

## **JUDGMENT SHEET.**

### **IN THE ISLAMABAD HIGH COURT, ISLAMABAD.** **JUDICIAL DEPARTMENT.**

**W.P. No. 1191/2019.**

Najm us Saqib

*versus*

Minhaaj Saqib, etc.

**Petitioner by:** Dr. G. M. Ch., Advocate.

**Respondents by:** Mr. Ijaz Janjua, Advocate.

**Date of Decision:** 17.02.2020.

**MOHSIN AKHTAR KAYANI, I:** Through this writ petition, the petitioner has assailed the order dated 20.03.2019, passed by learned Additional District Judge (West) Islamabad and has also assailed the judgment & decree dated 06.12.2018, passed by learned Judge Family Court (West), Islamabad, whereby suit for maintenance of respondents No.1 & 2 has been decreed in their favour.

2. Brief facts referred in the instant case are that respondents No.1 to 3 filed a suit for maintenance against the petitioner on 12.02.2016, which was contested by petitioner/father, however, matter was concluded after recording of evidence vide judgment & decree dated 06.12.2018 by the Judge Family Court in the following terms:-

*In wake of above discussion, the suit of the plaintiffs is hereby decreed in favor of the plaintiffs as under:-*

- *Plaintiff No.1 is entitled for recovery of past maintenance allowance from the defendant @ Rs.40,000/- per month, from September 2011 till institution of this suit. Further plaintiff No.1 is also entitled for recovery of future maintenance allowance @ Rs.60,000/- per month from the date of institution of this suit, till he attains the age of majority or till he is otherwise legally debarred, with 15% simple annual increase due in December 2019.*

- *Plaintiff No.2 is entitled for recovery of maintenance allowance from the defendant from September 2011 till May 2015 @ Rs.40,000/- per month. While from June 2015, till completion of her LLM from abroad, plaintiff No.2 is entitled to receive Rs.100,000/- per month. Plaintiff No.2 is entitled to receive future maintenance allowance @ Rs.40,000/- per month from the defendant till her legal entitlement with 15% annual increase which shall be applicable from December 2019.*

The above mentioned judgment was assailed in appeal however, the appeal was dismissed being time barred vide order dated 20.03.2019 and the application for condonation of delay was also turned down. Hence, instant writ petition.

3. Learned counsel for the petitioner contends that petitioner is a serving Civil Servant (BPS-21) and presently posted in Embassy of Pakistan in Brazil, who married with respondent No.3 on 25.07.1989, whereas three children were born from the said wedlock and as such divorce took place on 13.01.2011. The minor Myra Saqib is living with the petitioner and other two minors Sahar Saqib and Minhaaj Saqib are living with mother but Sahar Saqib is 28 years of age born on 08.07.1990 and is not entitled for any maintenance, whereas Minhaaj Saqib (son) born on 20.10.2001 and as such trial Court has not considered the evidence in its true perspective whereby exorbitant rate of maintenance has been fixed despite the fact that petitioner being civil servant is not in position to pay the maintenance beyond his salary paid by the Government; that properties highlighted by respondents before the Courts below are inherited properties and as such petitioner being civil servant is not in position to maintain the minors through exorbitant rate of maintenance; that this is second round of proceedings and petitioner was non-suited on hyper technical grounds as judgment & decree was passed on 06.12.2018 when petitioner was abroad in connection with his official duties being Ambassador of Pakistan and came back to Pakistan on 03.03.2019 and his date of knowledge is 04.03.2019, where-after he filed application of certified copy on 05.03.2019, which were received on 13.03.2019

and he immediately filed the appeal on 14.03.2019 but despite this fact he was not given benefit of Section 13 of Limitation Act, which provides the condonation if the appellant was out of country in the relevant time.

4. Conversely, learned counsel for respondent No.3 contends that petitioner is habitual defaulter in payment of maintenance who has not paid a single penny of maintenance despite the fact that judgment & decree was passed and as such he is not entitled for any relief; that ground raised for condonation of delay is not justiciable under the law as no sufficient cause has been explained in the application.

5. Arguments heard, record perused.

6. Perusal of record reveals that petitioner is mainly aggrieved with the judgment of appellate Court dated 20.03.2019, whereby appeal filed by petitioner against the judgment & decree of learned trial Court dated 06.12.2018 was dismissed being time barred. The petitioner who is civil servant of BPS-21 was posted as Ambassador of Pakistan in Brazil and he has taken the stance that he was out of country in connection with his official duties and on his arrival he came to know that a decree has been passed against him, where-after he filed an application for certified copy on 05.03.2019 which were supplied by the office on 13.03.2019, where-after he filed appeal before learned Additional District Judge on 14.03.2019 but despite all these justified reasons his appeal was dismissed being time barred, despite the fact that one of the respondents Sahar Saqib is 28 years of age and was not minor and he is not entitled for maintenance. It has also been argued that petitioner being civil servant placed copy of his salary slip on record but maintenance fixed by the trial Court is on higher side which is not permissible under these circumstances. In order to resolve the controversy it is necessary to decide the question of limitation at the first instance.

7. As per record judgment & decree was passed on 06.12.2018 by the Judge Family Court against the petitioner, however, petitioner came to Pakistan on 03.03.2019 and as per his own version his date of knowledge is 04.03.2019 and he

filed application for issuance of certified copy of the judgment & decree on 05.03.2019, which were supplied to him on 13.03.2019 and he filed appeal before the Additional District Judge (West), Islamabad on 14.03.2019 as such his appeal was time barred for 55 days at the initial stage, therefore, question of limitation requires appreciation in the light of Section 13 of the Limitation Act, 1908, which is as under:-

*"13. Exclusion of time of defendant's absence from Pakistan and certain other territories:- In computing the period of limitation prescribed for any suit, the time during which the defendant has been absent from [Pakistan] and from the territories beyond [Pakistan] under the administration of [the [Federal Government]] \* \* \* shall be excluded".*

8. The above referred provision provides protection to any person who was not available in Pakistan and period of limitation shall be reckoned from the date of his arrival. It has not been denied by respondent's side that petitioner was not out of country and was posted being Ambassador and copy of passport appended with this petition spells out exit and entry in Pakistan which is in line with the dates referred by the petitioner. It is trite law that parties should not be knocked out on technical reasons and their right should be decided on merits. Reliance is placed upon 2000 SCMR 830 (Muhammad Yaqub Vs. Pakistan Petroleum), and such type of situation requires adjudication of matter on merit and not on technical reasons.

9. I have also attended the proposition in the light of Section 13 of the Limitation Act, 1908, which has been discussed in the reported cases PLD 2006 SC 457 (Mst. Farah Naz Vs. Judge Family Court, Sahiwal and others) in the following manner:-

*On its part, High Court also committed serious error of law by non-suiting the appellant with the observation that period for recovery of past maintenance being three years, without citing any provision of the Limitation Act proceeded to endorse the judgments of the two Courts below. Indeed the claim for past maintenance would be governed by Article 120 of the Schedule to the Limitation Act 1908, which prescribes a*

*period of six years in a suit for which no period is provided elsewhere in this Schedule from the date when the right to sue accrues. Furthermore, by reason of section 13 of the Limitation Act 1908 in computing the period of limitation prescribed for any suit the time during which the defendant had been absent from Pakistan and from the territories beyond Pakistan under administration of the Central Government shall be excluded. Assuming, without conceding, even if the period of limitation for such suit be three years, in view of the admitted absence of the respondent from Pakistan, the period of his absence from Pakistan shall be excluded for reckoning the period of limitation. We are supported in this view by the precedents reported as Muhammad Nawaz v. Khurshid Begum (PLD 1972 SC 302), Mst. Bushra Qasim v. Dr. Abdul Rasheed and others (1993 CLC 2063), Mst. Zaibun v. Mehrban (PLD 2004 SC (AJ&K) 25) and Mst. Anar Mamana and another v. Misal Gul and 2 others (PLD 2005 Peshawar 194).*

10. Similarly, identical question has also been adjudicated in another case reported as 2015 YLR 2375 (Mst. Kulsoom Bibi Vs. Muhammad Waseem and 3 others) and following view has been taken:-

*The bare reading of the section ibid, reveals that it provides that in computing the period of limitation prescribed for any suit, the time during which the defendant has been absent from Pakistan and from the territories beyond Pakistan under the administration of the Central Government shall be excluded. This section makes no exception for cases in which the cause of action arose in a foreign country or for cases in which the defendant was in foreign country at the time of the accrual of cause of action, in all cases, the time during which the defendant has been absent from Pakistan must be excluded in computing the period of limitation. Section 13 does not state that it must be one continuous period and there is no scope for the interpretation, that if the defendant had at intervals been within Pakistan, the plaintiff cannot get benefit of this section. Even if the defendant is absent, not at a continuous stretch, but at intervals, still it will be time during which the defendant has been absent from the country and the plaintiff would be entitled to deduct the total period of absence of the defendant from Pakistan.*

11. The above referred view in terms of Section 13 of Limitation Act has to be considered valid for proposition in hand and learned District Judge is bound to

apply it by all means as Section 13 of Limitation Act, 1908 is an exception to general rules and clearly provides certain rights to all those individuals who are out of Pakistan as their period of limitation provided under the law is extended and period in which petitioner was out of country has to be excluded, therefore, appellate Court has not considered this aspect in its true perspective and has not applied the law in a proper manner as reasons rendered by the petitioner falls within the purview of sufficient cause in which he is entitled for condonation of delay, although grounds referred in his application are clearly established from record.

12. In the light of above mentioned discussion and ratio settled by the superior courts it has been seen that appellate Court has not applied the true intent of Section 13 of the Limitation Act, 1908 and has not applied the substantive exemption available to the petitioner in terms of Section 13 of the Limitation Act, 1908, hence, order of appellate Court is illegal and this Court in terms of Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 is competent to correct such mistakes in judicial review, therefore, instant petition is allowed, impugned order dated 20.03.2019 is illegal and the same is hereby set aside. The appeal filed by the petitioner shall be deemed to be pending before the learned Additional District Judge (West), Islamabad, who is directed to decide the appeal on merit after hearing the parties in accordance with law within period of 02 months. Both the parties are directed to appear before the concerned Court on 02.03.2020.

(MOHSIN AKHTAR KAZANI)  
JUDGE

Zahid