

**P L D 2012 Lahore 420**

**Before Malik Shahzad Ahmad Khan, J**

**ABRAR HUSSAIN---Petitioner**

**Versus**

**MEHWISH RANA and 3 others---Respondents**

Writ Petition No.3276 of 2011, decided on 20th March, 2012.

**(a) West Pakistan Family Courts Act (XXXV of 1964)---**

----S. 17-A---Interim maintenance---Object, purpose and scope---Purpose behind provisions for interim maintenance is to ensure that during pendency of such proceedings with Family Court, financial constraints faced by minors are ameliorated.

**(b) West Pakistan Family Courts Act (XXXV of 1964)---**

----S.17-A---Interim maintenance---Quantum---Determining factors---Family Court should broadly look into the social status of parties; earning of husband; his capacity to pay; requirements of minor; and on this touchstone fix interim maintenance.

**(c) West Pakistan Family Courts Act (XXXV of 1964)---**

----S.17-A---Interim maintenance---Powers of court---Family Court has uninhibited powers to enhance or decrease quantum of maintenance after appraising, deciphering and examining evidence produced during trial---Findings regarding interim maintenance normally cannot be interfered with, if the same were fixed upon the parameters in such regard.

#### **(d) Constitution of Pakistan---**

---Art. 199---Constitutional jurisdiction---Scope---Interim order---Petition under Art. 199 of the Constitution is maintainable even against an interim order, if the same is void ab-initio, without jurisdiction or if the same has attained the status of a final order.

Suleman and 4 others v. ASJ Nankana Sahib and 3 others PLJ 2007 Lah. 1173 and Muhammad Hassan v. Judge Family Court, Bhalwal and another 2008 YLR 1826 rel.

#### **(e) Constitution of Pakistan---**

---Art. 199---Constitutional jurisdiction---Scope---Appeal against interim order, absence of---Effect---When Legislature has specifically prohibited filing of appeal against an interim order and if constitutional petition is allowed to be filed against such order, it would tantamount to defeating and diverting the intent of Legislature.

Syed Saghir Ahmad Naqvi v. Province of Sindh through Chief Secretary S&GAD, Karachi and others 1996 SCMR 1165; Mohtarma Benazir Bhutto, MNA and Leader of the Opposition, Bilawal House, Karachi v. The State 1999 SCMR 1447 and Mushtaq Hussain Bukhari v. The State 1991 SCMR 2136 rel.

#### **(f) West Pakistan Family Courts Act (XXXV of 1964)---**

---S. 17-A---Constitution of Pakistan, Art. 199---Constitutional petition---Maintainability---Interim maintenance---Interim maintenance fixed by Family Court was assailed by husband on the plea of its being exorbitant and beyond his means---Validity---Order passed by Family Court could neither be termed as void ab initio nor without jurisdiction and the order had also not attained status of final order---Order for interim maintenance was passed by Family Court, who had jurisdiction to pass such order under S.17-A of West Pakistan Family Courts Act, 1964---Husband did not challenge jurisdiction of Family Court in his written statement, he was not condemned

unheard and was provided opportunity of hearing before passing the interim order--- Quantum of interim maintenance allowance was prima facie rightly fixed by Family Court, while keeping in view the status of parties and expenses of minors---Husband was unable to point out any patent illegality or material irregularity in the order of interim maintenance, therefore, petition which had been filed against interim order passed by court of competent jurisdiction, after providing an opportunity of hearing to parties was not maintainable in the eyes of law---High Court declined to interfere in interim maintenance fixed by Family Court---Petition was dismissed in circumstances.

Muhammad Younus Khan and 12 others v. Government of N.-W.F.P. through Secretary, Forest and Agriculture, Peshawar and others 1993 SCMR 618; Benedict F.D. Souza v. Karachi Building Control Authority and 3 others 1989 SCMR 918 and Muhammad Irfan v. Judge Family Court, Sargodha and 2 others 2008 CLC 585 rel.

Mian Altaf-ur-Rehman for Petitioner.

Mian Sohail Anwar for Respondents Nos.1 to 3.

## **ORDER**

**MALIK SHAHZAD AHMAD KHAN, J.**---Through the instant petition, the petitioner has challenged the impugned order dated 28-1-2011, passed by the learned Judge Family Court/Guardian Judge-III, Lahore, whereby, interim maintenance allowance of minor respondents Nos.2 and 3 was fixed at the rate of Rs.10,000 per month, per head.

2. As per brief facts of the present case on 22-12-1996 Mst.Mehwish Rana (respondent No.1) was married to Ibrar Hussain (petitioner) according to the injunctions of Islam. During the subsistence of said marriage, Zoha Ibrar (respondent No.2) and Muhammad Abdullah (respondent No.3) were born on 20-11-1998 and 5-11-1999, respectively. In the year 2007, the relationship between the spouses became strained. According to the version of Mehwish Rana (respondent No.1) she along with

her minor children (respondents Nos.2 and 3) was expelled by the petitioner from his house, on 6-11-2007 and no maintenance allowance of the above mentioned respondents Nos.1 to 3 was paid by the petitioner since then. Ultimately, on 22-1-2010 respondents Nos.1 to 3 filed a suit for the recovery of dowry articles, as well as, for the recovery of maintenance allowance at the rate of Rs.1,25,000 per month with effect from September, 2007 till the filing of the suit and at the same rate for recovery of future maintenance allowance with 20% annual increase. An application for the recovery of interim maintenance allowance at the rate of Rs.1,25,000 was also filed by the above mentioned respondents along with their suit.

The petitioner contested the above mentioned suit, as well as, the application for grant of interim maintenance allowance and filed his written statement along with written reply to the application for recovery of interim maintenance allowance. In the meanwhile, on 22-4-2010, the petitioner divorced respondent No. 1.

The learned Judge Family Court/Guardian Judge-III, Lahore vide impugned order dated 28-1-2011 fixed the interim maintenance allowance of minor respondents Nos. 2 and 3 at the rate of Rs.10,000 per month, per head.

The petitioner being aggrieved of the above mentioned interim order of the learned Judge Family Court/Guardian Judge-III, Lahore, has filed the instant writ petition.

3. It is contended by the learned counsel for the petitioner that the quantum of interim maintenance allowance as fixed by the learned Judge Family Court, Lahore, is exorbitant and the same is beyond the means of the petitioner; that the petitioner has already resigned from his job in the year 2010 and presently he is jobless, therefore, he is not in a position to pay the interim maintenance allowance as fixed by the learned Judge Family Court, Lahore; that the quantum of maintenance allowance has been fixed at an excessive rate of Rs.10,000 per month, per head, for respondents Nos.2 and 3 without any proof of the source of income of the petitioner; that under the law, the learned Judge Family Court was obliged to fix the interim maintenance allowance according to the status of the parties and the petitioner cannot be burdened to pay the

interim maintenance allowance at the above mentioned rate; that writ jurisdiction can be invoked against an interim order because there is no other alternate or efficacious remedy available to challenge the same; that this Court has ample power to interfere in the interlocutory order even if they are tentative in nature, therefore, the impugned order may kindly be declared illegal and void and the same may kindly be set aside.

4. On the other hand, the learned counsel for respondents Nos.1 to 3 opposes this petition on the grounds that the petitioner is admittedly a retired Major from Pakistan Army and his monthly pension is more than Rs.30,000; that apart from his pension, he is working in a multinational company and has been drawing a very handsome salary from his job; that the petitioner is owner of a lot of commercial, as well as, residential properties, he receives rent of the said properties and his monthly income from his pension, job and rent of properties is more than Rs.3,00,000 per month; that minor respondents Nos.2 and 3 were got admitted in Beacon House School System, Lahore by the petitioner himself and their monthly school fee is more than Rs.12,000; that the quantum of maintenance allowance as fixed by the learned Judge Family Court, Lahore, is already too meager to meet the expenses of the maintenance of the minor respondents; that the petitioner has filed this writ petition against an interim order, which is not maintainable in the eyes of law; that the petitioner has raised disputed questions of facts in this petition regarding his status and source of income and the said questions cannot be decided without recording of evidence, therefore, this petition may be dismissed.

5. Arguments heard. Record perused.

6. The Family Court Act, 1964 is a special statute and has been enacted with a specific purpose to ensure expeditious settlement and disposal of disputes relating to marriage and family affairs and also matters connected therewith. It, inter alia, has bestowed upon the Family Court powers under section 17-A of the Act *ibid* to grant interim maintenance to the concerned parties during the pendency of the proceedings. It also has been mandated that such maintenance shall be paid by the 14th day of each calendar month and in case of default the defence of the defendant shall be struck off

and the suit decreed. The purpose behind this legislation is to ensure that during pendency of these proceedings with the Family Court financial constraints faced by the minors are ameliorated. The question now arises that does the Family Court have unfettered and unbridled powers to fix interim maintenance at its discretion or is it required to proceed on pragmatic, rational and judicial basis? The answer, of course, is that it should proceed on the latter. It should broadly look into the social status of the parties, the earning of the defendant, his capacity to pay, the requirements of the minor and on this touchstone fix interim maintenance. It also is noteworthy that no right of appeal etc. has been provided against this fixation, because the order is tentative and interim in nature, therefore, the Family Court should be even more careful and precise in this context to ward off any injustice. However, this order is subject to final review after recording evidence of both parties, thus the quantum of maintenance can thereafter be easily determined and fixed accurately. The Court has uninhibited powers to enhance or decrease the quantum of maintenance after appraising deciphering and examining the evidence produced during trial. Therefore, findings qua interim maintenance normally cannot be interfered with, if the same are fixed upon the parameters stated above.

In the present matter, the demand for the maintenance allowance was made at the rate of Rs.1,25,000 per month. Similarly in the application for grant of interim maintenance allowance it was prayed by respondents Nos.1 to 3 that an order for payment of interim maintenance allowance at the rate of Rs.1,25,000 may be passed. The petitioner is admittedly a retired Major from Pakistan Army and he has been drawing pension from his previous job. In Para No. 6 of the plaint, it was asserted by the plaintiffs/respondents Nos.1 to 3 that the petitioner/defendant is employed in a multinational company and he is owner of different rented properties. In Para No. 8 of the plaint, it was specifically averred by the plaintiffs/respondents Nos 1 to 3 that income of the petitioner/defendant from his job and rented properties was more than Rs.3,00,000 (Rupee Three Lac) per month. On the other hand, in Para No.6 of the written statement filed by the petitioner/defendant he did not deny that he has no source of income from his rented properties. Regarding the source of income from his job in a multinational company, he has stated that he was earlier working in Haseen Habib Trading Company,

Lahore but he has resigned on 30-4-2010. It is pertinent to mention here that the suit for recovery of maintenance allowance and dowry articles was filed by respondents Nos.1 to 3 on 22-1-2010 and prima facie it appears that document regarding the resignation of the petitioner from his job has been prepared by the petitioner during the pendency of the above mentioned suit in order to avoid the payment of maintenance allowance. The petitioner has only placed on the record his alleged resignation, which has been prepared by the petitioner himself. No document has been placed on the record to show that the said resignation has been accepted by the company. Anyhow, the petitioner did not deny that at the time of filing of the suit, he was employed in a company. Moreover, there is no specific denial in Paras Nos.6 and 8 of the written-statement regarding the claim of respondents Nos.1 to 3 that the petitioner has been receiving rent from the properties owned by him and his monthly income from his job and properties was more than Rs.300,000. He has made a general and vague denial in paragraphs Nos.6 and 8 of his written-statement.

The status of the petitioner can also be tentatively determined from the facts mentioned by the petitioner/defendant in his written statement. The relevant extracts from para No.7 of the written statement filed by the petitioner/ defendant are re-produced here under for ready reference:--

Para No.7.....

.....

.....

It is pertinent to mention here that at that time the plaintiff No.1 and the said Shuaib Afzal Malik, while committing theft have also taken away the personal belongings LCD TV 32 inch, two beds, UPS with batteries, computer with computer table, carpets 4 in number, etc. purchased by the plaintiff after marriage. Prize Bond amounting to Rs.5,00,000 the plaintiff's personal belongs i.e. NIC Card, passport, property

documents, personal military documents, Toyota Corolla Model 2004 (bearing registration No.AHA-412) and its original documents.

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It is also pertinent to mention here that the plaintiff No.1 had access to the answering defendant's ATM Cards. On 20-2-2010, the plaintiff No.1 without the permission of the defendant transferred Rs.1,58,000 from the defendant's account in Askari Bank while using ATM into her own account of Allied Bank at Lalazar Rawalpindi and cash withdrawal of Rs.45,00,000. The plaintiff No.1 also withdraw (sic) Rs.30,000 from defendant's Al-Falah Bank Account. This fact came into the knowledge of the defendant when he checked his account after shifting of the plaintiff No.1".

The perusal of above-mentioned extracts of the written statement, filed by the petitioner/defendant, has prima facie established that the petitioner is a rich person and a man of means. He has mentioned different precious articles like LCD TV 32 inches, Toyota Corolla Car Model 2004 etc., which were available in his house. Similarly, he has mentioned huge amounts like Rs.45,00,000 (Rupees Forty Five Lac), etc. in the said paragraph, which were allegedly transferred from his account to the account of respondent No. 1. It shows that the petitioner has been maintaining accounts worth millions of rupees. His financial status can be assessed from the perusal of above-mentioned paragraphs of his written-statement.

7. Now coming to another aspect of the case i.e. status of the parties and expenses of the minors, it is noted that the petitioner/defendant has also admitted that he himself got the minors admitted in one of the best school systems of the country i.e. Beacon House School System. In this respect Para No.11 of the written statement filed by the petitioner is reproduced hereunder:--



"11. Denied in the light of reply to the foregoing paras. It is further submitted that the defendant in order to provide best, pleasant and healthy atmosphere to his family, kept them at the said address at DHA, he got admitted the minors in the best school system i.e. Beacon House School System. All the expenses had been borne by the defendant".

It is manifest from the perusal of above paragraph of the written-statement that the minors were got admitted by the petitioner himself in a very expensive school of the country i.e. Beacon House School System. He was naturally in a position to pay the fee of the minors and that is why they were got admitted in the said school. The above-mentioned paragraphs of the written statement, filed by the petitioner/defendant, have prima facie established that the petitioner is a man of means and he is a person of sound financial status. Zoha Ibrar (minor respondent No.2) and Muhammad Abdullah (minor respondent No.3) are admittedly studying in Beacon House School System. Their monthly fee is Rs.12,000 per month.

So keeping in view all the above-mentioned factors, it cannot be declared that the interim maintenance allowance as fixed by the learned Judge Family Court vide the impugned order dated 28-1-2011 is exorbitant and beyond the means of the petitioner, thus the impugned order cannot be declared void ab initio or have been passed without jurisdiction.

8. There is no cavil with this preposition that a petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 is maintainable even against an interim order if the same, is void ab-initio, without jurisdiction or if the same has attained the status of a final order. Reference in this context may be made to the case of Suleman and 4 others v. ASJ Nankana Sahib and 3 others (PLJ 2007 Lahore 1173), and Muhammad Hassan v. Judge Family Court, Bhalwal and another (2008 YLR 1826).

9. Anyhow, every interim order cannot be challenged in writ Jurisdiction, specially if the same does not fall within the above-mentioned categories of interim orders. Notwithstanding the contentions raised by the learned counsel, to my mind the present petition is incompetent and not maintainable on legal plane. Admittedly, the suit is still

pending and during its pendency, the learned Judge Family Court has passed the impugned order. Undoubtedly, order passed by the learned Judge Family Court, for all intents and purposes, is an interlocutory order, as the lis is pending before the learned Judge Family Court, and it has still to render its final verdict. The impugned order has not attained the status of a final order. The Legislature has made such order, passed by the Judge, Family Court as non-appealable by specifically making a provision in that respect by virtue of subsection (3) of Section 14 of the West Pakistan Family Courts Act, 1964, which for facility of reference is reproduced below.

"14 Appeal.---(1) Notwithstanding anything provided in any other law for the time being in force, a decision given or decree passed by a Family Court shall be appealable:-

(a) -----

(b) -----

(2) -----

(a) -----

(b) -----

(c) -----

(3) No appeal or revision shall lie against an interim order passed by a Family Court.

(4) -----

In these circumstances, when the Legislature has specifically prohibited the filing of an appeal against an interim order and if the Constitutional petition is allowed to be filed against such order, it would tantamount to defeating and diverting the intent of the Legislature. Reference is made to Syed Saghir Ahmad Naqvi v. Province of Sindh

through Chief Secretary S & G A D, Karachi and others (1996 SCMR 1165), in which the Hon'ble Supreme Court was pleased to hold as under:--

"Constitutional jurisdiction, exercise of statute excluding a right of appeal from the interim order could not be bypassed by bringing under attack such interim orders in constitutional jurisdiction. Party affected has to wait till it matures into a final order and then to attack it in the proper exclusive forum created for the purpose of examining such order."

The above-mentioned view was reiterated by the Hon'ble Supreme Court of Pakistan in the case of Mohtarma Benazir Bhutto, MNA and Leader of the Opposition, Bilawal House, Karachi v. The State (1999 SCMR 1447), wherein, at page 1452, it was held as under:--

"It is well settled that orders at the interlocutory stages should not be brought to the higher Courts to obtain fragmentary decision, as it tends to harm the advancement of fair play and justice, curtailing remedies available under the law, even reducing the right of appeal. Refer the case of "Mushtaq Hussain Bukhari v. The State" 1991 SCMR 2136, Muhammad Afzal Zullah, the then Hon'ble Chief Justice, at page 168 of the report observed as follows:--

"It is a wrong or at least misstatement in our state of law, practice, procedures and proceedings in the Courts of law, that wrong orders should be corrected at the time they are passed because it would take less time for the case to conclude. This might have been true half a century to quarter century ago. Thereafter, the challenge to the interlocutory orders has brought about a deluge in the administration of criminal justice. Cases started piling up with the result that the concept of speedy justice came to a grinding halt and powers that may be, started thinking of curtailing remedies even reducing the right of appeals. Cases like the present one do justify such an angry re-action but with a little change of practice in the technical field (for example amendment, vis-a-vis, the subject in section 197, Cr.P.C. it is hoped there would no (sic) be need to curtail the remedies as that too in the stage where we are passing, might be counter-productive"

The petitioner has got an adequate remedy available to him by challenging the impugned order in appeal, which, he may file against the ultimate order/judgment if the same would be passed against the petitioner. This petition is also hit by Article 199 (1) of the Constitution of Islamic Republic of Pakistan, 1973, hence, cannot be entertained.

As discussed earlier, the impugned order can neither be termed as void, ab initio nor without jurisdiction. Similarly, the impugned order has not attained the status of a final order. The impugned order was passed by the learned Judge Family Court, Lahore, who has the jurisdiction to pass the said order under section 17-A of the West Pakistan Family Courts, Act, 1964. The petitioner has not challenged the jurisdiction of the learned Judge Family Court, Lahore in his written statement filed before the learned trial court. He was not condemned unheard and was provided an opportunity of hearing before passing the impugned order. The quantum of interim maintenance allowance was prima-facie rightly fixed by the learned Judge Family Court, Lahore, while keeping in view the status of the parties and expenses of the minors. The learned counsel for the petitioner is unable to point out any patent illegality or material irregularity in the impugned order, therefore, the instant petition, which has been filed against an interim order passed by a Court of competent jurisdiction, after providing an opportunity of hearing to the parties, is not maintainable in the eyes of law.

10. The petitioner has raised disputed questions of facts in this petition regarding his resignation from the job, source of income and status. It is not possible to determine the veracity of the claim of the petitioner without recording of evidence. Such exercise cannot be undertaken in constitutional jurisdiction, especially when the finding was only tentative and not final and order was also interim in nature. I have fortified my views with the case of Muhammad Younus Khan and 12 others v. Government of N.-W.F.P. through Secretary, Forest and Agriculture, Peshawar and others (1993 SCMR 618), wherein at page 632 the Hon'ble Supreme Court of Pakistan has held as under:--

"It is a consistent view of this Court that in cases where factual controversies are involved, Constitution petition in the High Court is not the proper remedy, Reference can be made to PLD 1980 SC 139, 1980 SCMR 933, 1981 SCMR 291, 1989 SCMR 918 and PLD 1991 SC 476.

Similarly in another case of Benedict F.D. Souza v. Karachi Building Control Authority and 3 others (1989 SCMR 918) at page 920, the Hon'ble Supreme Court of Pakistan has observed as under:--

"Factual controversies involved in the case, could not be solved without a full-fledged trial. Accordingly we find that the approach of the High Court in its discretionary writ jurisdiction to decline relief to the petitioner, was unexceptionable. No justification has been made out for grant of leave to appeal. The same is refused."

Reference in this context may also be made to the case of Muhammad Irfan v. Judge Family Court, Sargodha and 2 others (2008 CLC 585).

11. In light of the above discussion, the instant petition is without any substance; hence, the same is, hereby, dismissed. There is no order as to costs.

12. Before parting with this judgment, I may observe here that the findings of the learned Judge Family Court, Lahore, in the impugned order, as well as, the observations made in this order are only tentative in nature and not final. Proper quantum of the maintenance allowance has to be fixed by the learned Judge Family Court, after recording of evidence. The learned Judge Family Court may increase or decrease the quantum of maintenance allowance at the time of final adjudication of the case, without being influenced by any observation made in the impugned order, as well as, in this order.