

**Stereo.HCJDA 38.**  
**JUDGMENT SHEET.**

**LAHORE HIGH COURT**  
**RAWALPINDI BENCH RAWALPINDI**  
**JUDICIAL DEPARTMENT**

**W.P.No.38 of 2014**

*BASHIR MASIH.   Versus.   SUNEELA NADEEM, ETC.*

**JUDGMENT.**

Date of hearing:   **29.04.2022**

Petitioner by:       Mr. Faisal Altaf Chohan, Advocate.

Respondents       Ex-parte.  
No.1 to 3:

Amicus curiae:     Ch. Imran Hassan Ali, Advocate.

**Mirza Viqas Rauf, J.** The petitioner is a Christian whose son Nadim Masih was married to Azra Nadeem on 15<sup>th</sup> April, 1994. From the wedlock, three minor daughters (i.e. respondents No.1 to 3) (hereinafter referred to as “respondents”) were born who at present are in the custody of their mother. Unfortunately, Nadeem Masih died on 29<sup>th</sup> January, 2004. After his death, the “respondents” instituted a suit for recovery of maintenance against the petitioner (grandfather) averring therein that after the death of their father, the petitioner had though paid them maintenance for almost three years but after that he stopped payment of maintenance without any lawful excuse. Suit was contested by the petitioner, who submitted his written statement wherein he controverted the assertions contained in the plaint. By way of order dated 19<sup>th</sup> July, 2012, the learned Judge Family Court fixed the interim maintenance of

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the “respondents” at the rate of Rs.800/- per month each and also framed necessary issues from the divergent pleadings of the parties. On failure by the petitioner to cross-examine the witnesses of the “respondents” and pay interim maintenance, his right of cross-examination was closed and defense was struck off vide order dated 16<sup>th</sup> September, 2013. Suit was thus finally decreed vide judgment dated 16<sup>th</sup> September, 2013. Feeling aggrieved, the petitioner though preferred an appeal before the learned Additional District Judge, Rawalpindi but his appeal was dismissed through judgment and decree dated 23<sup>rd</sup> December, 2013, hence this petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973.

2. This petition has remained pending at pre-admission stage since 2014 and it was finally admitted for regular hearing on 05<sup>th</sup> October, 2021 on account of involvement of certain important questions of law and Mr. Imran Hassan Ali, Advocate was appointed as amicus curiae. The “respondents” were, however, proceeded against ex-parte vide order dated 22<sup>nd</sup> November, 2021 and this petition was ultimately set down for final hearing.

3. Mr. Faisal Altaf Chohan, Advocate submitted that the petitioner is grandfather of “respondents” who all are governed by the Christian Laws. Learned counsel added that there is no provision in the Christian law to burden the grandfather for the payment of maintenance to the grandchildren. He contended that award of maintenance is even in derogation of Section 42 of the Succession Act, 1925. Learned counsel

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emphasized that both the Courts below, while decreeing the suit, have erred in law and concurrent findings are not tenable.

4. Mr. Imran Hassan Ali, learned Amicus Curiae on the other hand submitted that in the Christian law, primary responsibility is of parents to maintain their children. Learned counsel maintained that interim maintenance was fixed by the learned Judge Family Court without having regard to the relevant law and even the suit was decreed in a mechanical manner. It is contended with vehemence that penal provision of Section 17-A of the Family Courts Act, 1964 has been invoked in an arbitrary manner without taking into consideration the material facts of the case. In the last, learned Amicus Curiae, while pointing out legal flaws, submitted that certain material questions have since escaped notice of the Courts below, so it would be apt to remand this matter to the learned Judge Family Court for determination of these pivotal questions.

5. Learned counsel for the petitioner, when confronted with the mode suggested by the learned Amicus Curiae, while conceding the legal proposition, consented the remanding of the case to learned Judge Family Court.

6. Heard. Record perused.

7. The petitioner and “respondents” are admittedly Christian by their religion. It is also undisputed that petitioner is grandfather of the “respondents” from whom they are claiming maintenance in absence of

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their father who has passed away. In order to make provision for the establishment of family Courts for the expeditious settlement and disposal of disputes relating to marriage and family affairs and for matters connected therewith, Family Courts Act, 1964 (hereinafter referred to as “The Act”) was promulgated. By virtue of Section 5 of “The Act”, Family Courts established under Section 3 have been vested with exclusive jurisdiction to entertain, hear and adjudicate upon matters specified in part I of the schedule, subject to the provisions of the Muslim Family Laws Ordinance, 1961 and the Conciliation Courts Ordinance, 1961. Maintenance is one of the items mentioned in Part I of the schedule. There is no cavil to the proposition that the provisions of “The Act” are equally applicable to non-Muslims including the Christian citizens of Pakistan. Reference in this respect can be made to Mst. NOREEN IQBAL v. SOHAIL IQBAL and others (2005 CLC 1472) and JAGSI v. Shr. MARWAN and another (PLD 2005 Karachi 334).

8. The moot point, however, is as to whether petitioner being Christian grandfather can be burdened with the liability of maintenance of his grandchildren?

9. Before advertng to the core issue, it would be advantageous to observe that at the time of pre-trial reconciliation, the learned Judge Family Court on account of absence of the petitioner after declaring the same failed, proceeded to fix the interim maintenance of the “respondents” and framed issues vide order dated 19<sup>th</sup> July, 2012. Section 10 of “The Act” casts a duty upon the Family Court that on the

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date fixed for pre-trial proceedings, the Court shall examine the plaint, the written statement (if any) and the precis of evidence and documents filed by the parties and shall also, if it so deems fit, hear the parties and their counsel. Furthermore the Court shall ascertain the points at issue between the parties and attempt to effect a compromise or reconciliation between the parties, if this be possible. It evinces from the record that though petitioner was not present on the said date but his counsel was in attendance. It can be observed with naked eyes that at the time of pre-trial proceedings due compliance was not made to section 10 ibid and even issues were not framed properly to capture the actual controversy.

**10.** Suit was decreed on account of failure by the petitioner to pay the interim maintenance while invoking section 17-A of “The Act”, which at the relevant time was in the following shape: -

**17A. Interim order for maintenance.--** At any stage of proceeding 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.

The above provision was, however, later on amended through the Punjab Family Courts (Amendment) Act, (XI of 2015) and it was reshaped in the following manner: -

**“17-A. Suit for maintenance.—**(1) In a suit for maintenance, the Family Court shall, on the date of the first appearance of the defendant, fix interim monthly maintenance for wife or a child and if the defendant fails to pay the maintenance by fourteenth day of each month, the

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defence of the defendant shall stand struck off and the Family Court shall decree the suit for maintenance on the basis of averments in the plaint and other supporting documents on record of the case.

(2) In a decree for maintenance, the Family Court may:

- (a) fix an amount of maintenance higher than the amount prayed for in the plaint due to afflux of time or any other relevant circumstances; and
- (b) prescribe the annual increase in the maintenance.

(3) If the Family Court does not prescribe the annual increase in the maintenance, the maintenance fixed by the Court shall automatically stand increased at the rate of ten percent each year.

(4) For purposes of fixing the maintenance, the Family Court may summon the relevant documentary evidence from any organization, body or authority to determine the estate and resources of the defendant.”

From the combined analysis of old and new Section 17-A of “The Act” it is manifestly clear that though in the latter, very specific and categorical consequences of failure to pay the interim maintenance has been provided but Court was also made bound to look into averments of the plaint and other supporting documents on record of the case before passing the decree. In the case of MAQSOOD PERVAIZ CH. v. Mst. NAUSHEEN CHAUDHARY and others (PLD 2019 Lahore 102), this Court while dealing with the scope of Section 17-A as amended by the Punjab Family Courts (Amendment) Act (XI of 2015) held as under:-

“12. Bare reading of the above referred provision of law envisages that father cannot be burdened with the maintenance in all circumstances. There is no cavil that a family Court is vested with the power to pass an order for interim maintenance at any stage of proceedings in a suit for maintenance under Section 17-A of the Family Courts Act, 1964 to be paid to a child by the fourteenth day of each month, failing which the Court may strike off the defense of defendant and decree the suit but such powers are not to be exercised arbitrarily, illegally and whimsically.

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13. Even in case of non-compliance of order of interim maintenance, the Family Court is obliged under Section 17-A of the Family Courts Act, 1964 to look into the contents of plaint and other supporting documents on the record of the case. After having examined the order dated 20<sup>th</sup> February, 2015, resulting into decreeing the suit on the mandate of Section 17-A *ibid*, there can be no second opinion that suit was decreed in a perfunctory, whimsical and mechanical manner. Learned counsel for the “respondent” even when confronted with this aspect, he has no answer rather conceded legal flaw in the order passed by the learned Family Court.”

11. The proposition in the case at hand is, however, bit different as at the relevant time, former quoted provision was in field. By virtue of Section 17-A, as prevailing at the relevant time, on account of non-compliance of the order of interim maintenance, the Court may strike off the defense of the defendant and decree the suit. It is an oft repeated principle of law that words “may” and “shall” are always interchangeable keeping in view the facts and circumstances of the case. The former ordinarily denotes permission and not command. The word “may” ordinarily involves a choice whereas word “shall” carries command but even enabling word like “may” would become mandatory when object was to effectuate a legal right. Guidance in this respect, can be sought from ABU BAKAR SIDDIQUE and others v. COLLECTOR OF CUSTOMS, LAHORE and others (2006 SCMR 705). The relevant extract from the same is reproduced below: -

“9. ....The use of word 'may' in the statute in the plain meanings is to give discretion to the public authorities to act in their option in the manner in which such authorities deem proper but if the public authorities are authorized to discharge their functions in their option in a positive sense, the word 'may' used in the provision would be suggestive of conveying the intention of legislature of imposing an obligation. The word 'may' usually and generally does not mean 'must' or 'shall' but it is always capable of meaning 'must' if the discretionary power is conferred upon a public authority with an obligation under the law. The word 'may' is not always used in the statute with the intention and purpose to give uncontrolled powers to an authority rather oftenly

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*it is used to maintain the status of the authority on whom the discretionary power is conferred as an obligation and thus, the legislative expression in the permissive form, sometimes is construed mandatory.”*

**12.** Though by virtue of Section 17-A of “The Act”, Family Court was vested with the power to strike off the defence of the defendant and decree the suit on failure by him to pay the interim maintenance in terms of order of the Court but it will not equip the Court with unfettered powers to proceed mechanically. In no circumstances, a Court can abdicate its prime duty to foster justice as per canons of law. It is trite law that Court cannot proceed in vacuum and exercise judicial powers arbitrarily and whimsically. Before invoking a penal provision like section 17-A of “The Act” the Court was supposed to consider as to whether it was vested with the power to pass the order of interim maintenance, which was not done at all. Even the learned appellate Court did not apply its own independent judicious mind to the facts of the case and acted merely as a post office to affix its stamp on the findings of the learned Trial Court in a mechanical manner.

**13.** There are though concurrent findings of the Courts below but to my mind, both the learned Courts below have proceeded in a casual manner and took their eyes of some very material and important aspects of the matter mentioned hereinafter. It would thus be apt to remand the matter to the learned Senior Civil Judge (Family Division), Rawalpindi for determination of said questions instead of causing prejudice to any of the parties by any ultimate determination of rights of the parties in these proceedings. This petition is thus **allowed**. Resultantly, judgments and



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decrees of the Courts below are set aside being illegal and unlawful. As a consequence, suit instituted by the “respondents” shall be deemed to be pending before the learned Senior Civil Judge (Family Division), Rawalpindi who shall decide the same afresh while commencing the proceedings from pre-trial stage as provided under section 10 of “The Act”. Needless to observe that while framing the issues and passing the order of interim maintenance, the Family Court shall take into consideration following crucial questions: -

- i. Who has the primary responsibility to maintain children; parents or grandparents?**
- ii. Whether in Christian faith, a grandfather is liable to maintain his grandchildren, especially in the presence of mother of the children? If yes, to what extent?**
- iii. What is the extent of a mother’s liability to maintain her children?**
- iv. Can the Plaintiff’s mother be categorized as “poor” and “unemployable” so as to excuse her from primary responsibility for her children’s maintenance? Would it not be appropriate to require evidence of income of the Plaintiffs’ mother so as to determine whether she is “poor” and incapable of maintaining her children?**
- v. Whether, in the absence of any guidance in the Christian faith, principles of Islamic Law may be invoked in this case, and what will be the result of their application to the facts and circumstances of this case?**
- vi. Can it be said that the grandfather stands in *loco parentis* to his grandchildren when their mother has their custody and/ or guardianship?**
- vii. How long are the Plaintiffs entitled to receive maintenance? Issue No.1 specifically pertains to this question. However, both learned Courts below have simply held that the Plaintiffs are entitled to receive maintenance from the Defendant “till the time when they will be legally barred from being maintained by the defendant”, without categorically deciding when the legal bar will operate.**
- viii. If the claim of the Plaintiffs is not on the basis of minority but on basis of being poor relatives, even then, can the grandfather, who is of advanced age, be held liable for their maintenance in the presence of the mother and other relatives? If yes, to what extent?**

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**14.** Before parting, it is observed that in view of pendency of lis for a considerable period, it is expected from the learned Family Court, seized with the matter, to decide the suit expeditiously, keeping in view the mandate of Section 12A of “The Act” after procuring attendance of both the sides by adopting all possible legal modes.

**(MIRZA VIQAS RAUF)  
JUDGE**

**Approved for reporting.**

**JUDGE**

**Zeeshan**