

**JUDGMENT SHEET**  
**IN THE ISLAMABAD HIGH COURT,**  
**ISLAMABAD**

**WRIT PETITION NO. 4516 OF 2022**

**MST. NARGIS NAUREEN AND OTHERS.**

**VS.**

**ADDITIONAL DISTRICT JUDGE (MCAC)-WEST, ISLAMABAD, ETC.**

**Petitioner by                                 :       Mr. M. Saeed Khan Niazi, Advocate.**

**Respondents by                             :       M/s Tufail Shahzad and Sabir Shahzad,  
Advocates for Respondent No.3.**

**Date of Hearing                             :       15.02.2023.**

**SAMAN RAFAT IMTIAZ, J.:-**

1. Through the instant Writ Petition filed under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, the Petitioners No. 1 [Mst. Nargis Naureen] and Petitioners No. 2 & 3 [Muhammad Ayan Shakir and Mah Jabeen Zara] (**“Minors”**) seek the setting aside of the Judgments and Decrees dated 21.09.2021 (**“Impugned Judgment and Decree I**) and 11.11.2021 (**“Impugned Judgment and Decree II”**) passed by the Respondent No.2 [learned Judge Family/Guardian Judge] (**“Trial Court”**) and Respondent No.1 [learned Additional District Judge (MCAC), West-Islamabad] (**“Appellate Court”**), respectively and enhancement in their maintenance allowance.

2. Briefly stated, the facts as per the Memo of Petition are that the marriage between the Petitioner No.1 and the Respondent No.3 [Abdul Aziz Shakir] was solemnized and they were blessed with the Minors. After that the Respondent No.3 expelled the Petitioner No.1 from the matrimonial abode due to family pressure and honour on the pretext that the Petitioner No.1’s brother expelled the Respondent No.3’s sister. After desertion the Petitioner No.1 was left with no other option but to file a Suit for Recovery of Maintenance Allowance for herself and the Minors (**“Subject Suit”**), which was decreed vide the Impugned Judgment and Decree I, whereby the Minors were granted maintenance allowance of Rs. 3,000/- per month since August, 2019 till September, 2021 without annual increase

and Rs. 5,000/- each per month from October, 2021 till their legal entitlement with 10% annual increase. Whereas, the Petitioner No.1 was held disentitled to any past maintenance and was allowed maintenance allowance of Rs. 5,000/- per month only subject to joining the Respondent No.3 as wife. The Petitioners, being aggrieved, assailed the Impugned Judgment and Decree I through filing of Appeal, which was dismissed vide Impugned Judgment and Decree II, hence, the present Petition.

3. The learned counsel for the Petitioners submitted that the proof of financial strength of the Respondent No.3 is apparent from the payments made by him of the interim maintenance fixed by the Respondent No.2 and even otherwise maintenance of the Minors is the father's responsibility irrespective of whether he works or not. With regard to C.M. No. 1132/2022 he submitted that it has been filed by way of abundant caution. The amendment sought for is to challenge the Impugned Judgments and Decrees I and II in respect of the Petitioner No.1 as well to the extent that she has not been given past maintenance on the ground that she was unable to prove desertion. In this regard he relied upon the statement made by the Petitioner No.1 in her Affidavit-in-Evidence that she was forced to leave because of the intolerable behavior of the Respondent No.3 towards the Petitioner No.1 in response to which no cross examination was conducted on behalf of the Respondent No.3. He also referred to the explanation given by the Respondent No. 3 in paragraph 5 of his Written Reply to the Subject Suit filed by the Petitioners, whereby it has been stated that in the month of October, 2019 the parents of the Petitioner No.1 came to the Respondent No.3's house to see the Respondent No. 3's ailing sister whereupon harsh words were exchanged between the Respondent No.3's father and Petitioner No.1's mother and siblings due to the reason that the Petitioner No.1's parents started manhandling and mentally torturing the Respondent No. 3's ailing sister and due to this altercation the Petitioner No.1's parents forcefully took the Petitioners with them and asked the Respondent No.3 to divorce the Petitioner No.1. The learned counsel also showed various documents which according to him reflect that the Respondent No. 3 was involved with the divorce proceedings instituted by the Respondent No.3's sister

against the Petitioner No.1's brother notwithstanding Respondent No.3's denial in cross-examination that he had nothing to do with the said divorce proceedings. He argued that all the foregoing points indicate that the Petitioner No.1 was compelled to leave because of the circumstances created by the Respondent No.1 due to the relations between his sister and the Petitioner No.1's brother as such she is entitled to be maintained since desertion i.e. 28.08.2019. The learned counsel in support of his contentions placed reliance on *Marriam Bibi and others versus Azhar Iqbal and others*, PLD 2022 Lahore 840, *Mumtaz Hussain and others versus Public Service Commissioner of Azad Jammu and Kashmir and others*, PLD 2020 SC (AJ&K) 1, *Dr. Aqueel Waris versus Ibrahim Aqueel Waris*, 2020 CLC 131 [Islamabad], *Muhammad Asim and others versus Mst. Samro Begum and others*, PLD 2018 SC 819, *Syed Nobahar Shah versus Mst. Salma Bibi and others*, PLJ 2016 Peshawar 69, *Asif Rafique versus Mst. Quratullain and others*, 2016 MLD 425 [Sindh], *Mst. Farmidah versus Additional District Judge, Karor, District Layyah and others*, 2010 CLC 110 [Lahore], *Muhammad Aslam versus Muhammad Usman and others*, 2004 CLC 473 [Lahore], *M. Saleem Ahmad Siddiqui versus Mst. Sabira Begum and others*, 2001 YLR 2329, and an unreported Judgment of the Supreme Court passed in *Dastagir Khaliq versus Additional District Judge, etc.* (C.P. 5822/2021).

4. On the other hand the learned counsel for the Respondent No.3 argued that the Respondent No.3 is an Imam at a local Mosque and as such does not have any regular income and is only dependent on donations made to him from time to time, therefore, he is not a man of means and the Petitioner No.1 was unable to prove the allegation that he earns Rs. 150,000/- per month as such according to him the Impugned Judgments and Decrees I and II do not warrant interference by this Court. With regard to desertion of the Petitioner No.1 he argued that the fact that the Respondent No.3 filed Suit for Restitution of Conjugal Rights in itself shows that he did not want desertion of the Petitioner No.1 and her refusal to live with him reflects that she is who deserted the Respondent No.3.

5. I have heard the learned counsel for the parties and have also perused the available record with their able assistance.

**C.M.NO. 1132/2022:**

6. The instant C.M. is preferred seeking amendment in the Writ Petition by adding the following paragraph as paragraph 'h' under Grounds in the memo of Petition:

*“h. That the learned Lower Courts have ignored the important fact that the Petitioner No.1 who was legally wedded wife of the Respondent No.3 before seeking Khulla was compelled to leave the house of the Respondent No.3 and is entitled for the maintenance @ Rs. 15,000/- per month for the period of desertion till the date of iddat which was not granted and the same is an illegality and is amendable in the judicial review may kindly be allowed. Copy of suit for dissolution of marriage is annexed.*

*It has been held that even if the wife left the house of husband due to rash behavior with her free will even then she is entitled for maintenance allowance.*

*Reliance is placed on PLJ 2016 Pesh. 69 DB.”*

7. The learned counsel for the Respondent No.3 has not objected to such amendment as such the same is **allowed**.

**Maintenance of Petitioner No.1:**

8. The alleged reason for expulsion of the Petitioners by the Respondent No.3 as per the Memo of Petition and the arguments submitted by the learned counsel for the Petitioner was the expulsion of the Respondent No.3's sister by the Petitioner No.1's brother who were married to each other. However, perusal of the Complaint filed by the Petitioners in the Subject Suit as well as the Affidavit-in-Evidence shows that no such allegation was made therein. Therefore, this ground is clearly an afterthought.

9. Even otherwise this ground is only relevant for purposes of Petitioner No.1's claim for past maintenance from the date of alleged desertion whereas no such prayer has been made in the Memo of Petition which is restricted to challenging the Impugned Judgments and Decrees I and II to the extent that enhancement has been prayed for in the maintenance of the Minors from Rs. 3,000/- per month to Rs. 15,000/- with 10% increase and in the future maintenance at the same rate.

10. During the hearing, however, the learned counsel submitted arguments regarding past maintenance of the Petitioner No.1 and sought to amend the Memo of Petition. In this regard C.M.No.1132/2022 was filed seeking addition of a paragraph, which has been allowed by consent. However, addition of such paragraph will not change the prayer.

11. In any event, perusal of the Impugned Judgment and Decree II shows that neither this prayer nor arguments in support thereof as submitted before this Court had been made by the Petitioner No.1 before the learned Appellate Court, therefore, the Petitioner No.1 cannot be allowed to challenge the Impugned Judgment and Decree I to the extent that it was not challenged before the learned Appellate Court.

Maintenance of Minors:

12. The Petitioners vide the Complaint filed in the Subject Suit claimed that the Respondent No.3 is a man of means who apart from being an Imam Masjid is a Teacher and also has a Stationary Shop. On the other hand, the Respondent No.3 denied that he had any occupation other than being Imam Masjid for which he does not receive any regular salary and his only livelihood is through donations. The learned both the Courts below have accepted this plea and fixed the maintenance of the Minors accordingly while also observing that the Petitioners were unable to prove their allegation that the Respondent No.1 earns approximately Rs. 150,000/- per month.

13. However, by now it is well settled that a wife cannot be expected to have the means to produce evidence with regard to the husband's income especially when she is no longer living with him. Therefore, the onus to prove the monthly income is upon the husband. No evidence was produced by the Respondent No.3 to establish his income. Moreover, the learned Family Court is itself empowered to call for relevant documents for the purpose of establishing the salary of the father. Reliance is placed on *Nazia Bibi Vs. Additional District Judge, Ferozewala*, PLD 2018 Lahore 916 in this regard, however, no such effort has been made in this case.

14. I am also not impressed with the submission that as Imam Masjid he does not get a regular salary. There is no bar restraining the Respondent No.1 from supplementing his income by engaging in additional employment. Maintenance of the children is the responsibility of the father and not being gainfully employed despite being able bodied is not an acceptable reason not to sufficiently provide for the children.

15. According to the evidence produced by the Petitioners, the monthly school fees of both the Minors in the month of April, 2021 was a total of Rs. 3,200/-, whereas an amount of Rs. 17,600/- was spent on just their books in such month and Rs. 3,980/- was spent on their uniforms in October, 2020. However, the learned Family Court has failed to consider such evidence and give a finding as to whether the expenses of the Minors can be covered by the amount of maintenance granted to them nor has the learned Appellate Court adverted to its sufficiency.

16. In view of the foregoing, the instant petition is **partly allowed** to the extent that the Impugned Judgments and Decrees are hereby set aside and the matter is remanded to the learned Family Court to consider the sufficiency of the maintenance allowance of the Minors and to decide the same afresh.

**(SAMAN RAFAT IMTIAZ)**  
**JUDGE**

**Announced in open Court on this 13<sup>th</sup> day of April, 2023.**

**JUDGE**