

ORDER SHEET
IN THE LAHORE HIGH COURT,
MULTAN BENCH, MULTAN.
Judicial Department

I.C.A. No.439/2021

in

Writ Petition No.19490/2021.

Amir Sohail versus Judge Family Court etc.

S. No. of order/ Proceeding	Date of order/ Proceeding	Order with signature of Judge, and that of parties or counsel, where necessary
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30.12.2021. Mr. Jalal Badar Qureshi, Advocate for the Appellant.
Mr. Khush Bakht Khan, Assistant Advocate General,
Punjab.

Muzamil Akhtar Shabir, J. Through this Intra-Court Appeal filed under Section 3 of the Law Reforms Ordinance, 1972, the Appellant has called in question order dated 14.12.2021 passed by learned Single Judge in Chambers, whereby the Constitution Petition filed by the Appellant to challenge Judgment and decree dated 26.10.2021 passed by the Judge Family Court, Layyah, was disposed of with the direction to the learned Guardian Judge to decide the Guardianship matter pending before his Court, on priority basis, preferably within a period of three months.

2. As the Constitution petition simultaneously sought composite reliefs relating to two different matters one arising out of suit titled “Subhan Sohail versus Aamir Sohail” for recovery of maintenance allowance filed by the minor through his maternal grandmother against the Appellant and other filed by the appellant titled “Aamir Sohail versus Mst. Naseem Akhtar & another” for custody of minor filed against the mother and grandmother of the minor, hence for clarity the prayer in the Constitution petition is

reproduced below:-

"Under these circumstances, it is humbly prayed that this petition may kindly be accepted and the Judge Family Court Layyah order dated 26.10.2021 be set aside and in case titled Subhan Sohail vs. Aamir Sohail, custody of minor Subhan Sohail may kindly be given to the petitioner.

Any other relief which this Hon'ble Court deems fit may also be awarded to the petitioner."

3. Learned counsel for the Appellant while referring to the afore-mentioned prayer in the Constitution petition states that the grievance of the Appellant raised through the Constitution petition was two folds. The direction for expeditious disposal was issued to the extent of Guardianship matter pending before the trial court but nothing was mentioned to the extent of challenge raised against decree dated 26.10.2021 for past maintenance allowance of the minor Respondent, which has been allowed at the rate of Rs.4000/- per month with 10% annual increase w.e.f. 09.06.2016 i.e. for previous period of four years, two months and 6 days prior to filing of suit whereas court could not grant past maintenance allowance beyond three years period prior to the date of filing of suit for recovery of maintenance allowance titled "Subhan Sohail versus Aamir Sohail" filed by the minor through his maternal grandmother Kaniz Bibi wife of Allah Yar on 15.08.2020, which at the most could be ordered to commence w.e.f. 15.08.2017, hence according to him the maintenance allowance for period prior to the same is not sustainable.

4. In order to appreciate the contention of the learned counsel for the Appellant the impugned order is reproduced below:

"Through this petition, the Petitioner has made the following prayer:-

"Under these circumstances, it is humbly prayed that this petition may kindly be accepted and the Judge Family Court Layyah order dated

26.10.2021 be set aside and in case titled Subhan Sohail Vs Aamir Sohail and custody of minor Subhan Sohail may kindly be given to the petitioner."

2. *After some deliberation and when confronted as to the maintainability of the petition, learned counsel for the Petitioner has made a request that he will be satisfied if direction is given in petition titled "Aamir Sohail versus Mst. Naseem Akhtar & another" to the learned Guardian Judge, Layyah, to expedite the case.*

3. *Be that as it may, the learned Judge Guardian Court, Layyah, is directed to decide the petition titled "Aamir Sohail versus Mst. Naseem Akhtar & another" if still pending, on priority, preferably within three months from the date of receipt of certified copy of this order.*

4. *Disposed of."*

5. The learned counsel for the Appellant has been questioned as to maintainability of this appeal by confronting him with Para No.2 of the impugned order whereby the counsel on being confronted with the question of maintainability of the petition, himself requested that direction may be issued to the Guardian Judge, Layyah to expedite the case titled "Aamir Sohail versus Mst. Naseem Akhtar & another", whereupon consequential direction was given in furtherance of that request in Para No.3 of the impugned order to decide the said case expeditiously, preferably within three months, which order for all intents and purposes is an order made by consent of the Appellant through his counsel and consent order cannot be further challenged in appeal or through any other proceedings, which view has time and again been reiterated by the Superior Courts. Reliance in this behalf may be placed on "Ghulam Sarwar (Deceased) through LRs and others versus Ghulam Sakina" (2019 SCMR 567) wherein it has been held that the Judgment/order passed with consent of the parties could not be challenged by any of the parties.

6. The learned counsel for the appellant in

response has relied upon the Judgment reported as “Naseer Ahmad versus Sheikh Gulzar Ahmad and 10 others” (2006 MLD 1945) to state that even if the impugned order is treated to be a consent Order, the same can be challenged as the same does not properly determine the issue pending before court which passed the impugned order, besides legal aspects of the matter have not been addressed in the impugned order. In support of afore-mentioned ground he reiterates his stance that the grievance of the Appellant raised through the Constitution petition was two folds and direction was issued only to the extent of Guardianship matter pending before the learned trial court whereby he had asked for custody of minor to be handed over to him, but nothing was mentioned to the extent of past maintenance allowance of the Respondents decreed vide order dated 26.10.2021 in suit titled “Subhan Sohail versus Aamir Sohail”, that was also challenged through the Constitution petition wherein legal ground had been raised that court could not grant past maintenance allowance beyond three years period prior to filing of suit.

7. We have gone through the record of the case and order passed by learned Single Judge. First of all, the same does not mention that it was confined to the extent of relief for custody of minor only and not to the extent of the challenge to the decree of maintenance allowance. Presumption of regularity is attached to all judicial and official acts, which include orders of courts and the same also finds support from the illustration (e) attached to Article 129 of the Qanun-e-Shahadat Order, 1984 which provides that Court may presume that judicial and official acts have been regularly performed. Although the said presumption is rebuttable, the appellant never objected

to the passing of the said order at the stage when the same has been dictated nor any objection to the same was raised by filing any review application before the same judge to assert that consent had not been given for passing the said order, hence, on the face of it there is no substance in the claim of the Appellant that the said order decided only one of the two fold grievance raised by him.

8. In these circumstances, the impugned order for all intents and purposes is a consent order for the entire matter that was pending with and decided by the learned Single Judge in Chambers, which cannot be called in question through this Appeal in terms of principles laid down by the Hon'ble Supreme Court of Pakistan in the case of Ghulam Sarwar (deceased) (supra). The reliance of the learned counsel for the appellant on case of Naseer Ahmad (supra) is misplaced as the same is distinguishable on facts as in the said case, the consent order had been obtained by not impleading a necessary party, which act was treated as a fraudulent act, which aspect of the matter is not forthcoming in the present case to attract application of principles laid down in the said judgment.

9. Despite what has been stated above in the interest of justice, we have still considered the grounds raised by the counsel for the Appellant and have gone through the entire record including the order dated 26.10.2021 whereby while considering the claim of the Subhan Sohail minor respondent, who was born on 21.01.2015 for his maintenance allowance at the rate of Rs.15,000/- per month with annual increase with effect from his date of birth, the same has been fixed as Rs.4000/- per month w.e.f. 09.06.2016 i.e. the date when the mother of the minor was divorced and the

minor had since been living with her, till his legal entitlement with 10% annual increase.

10. The operative portion of order dated 26.10.2021 is reproduced below:

“16. In the light of my findings on supra issues, the suit of the plaintiff is decided in the following terms:-

i. The quantum of maintenance allowance to be recovered by plaintiff as Rs.4000/- per month with 10% annual increase, which shall be payable from 09.06.2016 to till his legal entitlement.”

11. The claim of the Appellant was that the maintenance allowance was not properly fixed. The minor in plaint claimed that the Appellant was working in a private company and was earning more than Rs.50,000/- per month and could easily pay Rs.15,000/- per month as maintenance allowance with annual increase, which claim was denied by the respondent. Despite the fact that Kaneez Bibi, maternal grandmother of minor appeared in evidence and produced her Affidavit as Exh-P1 and School admission certificate as Exh-P2 and also produced divorce deed as Mark-A and the Appellant appeared as DW-1 and produced his Affidavit as Exh-D1 and also produced Muhammad Hussain son of Rehmat Ali in evidence as DW-2, who also submitted in affidavit as Exh-D2 but was later on given up, neither the respondent/plaintiff nor the Appellant/defendant led any cogent evidence relating to income and financial status of the appellant.

12. It is settled by now that the minor could not be burdened with onus to prove the financial status and payment capacity of his father to be held entitled to maintenance allowance rather it was for the father to prove his financial sources which, if he fails to prove, inference is to be drawn against him in view of the principles laid down by the Hon’ble Supreme Court of

Pakistan in case titled “Muhammad Asim and others versus Mst. Samro Begum and others” (PLD 2018 SC 819) wherein it has been held that a husband was required to maintain his former wife during her *iddat* period or child and was required to pay maintenance, including the arrears of maintenance, his present and past earnings must be disclosed by him, because his financial status determined the amount of maintenance that should be awarded. In case of non-disclosure an adverse inference could be drawn against him. The Hon’ble Supreme Court of Pakistan further observed that the Family Court should try to ascertain the salary and earnings of the husband/father who was required to pay maintenance.

13. As the Appellant had not disclosed his financial status and earning capacity through cogent evidence, the learned trial court was justified to determine the quantum of maintenance allowance on the basis of tentative assessment of available record and the conclusion drawn by the trial court by fixing maintenance allowance at the Rate of Rs.4000/- per month could neither be stated to be excessive nor beyond the financial status of the Appellant, besides the same would not be liable to be interfered with by this Court on the ground that the minor is a growing boy who is also studying in school and such quantum of allowance was needed for his proper maintenance. Moreover, the same is a finding of fact which cannot be ordinarily interfered with in constitutional jurisdiction of this Court unless shown to be suffering from some illegality, misreading or non-reading of record or suffering from some jurisdictional defect which has not been pointed out from the record.

14. As far as past maintenance allowance for the period beyond three years is concerned, suffice it to

observe that the said aspect of the matter has already been decided by the Hon'ble Supreme Court of Pakistan in case titled "Mst. Farah Naz versus Judge Family Court, Sahiwal and others" (PLD 2006 Supreme Court 457), wherein it is held that the maintenance for past six years could be allowed by the Family Court as a suit for maintenance allowance would be governed by the residuary Article 120 of the Schedule attached to the Limitation Act, 1908 providing limitation of six years. The relevant portion of the judgment is reproduced below:

"9. 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)."
(Emphasis supplied)

15. The principles laid down in the case titled Mst. Farah Naz (supra) providing six years period limitation for filing suit for past maintenance allowance has also been reiterated in the judgments of this Court in cases titled "Shagufta Bibi and others

versus Amanat Ali and others” (2018 YLR 645), “Gakhar Hussain versus Mst. Surayya Begum and others.” (PLD 2013 Lahore 464) and “Rasheed Ahmad Khan through Special Attorney versus Additional District Judge Layyah and 2 others” (2011 MLD 1012), “Rasheed Ahmed versus Mst. Shamshad Begum and 3 others” (2007 CLC 656), “Mst. Bushra Qasim versus Dr. Abdul Rasheed and others” (1993 CLC 2063) and “Muhammad Aslam versus Zainab Bibi and 3 others” (1990 CLC 934), wherein it has been held that suit for recovery of maintenance allowance falls within the residuary Article 120 of the Limitation Act providing 6 years limitation. In view of the principles laid down in the aforementioned judgments the ground raised by the Appellant that past maintenance allowance for a period more than three years could not be allowed is without any substance or legal basis and it is held that the learned trial court rightly allowed maintenance allowance with effect from 09.06.2016, which time frame is within the period of six years prior to filing of the suit, especially when the Appellant has not been able to demonstrate from the record that he had paid maintenance to the minor for the said period. In these circumstances, there is no ground to interfere in the Judgment and Decree passed by the Judge Family Court on the said account as well.

16. The Appellant has also claimed that while passing the decree the interim maintenance allowance paid during the pendency of the suit has not been deducted from the decretal amount and the judgment of the trial court to that extent is a non-speaking order. It is settled position of law that the interim maintenance allowance paid during the pendency of the suit in compliance of orders passed by the court is

to be adjusted from the amount determined in the final decree. For this purpose, reference may be made to the case titled “Malik Sultan Khan versus Mst. Azra Yasmeeen and others” (2004 YLR 933) (Lahore), wherein it is laid down that interim maintenance allowance was always subject to variation and adjustment at the time of final decision which was given after recording of evidence.

17. In this view of the matter, we are inclined to observe that whatever interim maintenance allowance has been paid by the Appellant to the minor in the Court during the pendency of the suit for recovery of maintenance allowance, the same shall be taken into consideration by the learned Executing Court while adjusting and seeking recovery of amount of maintenance allowance recoverable in execution of the Judgment and Decree passed by the learned Trial Court.

18. In view of the above observations, we find no reason to interfere in the impugned order passed by the learned Single Judge in Chambers and this Intra Court Appeal is **disposed of** accordingly.

(Muhammad Raza Qureshi) (Muzamil Akhtar Shabir)
Judge Judge

Approved for reporting.

Judge

Judge