

**JUDGMENT SHEET**  
**IN THE ISLAMABAD HIGH COURT,**  
**ISLAMABAD**  
**WRIT PETITION NO. 878 OF 2022**

**TANVEER ALI CHAUDHRY**  
**VS.**  
**ADDITIONAL DISTRICT JUDGE ISLAMABAD (EAST) *and others***

**Petitioner by** : **Ms. Saira Khalid Rajput, Advocate.**

**Respondents by** : **Mr. Sajjad Akbar Abbasi, Advocate.**  
(for Respondents No.3 to 6)

**Date of Hearing** : **06-06-2023.**  
**SAMAN RAFAT IMTIAZ, J.:-**

1. Through the instant writ petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 the Petitioner [Tanveer Ali Chaudhry] (“**Petitioner/Husband**”) has assailed (i) the Judgment and Decree dated 22-09-2021 (“**Impugned Judgment and Decree I**”) passed by the Respondent No.2 [Family Judge, Islamabad (East), Islamabad (“**Family Court**”)] and (ii) the Judgment and Decree dated 11-12-2021 (“**Impugned Judgment and Decree II**”) passed by the Respondent No.1 [Additional District Judge, Islamabad (East) (“**Appellate Court**”)] in appeal filed by the Petitioner against the Impugned Judgment and Decree I.

2. The brief facts as per the Memo of Petition are that Respondent No.3 [Mst. Shehla Zafar] (“**Respondent No.3/Wife**”), and Respondent No.4 [Saim Ali], Respondent No.5 [Shavana Tanvir], and Respondent No. 6 [Mst. Manahil] (hereinafter Respondents No. 4, 5, and 6 are collectively referred to as the “**Minors**”) filed a Suit for Dissolution of Marriage on the basis of *Khulla*, Recovery of Dower, Maintenance Allowance and Dowry Articles (“**Subject Suit**”). The Petitioner/Husband filed his written statement whereafter the Subject Suit was fixed for pre-trial reconciliation proceedings which failed. As such the Subject Suit was decreed to the extent of dissolution of marriage on the basis of *Khulla* on 18.12.2020. Thereafter issues were framed by the learned Family Court. After recording of evidence, the learned Family Court decreed the Suit of the Respondents No.3 to 6 vide the Impugned Judgment and Decree I, whereby the Petitioner/Husband was directed to pay Rs.15,000/- maintenance to each of the Minors with effect from 12-10-2020 till their legal entitlement;

Rs.10,000/- per month to the Respondent No.3/Wife as maintenance with effect from 19-05-2020 till completion of her *iddat* period; and to return the dowry articles to the Respondent No.3/Wife or their value at Rs.2,96,935/-; and that all the above amounts shall be paid with 10% annual increase till realization.

3. Aggrieved of the Impugned Judgment and Decree I, the Petitioner/Husband filed appeal before the learned Appellate Court. The learned Appellate Court after hearing the parties, partially allowed the appeal and modified the Impugned Judgment and Decree I vide the Impugned Judgment and Decree II by holding that the Respondent No.3/Wife is entitled to recover dowry articles from the Petitioner/Husband as per list Exh.P3 or the value thereof as mentioned against each article with deduction at the rate of 20% on account of depreciation except articles mentioned at Serial No.11, 16, 10, 11, 12, and 18. Whereas, the Minors were allowed maintenance at the rate of Rs.15,000/- per month each till their legal entitlement with 10% annual increase and maintenance to the Respondent No.3/Wife at the rate of Rs.10,000/- with 10% annual increase.

4. Being aggrieved and dissatisfied by the Impugned Judgments & Decrees I and II passed by the learned Family Court and learned Appellate Court the Petitioner/Husband preferred the instant writ petition to the extent of issue No.1 whereby it was directed to pay maintenance to the Minors at Rs.15,000/- per month per head with effect from 12-10-2020 till their legal entitlement; Rs.10,000/- per month to the Respondent No.3/Wife as maintenance with effect from 19.05.2020 till completion of her *iddat* period; and issue No.3 that all the above amounts shall be paid with 10% annual increase till realization.

5. The learned counsel for the Petitioner/Husband submitted that the claim made by the Respondent No.3/Wife that she was deserted by the Petitioner/Husband on 19-05-2020 vide her plaint filed in the Subject Suit was categorically denied by the Petitioner/Husband vide his written statement despite which no evidence was led by the Respondent No.3/Wife to establish her claim. Yet both the learned Family Court as well as the learned Appellate Court did not consider the effect of such failure and no finding has been given as to whether the Respondent No.3/Wife was deserted / ousted by the Petitioner/Husband or whether she left the marital

home of her own will and accord as claimed by the Petitioner/Husband. Notwithstanding the absence of such finding, both the Courts below have nevertheless allowed the Respondent No.3/Wife recovery of maintenance from the date of the alleged desertion. According to the learned counsel for the Petitioner/Husband, such recovery is not justifiable without a finding of desertion and as such, the Respondent No.3/Wife is only entitled to maintenance for the period of *iddat*. She further submitted that even otherwise the monthly income of the Petitioner/Husband as alleged by the Respondent No.3/Wife was not proved. She drew this Court's attention to both the Impugned Judgments and Decrees whereby it has been recorded that the Petitioner/Husband admitted that he is a businessman inspite of the fact that no such admission was ever made by the Petitioner/Husband. With regard to the maintenance allowed to the Minors the learned counsel for the Petitioner/Husband submitted that although the Respondent No.3/Wife took the Minors with her on the night of 18-05-2020, they resided with the Petitioner/Husband from 24-09-2020 till 12-10-2020 which is evident from the fact that the Respondent No.3/Wife filed a petition under Section 491 Cr.P.C. for the Recovery of Minors which was decided vide Order dated 12.10.2020 and custody of the Minors was given to the Respondent No.3/Wife with visitation rights to the Petitioner/Husband on weekends. Therefore, the period of maintenance allowed for the Minors should exclude the period from 24-09-2020 till 12-10-2020 and that the quantum of maintenance allowed to the Minors is excessive not only because the Respondent No.3/Wife failed to discharge her burden to prove the Petitioner's monthly income as alleged but also because it has been granted without due regard to the fact that the Minors reside with the Petitioner/Husband on weekends and who is also admittedly bearing the educational expenses of the Minors. She also submitted that the Petitioner/Husband has made an application for modification / rectification of the Orders dated 11-04-2022 and 12-05-2022 passed by this Court in the instant writ, which incorrectly recorded that she made statement that the Petitioner/Husband is not challenging the Impugned Judgments and Decrees to the extent of quantum of the maintenance of the Minors.

6. The learned counsel for the Respondents No.3 to 6 at the very outset drew this Court's attention to the Impugned Judgments and Decrees

whereby the Minors have been allowed maintenance from 12.10.2020 and as such submitted that the period during which they resided with the Petitioner/Husband is not included. He also drew the Court's attention to the Orders passed by this Court on 11-04-2022 and 12-05-2022 whereby it has been recorded that the Petitioner/Husband did not wish to challenge the Impugned Judgments and Decrees to the extent of maintenance to the Minors. In respect of the Petitioner's application seeking modification / rectification of the said Orders, he submitted that such application has been filed belatedly and even otherwise cannot be moved in respect of statements made by legal counsel as recorded in court orders. He also submitted that the Petitioner/Husband is no longer paying the school fees of the Minors and that it is the Respondent No.3/Wife who is paying school fees out of the maintenance allowance granted by the Impugned Decrees.

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

8. First and foremost, it has to be borne in mind that this Court in exercise of Constitutional jurisdiction does not act like a Court of appeal. As such, the Court cannot embark upon a reappraisal of evidence. It is settled law that a High Court in such jurisdiction cannot substitute the concurrent findings of the courts below with its own findings solely on the ground that another view was possible on the same evidence. A party approaching the High Court under Article 199 of the Constitution has to demonstrate that there is a gross misreading or non-reading of evidence or jurisdictional error or such legal infirmity that has caused miscarriage of justice. Let us see whether interference by this Court in exercise of its Constitutional jurisdiction is warranted in this case.

#### Period of Respondent No.3/Wife's Maintenance

9. The Respondent No.3/Wife alleged in her plaint that she was severely beaten and thrown out from the marital home by the Petitioner/Husband on 19-05-2020. This has been denied categorically by the Petitioner/Husband in his written statement alleging instead that the Respondent No.3/Wife left the marital home along with the Minors and valuables on the night of 18.05.2020 stating that she wishes to visit her mother's house on account of her sister's illness and that the Petitioner/Husband dropped off the Respondent No.3/Wife to her mother's place himself. It was therefore

disputed between the parties as to whether the Respondent No.3/Wife was expelled/ousted by the Petitioner/Husband or she left the marital home of her own will and accord. In view of such disputed fact, a finding was necessary as to whether or not the Respondent No.3/Wife was expelled from the marital home by the Petitioner/Husband or not in order to determine the period for which maintenance could be granted. However, no finding has been rendered by the Courts below in this regard despite which maintenance has been allowed to the Respondent No.3/Wife from the date of the alleged desertion. This in my opinion is an infirmity which merits interference by this Court in exercise of Constitutional jurisdiction under Article 199 of the Islamic Republic of Pakistan, 1973.

#### Quantum of Maintenance of the Minors

10. Before I consider the merits of the arguments submitted by the parties with regard to the quantum of maintenance of the Minors, it is necessary to first consider the objection made by the learned counsel for the Respondents No.3 to 6 that the learned counsel for the Petitioner/Husband had made statement before this Court that the Petitioner/Husband is not challenging the Impugned Judgments and Decrees to the extent of amount of maintenance.

11. The Orders dated 11.03.2022, 11.04.2022, and 12.05.2022 are reproduced hereunder:

##### **Order dated 11.03.2022:**

*Learned counsel for the Petitioner states that vide impugned Judgment and Decree maintenance of the minors and plaintiff No. 1 has been decreed along with return of dowry articles and after listing of the above categories the impugned Decree at Sr. No. 4 states that "all the above amounts shall be paid with 10 % annual increase till realization".*

**2. The Petitioner has challenged the amount of maintenance and duration of maintenance as well as 10 % annual increase against all the above amounts particularly as no increase can be granted in respect of dowry articles.**

**3. Let notice be issued to the respondents.**

*C.M No. 01/2022.*

*Exemption sought for is allowed, subject to all just and legal exceptions.*

*C.M No. 02/2022.*

**Notice. In the meantime, 10 % annual increase shall not apply to the dowry articles.**

##### **Order dated 11.04.2022:**

*Learned counsel for the Petitioner submits that decree has not been challenged to the extent of return of dowry articles to Respondent No.3. Dispute is only with regard to the duration of maintenance awarded to the minors as well as to the Respondent No.3 and also to the extent of annual increase in respect of Respondent No.3.*

**2. Re-list, on 12.05.2022 with consent of parties.**

**Order dated 12.05.2022**

*Proxy counsel submits that learned principal counsel for the Petitioner is busy before another Bench. The last two orders reflect that the only issue raised by the Petitioner is to the extent of duration of maintenance awarded to the Respondents No. 3 to 6 and no issue has been raised regarding quantum of maintenance.*

2. *Despite foregoing, according to learned counsel for Respondents No. 3 to 6, the Petitioner has not been paying maintenance as per impugned judgment and decree.*

3. *In view of the above, learned counsel for the Petitioner is directed to satisfy this Court as to whether or not maintenance as per impugned judgment and decree is being paid to the Respondents No. 3 to 6, failure to comply with the foregoing shall result in dismissal of the instant petition.*

4. *Re-list on 30.05.2022. It is made clear that no further adjournment will be granted under any circumstances. [Emphasis added].*

12. As may be seen from the reproduction of the Orders dated 11.03.2022, 11.04.2022, and 12.05.2022 hereinabove no order has been passed recording a statement made by the learned counsel for the Petitioner/Husband that the Petitioner/Husband is not challenging the quantum of maintenance. The prayer in the instant writ petition as well as the Order dated 11.03.2022 whereby notice was issued to the Respondents categorically contained the Petitioner's challenge to the amount of maintenance. However, the same has not been mentioned in the subsequent two Orders. The said omission cannot be equated with a statement made by the learned counsel Petitioner/Husband that such part of the prayer made vide the writ petition is abandoned or withdrawn. Therefore, there is no merit in the argument of the learned counsel for the Respondents No.3 to 6 in this regard.

13. Coming to the merits, the learned counsel for the Petitioner/Husband has taken the Court through the record and indeed there is no admission by the Petitioner/Husband that he is a businessman nor was the counsel for the Respondents No.3 to 6 able to point out such admission from the record. It is also correct that the Respondent No. 3/Wife was unable to produce any evidence to support her allegation that the Petitioner/Husband earns Rs.200,000/- per month.

14. Having said that I agree with the judgments rendered by the Lahore High Court in the cases of *Tanveer Salamat versus Additional Sessions Judge and others*, 2019 YLR 1862, and *Tariq Mehmood versus Mst. Farah Shaheen*, 2010 YLR 349 whereby it has been held that the onus to prove financial capability is upon the Petitioner/Husband. A wife cannot be expected to have documentary proof of her former husband's income. No person can be burdened to prove the income of another. There is no cavil to

the proposition that children are the financial responsibility of a father. A minor's maintenance cannot be denied on account of the wife/mother's inability to prove the father/husband's financial capability. Therefore, it is the father/husband who has the burden to prove his financial capability in order for the learned Family Court to decide the quantum of maintenance of the minor children and in case of his failure to do so the learned Family Court may draw any negative inference on the basis of withholding of evidence and determine the quantum of maintenance for the minor. The Petitioner/Husband in the instant case has not produced any evidence of his monthly income or source thereof and yet is insisting that the amount is excessive. There is nothing on the record for me to conclude that the amount of maintenance granted to the Minors is beyond the means of the Petitioner/Husband. On the face of it, the maintenance granted by the courts below does not appear to be excessive.

10% annual increase

15. Last but not least, the learned counsel for the Petitioner/Husband pointed out that the Impugned Judgment and Decree I has allowed 10% annual increase till realization of all amounts including maintenance of the Wife and Minors as well as return of dowry articles and submits that 10% annual increase cannot be granted in respect of dowry articles. In this respect C.M. 02/2022 was moved by the Petitioner/Husband praying for suspension of operation of the Impugned Judgments and Decrees I and II, in respect of which notice was issued on 11.03.2022 and in the meantime it was ordered by this Court that 10% annual increase shall not apply to the dowry articles.

16. It is firstly noted that the Impugned Judgment and Decree I was challenged in appeal and that the 10% annual increase has been allowed by the Impugned Judgment and Decree II only in respect of the maintenance granted to the Respondent No.3/Wife and the Minors but not in respect of recovery of dowry articles. The learned Appellate Court vide the Impugned Judgment and Decree II has modified the Impugned Judgment and Decree I to the extent that Respondent No.3/Wife has been held entitled to the recovery of dowry articles as per Ex-P3 or value thereof as mentioned therein subject to depreciation at the rate of 20% except the articles as listed

in the Impugned Judgment and Decree II. Point to be noted is that recovery of the value of the recoverable articles has been allowed in the alternative.

17. The parties have not disclosed whether the Petitioner/Husband has returned the dowry articles as per the Impugned Judgment and Decree II or paid the alternate value thereof subject to depreciation at the rate of 20%. In case the Petitioner/Husband returns the dowry articles, it goes without saying that such return cannot be subjected to 10% annual increase. However, in case the Petitioner/Husband pays the value of the dowry articles as allowed by the Impugned Judgment and Decree II the same shall be subjected to 10% annual increase till realization.

18. The date from which such increase is to be applied is dependent on a finding from the learned Family Court regarding the allegation of desertion and date thereof. In case, the learned Family Court determines that the Respondent No. 3/Wife has established desertion by the Petitioner/Husband on 19-05-2020, 10% annual increase shall be applied from the said date of desertion. In case, desertion is not proved then the 10% annual increase shall be applied from the date of the Impugned Judgment and Decree II.

19. In view of the above, the instant petition is **partly allowed** and the Impugned Judgments and Decrees are set-aside to the extent of duration of maintenance granted to the Respondent No.3/Wife and the matter is remanded to the learned Family Court to render a finding with regard to the Respondent No.3/Wife's allegation of desertion by the Petitioner/Husband and to determine the duration of maintenance to be granted to the Respondent No.3/Wife accordingly as well as to apply the 10% annual increase upon recovery of alternate value of dowry articles as specified in the Impugned Judgment and Decree II in terms of the directions given herein above. All the pending C.Ms in the instant petition are also disposed of.

**(SAMAN RAFAT IMTIAZ)  
JUDGE**

**Announced in the open Court on this 9<sup>th</sup> day of June, 2023.**

**JUGDE**