

JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
(JUDICIAL DEPARTMENT)

Writ petition No.18625 of 2016

Mst. Farida Bibi etc.

Vs.

Judge Family Court etc

Petitioners by:- Miss Kashwar Naheed Advocate
 Respondent by:- Ex parte.
 Date of hearing: - 13.01.2022

JUDGMENT

SAFDAR SALEEM SHAHID, J:-Through instant constitutional petition, the petitioners seek enhancement of maintenance allowance, partly decreed by learned Judge Family Court, Sheikhpura, vide judgment and decree dated 15.09.2015 .

2. The brief facts of the family litigation are that Mst. Farida Bibi petitioner No.1 and Muhammad Shahid respondent No.2 were married on 24.03.2011, Out of this wedlock Ammara Shahid petitioner No.2 was born. Differences between the parties arose and ultimately the petitioner filed the suit for past and future maintenance allowance at the rate of Rs. 30,000/- per head per month. The respondent appeared before the court and submitted his contesting written statement. Consequently, learned trial court vide judgment and decree dated 15.09.2015 partly decreed the suit for recovery of maintenance allowance and petitioner No.1 was held entitled to maintenance allowance at the rate of Rs. 15000/- only for the period of “Iddat” whereas petitioner no.2/minor was held entitled to maintenance allowance at the rate of Rs. 5,000/- per month from the date of effectiveness of divorce between the spouses till marriage of respondent No.2 (minor) with 10% annual increase. Against the said judgment and decree the petitioners preferred instant writ

petition before this Court for enhancement of maintenance partly decreed by learned Judge Family Court Sheikhpura. Hence instant writ petition.

3. The issues No.1 & 2 were relating to maintenance allowance of the minor and the lady regarding the past as well as future period which were inter-related and inter-connected, hence the same were decided by learned trial court simultaneously. The learned trial court discussed the evidence of the parties and apprised that since the lady had left the house of the respondent alongwith minor out of her own will, therefore, she was not entitled to recover the past maintenance allowance. It was further held by the learned trial court that the petitioner/lady has neither mentioned any specific ground nor mentioned specific date or month when she was expelled and the respondent had not been giving the monthly allowance to her. Relying on these observations, the lady was deprived from her previous maintenance allowance however, she was held entitled the maintenance allowance only for the period of "Iddat" as she was divorced by the respondent and divorce was effected between the spouses on 30.06.2014 vide Exh.D-4. The learned trial court fixed the maintenance allowance of the minor at the rate of 5000/- per month from the date of divorce between the spouses till the marriage of respondent No.2 (minor) with 10% annual increase. The petitioner/plaintiff agitated the judgment and decree in question through instant writ petition as no other remedy was available to the petitioner with the version that the learned Judge Family Court has not decided the issues in accordance with law. It was argued by learned counsel for the petitioner/plaintiff that non-mentioning of exact date of desertion would not disentitle the petitioner from her past maintenance allowance as well as of the minor daughter of the petitioner. It was further argued by learned counsel that maintenance allowance of the minor has not been fixed by the learned trial court in view of financial status of the respondent as the respondent was serving in Saudi Arabia and he was earning more than Rs. One lac and in this regard the petitioner produced cogent evidence regarding his source of income. It was further contended that the minor is now

grown up and studying in a school and her average monthly expenditure on account of school fees, uniform, Qari Sahib fee, transport, foods and other necessities etc are higher than the maintenance allowance due to rise in inflation.

4. The respondent was summoned through summons in accordance with law but inspite of the same he did not appear; consequently he was proceeded against ex-parte.

5. Arguments heard. Record perused.

6. It has been noticed that there are many legal as well as Shari questions before this Court which are being discussed as under:-

1. Whether the lady/plaintiff having a suckling baby with her can be deprived from the maintenance allowance.?
2. Whether the maintenance allowance of the minor can be waived by the mother or any of the blood relative. ?

Since very important Shari questions were involved in the instant case, therefore, learned Assistant Advocate-General was appointed as amicus curiae in order to assist this Court.

7. Perusal of record reveals document Exh. D-I is available on file which shows that an agreement/Punchayat Nama was entered into between the parties where the father of the petitioner No.1 had signed the said document in view of its correctness. The contents of said agreement/Punchayatnama is reproduced as under:-

یہ کہ میں مسماۃ فریدہ بی بی دختر شاہ محمد حلفیہ بیان کرتی ہوں کہ میں بچی عمارہ دختر محمد شاہد کے کسی قسم کے خرچہ کا مطالبہ نہ کروں

گی۔ عمارہ کوروبرو گواہان محمد شاہد کی والدہ سے حاصل کر لی ہے۔ مورخہ 16.03.2004

The aforesaid document was written on 16.03.2015 which was signed and thumb marked by the father of the petitioner namely Shah Muhammad. The petitioner/plaintiff in her statement while appearing as PW-1 has specifically refused that she had ever signed any such document. . During cross-examination she deposed that she had no knowledge regarding execution of Exh. D-1 however, she had signed and thumb marked a blank paper . She further deposed that her father Shah Muhammad had signed the document Exh. D-1 and also thumb marked. The right of the minor cannot be waived by the mother or

any of the blood relative. Allah has specifically fixed the responsibility of the minor (suckling baby) to the father. The mother has been given responsibility of feeding the child, whereas the father, if the father is not alive or in a position not to pay the maintenance, then the responsibility will be shifted to mother, if can bear it or to the other family members as given in section 370 of Muhammadan Law which is reproduced as under:-

370. Maintenance of Children and Grand Children – (1) A Father is bound to maintain his sons until they have attain the age of majority. He is also bound to maintain his daughters until they are married. But he is not bound to maintain his adult sons unless they are disabled by infirmity or disease. The fact that the children are in the custody of their mother during their infancy (Section 352) does not relieve the father from the obligation of maintaining them. But the father is not bound to maintain a child who is capable of being maintained out of his or her own property.

(2) If the father is poor, and incapable of earning by his own labour, the mother, if she is in easy circumstances, is bound to maintain her children as the father would be.

(3) If the petitioner is poor and infirm, and the mother also is poor, the obligation to maintain the children lies on the grandfather, provided he is in easy circumstances.

Even this particular document Exh. D-1 will not disentitle the minor from her Shari right of maintenance allowance. Here I will quote the

Verse 233 of Surah Al-Baqara:-

وَالْوَالِدَاتُ يُرْضِعْنَ أَوْلَادَهُنَّ حَوْلَيْنِ كَامِلَيْنِ لِمَنْ أَرَادَ أَنْ يُتِمَّ الرَّضَاعَةَ ۖ وَعَلَى الْمَوْلُودِ لَهُ رِزْقُهُنَّ وَكِسْوَتُهُنَّ بِالْمَعْرُوفِ لَا تُكَلَّفُ نَفْسٌ إِلَّا وُسْعَهَا لَا تُضَارَّ وَالِدَةٌ بِوَلَدِهَا وَلَا مَوْلُودٌ لَهُ بِوَلَدِهِ ۚ وَعَلَى الْوَارِثِ مِثْلُ ذَلِكَ ۚ فَإِنْ أَرَادَا فِصَالًا عَنْ تَرَاضٍ مِّنْهُمَا وَتَشَاوُرٍ فَلَا جُنَاحَ عَلَيْهِمَا وَإِنْ أَرَدْتُمْ أَنْ تَسْتَرْضِعُوْا أَوْلَادَكُمْ فَلَا جُنَاحَ عَلَيْكُمْ إِذَا سَلَّمْتُمْ مَا اتَّيْتُمْ بِالْمَعْرُوفِ وَاتَّقُوا اللَّهَ وَاعْلَمُوا أَنَّ اللَّهَ بِمَا تَعْمَلُونَ بَصِيرٌ (٢٣٣)

اور مائیں دودھ پلائیں اپنے بچوں کو (ف ۴۶۶) پورے دو برس اس کے لئے جو دودھ کی مدت پوری کرنی چاہئے (ف ۴۶۷) اور جس کا بچہ ہے (ف ۲۶۸) اس پر عورتوں کا کھانا پہننا ہے حسب دستور (ف ۴۶۹) کسی جان پر بوجھ نہ رکھا جائے گا مگر اس کے مقدور بھر ماں کو ضرر نہ دیا جائے اس کے بچہ سے (ف ۴۷۰) اور نہ اولاد والے کو اس کی اولاد سے (ف ۴۷۱) یا ماں ضرر نہ دے اپنے بچہ کو اور نہ اولاد والا اپنی اولاد کو (ف ۴۷۲) اور جو باپ کا قائم مقام ہے اس پر بھی ایسا ہی واجب ہے پھر اگر ماں باپ دونوں آپس کی رضا اور مشورے سے دودھ چھڑانا چاہیں تو ان پر گناہ نہیں اور اگر تم چاہو کہ دایوں سے اپنے بچوں کو دودھ پلو تو بھی تم پر مضائقہ نہیں جب کہ جو دینا ٹھہرا تھا بھلائی کے ساتھ انہیں ادا کر دو، اور اللہ سے ڈرتے رہو اور جان رکھو کہ اللہ تمہارے کام دیکھ رہا ہے، ﴿۲۳۳﴾

(ترجمہ: کنز الایمان)

The wisdom mentioned in the aforesaid Verse of Surah Al-Baqara is that father is solely responsible to maintain the minor as well as the lady who is feeding his child . The document Exh. D-1 could be used for any other purpose but not to deprive the minor from her maintenance allowance and the lady who had been feeding the minor. It is legal as well as moral right of every minor/child that he be brought up in healthy atmosphere and be brought up with the feelings of self-respect alongwith educational necessities and it is duty of the father to bring up his children as per his financial status. Although learned Judge Family Court has not relied upon the document Exh. D-I but on the other hand, the learned Judge Family Court had deprived the lady/mother of the minor from the maintenance allowance regarding the period of feeding of the minor. It is settled principle of law that nobody/parents or any blood relative can waive the right of any minor regarding his maintenance allowance which has been given by ‘Shariah’. So the document Exh. D-I has no legal value in the eyes of law and same is against the spirit of Islamic Rules, therefore, it would not create a hurdle for the fixation of maintenance allowance for the past and future of the minor as well as to the lady. Admittedly the marriage between the parties was solemnized on 24.03.2011 whereas minor daughter was born on 13.01.2012. According to the version of the petitioner/lady taken by her in plaint, she left the house of the respondent one year prior to the institution of the suit. The suit was filed on 24.07.2014, meaning thereby the lady left the house of the respondent on 24.07.2013. Mark

DB dated 24.03.2014 is an important document (Talaq Nama) which was tendered by the respondent wherein it was admitted by the respondent that six months prior the lady had gone to her parents house, if said period is calculated, it means that the petitioner/lady had left the house of the respondent on 24.09.2013 whereas the petitioner/lady has claimed that she had left the house of her husband on 24.07.2013. So there is no a big difference in the dates regarding the leaving of the house of the petitioner from her husband's house/respondent. It is clear indicative of the fact that she was residing with her parents after the aforesaid dates and during the said period neither she was paid the maintenance allowance nor the minor. The question before this Court is that a disobedient lady living separately without any reason should be refused to pay the maintenance allowance for that period she had not performed her matrimonial obligations but here this is a different situation. She had been feeding the minor during the said period. In these circumstances, the father of the minor was under obligation to provide the maintenance to the lady who was feeding his child as per Holly Verse 233 of Surah Al-Baqara: So the learned Judge Family Court has not kept in view the entitlement of the lady for having the previous maintenance allowance on this score which was very important. In all circumstances, the welfare of the miner is the supreme, though she had left the house herself or she was expelled from the house as she had been feeding the minor and maintaining his suckling baby. As per 'Sharia' the father is duty bound to maintain his wife who was feeding his child. This principle is established from the traditions of Arabic societies where the children were handed over to the ladies (foster mothers) for feeding and they were paid penny/reward for feeding purpose. It is also a principle that even after separation, the lady can live in the house of her ex-husband for the purpose of feeding in case she had a suckling baby, within the limits prescribed by Almighty Allah. Meaning thereby, the maintenance of the mother who had been feeding a child cannot be stopped in any way, however, after that period the court can assess the evidence adduced by the parties and then can pass the

appropriate order regarding the maintenance allowance. In the instant case, the lady had been feeding the child, therefore, neither the child nor the lady can be deprived from the maintenance allowance in any away. This Court has reason to believe that the learned Judge Family court has not taken into consideration this aspect of the matter. The judgment and decree dated 15.09.2015 passed by learned Judge Family Court, Sheikhpura is modified to the extent that the plaintiff No.1 Mst. Farida Bibi/lady is held entitled for maintenance allowance for the period in which she had been feeding the minor. Under the Islamic Rules, the feeding period has been fixed by the Fiqh as 2 ½ years. Prima facie, the plaintiff no.1/lady had been feeding the minor for the period of 2 ½-years. Ammara Shahid minor was born on 13.01.2012 and if the aforesaid period is calculated, then it comes on record that the plaintiff/lady had been feeding the minor till 13.07.2014 and for that period the respondent No.2 is duty bound to pay the maintenance allowance to the plaintiff/lady. As discussed above the admitted dates of desertion of plaintiff-lady from the house of the respondent was noted as 24.07.2013 & 24.09.2013, therefore, the plaintiff-lady is held entitled for the past maintenance allowance at the rate of Rs. 5,000/- per month (which was fixed by learned Judge Family Court for minor) w.e.f 24.07.2013 to 13.07.2014 with 10 % annual increase. The maintenance allowance of the plaintiff-lady for the period of Iddat fixed by learned Judge Family Court is upheld. So far as contention of learned counsel for the petitioners that maintenance allowance of the plaintiffs/petitioners was not fixed by the learned trial court keeping in view the financial status of the respondent is concerned, I have gone through the whole evidence which shows that no such reliable document regarding the monthly income of the respondent was produced before the learned trial court. Keeping in view the evidence available on record, the learned Judge Family Court has rightly fixed the maintenance allowance of the plaintiffs. As far as the contention of learned counsel for the petitioners for enhancement of maintenance allowance on the ground of daily growing requirement of the minor is concerned, suffice it to say that the

Family Court has exclusive jurisdiction to pass an order on the application for enhancement of the maintenance allowance even after the passing the final judgment and decree. Reliance in this regard can be placed on the case titled Lt. Col. Nasir Malik vs Additional District Judge Lahore (2016 SCMR 1821) in which the Hon'ble Supreme Court of Pakistan held as follows:-

“ Family Court had exclusive jurisdiction relating to maintenance allowance and the matters connected therewith. Once a decree by the Family Court in a suit for maintenance (for minors) was granted, thereafter, if the granted rate for monthly allowance was insufficient and inadequate, in that case, institution of fresh suit was not necessary rather the Family Court may entertain any such application (under S.151,C.P.C) and if necessary make alteration in the rate of maintenance allowance”

In these circumstances, the petitioners may move the application for enhancement of maintenance allowance of the minor before the court of competent jurisdiction.

8. For what has been discussed above, instant petition is partly accepted and impugned judgment and decree dated 15.09.2015 passed by learned Judge Family Court is modified to the extent that the plaintiff-lady is held entitled for the past maintenance allowance at the rate of Rs. 5,000/- per month (which was fixed by learned Judge Family Court for minor) w.e.f 24.07.2013 to 13.07.2014 with 10 % annual increase. The maintenance allowance of the minor and the plaintiff-lady for the period of *Iddat* fixed by learned Judge Family Court is upheld. There is no order as to costs.

(Safdar Saleem Shahid)
Judge

Approved for reporting

Judge