

(Judgment Sheet)
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Writ Petition No.3821 of 2020

Khurram Shahzad
Versus
Naseem Akhter and others

Petitioner by: Mr. Shahid Mehmood Langrial, Advocate.
Respondents by: Mr. Jameel Hussian Qureshi, Advocate.
Date of hearing: 15.03.2021

GHULAM AZAM QAMBRANI, J.:- Through this consolidated judgment, I intend to decide two writ petitions bearing Nos.3821/2020 and 3734/2020, arising out of the same impugned judgment & decree and involving common questions of law and facts.

2. Through writ petition No.3821/2020, the petitioner has invoked the jurisdiction of this Court under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 with the following prayer:-

"It is, therefore, most respectfully prayed before this honourable court that the instant writ petition may kindly be accepted and the impugned judgment and decree dated 26.09.2020 passed by learned District Judge Islamabad-West and impugned order and decree dated 28.10.2019, 15.10.2019, 03.10.2019 and 03.09.2019 passed by Judge Family court Islamabad (west) may graciously be set aside and the orders passed by the family judge may graciously be declared void ab initio, against the paying capacity of the petitioner in the best interest of justice and the case of petitioner may kindly be remanded back for the true determination of rights of parties, and a reasonable maintenance of the minors may kindly be fixed in the best interest of justice.

Any other relief which this Hon'ble court deems fit, may also be accorded".

3. Whereas, in writ Petition No.3734 of 2020, following prayer has been made:-

"The impugned order and decree dated 28.10.2019 passed by respondent No.2 and impugned judgment and decree passed by respondent No.3 may graciously be set aside and/or modified to the extent of enhancement of

maintenance allowance of the petitioners according to the prayer of the main suit filed by the petitioner in the interest of justice"

4. Briefly the facts giving rise to the filing of these instant petitions are that the petitioner (Khurram Shehzad) and respondent No.1 (Naseem Akhtar) had entered into marriage bond on 07.03.2008 according to the injunctions of Islam and as a result of the marriage, the couple was blessed with two children namely Ali Gondal (son) and Zahra Gondal, (daughter) who are in custody of the mother and being brought up by respondent No.1. Unfortunately, differences cropped-up between the couple and according to the petitioner's version, he divorced his wife/respondent No.1 on 03.09.2018. However, she filed a suit for recovery of maintenance allowance for herself as well as her minor children at the rate of Rs.50,000/- each per month alongwith birth/delivery charges of respondents No.2 and 3 at the rate of Rs.1,00,000/- each.

5. The defendant/ petitioner submitted written statement through Fiaz Hussain Gondal Advocate/Special Attorney raising therein a number of preliminary objections both factual and legal. On merits, it was contended that the defendant has regularly paid the maintenance to the plaintiffs through online and through banks and he has never committed any default in payment of maintenance to the plaintiffs: that behavior of the defendant always remained good with the plaintiffs; that defendant always tried his level best to provide each and every necessity of life to the plaintiffs and he never maltreated her as alleged by her; that monthly income of the defendant is Rs.50,000/- and that the maintenance being demanded by the plaintiffs is exorbitant; that at the time of birth of the minors conjugal relations between the couple were quite normal and he had paid all the delivery charges.

6. Subsequently, the petitioner/defendant moved an application seeking amendment in the written statement as according to him, the special attorney was also closely related to the plaintiff/Naseem Akhtar who in connivance with the plaintiff, did not state the actual

facts in the written statement; that he did not mention the fact that the defendant had already divorced the plaintiff No 1 on 03.09.2018, hence she was no longer his wife; that the delivery charges at both occasions were paid by the defendant/petitioner, that the plaintiffs were living in the house of the petitioner and that throughout maintenance was paid by him to the plaintiffs, hence not entitled to claim any sort of maintenance from him.

7. Thereafter, vide the impugned order dated 03.09.2019, learned Judge Family Court, Islamabad, fixed the interim maintenance of both the minors @ Rs.15,000/- each per month and Rs.20,000/- per month for plaintiff No.1/Naseem Akhtar. Thereafter vide order date 03.10.2019, the learned Judge Family Court observed that as the defendant/petitioner has not paid the maintenance allowance as directed by the Court, therefore, while stopping the proceedings in the application for amendment in the written statement, ordered the defendant to pay the interim maintenance and to submit the receipts to the same effect on the next date of hearing. Thereafter, vide order dated 15.10.2019, the learned Judge Family Court again observed that the defendant has not paid the interim maintenance, therefore, his right to defence was struck off under Section 17(A) of the Family Courts Act 1964 and case was fixed for orders for 28.10.2019. On said date of hearing, when the defendant again failed to pay the maintenance allowance of the plaintiff, learned Judge Family Court proceeded to decree the suit in terms Section 17(A) of the Family Court Act 1964 to the effect that the defendant is liable to pay the maintenance of plaintiff No.1 at the rate of Rs.20,000/- per month and Rs.15,000/- per month each for the minors/plaintiffs No.2 and 3 with 10% per annum increase from the date of institution of suit i.e. March 2019 till attaining the majority by the plaintiffs No.2 and 3 and till plaintiff No.1 is wife of the defendant/ petitioner.

8. Being aggrieved of the above said orders, the defendant/petitioner filed an appeal before the District Judge, Islamabad west. The plaintiffs/respondents also filed an appeal before the learned District Judge, praying therein that the rate of

maintenance fixed by the learned Judge Family Court is disproportionate to their needs, hence the same may be increased, as prayed by them.

9. After hearing learned counsel for the parties, the learned lower appellate Court vide the impugned consolidated judgment 26.09.2020, dismissed both the appeals,

10. Feeling not satisfied with the same, both the parties have preferred the subject Writ Petitions.

11. Learned counsel for the petitioner/ Khurram Shahzad argued that both the learned lower courts failed to appreciate that the petitioner had divorced respondent No.1 on 03.09.2018 and she was no longer in the marriage bond of the petitioner and being so he was not obliged under the law to maintain her but both the learned courts have not adverted to this material aspect of the case and that non-consideration of this fact resulted into gross miscarriage of justice; that the order qua grant of monthly maintenance at the rate of Rs.20,000/- in favour of respondent No.1 is absolutely illegally and highly uncalled for and liable to be brushed aside; that the rate of maintenance fixed by the learned trial Court i.e. Rs.15,000, per month per minor is also disproportionate to the sources of income of the petitioner; that the quantum of maintenance was fixed relying on one sided version of the respondents, which is opposed to the principles of justice, that the petitioner is living in Oman and his attorney in connivance with the opponent party made ambiguous written statement in connivance with the respondents; that he filed an application for amendment in written statement, but learned trial Court did not entertain and adjudicate the said application and the same remained undecided; that findings of the learned courts below are not based on facts, hence liable to be set aside. Ultimately, acceptance of the petition was prayed for.

12. On the contrary, learned counsel for the respondents submitted that the petitioner has not mentioned the fact of pronouncement of Talaq in his written statement; that the petitioner

was living in Oman, therefore, if he has sent divorce from Oman, it should have been attested by Pakistan High Commission or Consulate General etc. at Oman but the same is not attested by them; that in absence of attestation, the alleged Divorce Deed shall be deemed to be issued in violation of the law and is null and void; that the quantum of maintenance fixed by the learned trial Court is highly insufficient to meet the needs of the respondents; that the petitioner is a man of means and can pay the maintenance as demanded in the plaint; that it is primary duty of the petitioner to maintain his wife and children, that the decree passed by the learned trial Court is in accordance with statutory provisions contained under section 17-A of the Family Courts Act 1964 as the suit can be decreed if defendant makes default in payment of interim maintenance, that the impugned judgment and decree needs to be modified only to the extent of rate of maintenance which may be increased as per prayer made by the plaintiffs/respondents.

13. I have considered the arguments advanced from both the sides and have gone through the record

14. At the very out-set, it may be pertinent to mention that in family suits pertaining to recovery of maintenance allowance, if defendant, despite orders issued by the Family Court qua payment of interim maintenance, defaults in making payment of interim maintenance, penal action in terms of Section 17-A of the Family Court Act 1964 can be taken by the Court concerned. Section 17-A ibid provides two separate penal consequences, first striking off the right of defence and second to decree the suit. From collective reading of the provisions of Sections 17-A and 17-B of the Act Supra. it is clear that by having used the word "May" the legislature did not intend to make passing of decree mandatory rather it has been left upon the discretion of the learned trial Court to consider the facts and circumstances of each case. It may be advantageous to reproduce Section 17-A hereunder:-

"Section 17-A. Interim order for maintenance:— At any stage of proceedings in a suit for maintenance, the Family court may pass an interim order for

maintenance, whereunder the payment shall be made by the fourteenth of each month, failing which the court may strike off the defence of the defendant and decree the suit."

Section 17-B further explains the circumstance as well as the mode of exercising the authority in the shape of making reasonable inquiry of the matter in-question before decreeing the suit due to default, For ready reference section 17-B is reproduced hereunder:-

"Power of the court to issue Commission. Subject to such conditions and limitations as may be prescribed, the Court may issue a Commission to-

- (a) Examine any person;
- (b) Make a local investigation; and
- (c) Inspect any property or document

15. Coming back to the proposition involved in the instant case. it is evident from record of proceedings conducted by the learned Family Court, that vide order dated 03.09.2019, learned Judge Family Court, Islamabad-west, fixed the interim maintenance Of both the minors @ Rs.15,000/- each per month and Rs.20,000/- per month for plaintiff No.1/ Naseem Akhtar. Thereafter, vide order date 03.10.2019, the learned Judge Family Court observed that as the defendant/petitioner has not paid the maintenance allowance as directed by the court, therefore, while stopping the proceedings in the application for amendment in the written statement, ordered the defendant to pay the interim maintenance and to submit the receipts to the same effect on the next date of hearing. Then vide order dated 15.10.2019, the learned Judge Family Court again observed that the defendant has not paid the interim maintenance, therefore, his right to defence was struck of under Section 17(A) of the Family Courts Act 1964 and case was fixed for orders for 28.10.2019. On this date of hearing, it was observed that when the defendant again failed to pay the maintenance allowance, learned Judge Family Court proceeded to decree the suit in terms of Section 17(A) of the Family Court Act, 1964 to the effect that the defendant is liable to pay the maintenance of plaintiff No.1 at the rate of Rs.20.000/- per month and Rs,15,000/- per month each for the minors/plaintiffs No.2 and 3 with 10% per annum increase vide

order dated 02.02.2012. This position verifies the fact that there has been a clear cut default on the part of defendant/petitioner in payment of interim maintenance and it cannot be said that the learned trial Court wrongly invoked the provisions of Section 17-A of Family Court Act, 1964.

16. As reproduced above, the second penal consequence provided under Section 17-A embraces the expression of "decree" which though has not been defined in Family Courts Act 1964, yet according to settled law decree invariably refers to judicial determination of a matter in controversy and such determination cannot be done without application of mind in accordance with evidence and law on the subject, therefore, the impugned judgment mechanically and technically upholding prayer of a suit cannot be termed a decree. In this behalf, I am fortified in my view from the law laid down in case of Hyderabad Development Authority through M.D Vs Abdul Maieed etc (PLD 2002 SC 841) and Messrs UBL Vs Messrs Silver Oil Mills Ltd (2003 SCMR 1161)

17. The petitioner/ defendant has moved an application seeking amendment in the written statement with the assertion that he was abroad and he appointed a Special Attorney who was also closely related to the plaintiffs and he in connivance with the plaintiffs failed to mention the fact that plaintiff No.1 had been divorced by the defendant on 03.09.2018 and thus she was not entitled to claim maintenance. Copy of the divorce deed is on record and the same is also acknowledged from the fact that plaintiff No1 has filed a suit in Civil Court Sargodha challenging the validity of the Divorce deed. Since the fate of claim of the plaintiff No.1 for recovery of maintenance hinges upon the factum of her being in the Nikah of the defendant or not, therefore, this material fact should not have been ignored and the application for amendment in the written statement ought to have been decided before passing a decree.

18. It is relevant to mention here that guidelines on the above subject were settled by Hon'ble Lahore High Court in a case reported as "Ali Adnan Dar Vs Judge Family Judge and others" (PLD 2016 Lahore 73), which are reproduced hereunder-

- 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 Act *ibid*, empowers Family Court to pass an order for grant of interim maintenance allowance at any stage of the proceedings, in the normality of 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 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.*
- iv) *The quantum of interim maintenance should be "bare minimum" to meet the day to day needs of the recipients in the narrow context;*
- v) *Although the family laws have been enacted to promote, protect and advance the rights of woman and children yet at the interim stage the version of the respondent/ defendant be given a sympathetic or some-what preferable consideration because non-payment of interim maintenance allowance will cut throat of his valuable rights i.e. right to defence and inconsequential effects, children/women would be the losing and deprived parties;*
- vi) *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 the High Court under Section 12-A or Family court itself reviews it at any stage as observed below"*

19. In addition to above, in consequence of the peculiar circumstances of instant case as well as the huge amount of maintenance demanded by the minors and their mother through her next friend, it was incumbent upon the learned trial Court to have sought evidence of the parties in proof of justification concerning the quantum of maintenance and financial position of the petitioner/defendant. Similarly, endorsing the quantum of maintenance fixed by the learned trial Court without dilating upon the above factors by the learned lower appellate Court is also legally not warranted.

20. For the aforesaid reasons the Writ Petition No.3821/ 2020 filed by Khurram Shahzad is **allowed**. Resultantly, the impugned judgment and decrees passed by the learned trial Court as well as learned lower appellate Court are set-aside and the case is remanded to the learned Family Court, Islamabad-West to decide the quantum of maintenance after taking evidence of petitioner viz-a-viz financial status of the petitioner. Learned Family Court shall also decide the application moved by the petitioner/defendant for seeking amendment in the written statement before passing any order for maintenance of plaintiff No.1 owing to the plea raised by the defendant/petitioner that having been divorced in year 2018, she is no more wife of the petitioner, hence not entitled to claim maintenance. However, interim maintenance shall also be fixed after hearing both the parties and considering the financial competence of the petitioner/ father, who shall regularly pay the interim maintenance to be fixed by the learned Family Court.

21. Learned trial Court is directed to decide the suit within a period of three months positively, under intimation to this Court through Additional Registrar (Judicial).

22. With the above observations, the writ petition No.3734/2020 is **disposed of**.

(GHULAM AZAM QAMBRANI)
JUDGE

Announced in open Court on this 29th day of March, 2021.

JUDGE