1 in-person.
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Through the instant intra court appeal, the appellants, impugn the judgment dated 21.09.2017, passed by the learned Single Judge in-Chambers, in writ petition No.76/2017 titled “Najm-us-Saquib Vs. Minhaaj Saqib etc.” only to the extent of the modification made in the order dated 14.11.2016, passed by the learned Judge Family Court, Islamabad, by reducing the quantum of interim maintenance to which the learned Judge Family Court, Islamabad, held each of appellants No.2 and 3 entitled to, from Rs.50,000/- to Rs.25,000/- per month. The learned Single Judge-in-Chambers made the said modification after holding the said writ petition was not maintainable.

2. The facts essential for the disposal of this appeal are that appellant No.3 (Saima Malik) and respondent No.1 (Najam-us-Saqib) got married on 25.07.1989. The couple were blessed with three children, namely, appellant No.2 (Ms. Sehar Saqib, who was born on 08.07.1990), Ms. Myra Saqib, who was born on 21.11.1991, and appellant No.1 (Minhaaj Saqib, who was born on 20.10.2001). Subsequently, the relations between the couple turned sour resulting in their divorce on 28.04.2011. Appellants No.1 and 2 are in their custody of their mother/appellant No.3.

3. On 21.06.2012, respondent No.1 filed a petition under Section 25 of the Guardians and Wards Act, 1890, for obtaining appellant No.1's custody. Vide judgment and decree dated 06.01.2015, the learned Guardian Judge dismissed the said petition. However, a visitation schedule for meetings between appellant No.1 and respondent No.1 was fixed by the learned Guardian Judge. Since respondent No.1 was posted abroad, the learned appellate Court vide judgment dated 09.05.2015 modified the visitation schedule with the consent of appellant No.3.

4. On 12.02.2016, the appellants filed a suit for maintenance for appellants No.1 and 2 before the learned Judge, Family Court, Islamabad. The details of appellants No.1 and 2 expenses were mentioned in the suit. Appellant No.1 was then a student at the Lahore Grammar School, Islamabad, whereas appellant No.2 was doing her L.L.M. at George Washington University, Washington D.C. In the said suit, a claim for past maintenance was also made. Respondent No.1 contested the said petition by filing a written statement. Vide order dated 14.11.2016, the learned Judge Family Court, fixed Rs.50,000/- per month as interim maintenance for each of appellants No.1 and 2. The said order dated 14.11.2016, which was interim in nature, was assailed by respondent No.1 in writ petition No.76/2016 before this Court. Vide judgment dated 21.09.2017, the learned Single Judge-in-Chambers held that the said writ petition was not maintainable. Nonetheless, he interfered with the interim order dated 14.11.2016 by reducing the interim maintenance for each of appellants No.1

and 2 from Rs.50,000/- to Rs.25,000/- per month. The said judgment dated 21.09.2017 has been impugned by the appellants only to the extent of the modification made in the quantum of interim maintenance fixed by the learned Judge Family Court.

5. Learned counsel for the appellants submitted that the learned Single Judge-in-Chambers was correct in holding that a writ petition against an interim order passed by the learned Judge Family Court was not maintainable; that the said finding of the learned Single Judge-in-Chambers was in consonance with the well settled principle that interim maintenance fixed by the learned Judge Family Court could not be assailed in a writ petition; that after holding that the writ petition instituted by respondent No.1 was not maintainable, the learned Single Judge-in-Chambers could not have interfered with the said order dated 14.11.2016 by reducing the interim maintenance for appellants No.1 and 2 fixed by the learned Judge Family Court; that there was a material contradiction in the judgment dated 21.09.2017, passed by the learned Single Judge-in-Chambers; and that respondent No.1 could not avoid his obligation of adequately maintaining his own children. Learned counsel for the appellants prayed for the judgment dated 21.09.2017 to be set-aside only to the extent of interference shown with the quantum of maintenance fixed by the learned Judge Family Court for appellants No.1 and 2.

6. On the other hand, respondent No.1 appeared in-person and submitted that he was currently serving as Pakistan's Ambassador to

Brazil; that respondent No.1's salary did not enable him to pay interim maintenance in the amount fixed by the learned Judge Family Court; that respondent No.1 draws a monthly salary of Rs.2,00,391/- only; and that the modification made by the learned Single Judge-in-Chambers in the interim maintenance fixed by the learned Judge Family Court was just and proper. Respondent No.1 prayed for the appeal to be dismissed.

7. We have heard the contentions of the learned counsel for the appellants as well as respondent No.1. The facts leading to the filing of the appeal are set out in sufficient details in paragraphs 2 to 4 above, and need not be recapitulated.

8. In writ petition No.76/2016, respondent No.1 had impugned the interim order dated 14.11.2016, passed by the learned Judge Family Court, Islamabad, whereby interim maintenance at the rate of Rs.50,000/- per month was fixed for each of appellants No.1 and 2. Vide judgment dated 21.09.2017, the learned Single Judge-in-Chambers held that the said writ petition was not maintainable. Paragraph 6 and a part of paragraph 7 of the said judgment are reproduced herein below:-

"6. I have gone through the pleadings of the parties as well as order passed by learned Family Judge. Although it is well settled that interim maintenance could not be assailed through a writ petition. Reliance is placed upon 2017 YLR 622 Islamabad titled as Shahida Fazil Vs. Mst. Hina Tahir, etc., 2014 CLC 330 Islamabad titled as Mst. Maham Shabbir Vs. Salman Haider and others 2015 MLD 840 titled as Shah Ameer Mujtaba Vs. XX Civil and Family Judge and 3 others.

7. In view of above, instant writ petition is not maintainable. ..."

9. After holding that the writ petition instituted by respondent No.1 was not maintainable, the learned Single Judge-in-Chambers interfered with interim order dated 14.11.2016, passed by the learned Judge Family Court by reducing the quantum of maintenance for each of appellants No.1 and 2 from Rs.50,000/- to Rs.25,000/- per month. We are of the view that once it was held that the writ petition was not maintainable, the learned Single Judge-in-Chambers ought not to have gone into the merits of the case by reducing the interim maintenance fixed by the learned Judge Family Court. When a Court holds that a writ petition is not maintainable, then it should not give any finding on merits or interfere with the order assailed in the writ petition.

10. There is a catena of case law in support of the proposition that where an objection to the maintainability of a */is* or to the jurisdiction of the Court to adjudicate upon the matter is taken, the same ought to be decided before an adjudication on merits. In the case of Chief Executive FESCO Ltd. Vs. Additional District and Sessions Judge, Sargodha (PLD 2005 Lahore 709), it has been held that *“it is obligatory rather mandatory for a Court in the first instance to satisfy itself about the existence of its jurisdiction and power to decide the matter brought before it.”* The rationale for this is that in the event, the Court finds that the */is* is not maintainable or that the Court does not have the jurisdiction to adjudicate upon the matter, there would be no occasion for the Court to delve into or give any findings on the merits of the case, let alone interference with the order under challenge.

11. Once a petition is held not to be maintainable, the Court, in effect, holds that it does not have the jurisdiction to adjudicate upon the */is*. In the case of Muhammad Naeem Kasi Vs. Abdul Latif (2005 SCMR 1699), it has been held that the word "jurisdiction" means the power to hear and decide legal controversy between parties to pronounce judgment as per requirement of law. After the Court holds that petition before it is not maintainable, any interference with order impugned in such a petition or determination of the */is* on merits, would be without jurisdiction and liable to be declared as such. Reference may be also be made to the following case law:-

- i) In the case of S.M. Waseem Ashraf Vs. Federation of Pakistan through Secretary, Ministry of Housing & Works and others (2013 SCMR 338), it has been held *inter-alia* that "any forum or court, which, if lacks jurisdiction adjudicates and decides a matter, such decision etc. shall be void and of no legal effect."
- ii) In the case of Humayun Saifullah Khan Vs. Federation of Pakistan (PLD 1990 SC 599), it has been held *inter-alia* that where the bar of jurisdiction had not been crossed, no adjudication on merits in the nature of a substantive finding could be recorded.
- iii) In the case of Yousuf A. Haroon Vs. Custodian of the Karachi Hotel Project (2004 CLC 1967), it has been held *inter-alia* that while disposing of a petition on the point of jurisdiction and non-maintainability of the petition, it would not be proper to make any observation on the merits of the

case and on any point of law other than maintainability of the petition as it was likely to effect the proceedings which the parties may pursue.

- iv) In the case of Messrs Voyage de Air, General Sales Agent, Shaheen Air International Vs. Shaheen Air International Pvt. Ltd. (2006 CLC 173), the Hon'ble Lahore High Court has held as follows:

“15. It is settled preposition of law that where the Courts having no jurisdiction over subject-matter of suit or appeal, it cannot decide any question on merits. It can simply decide question of jurisdiction and order return of plaint for its presentation to proper Court if it comes to conclusion that it has no jurisdiction. Reference in this context can be made to the cases of Athmanathaswami Devasthanam v. K. Gopalaswami Ayyangar AIR 1965 SC 338; Karachi Electric Supply Corporation Limited through Secretary v. Messrs Haji Hashim Haji Ahmad Brothers 2003 YLR 2226; Maqsood Ali Khan v. National Bank of Pakistan through President, Head Office, I.I. Chundrigar Road, Karachi and 3 others 2003 PLC (C.S.) 226; and Shah v. Bibi Bushra and others 1992 MLD 833.”

12. In view of the above, the instant appeal is allowed and the impugned order dated 21.09.2017 is set-aside only to the extent of modification made in the interim order dated 14.11.2016 by reducing the interim maintenance for each of appellants No.1 and 2 from Rs.50,000/- to Rs.25,000/- per month. There shall be no order as to costs.

(ATHAR MINALLAH)
JUDGE

(MIANGUL HASSAN AURANGZEB)
JUDGE

APPROVED FOR REPORTING

Qamar Khan*

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