

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

W.P. NO.1550/2019

FAROOQ AHMED KHAN.
Vs.
LEARNED ADDITIONAL DISTRICT JUDGE, ISLAMABAD
(WEST), ETC.

Petitioner by : Raja Muhammad Farooq, Advocate.

Respondents by : Ch. Zakki Rizwan, Advocate.
(For Respondent Nos. 3 to 7)

Date of hearing : 03.02.2020

LUBNA SALEEM PERVEZ, J. Petitioner has filed instant Writ Petition assailing order dated 25.10.2018, passed by the learned District & Sessions Judge, West-Islamabad, whereby, the learned Judge while deciding cross family appeals of the parties, modified the judgment and decree dated 31.05.2019, to the extent of reducing the annual increase in the maintenance from 15% to 10%, and confirmed the monthly maintenance of Rs.40,000/- for four minors.

2. Admitted facts of the case are that after dissolution of marriage between the Petitioner and Respondent No.3, by way of Khula, Respondent No.3 filed suit for maintenance and recovery of dowry articles before the learned Senior Civil Judge-III (Guardian Judge) West-Islamabad who, vide his order dated 31.05.2018, fixed the maintenance of four minor children at the rate of Rs. 10,000/- per month per child with annual increase of 15% w.e.f. date of judgment as against Rs. 1,00,000/- per child claimed by Respondent No. 3. The judgment was challenged through filing of appeals by both the parties before the Additional District Judge, who vide impugned order dated 25.10.2018, upheld the monthly maintenance of Rs. 10,000/- per child, however, reduced the annual increase from 15% to 10% , hence instant writ petition.

3. Learned counsel for the Petitioner argued that the monthly maintenance fixed by the Trial as well as Appellate Courts is exorbitant as both the Courts failed to appreciate the admitted fact that the Petitioner is a retired person who is solely dependent on pension of Rs. 25,000/- per month. Learned Counsel submitted that the claim of the ex-wife/Respondent No.3 that Petitioner is earning monthly Rs. 70,000/- is factually incorrect and the onus to prove this alleged fact lies on her, whereas, Petitioner has placed on record all the documents relating to his monthly earnings including the pension pass book before the courts. Learned Counsel contended that the allegation that Petitioner owned a Suzuki Carry for the purposes of running a business of pick and drop, is also factually incorrect as the Petitioner has sold the said vehicle during the execution proceedings, evidence of which was also produced before the learned Appellate Court. Learned Counsel lastly contended that it is not possible for Petitioner to comply with the Courts' orders because of his meager income of pension thus prayed for decreasing the monthly maintenance fixed by the lower courts.

4. Learned counsel for Respondent Nos.3 to 7 opposed the arguments of the Petitioner and submitted that the lower Courts, after taking into consideration all the facts and record, fixed the maintenance at Rs. 40,000/- i.e. Rs. 10,000/- per child per month which in view of present economic conditions is still not sufficient. Learned Counsel referred to cross examination of the Petitioner whereby it has been recorded that he "owns a hospital and not a college" and contended that in view of his own admission, Petitioner is in position to pay the maintenance and being a father, it is his responsibility to bear the expenses of his children. Learned Counsel in support of his contentions referred the case law reported as **(2018 SCMR 1991), (2010 YLR 2313) and (PLD 2013 SC 557).**

5. While submitting the rebuttal to the contentions of learned Counsel for the Respondents, learned Counsel for the Petitioner referred the statement of

Respondent No.3 recorded during trial, wherein, she deposed that "the hospital belongs to the brother of the Petitioner" and submitted that in view of this admission by the wife herself the argument of learned Counsel for Respondents regarding income of the Petitioner from hospital is self-contradictory.

6. Arguments advanced on behalf of learned Counsel for the parties have been heard and the documents placed on record including the judgment/order of the learned Trial as well as Appellate Courts have also been examined with their able assistance.

7. Perusal of the record shows that the Petitioner is aggrieved with the impugned judgment dated 25.10.2018, for fixing the monthly maintenance of four minor daughters at Rs.10,000/- per child being excessive and disproportionate to his income as according to him he is unable to pay the said maintenance from his monthly pension of Rs. 25,000/-. In this regard Petitioner has urged that he has no other source of income except the said pension. Perusal of the judgment shows that the finding of the learned Trial Court regarding Petitioner's monthly earning is based on statement/cross-examination of Respondent No.3, who alleged that the Petitioner's per month income is Rs.70,000/-, and presumed that beside pension he owned a hospital, a college and Suzuki Carry for running business of pick & drop, whereas, failed to take notice of the evidence/documents relied upon by the petitioner and the admission of fact of Respondent No.3 made during cross-examination, before coming to the conclusion of determining the monthly maintenance of Rs.10,000/- each child. Relevant portion of the judgment dated 31.05.2018, passed by the learned trial Court is as follows:

"ISSUE NO.1

Whether the plaintiffs are entitled for recovery of maintenance allowance @ Rs. 1,00,000/- per month from December 2015 to onward? OPP

10. *The onus of proving this issue was on the plaintiff No.1, she has prayed for maintenance allowance at the rate of Rs. 1,00,000/- per month for each of the minor, the contention in the plaint had been supported by her statement through*

affidavit. It is an admitted position that all the four minors, plaintiff Nos. 2 to 5, are the real daughters of defendant, so legally and morally he is obliged to maintain them. The contention of the plaintiff No.1 is that the defendant has not paid anything as maintenance w.e.f. December, 2015. In response to this very contention of the plaintiff No.1 the defendant has not placed on record any contrary plea, he has not even agitated that any maintenance was ever paid by him. In the circumstances, he is bound to make the payment w.e.f. December, 2015 to each of the minors, who are admittedly receiving education as is evident from receipts of their school fee made available before court as Ex.P2 and EX.P6. The question of quantum of maintenance allowance per minor has always been fixed as per the financial position of the defendant. Though the plaintiff No.1 has asserted that he is owner of a hospital, receiving pension and is also running a school van, therefore he can afford the maintenance allowance as per prayed for, however as per her own admission during the cross-examination, the income of defendant is Rs.70,000/- per month. In view of this admitted position the maintenance allowance at the rate of Rs.1,00,000/- per month for each of the minor cannot be ordered. Keeping in view the expenditures, incurred upon the schooling, transportation and other daily needs, this court deems it appropriate to fix the maintenance allowance of Rs.10,000/- per month for each of the minor, which the defendant shall be bound to pay w.e.f. 15.12.2015 till their marriage, however in calculating arrears of maintenance allowance the amount paid by the defendant as interim maintenance shall be deducted. The maintenance allowance shall be liable to 15% annual increase w.e.f. date of judgment. This issue is decided in above terms."

Furthermore, perusal of the impugned order dated 25.10.2018, reveals that the learned Appellate Court has also failed to take into account the Petitioner's means to support his children as being necessary for fixing the monthly maintenance thus, while confirming the judgment of the Trial Court, ignored the key factors to ascertain the petitioner's ability to pay the maintenance and fixed the same as per the needs of the children. Relevant paragraph of the judgment passed by the learned Appellate Court is given as under:

"12. The Second Point is to what extent Farooq is capable of to maintain her daughters from his monthly earnings. From the evidence of Farooq it transpired that he has to maintain his second wife too. Meaning thereby presently he has to shoulder the burden of this two families; one from first wife (Farkhanda) and with the second wife. From the second wife, he does not have any issue/children and if his monthly income is divided into two families, bring his monthly income half to a family i.e. Rs. 35,000/- each of the two. Since, he does not have any children from his second wife, therefore, that family is consisting of two members viz. himself and second wife. Thus, an edge to the family of his growing daughters can be given when they are four in terms of family members and he is not shying

of his responsibility to maintain them. I found him capable as such. Thus, fixing PKR. 10,000/- per month per daughter by learned trial court is quite reasonable making a total of PKR. 40,000/- per month when edge to this family in terms of members is seen. As to the annual increase of 15%, it seems to be on the higher side, therefore, is reduced to 10% per annum. Similarly, in above circumstances, I do not see that learned trial court was wrong in fixing the maintenance of the four daughters from 15.12.2015.”

Plain reading of the impugned judgment/order of the learned Courts below clearly shows that the conclusions have been drawn only on the assertions of Respondent No.3, who claimed the maintenance of Rs. 100,000/- per child, (though have been considered illogical by the Trial Court) but no deliberations have been made on the means, sources and financial capacity of the Petitioner. I am conscious of the fact that, at this stage, while exercising powers under the Constitutional Jurisdiction, this court has to see the illegality, irregularity or invalidity apparent in the decisions arrived at by the Courts below and that whether the decisions have been made after thrashing out all the material evidence and statements recorded during the trial, whereas, the factual aspects of the matter cannot be re-appraised in writ petition. However, in the interest of justice I have gone through the evidence and statements attached with the petition, which revealed that the statement and evidence produced by the Petitioner in respect of his income/pension have not been given due consideration and as such the impugned orders are silent to the extent of determination of actual source of income of the Petitioner as well as disputed version of the parties in this respect, therefore, it would be appropriate if matter is remanded back to the learned Appellate Court for decision afresh. In this regard, guidance has been taken from the judgment of Hon’ble Lahore High Court reported as **PLD 2018 Lahore 916**, and it would not be out of place to reproduce the observation therefrom:

"At the same time the court must determine the income of the father either through proper documentary evidence or on the basis of the social status and earning capacity of the father. In order to ensure that proper information is before the court, it may always require the father to produce documents such as his salary slips or any bank statement or property document on the basis of which

he is able to show his monthly income or earning or his financial status. In this regard, the assets owned by the father are relevant as it contributes towards establishing the financial status of the father that has to be probed into by the court and based on attending circumstances the court can conclusively establish the means through which the father will be able to maintain the minors. It is also important to take into consideration any liability of the father, that is whether he is paying any bank loan or debt, whether he has remarried or has other children or whether his parents are dependent on him. In this way the court can determine the manner in which the income of the father is spent and balance the income and capacity with the reasonable requirements of the minors seeking maintenance."

10. In this regard, it is noted that Section 17(A) of the West Pakistan Family Courts Act, 1964 specifically provides in subsection (4) that for the purposes of fixing maintenance, the court may summon the relevant documentary evidence from any organization, body or authority to determine the estate and resources of the defendant. The purpose of this provision is to facilitate the court to determine the financial position of the father. The court therefore is not dependent on documents or information provided by the father and can call for relevant documents or information be it from the relevant department or organization or as the case requires, in order to determine the income of the father."

8. In view of the discussion made hereinabove, the impugned order dated 25.10.2018, is set-aside to the extent of determination of monthly maintenance fixed for welfare of the minor children and the matter is remanded back to the learned Appellate Court for decision afresh, in the light of observations made in the preceding paragraphs; by providing opportunity of hearing to both the parties in accordance with law.

9. The Writ Petition stands disposed of in above terms.

(LUBNA SALEEM PERVEZ)
JUDGE